



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Jason Todd Alt
(on behalf of The Daily Journal)
Complainant

Complaint No. 2009-114

v.

New Jersey Department of Education
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the original Custodian lawfully denied access to the requested records because said records pertained to an ongoing investigation at the time of the Complainant’s OPRA request and thus are exempt from public access pursuant to N.J.S.A. 47:1A-3.a. Additionally, because the Department of Education’s receipt of said records was the impetus for the commencement of said investigation, said records were never available for public access from the Department of Education.¹

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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

¹ The Custodian raises additional arguments regarding the non-disclosure of the requested records. However, said arguments need not be addressed by the Council since the Custodian’s initial basis for denial is valid under OPRA.

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Jason Todd Alt
(On behalf of The Daily Journal)¹
Complainant**

GRC Complaint No. 2009-114

v.

**New Jersey Department of Education²
Custodian of Records**

Records Relevant to Complaint: Letter and attachments sent to Susan Martz, Director of Educational Support Services, on behalf of Richard Panas, Assistant Principal of Landis Intermediate School.³

Request Made: April 6, 2009

Response Made: April 7, 2009

Custodian: Maria Casale⁴

GRC Complaint Filed: April 7, 2009⁵

Background

April 6, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

April 7, 2009

Original Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested records is denied because the records requested are part of an ongoing investigation and release of pertinent materials would be inimical to the public interest.

¹ No legal representation listed on record.

² Represented by DAG Susan Huntley, on behalf of the NJ Attorney General.

³ The Complainant noted that the requested letter was received by the Department of Education in March 2009 as confirmed by the Press Office.

⁴ Anthony D'Elia was the Custodian at the time of the Complainant's OPRA request and Denial of Access Complaint.

⁵ The GRC received the Denial of Access Complaint on said date.

April 7, 2009

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

- Complainant’s OPRA request dated April 6, 2009
- Original Custodian’s response to the Complainant’s OPRA request dated April 7, 2009⁶

The Complainant states that he submitted his OPRA request on April 6, 2009. The Complainant states that the Custodian denied access to the requested records on the basis that said records are part of an ongoing investigation and are exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a.

The Complainant contends that the Custodian’s explanation for the denial of access contradicts the provisions of OPRA. The Complainant states that Serrano v. South Brunswick Township, 358 N.J. Super. 352 (App. Div. 2003), directly addresses the issue of releasing records that could be inimical to an ongoing criminal investigation. The Complainant states that the court held:

“N.J.S.A. 47:1A-3(a) allows (but does not mandate) confidentiality of records where an ‘investigation in progress’ causes the release of particular records to be ‘inimical to the public interest,’ but it adds the further limitation that this confidentiality does not extend to records previously ‘open for public inspection’...The tape that is the subject of this appeal was created hours before the police investigation began. If it was a public record when created, then it would remain accessible to the public under N.J.S.A. 47:1A-3(a) even if its release would be inimical to the public interest.”

Additionally, the Complainant does not agree to mediate this complaint.⁷

April 20, 2009

Request for the Statement of Information (“SOI”) sent to the Custodian.

April 21, 2009

E-mail from Custodian’s Counsel to GRC. The Custodian’s Counsel requests a five (5) business day extension of time to submit the Custodian’s completed SOI.

April 21, 2009

E-mail from GRC to Custodian’s Counsel. The GRC grants Counsel a five (5) business day extension of time to submit the Custodian’s completed SOI.

⁶ The Complainant attaches additional records that relate to another OPRA request; however, said OPRA request is not the subject of this Denial of Access Complaint.

⁷ The Complainant discusses another OPRA request and related communication with the Department; however, said OPRA request is not the subject of, nor relevant to, the adjudication of this Denial of Access Complaint.

April 30, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 6, 2009
- Original Custodian's response to the Complainant's OPRA request April 7, 2009
- Certification of Susan Martz, Director of the Office of Educational Support Services, dated April 30, 2009

The original Custodian states that on March 15, 2009 a letter was sent on behalf of Richard Panas, an administrator at the Landis School in Vineland, New Jersey to Susan Martz of the Department of Education's ("DOE") Office of Educational Support Services. The Custodian certifies that documents related to allegations concerning the reporting of violent incidents at the school were attached to said letter. Thus, the original Custodian certifies that when he received the Complainant's OPRA request on April 6, 2009, he denied said request in writing on April 7, 2009 pursuant to N.J.S.A. 47:1A-3.a. because the requested records were part of an ongoing investigation and the release of said records would be inimical to the public interest.

The original Custodian asserts that the public interest in this matter is the assurance that New Jersey schools are safe and that procedures for reporting incidents of violence in schools are being followed. The Custodian contends that any dissemination of the requested records during the course of the DOE's investigation could adversely affect its outcome by altering the perceptions of those persons who will be interviewed during the investigation and could possibly affect the objectivity of the investigator.

