



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

FINAL DECISION

January 26, 2010 Government Records Council Meeting

Ruth Hardrick
Complainant

Complaint No. 2009-172

v.

Hamilton Township School District (Atlantic)
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 19, 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 certified that no record responsive to the Complainant’s request exists, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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 26th Day of January, 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: January 29, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2010 Council Meeting**

**Ruth Hardrick¹
Complainant**

GRC Complaint No. 2009-172

v.

**Hamilton Township School District (Atlantic)²
Custodian of Records**

Records Relevant to Complaint: On site inspection of the segment of surveillance video which was recorded from 9:00 a.m. until 10:15 a.m. on February 20, 2009 outside of Ms. Ann Marie Benson's classroom door at the William Davies Middle School, 1876 Dr. Dennis Foreman Drive in Mays Landing.

Request Made: May 6, 2009

Response Made: May 11, 2009

Custodian: Martha Jamison

GRC Complaint Filed: May 19, 2009³

Background

May 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.

May 11, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that access to the requested record is denied because several students could be captured on the video tape, therefore under the Family Education Rights and Privacy Act ("FERPA") the record cannot be made available to unauthorized persons without a court order.

May 19, 2009

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

- Complainant's OPRA request dated May 6, 2009

¹ No legal representation listed on record.

² Represented by Louis J. Greco, Esq. (Mays Landing, NJ).

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

- Custodian’s response to the OPRA request dated May 11, 2009

The Complainant states that her OPRA request was provided to the Custodian on May 6, 2009 and that the Custodian responded to said request on May 11, 2009. The Complainant further states that the Custodian denied her request for the record because the Custodian alleged that it was confidential material under FERPA. The Complainant contends that she requested to see the portion of a video tape which includes her son and a non-student who placed her son’s books in the hall. The Complainant further contends that the video tape segment she requested does not include any other student. The Complainant states that Superintendent Cappelluti, Vice Principal Santilli and Guidance Counselor Hess have all viewed the video tape and have described the content of the record to the Complainant. The Complainant questions why she, as the parent of the student shown on the video tape, was denied access to the record. The Complainant also questions whether the video tape should be considered an educational record under FERPA.

May 28, 2009

Offer of Mediation sent to both parties.

June 3, 2009

The Custodian agrees to mediate this complaint.

June 22, 2009

The Complainant agrees to mediate this complaint.

June 22, 2009

The complaint is referred for mediation.

November 16, 2009

The complaint is referred back from mediation to the GRC for adjudication.

November 16, 2009

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

November 17, 2009

Letter from the GRC to the Complainant. The GRC provides the Complainant with an opportunity to amend her complaint no later than November 23, 2009, in the event some issues were resolved during the mediation process and no longer require adjudication.

December 1, 2009

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on November 16, 2009 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

December 2, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated May 6, 2009
- Custodian's response to the OPRA request dated May 11, 2009

The Custodian certifies that her search for the requested records involved checking with the agency's security personnel in order to determine how to access the requested recording from the video tape. The Custodian also certifies that the New Jersey Department of State, Division of Archives and Records Management has not established a Records Destruction Schedule for video surveillance tapes and therefore there is no requirement that the record responsive to the request be retained for any period of time.

The Custodian certifies that at the time of the request she did not understand the operation of the video surveillance system; therefore, she did not know that the tapes within the system were re-recorded every thirty (30) days. The Custodian certifies that she informed the Complainant in her response to the OPRA request that the record was denied under FERPA (20 U.S.C. 1232g, et seq.) on advice of Counsel.

The Custodian certifies that she subsequently learned from the agency's security personnel that the video tapes in the surveillance system are automatically re-recorded every thirty (30) days. The Custodian further certifies that the segment of the tape requested by the Complainant was recorded on or about February 20, 2009, and that the images captured on that date were destroyed when new images were automatically recorded on the tape on or about March 20, 2009. The Custodian certifies that the Complainant's OPRA request was received on May 6, 2009, after the requested tape segment had been re-recorded. The Custodian further avers, however, that if the tape content requested by the Complainant was intact, it would still have been subject to the provisions of FERPA and access may have been denied.

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 also provides:

“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the *specific basis* therefore on the request form and promptly return it to the requestor.” (Emphasis added.) N.J.S.A. 47:1A-5.g.

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 asserted that she requested to see the portion of a video tape which included her son and a non-student. The Complainant further asserted that the video tape segment she requested did not include any other student. The evidence of record, however, reveals the Complainant did not frame her OPRA request with such specificity. The evidence of record reveals that the Complainant sought to inspect a segment of surveillance video which was recorded from 9:00 a.m. until 10:15 a.m. on February 20, 2009 at a specific location. The Complainant in her request did not mention who or what she sought to view on the video tape.

The Custodian stated in her response to the Complainant’s OPRA request that because various students *might be* included on the tape, the record could not be accessed by unauthorized individuals. A custodian cannot presume what may or may not be included on a government record. The custodian has a duty pursuant to N.J.S.A. 47:1A-5.g. to provide a specific basis for denial of a requested record. Here, if the Custodian would have checked with security personnel in order to retrieve and review the tape segment requested by the Complainant before she responded to the Complainant’s request, the Custodian would have known that new images were automatically recorded over the requested segment of the tape on or about March 20, 2009. Such an examination, if conducted by the Custodian, would have then led to the proper response that the record didn’t exist.

After learning that new images had been recorded over the requested record, the Custodian certified in her SOI that she had determined that the record responsive to the Complainant’s request had been replaced by new images when the tape was re-recorded

on or about March 20, 2009.⁴ Accordingly, the Custodian certified that the record responsive to the Complainant's request does not exist and did not exist at the time of the Complainant's OPRA request.⁵

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records 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 the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified that no record responsive to the Complainant's request exists, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian certified that no record responsive to the Complainant's request exists, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

January 19, 2010

⁴ The Custodian certified that she did not know that the surveillance video tape was re-recorded automatically on a thirty (30) day cycle until she discussed accessibility of the video tape with the agency's security personnel subsequent to expiration of the statutorily mandated time period for responding to the OPRA request.

⁵ Because there is no record responsive to the Complainant's request it is unnecessary for the GRC to analyze whether the requested record is exempt from disclosure under FERPA.