



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

March 27, 2012 Government Records Council Meeting

Sabino Valdes
Complainant

Complaint No. 2011-27

v.

Union City Board of Education (Hudson),
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council ("Council") considered the March 20, 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 certified in the Statement of Information that no notice responsive to the request could be located and there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested public notice pursuant to 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 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: April 5, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

**Sabino Valdes¹
Complainant**

GRC Complaint No. 2011-27

v.

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

Records Relevant to Complaint: Copy of adequate notice to the public that public meetings were held by the Union City Board of Education (“UCBOE”) on September 13, 2000 and March 29, 2001. The notice dates are presumably September 11, 2000 and March 23, 2001.

Request Made: December 6, 2010

Response Made: December 21, 2010

Custodian: Anthony Dragona

GRC Complaint Filed: February 14, 2011³

Background

December 6, 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.

December 14, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian requests an extension of time until December 22, 2010 to respond to the OPRA request.

December 21, 2010

Custodian’s response to the OPRA request. The Custodian notes on the Complainant’s OPRA request form that he cannot locate either record; therefore, access to the requested records is denied.

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.

February 14, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated December 6, 2010 with Custodian’s response thereon dated December 21, 2010.⁴

The Complainant states that he submitted an OPRA request to the UCBOE on December 6, 2010. The Complainant states that the Custodian responded on December 21, 2010 denying access to the responsive records and noting on the OPRA request form the UCBOE could not locate either record.⁵

The Complainant states that the Open Public Meetings Act (“OPMA”) requires that a public body provide adequate notice of a meeting prior to same. N.J.S.A. 10:4-9. The Complainant states that he also understands that OPRA does not authorize the GRC to adjudicate whether a custodian has complied with OPMA. *See Allegretta v. Borough of Fairview*, GRC Complaint No. 2005-132 (Interim Order dated July 13, 2006). The Complainant states that the requested records are government records under OPRA pursuant to N.J.S.A. 47:1A-1.1; thus, this complaint is within the Council’s authority to adjudicate.

The Complainant states that OPRA shifts the burden of proving a lawful denial of access to the Custodian. N.J.S.A. 47:1A-6. The Complainant contends that the Legislative intent of OPRA was not to allow a custodian to deny access to government records simply because he/she cannot locate same. The Complainant contends that the Council previously determined that a custodian may request an extension of the statutorily mandated time frame if he is unable to locate the responsive records. *See Starkey v. NJ Dept. of Transportation*, GRC Complaint No. 2007-315, 2007-316 and 2007-317 (Interim Order dated October 29, 2008). The Complainant contends that the Custodian cannot deny access to the responsive records, if they exist, simply because he cannot locate them.

The Complainant requests that the Custodian must provide access to the responsive records if they exist or certify that no records responsive exist.

The Complainant does not agree to mediate this complaint.

March 16, 2011

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

March 24, 2011

Custodian’s SOI with the following attachments:

⁴ The Complainant indicates on page 2 of the Denial of Access Complaint that he submitted the relevant OPRA request on September 29, 2010; however, he subsequently states that he submitted the relevant OPRA request on December 6, 2010 and the Custodian attached to the Statement of Information a copy of a request dated December 6, 2010.

⁵ The GRC notes that the Complainant omitted from the Denial of Access Complaint the Custodian’s December 14, 2010 letter requesting an extension of time until December 22, 2010 to respond.

- “Request and Authorization for Records Disposal Form” (Authorization form”) dated July 27, 2007.
- Complainant’s OPRA request dated December 6, 2010 with Custodian’s response thereon dated December 21, 2010.
- Letter from the Custodian to the Complainant dated December 14, 2010.
- “School District Records Retention Schedule –M700202-999.”

The Custodian certifies that his search for the requested records included Ms. Eva Festa (“Ms. Festa”), Administrative Assistant, searching through boxes containing records relating to 2000 and 2001 UCBOE meetings. The Custodian certifies that Ms. Festa then searched through the file containing Authorization forms and searched the internet for New Jersey public notices. The Custodian certifies that Ms. Festa spent approximately one and one half hours to conduct her search.

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 New Jersey Department of State, Division of Archives and Records Management, was on July 27, 2007.

The Custodian certifies that he received the Complainant’s OPRA request on December 6, 2010. The Custodian certifies that he responded in writing to the Complainant on December 14, 2010 requesting an extension of time until December 22, 2010 to respond to said request. The Custodian certifies that he responded to the Complainant on December 21, 2010 noting on the OPRA request form that he could not locate the responsive records.