Additionally, the original Custodian states that he recognizes that N.J.S.A. 47:1A-3.a. does not allow agencies to prohibit access to records that were previously open for public inspection prior to the investigation. However, the Custodian asserts that the requested records were never open for public inspection prior to the investigation. The Custodian contends that the requested letter became a "government record" pursuant to N.J.S.A. 47:1A-1.1. when it was received by the DOE in the course of its official business. The Custodian also asserts that at the same time, the requested letter became one of the initial records to be considered as evidence in the investigation. As such, the Custodian contends that at no time before the onset of the investigation was the letter accessible to the public.

The original Custodian claims that the same applies to the records attached to the requested letter. The Custodian asserts that said attachments are education records that contain personally identifiable information of students and are exempt from public access under the Family Education Rights and Privacy Act ("FERPA"). 20 U.S.C. 1232(g)(b). The Custodian contends that N.J.S.A. 47:1A-1⁸ provides that records exempt from public access pursuant to federal laws and regulations are not subject to disclosure under OPRA. The Custodian states that the regulations underlying FERPA define "personally identifiable information" to include a student's name, address, social security number and

⁸ Correct citation is N.J.S.A. 47:1A-9.

“other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty. 34 C.F.R. 99.3.

The Custodian certifies that the records attached to the requested letter contain student names, student numbers, and information concerning incidents that alone or in combination might be enough information to allow a person to identify the students.

Further, the original Custodian contends that this matter is distinguishable from Serrano v. South Brunswick Township, 358 N.J. Super. 352 (App. Div. 2003). The Custodian states that in Serrano, the court determined that a 911 tape created four (4) hours before a criminal investigation commenced was not exempt from disclosure under N.J.S.A. 47:1A-3.a. The Custodian states that the court reasoned that the tape was a government record available for public inspection when it was created and therefore remained accessible even though its release may be inimical to the public interest. The Custodian asserts that in the instant matter, there was no lapse of time before the investigation commenced when the records were available for public inspection.

Additionally, the Custodian certifies that no search for the requested records was undertaken because the requested records were held at the DOE’s offices due to an investigation into allegations contained in the requested letter.

The Custodian also certifies that no records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

April 30, 2009⁹

Certification of Susan Martz (“Ms. Martz”), Director of the Office of Education Support Services of the New Jersey Department of Education. Ms. Martz certifies that the Office of Educational Support Services is charged with ensuring that schools comply with regulations in N.J.A.C. 6A regarding the reporting of incidents of violence, vandalism, alcohol and other drug abuse, as well as maintenance of the Electronic Violence and Vandalism Reporting system. Ms. Martz certifies that her office initiates investigations into allegations of noncompliance with these regulations.

Ms. Martz certifies that on March 18, 2009 she received a letter and related attachments from counsel for Richard Panas in which allegations were made concerning the reporting of violent incidents at the school where Mr. Panas is employed. Ms. Martz certifies that on March 18, 2009 she reviewed said letter and attachments and immediately initiated an investigation based on the allegations contained in said records. Ms. Martz certifies that the letter and attachments were placed in a file and forwarded to the assigned investigator.

⁹ Additional correspondence was submitted by the parties. However, said correspondence is not relevant to the adjudication of this complaint.
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Analysis

Whether the Custodian unlawfully denied access to the requested records?

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 states that:

“...where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA] may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced...” N.J.S.A. 47:1A-3.a.

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.

The Complainant states that he submitted his OPRA request on April 6, 2009 for the letter and attachments sent to Susan Martz, Director of Educational Support Services, on behalf of Richard Panas, Assistant Principal of Landis Intermediate School. The Complainant states that the original Custodian denied access to said records in writing on

April 7, 2009 on the basis that N.J.S.A. 47:1A-3.a. exempts the requested records from public access because they pertain to an investigation in progress.

N.J.S.A. 47:1A-3.a. exempts from public access records pertaining to an investigation in progress by any public agency if the release of said records would be inimical to the public interest. However, N.J.S.A. 47:1A-3.a. also provides that this exemption shall not be construed to allow any public agency to prohibit access to a record of that agency that was available for public access before the investigation commenced.

The crux of the Complainant's Denial of Access Complaint is the Complainant's contention that the Custodian unlawfully denied access to the requested records because said records were available for public access prior to the commencement of the Department of Education's investigation and as such, said records were available for public access at the time of the Complainant's OPRA request. In support of his contention, the Complainant states that Serrano v. South Brunswick Township, 358 N.J. Super. 352 (App. Div. 2003), directly addressed the issue of releasing records that could be inimical to the ongoing criminal investigation. The Complainant states that the court held:

"N.J.S.A. 47:1A-3(a) allows (but does not mandate) confidentiality of records where an 'investigation in progress' causes the release of particular records to be 'inimical to the public interest,' but it adds the further limitation that this confidentiality does not extend to records previously 'open for public inspection'...The tape that is the subject of this appeal was created hours before the police investigation began. If it was a public record when created, then it would remain accessible to the public under N.J.S.A. 47:1A-3(a) even if its release would be inimical to the public interest."

