



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

July 31, 2012 Government Records Council Meeting

Sabino Valdes
Complainant

Complaint No. 2011-146

v.

Union City Board of Education (Hudson)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 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. Although the Custodian responded to the Complainant’s OPRA request in writing in a timely manner, his response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), because his response that the Complainant was previously provided with all responsive records on two (2) occasions failed to contain a lawful basis for denying access to said OPRA request.
2. The Custodian certified in the Statement of Information that the no executive session minutes for the Union City Board of Education’s October 30, 2003 caucus meeting existed and the Complainant failed to submit any evidence to refute the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to the requested minutes pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian’s response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5 and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), the Custodian did not unlawfully deny access to the requested records because same do not exist. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Additionally, 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 insufficient response does not rise to the level of a knowing and willful violation of OPRA and 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 31st Day of July, 2012

Robin Berg Tabakin, 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: August 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**Sabino Valdes¹
Complainant**

GRC Complaint No. 2011-146

v.

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

Records Relevant to Complaint: Copy of the approved minutes from the executive session of the caucus meeting held by the Union City Board of Education (“UCBOE”) on October 30, 2003.

Request Made: March 28, 2011

Response Made: April 6, 2011

Custodian: Anthony Dragona

GRC Complaint Filed: May 2, 2011³

Background

March 28, 2011

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.

April 6, 2011

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the OPRA request form on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested record is denied because he already provided the Complainant with the only executive session minutes dated October 30, 2003 possessed by the UCBOE on December 8, 2010 and again on January 4, 2011.

May 2, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments⁴

- Regular session minutes dated October 30, 2003.

¹ No legal representation listed on record.

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

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

⁴ The Complainant attached additional records that are not relevant to the instant complaint.

- Executive session minutes dated October 30, 2003.
- Caucus session minutes dated October 30, 2003.
- “[UCBOE] Resolution Certifying Tenure Charges Against Charles Trelease, Maintenance Person, To The Commissioner of Education” (“Resolution”) dated October 30, 2003.
- “Certificate of Determination” dated November 3, 2003.
- Complainant’s OPRA request dated November 29, 2010 with the Custodian’s response thereon December 8, 2010.
- Complainant’s OPRA request dated November 29, 2010 with the Custodian’s response thereon December 8, 2010.
- Complainant’s OPRA request dated February 28, 2011 with the Custodian’s response thereon March 9, 2011.
- Complainant’s OPRA request dated March 25, 2011 with the Custodian’s response thereon April 5, 2011.
- Custodian’s Statement of Information (“SOI”) for GRC Complaint No. 2011-47 dated March 23, 2011.
- Complainant’s OPRA request dated March 28, 2011 with the Custodian’s response thereon dated April 6, 2011.
- Government Records Request Receipt dated March 29, 2011.

The Complainant states that at its October 30, 2003 executive session, the UCBOE voted on a resolution to certify tenure charges against an employee.

The Complainant states that he submitted two (2) OPRA requests on November 29, 2010 seeking (1) regular and executive session minutes for the UCBOE’s October 30, 2003 meeting and, (2) the Resolution adopted at the UCBOE’s October 30, 2003 meeting reflecting the charges in the tenure matter. The Complainant states that on December 8, 2010, the Custodian granted access to the minutes. The Complainant states that the executive session minutes included a discussion and vote regarding the tenure charges. The Complainant notes that the Custodian also denied access to the Complainant’s request for the adopted Resolution because he could not locate the record.

The Complainant states that because the regular session minutes did not contain a motion to go into executive session, he submitted another OPRA request on February 28, 2011 seeking copies of the “approved minutes” dated October 30, 2003 including a motion to go into executive session. The Complainant states that the Custodian denied the OPRA request stating that the Complainant was already provided with the only record that existed. The Complainant states that although the minutes provided by the Custodian were authenticated with the seal of the UCBOE, the Custodian would not certify that the minutes were a true copy of the original.⁵

The Complainant contends that he subsequently requested and received from the New Jersey Department of Education (“DOE”) a copy of the Resolution that the Custodian was unable to locate. The Complainant states that attached to the Resolution

⁵ The Complainant notes that he subsequently filed a complaint with the GRC: Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-47 (May 2012). The subject OPRA request sought “minutes from the regular and executive session of a special meeting held ... on October 30, 2003.” Sabino Valdes v. Union City Board of Education (Hudson), 2011-146 – Findings and Recommendations of the Executive Director 2

was a Certificate of Determination in which the Custodian, who was serving at UCBOE secretary on an interim basis at the time, certified that “on October 30, 2003, the [UCBOE] met in closed session at about 5:00 p.m. ... a true copy of the Resolution adopted ... is attached hereto.” The Complainant contends that it is not true that the UCBOE adopted the Resolution at its October 30, 2003 meeting: the Custodian’s certification was meant to deceive which is proven by the fact that the UCBOE does not maintain a copy of the Resolution.

