



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

April 25, 2012 Government Records Council Meeting

David Herron
Complainant

Complaint No. 2011-56

v.

New Jersey Department of Education
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted 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 within the statutorily mandated seven (7) business days, her response was insufficient and in violation of N.J.S.A. 47:1A-5.g. pursuant to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No 2008-48 (Interim Order dated March 25, 2009), because she failed to definitively state in her written response whether the records at issue herein existed.
2. Both the Custodian and Ms. Griffith certified in the Statement of Information that no records responsive to the Complainant’s OPRA request exist and the Complainant has submitted no credible evidence to refute the Custodian’s certification. Therefore, the Custodian has not unlawfully denied access to the records requested 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 response was insufficient and in violation of N.J.S.A. 47:1A-5.g. because she failed to definitively state in her response to the Complainant’s OPRA request whether the records requested existed, the Custodian did not unlawfully deny access to same because no records responsive exist pursuant to 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 25th Day of April, 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: April 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting**

**David Herron¹
Complainant**

GRC Complaint No. 2011-56

v.

**New Jersey Department of Education²
Custodian of Records**

Records Relevant to Complaint: Copies of the following records relevant to Case No. INV-031-10:

- Alvarez, Frank – Doctorate Diploma from Columbia University.
- Anderson, Adunni – Doctorate transcript from Seton Hall University.
- Anderson, Adunni – Official college letter dated July 17, 2003.
- Anemone, Alex – Doctorate Transcript from Seton Hall University.
- Aquavia, James – Masters transcript from Columbia University.
- Aquavia, James – Official college letter dated February 12, 2001.
- Benjamin, Anthony – Masters transcript from Columbia University.
- Benjamin, Anthony – Masters transcript from Seton Hall University.
- Benschaw, Susan – Masters transcript.
- Bilal, Centhia – Masters diploma.
- Bishop, Lisa – Masters transcript.
- Boote, Henry – Juris Doctorate diploma.
- Breiman, Keith – Doctorate diploma.
- Burroughs, George – Masters transcript.
- Burroughs, George – Juris Doctorate transcript.
- Cadillo, Patricia – Masters transcript.
- Carrington, Syreeta – Juris Doctorate transcript.
- Chiles, Michael – Masters transcript.
- Clark, Gail – Masters transcript.
- Cobb, Charles – Doctorate transcript.
- Csuka, Lauren – Masters transcript.
- Day, Marie – Masters transcript.
- Durber, Laurie – Masters transcript.
- Earle, James – Masters transcript.
- Fox, George – Doctorate transcript.
- Francica, Maria – Masters transcript.
- Franklin, Nancy – Masters transcript.
- Gilbert, Eileen – Masters transcript.

¹ No legal representation listed on record.

² Represented by DAG Susan Huntley, on behalf of the NJ Attorney General.

- Grier-Jones, Tanisha – Masters transcript.
- Grosso, Anthony – Masters transcript.
- Hakusa, Susan – Masters transcript.
- Harris, Justine – Masters transcript.
- Harrison, Felice – Masters diploma.
- Heard, Marcia – Masters transcript.
- Jacobs, Janice – Masters transcript.
- Jeffrey, Katie – Masters transcript.
- Jorge, Solange – Masters transcript.
- Khan, Ridwan – Masters transcript.
- Kirkman, Naomi – Masters transcript.
- Kuryllo, Helen – Masters transcript.
- Landou, Lissa – Doctorate transcript.
- Lawrence, III, Theodore – Masters transcript.
- Matto, Richard – Juris Doctorate transcript.
- McGriff, Winthrop – Masters diploma.
- Meyer, Jonathan – Masters transcript.
- Morrison, Tracie – Masters transcript.
- Narciso, Maria – Masters transcript.
- Neilan, Vanessa – Masters transcript.
- Nunley, Lauren – Masters diploma.
- Patterson, James – Doctorate transcript.
- Patterson, James – Masters transcript.
- Powers-Sanders, Shirlene – Masters transcript.
- Purtino, Joseph – Doctorate transcript.
- Robbins, Lisa – Doctorate transcript.
- Robertson, Petal – Masters transcript.
- Rolandelli, Karen – Juris Doctorate transcript.
- Sack, Jill – Doctorate transcript.
- Scagliotti, James – Doctorate diploma.
- Sellar, Jane – Masters transcript.
- Sender, Marianne – Juris Doctorate transcript.
- Skopak, Victoria – Masters transcript.
- Spagnuolo, Dana – Masters transcript.
- Steadman, Nina – Masters transcript.
- Stebbins, Shelly – Masters transcript.
- Steinbeach, Beryl – Juris Doctorate transcript.
- Stickel, Deborah – Masters transcript.
- Stulbaum, Mark – Masters transcript.
- Sullivan, Karen – Masters transcript.
- Turnamian Peter – Masters transcript.
- Vallillo, Stephen – Masters transcript.
- Vallillo, Stephen – Doctorate transcript.
- Voltman, Elizabeth – Doctorate transcript.
- Weller, Barbara – Masters transcript.
- Weller, Barbara – Doctorate transcript.

