



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 26, 2012 Government Records Council Meeting

Sabino Valdes
Complainant

Complaint No. 2010-289

v.

Union City Board of Education (Hudson)
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 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:

1. Because the Custodian properly requested an extension of time to respond to the Complainant’s OPRA request in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension and responded to the request in a timely manner pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because the Custodian herein certified in the Statement of Information that the executive session minutes could not be located, and because the Complainant submitted no competent, credible evidence to refute the Custodian’s certification, the Custodian has borne his burden of proving that he did not unlawfully deny access to the requested executive session minutes from a special meeting of the Board on July 1, 2003 pursuant to N.J.S.A. 47:1A-6, Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and 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 June, 2012

Steven F. Ritardi, Esq., Acting Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

**Sabino Valdes¹
Complainant**

GRC Complaint No. 2010-289

v.

**Union City Board of Education (Hudson)²
Custodian of Records**

Record Relevant to Complaint: A copy of the executive session minutes from a special meeting of the Union City Board of Education (“Board”) on July 1, 2003.

Requests Made: October 4, 2010

Response Made: October 5, 2010

Custodian: Anthony Dragona

GRC Complaint Filed: November 10, 2010³

Background

October 4, 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.

October 5, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the same date the Custodian received the request.⁴ The Custodian states that because the Complainant filed twenty (20) OPRA requests during the past week and another requestor filed seventeen (17) OPRA requests on October 5, 2010, responding to all of the requests in one week would substantially disrupt the operations of his agency. The Custodian states that he needs additional time to respond to the Complainant’s OPRA request and will respond to the request by October 20, 2010.

October 18, 2010

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that the Custodian is still searching for the records responsive to the Complainant’s request and therefore will not be able to address the Complainant’s

¹ No legal representation listed on record.

² Represented by Susanne Lavelle, Esq., (Union City, NJ).

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

⁴ The Custodian certifies in the Statement of Information that he received the Complainant’s OPRA request on October 5, 2010.

request by October 20, 2010. The Custodian further informs the Complainant that the Custodian will need an additional extension of time until October 29, 2010 in order to address the Complainant's requests.

October 27, 2010

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that the requested record cannot be located.⁵

November 10, 2010

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

- Copy of Board special meeting minutes dated July 1, 2003
- Complainant's OPRA request dated October 4, 2010
- Letter from the Custodian to the Complainant dated October 27, 2010

The Complainant states that on October 4, 2010 he filed an OPRA request seeking a copy of the executive session minutes from a special meeting of the Board on July 1, 2003. The Complainant also states that on October 27, 2010 the Custodian responded to said request stating that a copy of the requested minutes could not be located.

The Complainant states that the Open Public Meetings Act requires each public body to keep reasonably comprehensive minutes of all its meetings which shall be promptly available to the public. The Complainant states that in Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010) the complainant filed an OPRA request seeking Board Special Meeting minutes dated June 13, 2003 and that the Custodian responded in writing stating the record could not be located. The Complainant further states that the Custodian later located one (1) page of minutes dated June 13, 2000 in a box labeled "Nancy's Copies." The Complainant states that the complainant in Rivera, supra, was thus deprived of timely access to the requested record. The Complainant states that the GRC should not allow the Custodian to continue to deny access to government records by asserting that requested records cannot be located.

November 14, 2010

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

December 8, 2010

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

December 14, 2010

Custodian's SOI with the following attachments:

- Letter from the Custodian to the Complainant dated August 25, 2008⁶

⁵ This letter addresses several items the Complainant previously requested. Only the issue that is relevant to the instant complaint is mentioned herein.

- Complainant's OPRA request dated October 4, 2010
- Custodian's response to the OPRA request dated October 5, 2010
- Letter from the Custodian to the Complainant dated October 18, 2010
- Letter from the Custodian to the Complainant dated October 27, 2010

The Custodian certifies that his search for the requested record involved giving the OPRA request to his assistant whom he knows searched through ledger books and storage boxes in an attempt to locate the requested record. The Custodian also certifies that he has knowledge that his assistant located the regular session minutes for July 1, 2003 but could not locate the executive session minutes. The Custodian further certifies that he has knowledge that his assistant searched through the regular session minutes to be certain that the executive session minutes were not misfiled with the regular session minutes. The Custodian certifies that his assistant could not locate the record responsive to the Complainant's request.

