



**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*

**LORI GRIFA**  
*Acting Commissioner*

**FINAL DECISION**

**April 8, 2010 Government Records Council Meeting**

Donna Antonucci  
Complainant

Complaint No. 2009-116

v.

Hoboken Board of Education (Hudson)  
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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 because the Custodian responded on the seventh (7<sup>th</sup>) business day after receipt of the Complainant’s OPRA request stating that no record responsive exists and subsequently certified in the Statement of Information that the Hoboken Board of Education did not receive the requested record until April 6, 2009 (after the date of the Complainant’s OPRA request), and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008). Additionally, the Custodian has borne his burden pursuant to N.J.S.A. 47:1A-6 of proving a lawful denial of access and was under no obligation to provide the requested record to the Complainant since the requested record did not exist at the time of the Complainant’s request.

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 8<sup>th</sup> Day of April, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: April 13, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 8, 2010 Council Meeting**

**Donna Antonucci<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-116**

v.

**Hoboken Board of Education (Hudson)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of the recent transportation audit.

**Request Made:** March 25, 2009

**Response Made:** April 3, 2009

**Custodian:** David Anthony

**GRC Complaint Filed:** April 8, 2009<sup>3</sup>

**Background**

**March 25, 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 3, 2009**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested record is denied because no transportation audit exists. The Custodian states that the Hoboken Board of Education ("BOE") is in the process of compiling and evaluating information from the transportation department and as such, the report is only a work in progress.

Additionally, the Custodian states that the requested audit cannot be released until completed, reviewed by counsel and approved by the BOE. The Custodian states that he has been given no specific time frame for the anticipated completion of the requested audit, just that it will take a while longer. The Custodian states that he will consider the instant request closed.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Joseph R. Morano, Esq. (Hoboken, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

**April 8, 2009**

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

- Complainant’s OPRA request dated March 26, 2009.
- E-mail from the Custodian to the Complainant dated April 3, 2009.

The Complainant states that she submitted an OPRA request to the BOE on March 25, 2009. The Complainant states that the Custodian responded in writing on April 3, 2009 denying access to the requested transportation audit because it was not yet prepared or approved by the BOE.

The Complainant states that her request was made because she feels the BOE is overspending for transportation. The Complainant asserts that she believes the BOE is attempting to hide expenditures ahead of a public vote on the budget on April 21, 2009. The Complainant asserts that the agenda for the BOE’s April 7, 2009 meeting contained an item for transportation, forcing the Complainant to believe that the requested audit was completed prior to the meeting.

The Complainant does not agree to mediate this complaint.

**April 14, 2009**

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

**April 15, 2009**

E-mail from the Custodian to the GRC. The Custodian requests an extension until April 28, 2009 to submit the requested SOI because schools are currently closed for vacation.

**April 15, 2009**

E-mail from the GRC to the Custodian. The GRC grants an extension until April 28, 2009 to submit the requested SOI.

**April 24, 2009**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 25, 2009.
- E-mail from the Custodian to the Complainant dated April 3, 2009.<sup>4</sup>

The Custodian states that he received the Complainant’s request on March 25, 2009. The Custodian states that he responded to the Complainant’s request on April 3, 2009, advising the Complainant that no transportation audit existed yet, because the BOE was still in the process of compiling and evaluating information from the transportation department.

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<sup>4</sup> The Custodian did not certify to the search undertaken or whether any records responsive to the 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 (“DARM”) Donna Antonucci v. Hoboken Board of Education (Hudson), 2009-116 – Findings and Recommendations of the Executive Director

The Custodian certifies that the requested transportation audit did not exist at the time of the Complainant's OPRA request. The Custodian certifies that the BOE came into possession of the transportation audit draft dated April 6, 2009, performed by Earth Spec, on April 9, 2009. The Custodian states that information contained in the audit pertaining to confidential student and employee information has been redacted and the audit will be provided to the Complainant.

### **April 28, 2009**

The Complainant's response to the Custodian's SOI. The Complainant states that she received the Custodian's SOI. The Complainant argues that based on the Custodian's statement that the audit was received on April 6, 2009, he could have provided the requested record, with redactions where necessary, by April 20, 2009. The Complainant contends that the Custodian denied access to the requested audit in order to hide wasteful spending.