The Complainant contends that there was no executive session held at the UCBOE’s regular meeting on October 30, 2003. The Complainant asserts that the Custodian nonetheless contends that the UCBOE met in executive session at 5:00 p.m. and voted on the tenure matter. The Complainant argues that this is impossible because the regular session was called to order at 7:00 p.m.; the tenure matter was not determined at the UCBOE’s regular session.

The Complainant states that he thus submitted an OPRA request on March 25, 2011 for a copy of the UCBOE’s caucus session minutes dated October 30, 2003. The Complainant states that the Custodian granted access to same on April 5, 2011. The Complainant states that the minutes indicate that the UCBOE opened the meeting at 5:00 p.m. and went into closed session shortly thereafter.

The Complainant states that in the interim, he also submitted to the Custodian the OPRA request relevant to this complaint on March 28, 2011. The Complainant states that on April 6, 2011, the Custodian responded to the OPRA request denying access and stating that he provided the Complainant with the only executive session minutes in the UCBOE’s possession. The Complainant contends that this is not true. The Complainant asserts that he was previously provided with executive session minutes from the UCBOE’s regular meeting that included the tenure matter; however, the Custodian certified in 2003 that the tenure matter was voted on at a caucus meeting.

The Complainant states that OPRA provides that “...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State ...” N.J.S.A. 47:1A-1. The Complainant states that OPRA further defines government records as any record “...made, maintained or kept on file in the course of ... official business by any officer, commission, agency or authority of the State or of any political subdivision thereof ... or that has been received in the course of ... official business ...” N.J.S.A. 47:1A-1.1. The Complainant states that a custodian must respond to an OPRA request in writing within seven (7) business days granting access or denying access and stating the specific basis for said denial. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Complainant further states that a public agency “... shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. 47:1A-6.

The Complainant states that executive session minutes are government records pursuant to Davis v. Rumsen Fair-Haven Board of Education, GRC Complaint No. 2003-56 (December 2003). The Complainant states that although the Custodian is required to grant or deny access to records, he cannot provide a fake record in order to hide that he is actually denying access to same. The Complainant contends that here, the Custodian previously granted access to executive session minutes of the regular meeting conducted

on October 30, 2003; however, there was no executive session held during this meeting. The Complainant thus contends that the Custodian previously provided him with records under false pretense.

The Complainant contends that this is not the first time the Custodian attempted to deceive the Complainant and the GRC in this manner. The Complainant asserts that in GRC Complaint No. 2011-47, the Custodian attempted to trick the GRC into believing that the executive session minutes he provided were actually part of the caucus meeting held on March 29, 2001. The Complainant asserts that the Custodian blamed the confusion on the Complainant. The Complainant thus contends that the GRC should not allow the Custodian to deny his OPRA request for approved minutes of the executive session of the caucus meeting conducted on October 30, 2003 on the basis that the Custodian provided the Complainant with all minutes within the UCBOE's possession. The Complainant contends that the Custodian must (1) deny the Complainant's OPRA request on the basis that no records responsive exist, or (2) grant access to the responsive minutes.

The Complainant does not agree to mediate this complaint.

May 26, 2011

Request for the SOI sent to the Custodian.

May 31, 2011

Custodian's SOI attaching the Complainant's OPRA request dated March 28, 2011 with the Custodian's response thereon dated April 6, 2011.

The Custodian certifies that his search for the requested records included his assistant and Custodian's Counsel expending half an hour reviewing the Complainant's prior OPRA requests to ensure that the Complainant was previously provided with the responsive record. The Custodian certifies that his assistant and Counsel determined that the UCBOE previously provided the responsive record with partial redactions to the Complainant on December 8, 2010 and January 4, 2011. The Custodian certifies that by the Complainant's own admission, he has been provided with the responsive minutes.

The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable.

The Custodian certifies that he received the Complainant's OPRA request on March 28, 2011. The Custodian certifies that he responded in writing to the Complainant's OPRA request on April 6, 2011 stating that he had already provided the Complainant with the only October 30, 2003 executive session minutes in the UCBOE's possession on December 8, 2010 and January 4, 2011 (with partial redactions). The Custodian certifies that the UCBOE does not have an executive session for caucus meetings and that the only executive session minutes that exist are those from the regular meeting.

The Custodian certifies that for each regular meeting, there are three (3) sets of minutes: one (1) for the caucus session, executive session meeting and regular session respectively. The Custodian certifies that the Complainant was provided with the regular and executive session minutes on December 8, 2010 in response to an OPRA request. The Custodian certifies that on March 9, 2011, he denied the Complainant's request for minutes including the motion to go into closed session. The Custodian asserts that OPRA does not require a custodian to search through its minutes to ensure that the motion was contained in the minutes.