The Custodian also certifies that the records that may have been responsive to the request were not destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management because the records must be retained permanently.

The Custodian certifies that he is the Interim Board Secretary and Custodian of Records for the Board and that he has held such a position with the Board since 2006. The Custodian also certifies that he received the Complainant's OPRA request on October 5, 2010, but because he had a number of OPRA requests pending fulfillment he informed the Complainant that he could not address the Complainant's request at that time and requested an extension of time until October 20, 2010 to respond to the Complainant's request. The Custodian further certifies that because he was still searching for the record responsive to the Complainant's request on October 18, 2010, he requested an additional extension of time until October 29, 2010 to address the Complainant's request. The Custodian certifies that he responded in writing to the Complainant's request on October 27, 2010.

The Custodian certifies that he conducted a diligent search for the record requested by the Complainant but the requested record could not be located. The Custodian further certifies that he did not violate OPRA by denying the Complainant's requests for a record that does not exist. The Custodian cites Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) in support of his certification.

⁶ In this letter the Custodian informed the Complainant that, in response to several of the Complainant's OPRA requests filed 2008, minutes for a July 1, 2003 special meeting of the Board are available for purchase.

January 7, 2011⁷

Letter from the Complainant to the GRC. The Complainant argues that the Custodian was the Acting Board Secretary on November 3, 2003. The Complainant attaches a Certification of Determination for another legal manner wherein the Custodian certifies that he is the "...Acting Board Secretary for the Union City Board of Education..." The Custodian signed and dated the certification on November 3, 2003. The Complainant argues that the Custodian, as Acting Board Secretary at the time, was responsible for preparing the Board's executive session minutes on July 1, 2003. The Complainant also stated that the Custodian intentionally provided the GRC with false information by not certifying that he was Acting Board Secretary in 2003.

February 15, 2011

Letter from the GRC to the Complainant. The GRC informs the Complainant that the Executive Director has granted him fifteen (15) business days to amend his complaint.

February 15, 2011

E-mail from the GRC to the Custodian. The GRC informs the Custodian that the Complainant will have until March 9, 2011 to amend his complaint.

February 22, 2011

Letter from the Complainant to the GRC. The Complainant requests an extension of time until March 15, 2011 to submit a supplement to his complaint.

February 28, 2011

Letter from the GRC to the Complainant. The GRC informs the Complainant that he is not authorized to supplement his complaint, but rather that the Executive Director granted him an extension of time to amend his complaint beyond the thirty (30) business day period after the filing of the complaint. The GRC grants the Complainant an extension of time until March 15, 2011 to amend his complaint and informs the Complainant that the Executive Director will not approve any extensions of time beyond March 15, 2011.

March 9, 2011

Letter from the Complainant to the GRC. The Complainant captions his letter as a withdrawal of another GRC Denial of Access Complaint he has pending before the GRC. The Complainant then goes on to reiterate some of the issues he raised in his submission dated December 16, 2010 which the GRC refused to accept.

March 9, 2011

Letter from the GRC to the Custodian. The GRC informs the Custodian that the Complainant, under the pretense of a withdrawal letter sent to the GRC for a different

⁷ The Complainant submitted to the GRC a "reply to the Statement of Information" dated December 16, 2010. By letter dated December 17, 2010, the GRC returned the submission to the Complainant with an explanation that *N.J.A.C. 5:105 et seq.* provides the proper procedure for post-SOI party submissions and that the Complainant failed to comply with the procedure set forth in said regulation. The Complainant subsequently sought, and was denied, permission to submit an amended complaint because the thirty (30) business day period provided for the filing of an amended complaint had expired.

complaint, reiterated some of the issues he raised in an earlier submission for the instant complaint. The Custodian was informed that, because such practice violates the GRC's position with respect to *ex parte* communications, the Custodian would be granted a five (5) business day period to respond to the Complainant's allegations should he wish to do so.

