



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

**FINAL DECISION**

**March 27, 2012 Government Records Council Meeting**

Sabino Valdes  
Complainant

Complaint No. 2010-256

v.

New Jersey Department of Education  
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 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 the Custodian’s response to the Complainant’s OPRA request was lawful because said response was timely and the Government Records Request Receipt signed and dated by the Custodian which provided a lawful basis for the denial of access is the only record responsive to the Complainant’s request. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i.; see Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 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 27<sup>th</sup> Day of March, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Catherine Starghill, Executive Director  
Government Records Council

**Decision Distribution Date: April 25, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 27, 2012 Council Meeting**

**Sabino Valdes<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-256**

v.

**New Jersey Department of Education<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A true copy of the original Government Records Request Form sent by overnight mail to the Department of Education (“DOE”) on June 7, 2010 for request No. C51015, indicating the specific basis for the denial, signed and dated by the Custodian pursuant to N.J.S.A. 47:1A-5.g.<sup>3</sup>

**Request Made:** September 13, 2010

**Response Made:** September 22, 2010

**Custodian:** Maria Casale<sup>4</sup>

**GRC Complaint Filed:** September 24, 2010<sup>5</sup>

**Background**

**September 13, 2010**

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.

**September 22, 2010**

Custodian’s response to the OPRA request. The Custodian responds in writing via Government Records Request Receipt to the Complainant’s OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian states that the only record responsive which indicates the basis for the denial of the request that is signed and dated by the OPRA Custodian is the Government Records Request Receipt. The Custodian also states that she is providing the Complainant with a copy of the original government records request form for Request No. C51015, signed and dated by the Complainant. The Custodian further states that she is also providing a copy of the Government Records Request Receipt for Request No. C51015 that provides the basis for

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

<sup>2</sup> Represented by DAG Caroline Jones, on behalf of the NJ Attorney General.

<sup>3</sup> The Complainant’s request No. C51015 sought a Statement of Items Comprising the Record. The Complainant states that he is not requesting a Government Records Request Receipt. The Custodian at the time of Complainant’s request No. C51015 was Mr. Anthony Bland.

<sup>4</sup> The Custodian at the time of the Complainant’s OPRA request was Mary Torres. However, the Custodian at the time of the Statement of Information was Beth Auerswald.

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

the denial which is signed and dated by the Custodian. Lastly, the Custodian states that these are the only records responsive to this OPRA request.

### **September 24, 2010**

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

- Complainant’s OPRA request dated September 13, 2010
- Original Custodian’s response to the Complainant’s OPRA request on a Government Records Request Receipt, with attachments.<sup>6</sup>

The Complainant states that on September 16, 2010 he filed an OPRA request with DOE requesting “a true copy of the original Government Records Request Form sent by overnight mail to DOE on June 7, 2010 for Request No. C51015, indicating the specific basis for the denial, signed and dated by the Custodian pursuant to N.J.S.A. 47:1A-5.g.”<sup>7</sup> The Complainant also states that the Custodian responded on September 22, 2010 stating that “the only document related to C51015...which indicates the basis for the denial of the request that is signed and dated by the Custodian is the Government Records Request Receipt. These are the only records that would be responsive to this request.” The Complainant further states that the Custodian provided the Complainant with a copy of the Government Records Request Receipt and an unsigned and undated copy of the Government Records request form for Request No. C51015.

The Complainant argues that in Paff v. Township of Old Bridge, Complaint No. 2005-123 (Interim Order April 7, 2006), the Council concluded that “the use of the request form is required for all requestors and the custodian shall adopt a form for the use of any person who requests access to government records held or controlled by the public agency.” N.J.S.A. 47:1A-5.f. The Complainant also argues that the Council held in Paff that:

“[t]he form to which N.J.S.A. 47:1A-5.g. refers is the form required by N.J.S.A. 47:1A-5.f.. In providing in 5.g. that the Custodian shall signed and date the form, indicate the basis for denial on the form and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors. See Harvey v. Essex County Board of Freeholders, 30 N.J. 381, 391-92 (1959). (The word “shall” in a statute is generally mandatory.). The express requirement that the custodian use the request form in denying an OPRA request, construed together with the proceeding statutory requirement that the custodian adopt a request form, demonstrates that the Legislature intended that this form would be used for all OPRA requests. If all requestors are not required to submit requests on the form prescribed by the statute, then the statutory provision requiring the Custodian to sign and date the form and return it to the requestor, would be meaningless.”