The Custodian states that the Complainant subsequently received from DOE the Resolution and Certificate of Determination. The Custodian certifies that the Certificate of Determination states that the UCBOE went into executive session at 5:00 p.m. and the Resolution was certified on October 30, 2003. The Custodian further certifies that the executive session minutes show a discussion of the tenure matter and the regular session minutes note that the UCBOE considered "... tenure charges against employee XXXXX." The Custodian asserts despite the uncontroverted facts and supporting evidence, the Complainant has accused the UCBOE and the Custodian of creating and providing false records.

The Custodian certifies that he previously provided the Complainant with all responsive records, yet the Complainant still submitted the OPRA request at issue herein on March 28, 2011. The Custodian certifies he denied access to the Complainant's OPRA request because no executive session minutes from the October 30, 2003 caucus meeting exist and the Custodian previously provided the only set of executive session minutes that did exist.

The Custodian finally argues that the Complainant is himself blatantly trying to mislead the Council. The Custodian further requests that the Council address the Complainant's harassment of the UCBOE.

Analysis

Whether the Custodian's response to the Complainant's OPRA request was sufficient?

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.

In the instant complaint, the Custodian responded in writing to the Complainant’s OPRA request on the seventh (7th) business day after receipt of same denying access and stating that he already provided the Complainant with the only responsive minutes in the UCBOE’s possession on December 8, 2010 and January 4, 2011 (with partial redactions).

In Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), the complainant filed numerous OPRA requests for the same records in each request. The custodian responded to the complainant stating that the records were previously provided to the complainant in 2002 and 2003 on repeated occasions. The Council held that “the fact that the records were previously provided to the Complainant on several occasions is not a lawful basis to deny access to the records requests.”

Therefore, although the Custodian responded to the Complainant’s OPRA request in writing in a timely manner, his response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Caggiano, because his response that the Complainant was previously provided with all responsive records on two (2) occasions failed to contain a lawful basis for denying access to said OPRA request.

Whether the Custodian unlawfully denied access to the requested minutes?

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 Complainant herein contended that the Custodian attempted to hide his denial of access to the requested October 30, 2003 executive session minutes of the caucus meeting by providing access to other records. The Complainant argued that the Custodian previously tried to mislead the GRC. The Complainant further contended that the Custodian must (1) deny the Complainant’s OPRA request on the basis that no records responsive exist, or (2) grant access to the responsive minutes. As part of the Denial of Access Complaint, the Complainant included caucus minutes, executive session minutes and regular session minutes that he was provided in response to previous OPRA requests.

The Custodian certified in the SOI that he provided the Complainant with all October 30, 2003 minutes that were in the UCBOE’s possession. The Custodian further certified that for each regular meeting, there are generally three (3) sets of minutes: one (1) for the caucus session, executive session and regular session respectively. The Custodian certified that no executive session minutes from the October 30, 2003 caucus meeting exist and the Custodian previously provided the only set of executive session minutes that did exist. The Custodian further asserted that despite the undisputed facts and supporting evidence, the Complainant contended that the Custodian provided a false record.

Thus, the crux of this complaint is whether the Custodian unlawfully denied access to the Complainant’s OPRA request for executive session minutes from the October 30, 2003 caucus meeting. The Complainant submitted an extensive history of how he came to submit the OPRA request at issue herein; however, this evidence does not refute the Custodian’s certification that only three (3) sets of minutes for October 30, 2003 exist. Moreover, the evidence does not refute the Custodian’s certification that no executive session minutes from the UCBOE’s caucus meeting responsive to the Complainant’s OPRA request exist.

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 certified in the SOI that no records responsive to the complainant’s request existed. The complainant submitted no evidence to refute the custodian’s certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified in the SOI that the no executive session minutes for the UCBOE’s October 30, 2003 caucus meeting existed and the Complainant failed to submit any evidence to refute the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to the requested minutes pursuant to Pusterhofer.

Whether the Custodian’s insufficient response 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.

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 (Felder 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 response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5 and Caggiano, the Custodian did not unlawfully deny access to the requested records because same do not exist. Pusterhofer. Additionally, 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 insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded to the Complainant's OPRA request in writing in a timely manner, his response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), because his response that the Complainant was previously provided with all responsive records on two (2) occasions failed to contain a lawful basis for denying access to said OPRA request.
2. The Custodian certified in the Statement of Information that the no executive session minutes for the Union City Board of Education's October 30, 2003 caucus meeting existed and the Complainant failed to submit any evidence to refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to the requested minutes pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5 and Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211 (January 2006), the Custodian did not unlawfully deny access to the requested records because same do not exist. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Additionally, 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 insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012