



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**FINAL DECISION**

**August 11, 2009 Government Records Council Meeting**

Askia J. Nash  
Complainant

Complaint No. 2009-168

v.

Newark Public Schools (Essex)  
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 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 because the Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant’s May 14, 2009 OPRA request and the statutorily mandated seven (7) business day time frame for a Custodian to respond had not expired, the instant complaint is materially defective and therefore should be dismissed. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007-226 (April 2009).

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 11<sup>th</sup> Day of August, 2009

Robin Berg Tabakin, Chair  
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: August 17, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 11, 2009 Council Meeting**

**Askia J. Nash<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-168**

v.

**Newark Public Schools (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Personnel files from 1992 to 2000
2. Information regarding the insurance company with which Newark Public Schools had an insurance policy from 1992 to 2000.<sup>3</sup>

**Request Made:** May 14, 2009<sup>4</sup>

**Response Made:** None

**Custodian:** Pamela D. Luke

**GRC Complaint Filed:** May 15, 2009<sup>5</sup>

**Background**

**May 14, 2009**

Complainant's letter request attaching a letter from the New Jersey Public Employment Relations Commission ("PERC") dated January 23, 2009. The Complainant requests the records relevant to this complaint listed above in a letter that does not refer to OPRA.

**May 15, 2009**

Denial of Access Complaint filed with the Government Records Council ("GRC") with no attachments.

The Complainant asserts that he submitted an OPRA request to the Newark Public Schools District and received no response from the Custodian.

**May 19, 2009**

Facsimile from the Custodian to the GRC with the following attachments:

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> Based on the Complainant's letter request and subsequent Denial of Access Complaint, it is unclear as to the specific records being requested.

<sup>4</sup> The Complainant's letter addressed to the New Jersey Public Employment Relations Commission was dated January 15, 2009; however, the evidence of record shows that the Complainant then forwarded the letter to the Custodian, who received the letter via certified mail on May 14, 2009.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

- Letter from the Complainant to the PERC dated January 15, 2009.<sup>6</sup>
- Letter from the PERC to the Complainant dated January 23, 2009.
- Certified mail envelope from the Complainant to the Custodian postmarked May 13, 2009.

The Custodian states that she received the Complainant's letter request on May 14, 2009. The Custodian states that she has until May 26, 2009 to respond to the Complainant. The Custodian states that she is preparing to forward the School District's official OPRA request form to the Complainant.

### **May 20, 2009**

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the Custodian's May 19, 2009 fax and has additional questions regarding the instant complaint. The GRC requests that the Custodian certify to the following:

1. What date did the Custodian receive the Complainant's letter request?
2. Whether a response to the Complainant's letter request has been provided to the Complainant?

The GRC requests that the Custodian provide the legal certification and any supporting documents to the GRC by close of business on May 22, 2009.

### **May 21, 2009**

Legal Certification from the Custodian with the following attachments:

- Letter from the Complainant to the PERC dated January 15, 2009.<sup>7</sup>
- Letter from the PERC to the Complainant dated January 23, 2009.
- Certified mail envelope from the Complainant to the Custodian postmarked May 13, 2009.
- Letter from the Custodian to the Complainant dated May 20, 2009 attaching the Newark Public Schools official OPRA request form.
- Envelope from the Custodian to the Complainant postmarked May 20, 2009.

The Custodian certifies that she received the Complainant's letter request on May 14, 2009. The Custodian certifies that she responded in writing to the Complainant's letter request on May 20, 2009, enclosing an official OPRA records request form and advising the Complainant to complete and return the District's OPRA request form with a brief description of the records requested.

## **Analysis**

### **Whether the Complainant's Denial of Access Complaint should be dismissed as not ripe for adjudication?**

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<sup>6</sup>The evidence of record shows that the Custodian date stamped the Complainant's January 15, 2009 letter May 14, 2009.

<sup>7</sup>The evidence of record shows that the Custodian date stamped the Complainant's January 15, 2009 letter May 14, 2009.

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:

“a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived....” 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.

As one means of challenging denials of access to a government record, OPRA provides for the filing of a complaint with the GRC. N.J.S.A. 47:1A-6. In order for such a complaint to be ripe, a complainant must have been denied access to a government record. In the instant matter, however, the Complainant filed a complaint with the GRC prior to being denied access to any records responsive to his request and before the statutorily mandated seven (7) business day time frame for the Custodian to respond expired.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s

response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Here, the Custodian certified on May 21, 2009 that she received the Complainant's letter request on May 14, 2009, or one (1) day prior to the Complainant's filing a Denial of Access Complaint with the GRC, and the evidence of record supports the Custodian's certification.

In Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-226 (April 2009), the Complainant forwarded a complaint to the GRC asserting that he had not received a response from the Custodian and seven (7) business days would have passed by the time the GRC received the Denial of Access Complaint. The Custodian argued in the SOI that the Complainant filed the complaint prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5.i. The Council held that:

"...because the Complainant's cause of action was not ripe at the time he verified his Denial of Access Complaint; to wit, the Custodian had not at that time denied the Complainant access to a government record, the complaint is materially defective and therefore should be dismissed."

In the matter currently before the Council, the Complainant acted in the same manner as the Complainant in Sallie, *supra*, by filing a Denial of Access Complaint with the GRC prior to a denial of access to the requested records by the Custodian. Additionally, as in Sallie, *supra*, the Complainant filed his complaint with the GRC prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5.i.

Therefore, because the Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant's May 14, 2009 OPRA request and the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired, the instant complaint is materially defective and therefore should be dismissed. *See Sallie*, *supra*.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant's May 14, 2009 OPRA request and the statutorily mandated seven (7) business day time frame for a Custodian to respond had not expired, the instant complaint is materially defective and therefore should be dismissed. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007-226 (April 2009).

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

August 4, 2009