



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

Mr. & Mrs. L. Johnston
Complainant

Complaint No. 2011-213

v.

Montclair Board of Education (Essex)
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 because the Custodian has certified that no records responsive to the Complainants’ OPRA request exist and because there is no competent, credible evidence in the record sufficient to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainants access to the requested records. N.J.S.A. 47:1A-6.

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 7, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Mr. & Mrs. L. Johnston¹
Complainants**

GRC Complaint No. 2011-213

v.

**Montclair Board of Education (Essex)²
Custodian of Records**

Records Relevant to Complaint:

1. College applications completed by Ms. Nedra Clark.
2. The faxed Georgetown University application returned to Montclair High School³

Request Made: April 25, 2011

Response Made: April 28, 2011

Custodian: Dana Sullivan

GRC Complaint Filed: June 14, 2011⁴

Background

April 25, 2011

Complainants' Open Public Records Act ("OPRA") request. The Complainants request the records relevant to this complaint listed above on an official OPRA request form.

April 28, 2011

Custodian's response to the OPRA request. On behalf of the Custodian, Montclair Board of Education's ("Board") general counsel, Maxine Johnson, Esq., responds in writing via letter to the Complainants' OPRA request on the third (3rd) business day following receipt of such request. In regards to Item No. 1, Counsel requests that the Complainants specify the years and student name that corresponds with the sought applications. Counsel states that if the application is for the Complainants' child, then the name of that child will need to be included in the request.

In regards to Item No. 2, Counsel requests that the Complainants provide the year and name of the child that corresponds with the requested Georgetown University application.

¹ No legal representation listed on record.

² Represented by Derlys Maria Guitierrez, Esq., of Adams, Stern, Guitierrez, & Lattiboudere (Newark, NJ).

³ The Complainants also included additional OPRA requests that do not correspond to the requested records named in the Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

May 11, 2011

Letter from Maxine Johnson to the Complainants. Counsel asserts that guidance counselors do not complete college application forms for students, but do complete a Common Application – Secondary School Report, recommendation letters, transcripts, and a high school profile report for each college for which a student is applying. Counsel states that the guidance counselor completed a Common Application 2009-10 Secondary School Report for the Complainants' daughter. Counsel states that the report is attached to this letter.

Additionally, Counsel asserts that the guidance counselor's recommendation is redacted because the Complainants' daughter signed a waiver of access. Counsel states that this waiver applies to both the Complainants' daughter and the Complainants pursuant to the Family Educational Rights and Privacy Act (FERPA), which prevents the school district from sharing the recommendations of the guidance counselor with the student and the parents.

Counsel also states that neither Montclair High School nor the Board's Central Office has records that correspond with Item No. 2 of the Complainants' request. Counsel maintains that no school returned copies of the Common Application completed by the Complainants' daughter or Montclair High School's guidance counselors.

June 14, 2011

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

- Complainants' OPRA request dated April 25, 2011
- Letter from the Custodian to the Complainants dated April 28, 2011
- Letter from Counsel to the Complainants dated May 11, 2011

The Complainants allege that someone in the guidance department is intentionally tampering with their daughter's high school transcripts. The Complainants contend that several documents are missing from their daughter's transcripts. The Complainants state that the Montclair school district is using their attorney to prevent the Complainants from having access to their daughter's transcripts. The Complainants maintain that they were informed that all of their daughter's college applications were destroyed and are not in the school district's files. The Complainants assert that the college applications the Complainants were able to obtain from the school district were redacted copies.

The Complainants do not agree to mediate this complaint.

June 14, 2011

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

June 14, 2011

Custodian's SOI with the following attachments:

- Complainants' OPRA request dated April 25, 2011

- Letter from the Custodian to the Complainants dated April 28, 2011⁵

The Custodian certifies that the Montclair Board of Education does not maintain or complete college application forms for students but instead guidance counselors complete a Common Application – Secondary School Report. The Custodian certifies that this report was provided to the Complainants with redactions made to the guidance counselor’s recommendation because the Complainants’ daughter signed a waiver of access pursuant to FERPA. The Custodian further certifies that neither Montclair High School nor the Board’s Central Office possesses any faxed records from Georgetown University.

The Custodian certifies that the only communication received by Montclair High School from Georgetown University that is related to the Complainants’ daughter is an e-mail dated March 2, 2010 from Georgetown University explaining that the university was not able to return the Complainants’ daughter’s records because she had waived access to the Common Application – Secondary School Report. The Custodian further certifies that a copy of this e-mail was provided to Mrs. Johnson by letter on May 11, 2011.

Analysis

Whether the Custodian unlawfully denied the Complainants 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

⁵ The Custodian provided additional documentation that is not relevant to the adjudication of this complaint.

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 Complainants argue that someone working within the Montclair Board of Education is tampering with their daughter’s high school transcripts and contend that several documents responsive to their OPRA request are now missing. The Council notes that it has no authority to regulate the manner in which a public agency maintains its files or which records an agency must maintain. Van Pelt v. Township of Edison Board of Education, GRC Complaint No. 2007-179 (January 2008). Moreover, the Custodian certified in the Statement of Information that no records responsive to the Complainants’ request exist and further certified that the Montclair Board of Education does not maintain the records requested by the Complainant. The Complainants have failed to submit sufficient competent, credible evidence to refute the Custodian’s certification that the Montclair Board of Education does not possess the requested records.

The Council has consistently held that no denial of access occurs when a custodian has demonstrated that no records responsive to a complainant’s 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 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 and the complainant submitted no evidence to refute said certification. The GRC held 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 has certified that no records responsive to the Complainants’ OPRA request exist and because there is no competent, credible evidence in the record sufficient to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainants access to the requested records. N.J.S.A. 47:1A-6. While the Council notes that the validity of the Complainants’ request may be called into question, the Council declines to address this issue because the Custodian has borne her burden of proof that the denial of access to the records requested was lawful pursuant to N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian has certified that no records responsive to the Complainants’ OPRA request exist and because there is no competent, credible evidence in the record sufficient to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainants access to the requested records. N.J.S.A. 47:1A-6.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012