



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

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**December 18, 2012 Government Records Council Meeting**

David B. Popkin  
Complainant

Complaint No. 2011-263

v.

Englewood Board of Education (Bergen)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 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 requested record is a student record pursuant to *N.J.A.C. 6A:32-1.1*, and because *N.J.A.C. 6A:32-7.5* provides that only authorized persons enumerated in the regulation shall have access to student records, and because the evidence of record reveals the Complainant is not such an authorized person, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to *N.J.S.A. 47:1A-9.a.*, the Custodian did not unlawfully deny the Complainant access to the settlement agreement approved by Board Resolution 12-F-10 at its July 21, 2011 meeting.

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 18<sup>th</sup> Day of December, 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: December 20, 2012**

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**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**David B. Popkin<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-263**

v.

**Englewood Board of Education (Bergen)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Resolution 12-F-10 was approved at the July 21, 2011 Board of Education meeting. Please furnish records which will show the dollar amount of this settlement.

**Request Made:** July 22, 2011

**Response Made:** July 29, 2011

**Custodian:** James Olobardi

**GRC Complaint Filed:** August 9, 2011<sup>3</sup>

**Background**

**July 22, 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. The Complainant indicates that the preferred method of delivery is via fax or e-mail.

**July 29, 2011**

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request.<sup>4</sup> The Custodian states that access to the requested record is denied because the requested record is a confidential settlement agreement regarding a special education student.

**July 29, 2011**

E-mail from the Complainant to the Custodian. The Complainant asks the Custodian to cite the statutory provision upon which the Custodian has relied to deny access to the requested record.

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

<sup>2</sup> Represented by Mark A. Tabakin, Esq., of Weiner Lesniak LLP (Parsippany, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> Administrative Assistant Anna Pawlak responds on behalf of the Custodian.

**July 29, 2011**

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that the statute is N.J.S.A. 47:1A-9.

**August 5, 2011**

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the GRC is responding to the Complainant's request for GRC decisions regarding access to settlement agreements. The GRC provides the Complainant with synopses of three (3) GRC decisions: Ungaro v. Town of Dover (Morris), GRC Complaint No. 2008-115 (November 2009), O'Connor v. Town of Dover (Morris), GRC Complaint No. 2008-164 (November 2009), and Paff v. Barrington School District (Camden), GRC Complaint No. 2009-55 (October 2010).

**August 5, 2011**

E-mail from the Complainant to Ms. Pawlak. The Complainant forwards the e-mail from the GRC to the Complainant dated August 5, 2011 to Ms. Pawlak and informs Ms. Pawlak to reconsider the denial of his OPRA request.

**August 5, 2011**

E-mail from Ms. Pawlak to the Custodian's Counsel. Ms. Pawlak forwards the e-mail from the Complainant to Ms. Pawlak dated August 5, 2011 and asks Counsel to review the e-mail and advise the Englewood Board of Education ("Board") how to proceed.

**August 9, 2011**

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

- Complainant's OPRA request dated July 22, 2011
- Custodian's response to the OPRA request dated July 29, 2011
- E-mail from the Complainant to the Custodian dated July 29, 2011
- E-mail from the Custodian to the Complainant dated July 29, 2011
- E-mail from the GRC to the Complainant dated August 5, 2011
- E-mail from the Complainant to Ms. Pawlak dated August 5, 2011
- E-mail from Ms. Pawlak to the Custodian's Counsel dated August 5, 2011

The Complainant states that he provided his OPRA request to the Custodian on July 22, 2011, and that the Custodian responded to the request on July 29, 2011. The Complainant also states that the Board approved a resolution to settle a student complaint on July 21, 2011 and that he thereafter requested the dollar amount of the settlement since it was paid with public funds; however, the Custodian denied him access to the requested record.

The Complainant does not agree to mediate this complaint.

**August 16, 2011**

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

**August 23, 2011<sup>5</sup>**

Custodian's SOI without attachments. The Custodian 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 OPRA records request on July 22, 2011 and responded to the request on July 29, 2011. The Custodian further certifies that the record responsive to the Complainant's request is a settlement agreement approved by Board Resolution 12-F-10 at its July 21, 2011 meeting.

The Custodian's Counsel asserts that the Complainant filed an OPRA request seeking "records...which will show the dollar amount of this settlement." Counsel states that said settlement was approved by Board Resolution 12-F-10 and that the settlement agreement between the Board and the parents of a special education student is the only record responsive to the Complainant's request. Counsel states that the Custodian denied the Complainant access to the record.