The original Custodian contends that this matter is distinguishable from Serrano, supra. The Custodian states that in Serrano, the court determined that a 911 tape created four (4) hours before a criminal investigation commenced was not exempt from disclosure under N.J.S.A. 47:1A-3.a. The Custodian states that the court reasoned that the tape was a government record available for public inspection when it was created and therefore remained accessible even though its release may be inimical to the public interest. The Custodian asserts that in the instant matter, there was no lapse of time before the investigation commenced when the records were available for public inspection.

Susan Martz, Director of the Office of Education Support Services of the New Jersey Department of Education, certified that on March 18, 2009 she received a letter and related attachments from counsel for Richard Panas in which allegations were made concerning the reporting of violent incidents at the school where Mr. Panas is employed (the requested records). Ms. Martz certified that on March 18, 2009 she reviewed said letter and attachments and immediately initiated an investigation based on the allegations contained in said records. Ms. Martz certified that the letter and attachments were placed in a file and forwarded to the assigned investigator.

Additionally, the original Custodian asserts that the release of the requested records would be inimical to the public interest. The Custodian contends that the public interest in this matter is the assurance that New Jersey schools are safe and that procedures for reporting incidents of violence in schools are being followed. The Custodian contends that any dissemination of the requested records during the course of the DOE's investigation could adversely affect its outcome by altering the perceptions of those persons who will be interviewed during the investigation and could possibly affect the objectivity of the investigator.

Both the Complainant and the Custodian cite to Serrano, *supra*, in support of their positions that the requested records are or are not exempt from public access pursuant to N.J.S.A. 47:1A-3.a. In Serrano, the record at issue was a 911 call made by a defendant in an ongoing murder prosecution a few hours prior to the alleged homicide for which the defendant was indicted. The court provided the following summary regarding the timeline of events surrounding the 911 call at issue and subsequent murder investigation:

“[a]t about 11:15 p.m., July 16, 2002, Michael Janicki dialed 911 from his home and reached South Brunswick Police headquarters. Police and emergency medical service (EMS) units responded to Janicki's call, but he declined their assistance when they arrived at his home. At 2:15 a.m. on July 17, 2002, Janicki, it is alleged, stabbed his father. His mother, Cheryl Janicki, immediately placed a 911 call. Police officers from the Township arrived at the Janicki home ten minutes later, beginning the criminal investigation. At 3:20 a.m., investigators from the prosecutor's office arrived at the scene and took control of the investigation. By 3:00 p.m. defendant was found in Plainsboro, taken into custody, and later that day, charged with murder.”

Using the above timeline, the court concluded that “[t]he tape that is the subject of this appeal [the 11:15 p.m. 911 call] was created hours before the police investigation began. If it was a public record when created, then it would remain accessible to the public under N.J.S.A. 47:1A-3(a) even if its release would be inimical to the public interest.”

However, in this instant complaint, Susan Martz, Director of the Office of Education Support Services of the New Jersey Department of Education, certified that immediately upon her receipt of the requested letter and attachments, her office initiated an investigation based on the allegations contained in said records. Thus, the requested letter and attachments formed the basis and impetus for said investigation. Unlike the facts in Serrano, there were no subsequent or intervening events that caused or formed the basis for the investigation. And here, the DOE's receipt of the requested letter and attachments were concurrent with the commencement of the DOE's investigation into alleged violations of school violence reporting, there was no lapse of time as discussed in Serrano, *supra*, for the N.J.S.A. 47:1A-3.a exemption to not apply.

Therefore, the original Custodian lawfully denied access to the requested records because said records pertained to an ongoing investigation at the time of the Complainant's OPRA request and thus are exempt from public access pursuant to

N.J.S.A. 47:1A-3.a. Additionally, because the Department of Education's receipt of said records was the impetus for the commencement of said investigation, said records were never available for public access from the Department of Education.¹⁰

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the original Custodian lawfully denied access to the requested records because said records pertained to an ongoing investigation at the time of the Complainant's OPRA request and thus are exempt from public access pursuant to N.J.S.A. 47:1A-3.a. Additionally, because the Department of Education's receipt of said records was the impetus for the commencement of said investigation, said records were never available for public access from the Department of Education.¹¹

Prepared By: Dara Lownie
Communications Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012¹²

¹⁰ The Custodian raises additional arguments regarding the non-disclosure of the requested records. However, said arguments need not be addressed by the Council since the Custodian's initial basis for denial is valid under OPRA.

¹¹ The Custodian raises additional arguments regarding the non-disclosure of the requested records. However, said arguments need not be addressed by the Council since the Custodian's initial basis for denial is valid under OPRA.

¹² This complaint was prepared for adjudication on April 21, 2010; however, said complaint was not adjudicated due to the Council's lack of quorum.