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<sup>6</sup> The Complainant also includes a copy of the unsigned Government Records Request Form dated June 7, 2010 and the Government Records Request Receipt dated June 8, 2010 for Request No. C51015, signed by the Custodian.

<sup>7</sup> The evidence of record indicates that the Complainant’s OPRA request is dated September 13, 2010. Sabino Valdes v. New Jersey Department of Education, 2010-256 – Findings and Recommendations of the Executive Director

The Complainant argues that the Government Records Request Receipt for Request No. C51015 provided by the Custodian is not the OPRA request form. The Custodian also argues that unless the aforementioned laws have changed, it is mandatory for the Custodian to comply with his OPRA request for the requested Government Records Request Form, signed and dated by the Custodian, indicating the basis for the denial.

The Complainant does not agree to mediate this complaint.

**September 29, 2010**

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

**October 14, 2010**

E-mail from the GRC to the Custodian. The GRC confirms a telephone conversation granting an extension of time to complete the SOI by October 14, 2010.

**October 22, 2010**

Facsimile from the Complainant to the GRC. The Complainant states that to date, he has not received the Custodian’s SOI. The Complainant also states that unless there is a valid explanation for the Custodian’s lack of response, the GRC must adjudicate the matter based only on the information submitted in his Denial of Access Complaint.

**October 22, 2010**

Letter from the Executive Director of the GRC to the Complainant. The Executive Director acknowledges the Complainant’s facsimile dated October 22, 2010. The Executive Director states that due to extraordinary circumstances at DOE, an extension of time will be granted to complete the SOI. The Executive Director also states that soon as she is notified of the identity of the new Custodian for DOE, she will determine the appropriate extension to complete the requested SOI.

**November 17, 2010**

E-mail from Beth Auerswald, Acting Records Custodian, (“Ms. Auerswald”) to the GRC. Ms. Auerswald states that she is the Acting Custodian for DOE. Ms. Auerswald inquires if there are any complaints involving the Complainant that are awaiting responses from DOE.<sup>8</sup>

**November 19, 2010**

E-mail from the GRC to the Custodian. The GRC resends the request for the SOI. The GRC informs the Custodian that the SOI must be completed by December 6, 2010.

**December 6, 2010<sup>9</sup>**

Custodian’s SOI with the following attachments:

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<sup>8</sup> The evidence of record indicates that at the time of the request for the SOI, DOE also had to respond to four (4) other Denial of Access Complaints filed by the Complainant.

<sup>9</sup> The parties submitted additional correspondence. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

- Complainant’s OPRA request dated September 13, 2010
- Custodian’s response on a Government Records Request Receipt to the Complainant’s OPRA request dated September 22, 2010 with attachments.<sup>10</sup>

The Custodian certifies that the OPRA Unit staff searched the files for the records responsive to the Complainant’s OPRA request. The Custodian also certifies that the records retention requirement for OPRA requests without a fee that include request forms and response documents is three (3) years in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that the OPRA Unit utilizes the NJ Office of Information Technology’s OPRA database to track all OPRA requests. The Custodian also certifies that if an OPRA request is delivered to DOE via facsimile or U.S. Mail, the staff manually enters the OPRA request into the state’s tracking database. The Custodian further certifies that all of the Complainant’s OPRA requests are submitted either via facsimile or U.S. Mail. The Custodian certifies that the tracking database assigns a request number and produces a Government Records Request Receipt, which is the *de facto* request form for all electronic, faxed and mailed OPRA requests. The Custodian also certifies that the Acting Custodian at the time of Complainant’s request No. C51015 was Mr. Anthony Bland, (“Mr. Bland”). The Custodian further certifies that Mr. Bland signed the Government Records Request Receipt for request No. C51015.