- Whitlock, Guy – Juris Doctorate transcript.³

Request Made: February 7, 2011

Response Made: February 15, 2011

Custodian: Beth Auerswald⁴

GRC Complaint Filed: March 1, 2011⁵

Background

February 7, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail.⁶

February 15, 2011

Custodian's response to the OPRA request (with attachments). The Custodian responds in writing via e-mail to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian provides records that are not at issue in this complaint. Further, the Custodian states that the investigation for Case No. INV-031-10 was conducted by Ms. Joanne V. Griffith ("Ms. Griffith"), Planning Associate I, at the Office of Fiscal Accountability and Compliance ("OFAC"). The Custodian states that Ms. Griffith conducted a limited review of staff member transcripts to ensure degree verification. The Custodian states that in most instances, Ms. Griffith viewed the transcripts on file and did not obtain copies.

February 17, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he is in receipt of the Complainant's response to his OPRA request. The Complainant states that the Custodian's response indicated that Ms. Griffith reviewed documents on-site at the District. The Complainant requests that the Custodian provide copies of the records at issue herein as these records are the records the Complainant sought in his OPRA request.

February 17, 2011

E-mail from the Custodian to the Complainant.⁷ The Custodian states that Ms. Griffith's review was limited and in most cases Ms. Griffith did not obtain copies of transcripts. The Custodian states that she believes Ms. Griffith conducted her review on-site at the Montclair School District ("District") but will confirm with Office of Licensure and Credentials ("OLC"). The Custodian states that the New Jersey Department of Education ("DOE") would not possess any of the responsive records if Ms. Griffith conducted an on-site review at the District. The Custodian states that she will advise the Complainant where the review took place once OLC has confirmed same.

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The current Custodian of Record is Maria Casale, who became Acting Custodian in August 2011.

⁵ The GRC received the Denial of Access Complaint on said date.

⁶ The Complainant submitted his OPRA request via U.S. Mail and through OPRA Central.

⁷ The Custodian states that she received a letter from the Custodian

February 23, 2011

E-mail from the Custodian to the Complainant. The Custodian states that in order to receive copies of all transcripts listed in the Complainant's request, the Complainant will need to contact the District. The Custodian states that Ms. Griffith conducted a review at the District and DOE does not maintain copies of the records at issue herein.

March 1, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:⁸

- Complainant's OPRA request dated February 7, 2011.
- E-mail from the Custodian to the Complainant dated February 15, 2011 (with attachments).
- Government Records Request Receipt dated February 15, 2011.
- E-mail from the Complainant to the Custodian dated February 17, 2011.
- E-mail from the Custodian to the Complainant dated February 17, 2011.
- E-mail from the Custodian to the Complainant dated February 23, 2011.

