



**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  
*Commissioner*

**FINAL DECISION**

**March 29, 2011 Government Records Council Meeting**

David Herron  
Complainant

Complaint No. 2010-94

v.

Westfield Public School District (Union)  
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 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. The Custodian’s failure to respond in writing to the 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 (January 2010).
2. Because the Custodian herein certified that no records responsive to Items No. 1 and 3 of the Complainant’s request exist, 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 records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial and a violation of N.J.S.A. 47:1A-5.g., the Custodian has certified that he provided the Complainant with copies of all the records responsive to Item No. 2 on September 29, 2010 (over seven (7) months after receipt of the request) and the Custodian certified that there are no records responsive to Item No. 1 and No. 3 in the Statement of Information and on January 26, 2011, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.



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 29<sup>th</sup> Day of March, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: April 1, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 29, 2011 Council Meeting**

**David Herron<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-94**

v.

**Westfield Public School District (Union)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the following regarding former Guidance Director, Scott White:

1. Employment application
2. Transcripts
3. College degrees<sup>3</sup>

**Request Made:** February 27, 2010

**Response Made:** March 10, 2010

**Custodian:** Robert Berman

**GRC Complaint Filed:** May 7, 2010<sup>4</sup>

**Background**

**February 27, 2010**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA.

**March 10, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eighth (8<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the records responsive to request Items No. 1 and No. 3 are denied because the District does not possess these records. The Custodian states that access to records responsive to request Item No. 2 is denied because pursuant to OPRA, Mr. White's transcripts are confidential personnel records and are therefore not public records subject to disclosure under OPRA.

**May 7, 2010**

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

---

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

<sup>2</sup> Represented by Philip E. Stern, Esq. (Newark, NJ).

<sup>3</sup> The Complainant requested additional records which are not at issue in this matter.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

- Complainant's OPRA request dated February 27, 2010.
- Letter from the Custodian to the Complainant dated March 10, 2010.<sup>5</sup>

The Complainant states that on February 27, 2010 he sent an OPRA request to the Westfield Board of Education seeking information about Scott White, who had been employed by the district. The Complainant states that he is seeking 1) a copy of Mr. White's employment application; 2) copies of Mr. White's transcripts; 3) copies of college degrees/diplomas for Mr. White. The Complainant states that the Custodian denied the request for Items No. 1, No. 2 and No. 3.

The Complainant agrees to mediate this complaint.

**May 13, 2010**

Offer of Mediation sent to the Custodian.

**June 7, 2010**

The Custodian agrees to mediate this complaint.

**June 7, 2010**

The complaint is referred to mediation.

**September 28, 2010**

The complaint is referred back to the GRC for adjudication.

**September 28, 2010**

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

**September 29, 2010**

E-mail from Custodian's Counsel to the GRC. Custodian's Counsel responds to the request for the SOI by attaching a legal certification from the Custodian and records responsive to the OPRA request that were provided to the Complainant on this same date.

Counsel attaches copies of the following records in response to the Complainant's OPRA request Item No. 2: 1) Harvard University Graduate School of Education transcript; 2) Pennsylvania Certificate for Social Studies; 3) New Jersey Certificate for Student Personnel Services; 4) New Jersey Certificate for Director of Student Personnel Services; 5) New Jersey Certificate for Supervisor; and 6) Swarthmore College Transcript.

Counsel inquires if the attached records will resolve this matter. The Custodian certifies that the records attached represent all the records that the Board has in its possession. The Custodian certifies that these are the only records that the Board has on file in response to the Complainant's OPRA request. The Custodian also certifies that the Board does not utilize a third-party vendor for employment application screening. Thus,

---

<sup>5</sup> The Complainant attached additional materials not relevant to the adjudication of this complaint.  
David Herron v. Westfield Public School District (Union), 2010-94 – Findings and Recommendations of the Executive Director

the Custodian certifies that there are no other records to provide concerning the Complainant's request.

**September 30, 2010**

E-mail from the GRC to the Custodian's Counsel. The GRC informs the Custodian's Counsel that the completed SOI is still needed, but that the GRC can consider the Custodian's legal certification as responsive to Item No. 12 of the SOI.

**September 30, 2010**

E-mail from the Custodian's Counsel to the GRC. Custodian's Counsel states he will return the SOI right away, but that he was confused as to what issues were outstanding.

**October 22, 2010**

E-mail from the Complainant to the GRC. The Complainant states that he still has not received any information from the Custodian.

**October 22, 2010**

Telephone call from the GRC to the Custodian. The GRC informs the Custodian that the completed SOI is still needed and will resend the SOI request to the Custodian for his completion.

**October 22, 2010**

E-mail from the GRC to the Complainant. The GRC informs the Complainant that he may amend his Denial of Access Complaint since his complaint was referred back to the GRC for adjudication.<sup>6</sup>

**October 22, 2010**

E-mail from the GRC to the Custodian. The GRC re-sends the request for the SOI and asks the Custodian to respond within five (5) business days.