The Custodian certifies that public notice of all meetings is published in May of every year following the UCBOE’s Reorganization meeting; thus, the only responsive record would be the public notice for May 2000 because it contains all regular meeting dates from June 2000 through May 2001.

The Custodian disputes the Complainant’s argument that the Custodian violated OPRA by failing to request an extension of time to locate the responsive record or certify that no responsive record exists. The Custodian certifies that he responded to the Complainant on December 14, 2010 requesting an extension of time until December 22, 2010 in order to conduct a more thorough search of the UCBOE’s records. The Custodian further certifies that after not locating the responsive record, Ms. Festa searched for an applicable Authorization form that she was unable to locate. The Custodian certifies that it is possible that the responsive record was attached to the purchase orders used to process payment for the publication of the notice and that same was destroyed along with the purchase orders on July 27, 2007.

The Custodian contends that the UCBOE conducted a reasonable search to locate the responsive record. The Custodian further asserts that the UCBOE did not unlawfully deny access to the responsive record and has borne its burden of proving due diligence in searching for same. N.J.S.A. 47:1A-6. The Custodian asserts that the UCBOE could not have violated OPRA for failing to provide a record that it was unable to locate and in all likelihood was destroyed in accordance with the UCBOE’s records retention schedule.

See Pusterhofer v. NJ Dept. of Education, GRC Complaint No. 2005-49 (July 2005); Paff v. NJ Dept. of Labor, 392 N.J. Super. 334 (App. Div. 2007); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).

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.

The Complainant filed the instant complaint contending that the Custodian failed to bear his burden of proving a lawful denial of access when he responded to the Complainant’s OPRA request that he could not locate any responsive records. The Complainant contended that the Council previously determined that a custodian could request additional time to respond if he/she was unable to locate responsive records. See Starkey, *supra*. The Complainant requested that the GRC order disclosure of the responsive records or order the Custodian to certify that no responsive records exist.

In the SOI, the Custodian certified that the only responsive record would be the public notice for May 2000 because it contained all regular meeting dates from June 2000 through May 2001. The Custodian further certified that after conducting a thorough search for the responsive notice from May 2000, the UCBOE could not locate the

responsive record. The Custodian further certified that it is possible that the responsive record was attached to the purchase orders used to process payment for the publication of the notice and that same was destroyed along with the purchase orders on July 27, 2007. The Complainant has submitted no evidence to refute the Custodian's certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access." *Id.*

Additionally, the GRC has previously upheld a denial of access in which a custodian certified in the SOI that no responsive records could be located. In Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (Interim Order dated August 11, 2009), the complainant sought tenure charges filed on August 2, 2000. The custodian responded requesting an extension of time and later stated that the UCBOE attorney was searching for responsive records. The custodian subsequently certified in the SOI that the UCBOE was unable to locate any tenure charges dated August 2, 2000 and that it is unknown whether said records exist. The custodian further asserted that he is unable to produce records that are not in the UCBOE's possession or possibly never existed. O'Shea, Paff and Bent. The GRC thus determined that:

"... because the Custodian in this complaint certified that there are no records responsive to the Complainant's request for tenure charges ... dated August 2, 2000, and there is no credible evidence in the record to refute the Custodian's certification, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*, had the Custodian properly responded in writing within the extended deadline date pursuant to N.J.S.A. 47:1A-5.i." *Id.* at pg. 23.

The GRC has similarly held that a custodian lawfully denied access to records that could not be located pursuant to Pusterhofer. See O'Shea v. Borough of Hopatcong (Sussex) GRC Complaint No. 2009-223 (December 2010), Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011) and Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2010-180 (December 2011).⁶

In this complaint, the Custodian certified in the SOI that no notice responsive to the request could be located and there is no credible evidence in the record to refute the

⁶ The GRC notes that the Complainant's reliance on Starkey v. NJ Dept. of Transportation, GRC Complaint No. 2007-315, 2007-316 and 2007-317 (Interim Order dated October 29, 2008) is misplaced. Both the Custodian here and the custodian in Starkey sought extensions of time to locate records. However, the custodian in Starkey never stated that any of the records responsive to the complainant's OPRA requests could not be located.

Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the requested public notice pursuant to Pusterhofer.

The GRC notes that it declines to address whether the Custodian responded in a timely manner because the evidence of record is clear that the Custodian responded in writing on the sixth (6th) business day after receipt of the Complainant's OPRA request requesting an extension of time until December 22, 2010 to respond. Moreover, the Custodian responded in writing within the extended deadline stating that he could not locate the responsive notice.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian certified in the Statement of Information that no notice responsive to the request could be located and there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested public notice pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 2012