March 11, 2011

Letter from the Complainant to the GRC. The Complainant argues that instead of amending his complaint he should be authorized to supplement his complaint. The Complainant requests an additional ten (10) business day extension of time to supplement his complaint.

March 14, 2011⁸

Letter from the Custodian's Counsel to the Complainant. Counsel forwards a certification from the Custodian in which the Custodian certifies that in his SOI he certified that he has been the Custodian since 2006. The Custodian certifies that he neglected to mention in the SOI that he was also the Custodian for the Board from July 2003 through December 2003. The Custodian also certifies that he inadvertently left this information out of the SOI and did not do so with intent to conceal or distort any facts. The Custodian further certifies that he did not disavow responsibility for keeping and maintaining the requested records; however, after conducting a diligent search for the records, the Custodian certifies that those records could not be located and therefore could not be disclosed.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA 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.

Further, OPRA 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.

⁸ Other subsequent correspondence was received from the parties which restates facts/assertions already presented to the GRC.

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.⁹ 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 (Interim Order October 31, 2007).

Here, the Complainant states that his OPRA request was provided to the Custodian on October 4, 2010 but that the Custodian did not respond to his request until October 27, 2010. The Custodian certified that he did not receive the Complainant's request until October 5, 2010 and that he responded to the Complainant's request on October 27, 2010 after requesting two extensions of time.

The evidence of record reveals that the Custodian received the Complainant's OPRA request on October 5, 2010 and responded to the Complainant's request in writing on that same date, informing the Complainant that the Custodian's office was inundated with OPRA requests and that responding to all of the requests in one week would substantially disrupt the operations of his agency. The evidence of record also reveals that the Custodian informed the Complainant that the Custodian needed additional time to respond to the Complainant's OPRA request and that he would respond to the request by October 20, 2010. The evidence of record further reveals that on October 18, 2010, before the extended time for a response expired, the Custodian informed the Complainant that he was still searching for the records responsive to the Complainant's request and would need an additional extension of time until October 29, 2010 in order to address the Complainant's request. On October 27, 2010 the Custodian informed the Complainant that the requested record could not be located.

In Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. [and] N.J.S.A. 47:1A-5.i."

⁹ It 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.

Similarly in this complaint, the Custodian provided the Complainant with a written response to his OPRA request on the same day the request was received and requested an extension of time until October 20, 2010 to fulfill the Complainant's request for executive session minutes. Thereafter, *before the self-imposed deadline date for a response expired*, the Custodian requested a second extension of time to respond until October 29, 2010. This action had the effect of extending the deadline date for a response from October 20, 2010 until October 29, 2010.

The Custodian certified that he needed the extension of time to respond to the Complainant's request because he had received thirty-seven (37) OPRA requests during the past week and responding to all of the requests in one week would substantially disrupt the operations of his agency. The Council has determined that a custodian's opinion that his or her response to a sudden surge of OPRA requests within a short period of time would substantially disrupt agency operations is a valid reason for requesting an extension of time.

In Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (Interim Order August 2009), the Custodian certified that responding to twenty-one (21) OPRA requests in a week would substantially disrupt the operations of the agency and the Custodian therefore requested an extension of time to respond to the Complainant's OPRA requests. The Council held that:

"...because the Custodian certified that responding to twenty-one (21) OPRA requests in one (1) week would substantially disrupt the operations of his agency, and because the Custodian properly requested an extension of time to respond to the Complainant's OPRA requests, the Custodian's request for an extension of time to respond to the Complainant's OPRA requests is a sufficient and reasonable solution that accommodates the interests of the requestor and the agency, pursuant to N.J.S.A. 47:1A-5.g."

In the instant complaint, the Custodian properly requested an extension of time until October 29, 2010 to respond to the Complainant's request and subsequently did respond to the request on October 27, 2010 by informing the Complainant in writing that the Custodian could not locate the requested records. As such, the Custodian responded to the Complainant's request in a timely manner.