**November 3, 2010**

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 September 28, 2010 and October 22, 2010 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant. The GRC also states that pursuant to the Uniform Mediation Act, the GRC cannot consider any submissions of records or arguments made by either party during mediation.

**November 15, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 27, 2010
- Letter from the Custodian to the Complainant dated March 10, 2010.
- Certification from Custodian dated September 29, 2010

---

<sup>6</sup> The Complainant did not amend his Denial of Access Complaint.

The Custodian certifies that no record exists which is responsive to the request for Item No. 1.

The Custodian further certifies that there are six (6) records responsive to the Complainant's OPRA request for Item No. 2. These records include: 1) Harvard University Graduate School of Education transcript; 2) Pennsylvania Certificate for Social Studies; 3) New Jersey Certificate for Student Personnel Services; 4) New Jersey Certificate for Director of Student Personnel Services; 5) New Jersey Certificate for Supervisor; and 6) Swarthmore College Transcript.

The Custodian certifies that the records responsive to request Item No. 2 must be permanently maintained and may only be archived. The Custodian also certifies that all of the existing records responsive were provided to the Complainant without redactions on September 29, 2010.

#### **January 14, 2011**

E-mail from the GRC to the Custodian. The GRC requests a legal certification from the Custodian certifying whether there are any records responsive to the Complainant's OPRA request for Item No. 3.

#### **January 26, 2011**

E-mail from the Custodian to the GRC. The Custodian certifies that there are six (6) records responsive to the Complainant's OPRA request Item No. 2. These records include: 1) Harvard University Graduate School of Education transcript; 2) Pennsylvania Certificate for Social Studies; 3) New Jersey Certificate for Student Personnel Services; 4) New Jersey Certificate for Director of Student Personnel Services; 5) New Jersey Certificate for Supervisor; and 6) Swarthmore College Transcript.

The Custodian further certifies that he does not have any records responsive to the Complainant's OPRA request for Item No. 3.

### **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 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 Custodian responded to the Complainant’s OPRA request in writing on the eighth (8<sup>th</sup>) business day following receipt of such request. The Custodian denied access to records responsive to Items No. 1 and No. 3 because the Custodian stated the District does not possess these records. The Custodian also responded to the Complainant’s request for Item No. 2 stating that transcripts are confidential personnel records and therefore not subject to disclosure under OPRA. The Custodian later certified in his SOI and on January 26, 2011 that no records exist which are responsive to the Complainant’s request for Item No. 1 and No. 3 and also certified that he provided the Complainant with unredacted copies of records responsive to Item No. 2 on September 29, 2010 (over seven (7) months after receipt of the request). The Complainant has submitted no evidence to refute either of the Custodian’s certifications.

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.<sup>7</sup> 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 (January 2010).

Therefore, the Custodian’s failure to respond in writing to the 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.,

---

<sup>7</sup> 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.

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

The GRC will now address the issue of whether the Custodian unlawfully denied the Complainant access to records responsive to request Items No. 1 and 3 of the Complainant's OPRA request.

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 complainant did not submit any evidence to refute the Custodian's certification. 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 and there was no credible evidence in the record to refute the Custodian's certification.

In the instant complaint, the Custodian responded to the Complainant's OPRA request stating that there are no records responsive to request for Item No. 1 and No. 3. Furthermore, the Custodian later certified that there are no records responsive to Item No. 1 in his SOI. In addition, the Custodian provided a legal certification to the GRC on January 27, 2011 stating that no records responsive to request Item No. 3 exist. The Complainant has submitted no evidence to refute the Custodian's certifications.

Therefore, because the Custodian herein certified that no records responsive to Items No. 1 and 3 of the Complainant's request exist, 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 records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

**Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances,



the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

The Custodian provided the records responsive to Item No. 2 over seven (7) months after receipt of the request. Additionally, the Custodian later certified that no records responsive to Items No. 1 and No. 3 exist on September 29, 2010 and January 27, 2011, respectively. Furthermore, the Custodian certified that he provided the Complainant with all the records responsive to request Item No. 2.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial and a violation of N.J.S.A. 47:1A-5.g., and the Custodian has certified that he provided the Complainant with copies of all the records responsive to Item No. 2 on September 29, 2010 (over seven (7) months after receipt of the request) and the Custodian certified that there are no records responsive to Item No. 1 and No. 3 in the SOI and on January 26, 2011, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to respond in writing to the 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 (January 2010).
2. Because the Custodian herein certified that no records responsive to Items No. 1 and 3 of the Complainant’s request exist, 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 records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g., the Custodian has certified that he provided the Complainant with copies of all the records responsive to Item No. 2 on September 29, 2010 (over seven (7) months after receipt of the request) and the Custodian certified that there are no records responsive to Item No. 1 and No. 3 in the Statement of Information and on January 26, 2011, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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

Approved By: Catherine Starghill, Esq.  
Executive Director

March 22, 2011