### 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:

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<sup>10</sup> Ms. Auerswald includes a copy of the unsigned Government Records Request Form dated June 7, 2010 and the Government Records Request Receipt dated June 8, 2010 for Request No. C51015 signed by the Custodian.

“[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 the instant complaint, the Complainant stated in the Denial of Access Complaint that he filed an OPRA request with DOE seeking “a true copy of the original Government Records Request Form sent by overnight mail to DOE on June 7, 2010 for request No. C51015, indicating the specific basis for the denial, signed and dated by the Custodian pursuant to N.J.S.A. 47:1A-5.g...” The Complainant argued that the Government Records Request Receipt provided by the original Custodian is not the Government Records Request form adopted by the public agency and on which the Custodian is required to respond to OPRA requests. The evidence of record indicates that the Acting Custodian at the time of Request No. C51015 was Mr. Bland, who signed and dated the Government Records Request Receipt and provided a lawful basis for a denial within the seven (7) business days. The evidence of record also indicates that the original Custodian in this instant complaint responded to the Complainant’s OPRA request stating the only record responsive which indicates the lawful basis for the denial of Request No. C51015 that is signed and dated by the Custodian is the Government Records Request Receipt.

Further, the Custodian certified in the SOI that DOE’s OPRA unit utilizes the NJ Office of Information Technology’s OPRA database to track all OPRA requests. The Custodian also certified that if an OPRA request is delivered via facsimile or U.S. Mail,

then that request is manually entered into the database. Lastly, the Custodian certified that the Government Records Request Receipt is the *de facto* request form for all electronic, faxed and mailed OPRA requests.

A valid response to an OPRA request is set forth in N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. OPRA states that a custodian shall indicate the specific basis for non-compliance with an OPRA request on the request form itself and provide such to the requestor pursuant to N.J.S.A. 47:1A-5.g. This provision of OPRA also states that a custodian must sign and date the form and provide the requestor a copy thereof. OPRA also states 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.

However, in Renna v. Township of Warren (Somerset), GRC Complaint No. 2008-40 (April 2009), the Council held that:

“[i]t is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, *even if said response is not on the agency’s official OPRA request form*, is a valid response pursuant to OPRA.” (Emphasis added).

Thus, despite the language in N.J.S.A. 47:1A-5.g. regarding a custodian’s response to an OPRA request being on the official OPRA request form, the Council routinely recognizes a custodian’s written response to a request even when same is not on the official OPRA request form. See Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009)(holding that requestors should continue to use public agencies’ OPRA request forms when filing requests, and stating that custodians shall not withhold records if a request is not on an official OPRA request form).

In the instant complaint, the Complainant argued that the Government Records Request Receipt he received in response to his OPRA request is not the Government Records Request Form that he requested, *i.e.*, the OPRA request form adopted by the public agency. The Complainant also argued that the Custodian must comply with N.J.S.A. 47:1A-5.g. and provide the response to Request No. C51015 on the official OPRA request form.

However, the evidence of record indicates that the Government Records Request Receipt provided to the Complainant was signed and dated by the Custodian at the time of the request. The evidence of record also indicates that a specific lawful basis for a denial of access was provided on this receipt, *i.e.*, that the only record responsive which indicates the basis for the denial of the request that is signed and dated by the OPRA Custodian is the Government Records Request Receipt.

Therefore, the Custodian’s response to the Complainant’s OPRA request was lawful because said response was timely and the Government Records Request Receipt signed and dated by Mr. Bland which provided a lawful basis for the denial of access is the only record responsive to the Complainant’s request. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i.; see Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian's response to the Complainant's OPRA request was lawful because said response was timely and the Government Records Request Receipt signed and dated by the Custodian which provided a lawful basis for the denial of access is the only record responsive to the Complainant's request. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i.; *see Renna v. County of Union*, 407 N.J. Super. 230 (App. Div. 2009).

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

March 20, 2012