The Complainant states that the records at issue in the instant complaint relate to a DOE review of the District that the Complainant initiated in June 2010. The Complainant states that he submitted an OPRA request to DOE on February 7, 2011. The Complainant states that the Custodian provided records not at issue herein to him via e-mail on February 15, 2011.

The Complainant states that in response to his letter dated February 17, 2011, the Custodian e-mailed him on the same day advising that Ms. Griffith conducted an on-site review at the District and in most cases did not obtain copies of transcripts. The Complainant states that the Custodian also advised that she would confirm this fact with OLC.

The Complainant states that the Custodian e-mailed him on February 23, 2011 confirming that Ms. Griffith conducted a review at the District and that DOE does not maintain copies of the records reviewed except those provided to the Complainant on February 15, 2011.

The Complainant agrees to mediate this complaint.

March 22, 2011

Offer of Mediation sent to the Original Custodian.

March 25, 2011

The Custodian declines mediation.

April 15, 2011

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

⁸ The Complainant attached additional documents that are not relevant to the instant complaint.
David Herron v. New Jersey Department of Education, 2011-56 – Findings and Recommendations of the Executive Director

April 20, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of five (5) business days to submit the SOI.

April 20, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until May 2, 2011 to submit the SOI.

May 2, 2011

Custodian's SOI with the following attachments:⁹

- Complainant's OPRA request dated February 7, 2011.
- E-mail from the Custodian to the Complainant dated February 15, 2011 (with attachments).
- Government Records Request Receipt dated February 15, 2011.
- E-mail from the Custodian to the Complainant dated February 17, 2011.
- E-mail from the Custodian to the Complainant dated February 23, 2011.
- Ms. Griffith's legal certification.

The Custodian certifies that her search for the requested records included speaking with the appropriate personnel from OFAC to provide her with any records responsive to the Complainant's OPRA request. The Custodian certifies that personnel located and provided records not at issue in this complaint and sent a one (1) page explanation advising that Ms. Griffith reviewed a sampling of transcripts of the District's staff. The Custodian certifies that the explanation further advised that Ms. Griffith viewed transcripts on file and did not obtain a copy of such transcripts in most instances.

The Custodian also certifies that OFAC investigation records are maintained for seven (7) years after the final action in the case. The Custodian certifies that the records are destroyed after that time in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that she received the Complainant's OPRA request on February 7, 2011. The Custodian certifies that she responded on February 15, 2011 providing all responsive records that DOE maintained on file. The Custodian certifies that she contacted the Complainant again on February 23, 2011 confirming that Ms. Griffith reviewed all other transcripts for Case No. INV-031-10 on-site at the District and that she did not obtain copies of the records at issue herein.

The Custodian states that OPRA defines a government record as "any paper, written or printed book, document ... that has been made, maintained or kept on file ... or has been received in the course of ... official business." N.J.S.A. 47:1A-1.1. The Custodian certifies that DOE does not maintain the records at issue herein; thus, she could not have unlawfully denied access to the records. The Custodian reiterates that Ms.

⁹ The Custodian attached additional documents that are not relevant to the instant complaint.

Griffith reviewed documents on-site at the District and did not copy everything she inspected.

Ms. Griffith certifies that she is an investigator at OFAC and was assigned Case No. INV-031-10. Ms. Griffith certifies that she performed an on-site review of a sampling of transcripts at the District. Ms. Griffith certifies that she did not make copies of every transcript or document she reviewed. Ms. Griffith certifies that she reviewed the list of records the Complainant contends are at issue and further certifies that she did not make copies of any of these records during her on-site review.

Analysis

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

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.

On February 15, 2011, the Custodian responded to the Complainant's OPRA request within the statutorily mandated seven (7) business days stating that Ms. Griffith conducted a limited review of staff member transcripts to ensure degree verification. The Custodian further stated that in most instances, Ms. Griffith viewed the transcripts on file and did not obtain copies. The Complainant subsequently replied to the Custodian on February 17, 2011 stating that his request sought the records at issue herein. The Complainant thus requested that the Custodian provide those records.