The Complainant requests that the GRC contact "Earth Spec," the vendor responsible for the audit, to confirm that the report was not provided to the BOE until April 6, 2009. Additionally, the Complainant requests that the GRC determine that final edits and redactions could have been made before the BOE went on spring break. The Complainant requests that the GRC also hold the BOE accountable for not providing access to the requested audit on or before April 20, 2009, as the BOE knew the audit was related to the vote on April 21, 2009.

### **May 6, 2009**

Letter from the Custodian to the GRC. The Custodian states that the requested transportation audit has been provided to the Complainant.

## **Analysis**

### **Whether the Custodian unlawfully denied access to the requested record?**

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 also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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 submitted an OPRA request on March 25, 2009. The Custodian responded on April 3, 2009 stating that the requested record did not exist. The Custodian subsequently certified in the SOI that the BOE did not receive the requested audit from “Earth Spec” until April 6, 2009. The Custodian informed the GRC on May 6, 2009 that the requested audit was forwarded to the Complainant.

The Complainant initially argued that the BOE was hiding the audit because she believed the BOE was attempting to hide expenditures ahead of a public vote on the BOE’s budget held on April 21, 2009. The Complainant also noted that the April 7, 2009 BOE meeting agenda contained an item for transportation, which the Complainant contends is evidence that the BOE received the transportation audit prior to April 7, 2009. Further, the Complainant argued that if the Custodian received the requested audit on April 6, 2009, then the audit should have been provided to her prior to the budget vote on April 21, 2009.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) the Complainant sought telephone billing records showing a call

made to him from the New Jersey Department of Education. The Custodian responded, stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Moreover, in Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008), the Custodian responded to the Complainant's November 30, 2007 OPRA request for a proposal on the same day as receipt of the request stating that no record responsive existed. The Custodian subsequently certified in the SOI that no records responsive existed at the time of the Complainant's OPRA request, but that the Complainant was provided with a copy of the proposal after it was obtained by the BOE. The GRC held that:

“[b]ecause the Custodian in this complaint responded in writing on the same day of receipt of the Complainant's November 30, 2007 OPRA request stating that no records responsive exist, the Custodian has borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra. Further, the Custodian was under no obligation to provide the requested record to the Complainant following the Custodian's response that no record existed pursuant to Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 2007).”

The facts in Pusterhofer, supra, and Driscoll, supra, are similar to the instant complaint. Specifically, the Custodian in this complaint responded to the Complainant's OPRA request within the statutorily mandated seven (7) business day time frame advising that no audit responsive to the Complainant's request exists. The Custodian later certified in the SOI that the BOE did not receive the requested record until April 6, 2009. Moreover the Custodian provided the Complainant with a copy of said record on May 6, 2009.

Therefore, because the Custodian responded on the seventh (7<sup>th</sup>) business day after receipt of the Complainant's OPRA request stating that no record responsive exists and subsequently certified in the SOI that the BOE did not receive the requested record until April 6, 2009 (after the date of the Complainant's OPRA request), and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested record pursuant to Pusterhofer, supra, and Driscoll, supra. Additionally, the Custodian has borne his burden of proving a lawful denial of access and was under no obligation to provide the requested record to the Complainant since the requested record did not exist at the time of the Complainant's request pursuant to N.J.S.A. 47:1A-6.

Additionally, the Complainant requested that the GRC contact “Earth Spec” to verify that they provided the requested audit to the BOE on April 6, 2009, make a determination that the redactions and final edits could have been completed prior to the

BOE going on spring break, and hold the BOE accountable for not providing the record prior to April 21, 2009.

However, these issues are moot because the Custodian certified in the SOI that he did not receive the requested record from “Earth Spec” until April 6, 2009. Under OPRA, the Custodian was not required to produce the record to the Complainant if no record responsive existed at the time of the request.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Custodian responded on the seventh (7<sup>th</sup>) business day after receipt of the Complainant’s OPRA request stating that no record responsive exists and subsequently certified in the Statement of Information that the Hoboken Board of Education did not receive the requested record until April 6, 2009 (after the date of the Complainant’s OPRA request), and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008). Additionally, the Custodian has borne his burden pursuant to N.J.S.A. 47:1A-6 of proving a lawful denial of access and was under no obligation to provide the requested record to the Complainant since the requested record did not exist at the time of the Complainant’s request.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 1, 2010