



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

April 29, 2009 Government Records Council Meeting

Chris Rogers
Complainant

Complaint No. 2008-229

v.

Roxbury Board of Education (Morris)
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council (“Council”) considered the April 22, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving that the user’s manual for the Board’s accounting software is exempt from disclosure as “administrative or technical information regarding computer software...which, if disclosed, would jeopardize computer security” pursuant to N.J.S.A. 47:1A-1.1.
2. The Custodian has not unlawfully denied access to the requested user’s manual pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because the Custodian certified that no records responsive exist and there is no credible evidence in the record to refute the Custodian’s certification.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Janice L. Kovach
Government Records Council

Decision Distribution Date: May 4, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**Chris Rogers¹
Complainant**

GRC Complaint No. 2008-229

v.

**Roxbury Board of Education (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copy of the user's manual for the accounting software currently in use by the Roxbury Board of Education.

Request Made: September 23, 2008

Response Made: October 1, 2008

Custodian: Ruth Anne Quinn

GRC Complaint Filed: October 10, 2008³

Background

September 23, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail stating that it is an official OPRA request.⁴

September 29, 2008

E-mail from the Complainant to the Custodian. The Complainant requests that the Custodian confirm whether a copy of the requested user's manual is ready for pickup.

October 1, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the requested record is denied due to security issues.

October 2, 2008

E-mail from the Complainant to the Custodian. The Complainant asks if the Custodian would consider providing the name of the accounting software used by the

¹ No legal representation listed on record.

² Represented by Marc H. Zitomer, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler, LLC (Morristown, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Complainant did not attach an official OPRA request form to his September 23, 2008 e-mail. The Custodian forwarded a copy of the e-mail attached to an official OPRA request via facsimile on September 24, 2008.

Board. The Complainant states that he will then try to find a generic user's manual on the internet.

October 2, 2008

E-mail from the Custodian to the Complainant. The Custodian states that the software was created by Systems3000 specifically for use in school districts.

October 10, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated September 23, 2008.⁵
- E-mail from the Complainant to the Custodian dated September 29, 2008.
- E-mail from the Custodian to the Complainant dated October 1, 2008.
- E-mail from the Complainant to the Custodian dated October 2, 2008.
- E-mail from the Custodian to the Complainant dated October 2, 2008.

The Complainant states that he e-mailed the Custodian on September 23, 2008 and requested a copy of the user's manual for the accounting software currently in use by the Board. The Complainant states that the Custodian responded via e-mail on October 1, 2008, denying access to the requested report and citing that disclosure of the user's manual would pose a security issue.

The Complainant states that in response to an e-mail to the Custodian on October 2, 2008, the Custodian provided the name of the accounting software to the Complainant.

November 14, 2008

Offer of Mediation sent to both parties.

November 16, 2008

The Complainant declines mediation. The Custodian also declined to mediate this complaint.

November 18, 2008

Request for the Statement of Information sent to the Custodian.

November 20, 2008

Letter from the Custodian's Counsel to the GRC. Counsel requests a seven (7) day extension until December 1, 2008 to submit the Statement of Information.

November 21, 2008

E-mail from the GRC to the Custodian's Counsel. The GRC states that, if needed, it usually grants a five (5) business day extension of time to respond to a request

⁵ The Complainant also attaches several e-mails which are irrelevant to the adjudication of this complaint and an official OPRA request form dated October 2, 2008 for the same record relevant to this complaint. It is not clear why the Complainant chose to include the October 2, 2008 OPRA request in the instant complaint; however, the Complainant filed this Denial of Access Complaint prior to the expiration of the Custodian's statutorily mandated seven (7) business day time frame to respond to that request.
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for a Statement of Information. Therefore, the GRC grants an extension until December 3, 2008 to submit the Statement of Information.

December 3, 2008

Custodian's Statement of Information ("SOF") with the following attachments:

- Complainant's Denial of Access Complaint.
- E-mail from the Complainant to the Custodian dated September 29, 2008.
- E-mail from the Custodian to the Complainant dated October 1, 2008.
- E-mail from Systems3000, producer of the Board's accounting software, to the Custodian dated November 20, 2008.

The Custodian states that she responded to the Complainant's September 23, 2008 OPRA request on October 1, 2008, stating that access to the user's manual for the Board's accounting software was denied because disclosure of the requested manual was a security risk. The Custodian states that N.J.S.A. 47:1A-1.1 provides that a government record may be exempt from disclosure as "administrative or technical information regarding computer hardware, software and networks, which, if disclosed, would jeopardize computer security."

The Custodian avers that after attempting to find a user's manual, the Supervisor of Support Services for Systems3000 confirmed that a manual for the accounting software is not provided to the purchaser; rather, the user's manual is embedded in the software as a help tool. The Custodian certifies that the embedded tool, which includes approximately forty-four (44) main topics and hundreds of sub-topics, does not permit a user to generate hard-copy or electronic print-outs of general topics; therefore, the Custodian does not have the ability to provide the requested manual to the Complainant.

The Custodian contends that she has not unlawfully denied access to the requested records because no records responsive exist and cites to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Additionally, the Custodian avers that a custodian is not charged with the duty to create a record in the absence of a specific, identifiable record and cites to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005).

The Custodian contends that based on the aforementioned reasons, the GRC should dismiss this complaint in its entirety and find that the Custodian lawfully denied access to the requested user's manual.

Analysis

Whether the Custodian unlawfully denied access to the requested user's manual?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA exempts disclosure of:

“*administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In this complaint, the Complainant’s September 23, 2008 OPRA request was an e-mail that referenced OPRA. Because the Custodian responded to this request as if it were a valid OPRA request and did not raise the lack of an official request form as a reason for denying access to the requested record, the request is deemed to be a valid OPRA request.

Additionally, the Custodian responded in writing on October 1, 2008, denying access to the requested user’s manual for the school district’s accounting software pursuant to N.J.S.A. 47:1A-1.1., which exempts “administrative or technical information regarding computer software...which, if disclosed, would jeopardize computer security.”

The Custodian certifies that the accounting software was created by Systems3000 specifically for use in school districts. Providing administrative or technical information concerning the inner workings of the software may allow for outside users to compromise an essential component of the Board’s accounting system.

Therefore, pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving that the user’s manual for the Board’s accounting software is exempt from

disclosure as “administrative or technical information regarding computer software...which, if disclosed, would jeopardize computer security” pursuant to N.J.S.A. 47:1A-1.1.

Moreover, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Council held that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

The Custodian in this complaint certified in the SOI that no record responsive existed because the user’s manual for the accounting software is an embedded tool which cannot be printed out summarily into a complete manual; therefore, no record responsive exists. Therefore, the Custodian has not unlawfully denied access to the requested user’s manual pursuant to Pusterhofer, *supra*, because the Custodian certified that no records responsive exist and there is no credible evidence in the record to refute the Custodian’s certification.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving that the user’s manual for the Board’s accounting software is exempt from disclosure as “administrative or technical information regarding computer software...which, if disclosed, would jeopardize computer security” pursuant to N.J.S.A. 47:1A-1.1.
2. The Custodian has not unlawfully denied access to the requested user’s manual pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because the Custodian certified that no records responsive exist and there is no credible evidence in the record to refute the Custodian’s certification.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 22, 2009