Accordingly, because the Custodian properly requested an extension of time to respond to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension and responded to the request in a timely manner pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, supra.

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 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 Custodian certified in the SOI that the executive session minutes from a special meeting of the Board on July 1, 2003 could not be located and therefore do not exist. Further, the Complainant provided no evidence to refute the Custodian’s certification.¹⁰

In Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009), the Council addressed the issue of the Custodian’s inability to locate executive session minutes dated June 13, 2000. In that complaint, the Custodian certified

¹⁰ The Complainant offered what he purports to be evidence to refute the Custodian’s certification in the SOI that he had been the Board Secretary and Custodian since 2006. The Complainant offered to the GRC a copy of a Certification of Determination for another legal manner wherein the Custodian certified on November 3, 2003, that he was the Acting Board Secretary for the Union City Board of Education. The Complainant argued that the Custodian, as Acting Board Secretary in 2003 was responsible for preparing and maintaining the Board’s executive session minutes on July 1, 2003. The Complainant stated that the Custodian provided the GRC with false information by not certifying that he was Acting Board Secretary in 2003. The Complainant suggested that the Custodian was, by these actions, intentionally concealing the requested record from the public. The Custodian submitted a separate certification to the GRC dated March 14, 2011, wherein he certified that he neglected to mention in the SOI that he was also the Custodian for the Board from July 2003 through December 2003. The Custodian also certified that he inadvertently left this information out of the SOI and did not do so with intent to conceal or distort any facts. The GRC is not convinced that the Complainant’s statements with respect to the Custodian’s service to the Board as Acting Secretary constituted competent, credible evidence sufficient to refute the Custodian’s certification that the requested records are nonexistent.

that he responded to the complainant informing him that the requested meeting minutes could not be located, but would be provided if found. The Custodian also certified that Ms. Festa searched through six (6) storage boxes and finally did locate one (1) page of the executive session minutes in a box labeled “Nancy’s copies” which was immediately provided to the complainant. The Custodian further certified that he was unaware of the existence or the contents of the box labeled “Nancy’s copies.” The Council determined that

“[b]ecause the Custodian conducted a reasonable search for the requested special meeting minutes in the Board of Education’s ledger minute book and six (6) archived boxes of records, and because the Custodian certified that he was not aware of the existence or the contents of the box labeled “Nancy’s copies” in which the Custodian’s assistant located portions of the requested minutes, the Custodian did not unlawfully deny access to said minutes and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.” *Id.*

As in Rivera, the Custodian herein also certified in the SOI that he conducted a diligent search of the records in the Board’s possession for the record responsive to the Complainant’s request. The Custodian certified that his assistant searched through ledger books and storage boxes in an attempt to locate the requested record. The Custodian also certified that his assistant located the regular session minutes for July 1, 2003 but could not locate the executive session minutes. The Custodian further certified that his assistant also searched through the regular session minutes to be certain that the executive session minutes were not misfiled with the regular session minutes. The Custodian certifies that notwithstanding this thorough and diligent search, his assistant was unable to locate the record responsive to the Complainant’s request.

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 Complainant failed to submit any evidence to refute the Custodian’s certification. The GRC held 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 herein certified in the SOI that the executive session minutes could not be located, and because the Complainant submitted no competent, credible evidence to refute the Custodian’s certification, the Custodian has borne his burden of proving that he did not unlawfully deny access to the requested executive session minutes from a special meeting of the Board on July 1, 2003 pursuant to N.J.S.A. 47:1A-6, Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and 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:

1. Because the Custodian properly requested an extension of time to respond to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension and responded to the request in a timely manner pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).

2. Because the Custodian herein certified in the Statement of Information that the executive session minutes could not be located, and because the Complainant submitted no competent, credible evidence to refute the Custodian's certification, the Custodian has borne his burden of proving that he did not unlawfully deny access to the requested executive session minutes from a special meeting of the Board on July 1, 2003 pursuant to N.J.S.A. 47:1A-6, Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

June 19, 2012