Counsel states that the Complainant informed the Custodian that he had contacted the GRC and was provided with several GRC opinions in which confidential settlement agreements were found to be subject to disclosure under OPRA; therefore, the Complainant asked the Custodian to reconsider denial of the record request. Counsel asserts that the GRC opinions that the Complainant forwarded to the Custodian involved settlement agreements stemming from civil cases but in the instant matter the settlement agreement determined to be responsive to the request related to a special education student, not a civil litigant. Counsel specifically states that in O'Connor, *supra*, the complainant's request for a settlement agreement was denied based on the custodian's belief that the confidentiality clause in the agreement barred its disclosure. Counsel argues that, unlike in O'Connor, the Board here is not relying upon a confidentiality clause, but rather upon the inclusion of information regarding a student, the student's disability and services to be provided. Counsel contends that the settlement agreement sought in the instant matter is protected from disclosure by state and federal law.

Counsel asserts that *N.J.A.C.* 6A:14-2.9 addresses the release of information regarding special education students and provides that "...all records shall be maintained according to *N.J.A.C.* 6A:32." Counsel further asserts that student records are defined in the regulation as "... information related to an individual student gathered within or outside the school district and maintained within the school district, regardless of the physical form in which it is maintained..." Counsel states that the settlement agreement requested by the Complainant references the student's classification, placement, program and services to be provided as a result of a Due Process Petition filed on behalf of the minor student. Counsel argues that the requested settlement agreement should be granted the same protections afforded to student records because the agreement contains confidential "information related to an individual student...maintained within the school district." Counsel also states that the regulation provides that only authorized

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<sup>5</sup> The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).  
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organizations, agencies or persons enumerated in the regulation shall have access to student records; however, Counsel argues that the authorized organizations, agencies or persons does not include members of the public who have made a request for disclosure pursuant to OPRA. For this reason, Counsel contends that the Custodian acted properly by denying the Complainant access to the requested record.

Counsel argues that disclosing a redacted copy of the requested record, *i.e.*, disclosing the settlement amount without knowledge of the student's disability and the services needed to address that disability, would establish an undesirable precedent and hamper the Board's ability to amicably resolve similar cases in the future.

Counsel contends that *N.J.A.C. 6A:14-2.9* and *N.J.A.C. 6A:32* are applicable to exclude the requested record from disclosure because OPRA allows exemptions from disclosure for records governed by any other statute, resolution of either or both houses of the Legislature, regulation promulgated under the authority of any statute or Executive Order of the Governor, Executive Order of the Governor, Rules of Court, any federal law, federal regulation or federal order.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested record?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA 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 also provides that:

"[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the

Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9.a.

The rules of the State Board of Education and the Commissioner of Education define a “student record” as:

“... information related to an individual student *gathered within or outside the school district and maintained within the school district*, regardless of the physical form in which it is maintained.” (Emphasis added.) *N.J.A.C. 6A:32-1.1.*

The rules of the State Board of Education and the Commissioner of Education provide that:

“Only authorized organizations, agencies or persons as defined herein shall have access to student records ...” *N.J.A.C. 6A:32-7.5.*

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.

There is no dispute between the parties that the Custodian received the OPRA request on July 22, 2011 and responded to the request in a timely manner on July 29, 2011.

The threshold issue in this complaint is whether the Complainant filed a proper OPRA request. The Complainant’s request references a resolution by number and approval date and then asks for records which show the dollar amount of a settlement. Clearly, this request is overly broad on its face because it does not identify with specificity, or even with reasonable clarity, the record or records sought. Notwithstanding the overly broad nature of the request, however, the Custodian determined that the record responsive to the Complainant’s request was a settlement agreement approved by Board Resolution 12-F-10 at its July 21, 2011 meeting. Further, the Custodian’s Counsel stated that said settlement agreement is the only record responsive to the Complainant’s request.

The Council has found that, although a request may be overly broad and unclear, if it is sufficient for the custodian to identify the requested record, then it is a valid request. In Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (March 2011), the complainant requested “all proposals submitted for the position of ... solicitor.” The custodian responded stating that three (3) records responsive had been identified but that access to same was denied. The GRC noted that:

“... while the Complainant’s OPRA request on its face is overly broad and unclear due to the absence of a specific time period within which the Custodian could narrow her search ... the Complainant’s OPRA request was sufficient for the Custodian to identify the responsive records ... Additionally, the Custodian responded to the Complainant’s OPRA request identifying three (3) proposals as responsive: the Custodian’s response is an indication that she needed no additional information to identify the records responsive to the Complainant’s OPRA request.” *Id.* at pg. 15. *See also* Darata v. Monmouth County Board of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim Order dated February 24, 2011).

Similar to the facts of Bond, in the instant complaint the evidence of record indicates that the Custodian was clearly able to identify the records sought and “needed no additional information to identify the records responsive to the Complainant’s OPRA request.”

Thus, while the Complainant’s OPRA request on its face is overly broad and unclear due to its failure to identify a specific type of government record, the request was sufficiently clear for the Custodian to identify the responsive record within the statutorily mandated time frame.