On February 17, 2011, the Custodian wrote the Complainant stating that if Ms. Griffith inspected the records at issue on-site at the District, then DOE would likely not possess any of the records. The Custodian further stated that she would confirm this with OLC and advise the Complainant of OLC's response. On February 23, 2011, the Custodian responded to the Complainant confirming that Ms. Griffith conducted her review on-site at the District and that DOE does not maintain any of the records at issue.

In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No 2008-48 (Interim Order dated March 25, 2009), the complainant's OPRA request Item No. 1 sought "... the ordinance creating the position of Municipal Administrator." The custodian responded in writing in a timely manner to the complainant's OPRA request Item No. 1 stating that he believed no ordinance existed. However, the Custodian then stated that because the position of Municipal Clerk is noted in the salary ordinance, an ordinance creating the position of Municipal Clerk may exist. The complainant subsequently filed a complaint disputing the custodian's response.

The Council thus held that:

“N.J.S.A. 47:1A-5.g. states that if a Custodian is ‘unable to comply with a request for access, then the Custodian shall indicate the specific basis’ for noncompliance. Although the Custodian responded in writing to Item No. 1 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because he failed to provide a definitive response as to whether the record requested in Item No. 1 existed. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.” *Id.* at pg. 5.

The facts herein are similar to those in Verry. Specifically, the Custodian responded timely and in writing, addressing the requested records. However, the Custodian failed to definitively state that same did not exist. The Custodian’s response caused confusion regarding whether any records existed: this conclusion is supported by the Complainant’s February 17, 2011 follow-up letter to the Custodian reiterating that he sought access to the records at issue herein.

Therefore, although the Custodian responded to the Complainant’s OPRA request in writing and within the statutorily mandated seven (7) business days, her response was insufficient and in violation of N.J.S.A. 47:1A-5.g. pursuant to Verry, *supra*, because she failed to definitively state in her written response whether the records at issue herein existed.

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 Custodian advised the Complainant on February 23, 2011 that Ms. Griffith conducted a review at the District and that DOE does not maintain copies of the records at issue herein. The Complainant subsequently filed this complaint contending that the Custodian unlawfully denied access to transcripts, diplomas and/or college letters for 68 employees of the District.

The Custodian certified in the SOI that DOE never maintained the records that the Complainant requested because Ms. Griffith conducted a review on-site at the District and did not copy every record she reviewed. Moreover, Ms. Griffith provided as part of the SOI a legal certification in which she certified that she reviewed the list submitted by the Complainant in the Denial of Access Complaint and determined that she did not obtain copies of any of the records requested.

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.

In this complaint, both the Custodian and Ms. Griffith certified in the SOI that no records responsive to the Complainant’s OPRA request exist and the Complainant has submitted no credible evidence to refute the Custodian’s certification. Therefore, the Custodian has not unlawfully denied access to the records requested pursuant to Pusterhofer, supra. N.J.S.A. 47:1A-6.

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 (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 response was insufficient and in violation of N.J.S.A. 47:1A-5.g. because she failed to definitively state in her response to the Complainant’s OPRA request whether the records requested existed, the Custodian did not unlawfully deny access to same because no records responsive exist pursuant to 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 within the statutorily mandated seven (7) business days, her response was insufficient and in violation of N.J.S.A. 47:1A-5.g. pursuant to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No 2008-48 (Interim Order dated March 25, 2009), because she failed to definitively state in her written response whether the records at issue herein existed.
2. Both the Custodian and Ms. Griffith certified in the Statement of Information that no records responsive to the Complainant’s OPRA request exist and the Complainant has submitted no credible evidence to refute the Custodian’s certification. Therefore, the Custodian has not unlawfully denied access to the records requested 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 response was insufficient and in violation of N.J.S.A. 47:1A-5.g. because she failed to definitively state in her response to the Complainant's OPRA request whether the records requested existed, the Custodian did not unlawfully deny access to same because no records responsive exist pursuant to 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: Catherine Starghill, Esq.
Executive Director

April 18, 2012