The Council next turns to the issue of whether the Custodian lawfully denied the Complainant access to the requested record. The Custodian’s Counsel stated that the requested record, a settlement agreement between the Board and the parents of a special education student, should be granted the same protections afforded to student records because it references the student’s classification, placement, program and services to be provided as a result of a Due Process Petition filed on behalf of the minor student.

Conversely, the Complainant asserted that the record should be disclosed and he attached to his complaint a copy of an e-mail from the GRC to him dated August 5, 2011, which contains three cases that the GRC cited in reply to the Complainant’s request for GRC decisions regarding access to settlement agreements: Ungaro v. Town of Dover (Morris), GRC Complaint No. 2008-115 (November 2009), O’Connor v. Town of Dover (Morris), GRC Complaint No. 2008-164 (November 2009), and Paff v. Barrington School District (Camden), GRC Complaint No. 2009-55 (October 2010).

The cases offered by the Complainant in support of his assertion that the requested record should be disclosed are not precedential with respect to the instant complaint, however, because the facts differ.

In Ungaro and O’Connor, different complainants sought the same record, which was a copy of a separation agreement between the Town of Dover and its Business Administrator. In each complaint, the Custodian denied access to the requested agreement, which the custodian determined was a settlement agreement that contained a confidentiality clause. The Council’s decision was identical in both complaints. The Council found that settlement agreements entered into by private parties in civil court are subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super.

307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008). The Council further found that OPRA does not contain any provision which exempts access to such records based on confidentiality clauses. The Council then concluded that the fact that the requested agreement contained a confidentiality clause was not a lawful basis for a denial of access under OPRA. In these two complaints, which involved a request for settlement agreements *entered into by private parties in a civil action*, the custodian denied access in reliance upon the confidentiality clause, which she believed barred its disclosure.

In Paff, the complainant requested a settlement agreement for “O.H. parent of C.F.” and “L.M. parent of B.E.” The custodian responded to the complainant’s request after a long delay by stating that, although the school district was not in possession of the requested records at the time of the complainant’s request, it had since obtained the records from outside counsel and was disclosing them in redacted form. The Council found that the custodian unlawfully denied access because she had knowledge of the litigation and was therefore obligated to obtain the agreements from the third party holder in a timely manner; however, the Council never reached the issue of whether the record may have been exempt from disclosure because, unlike in the instant complaint, the custodian had already disclosed the record to the complainant.

In the instant complaint, the issue is not the existence of a confidentiality clause barring disclosure but rather the content of the settlement agreement itself, which renders it a student record exempt from disclosure pursuant to the New Jersey Administrative Code.

Chapter 14 of the New Jersey Administrative Code provides for special education. *N.J.A.C. 6A:14-2.9(a)* provides that “[a]ll student records shall be maintained according to *N.J.A.C. 6A:32.*” Pursuant to *N.J.A.C. 6A:32-1.1.*, the definition of a student record is “... information *related to* an individual student *gathered within or outside the school district and maintained within the school district* ...” Based upon the description of the requested settlement agreement provided by the Custodian’s Counsel, it is clear that the record contains information “related to” the student “gathered within or outside the school district.” It is also clear that the record is “maintained within the school district” because the Custodian located it as the record responsive to the Complainant’s request. As such, the requested record is a student record. Additionally, *N.J.A.C. 6A:32-7.5* provides that “[o]nly authorized...persons...shall have access to student records ...” There is nothing in the evidence of record that reveals that the Complainant is an authorized person as enumerated in said regulation.

The provisions of *N.J.A.C. 6A:32-1.1* and *N.J.A.C. 6A:32-7.5* are applicable to OPRA pursuant to N.J.S.A. 47:1A-9.a., which provides that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...regulation promulgated under the authority of any statute...” N.J.S.A. 47:1A-9.a.



Accordingly, because the requested record is a student record pursuant to *N.J.A.C.* 6A:32-1.1, and because *N.J.A.C.* 6A:32-7.5 provides that only authorized persons enumerated in the regulation shall have access to student records, and because the evidence of record reveals the Complainant is not such an authorized person, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9.a., the Custodian did not unlawfully deny the Complainant access to the settlement agreement approved by Board Resolution 12-F-10 at its July 21, 2011 meeting.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the requested record is a student record pursuant to *N.J.A.C.* 6A:32-1.1, and because *N.J.A.C.* 6A:32-7.5 provides that only authorized persons enumerated in the regulation shall have access to student records, and because the evidence of record reveals the Complainant is not such an authorized person, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9.a., the Custodian did not unlawfully deny the Complainant access to the settlement agreement approved by Board Resolution 12-F-10 at its July 21, 2011 meeting.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

October 23, 2012<sup>6</sup>

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<sup>6</sup> This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.