



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 29, 2014 Government Records Council Meeting

Rahim R. Caldwell
Complainant

Complaint No. 2013-318

v.

Salem County Special Services School District
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 the Custodian has met his burden of proof that he did not unlawfully deny access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. The Custodian certified that no responsive records exist, and there is no credible evidence in the record to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., 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 29th Day of July, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council



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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Rahim R. Caldwell¹
Complainant**

GRC Complaint No. 2013-318

v.

**Salem County Special Services School District²
Custodial Agency**

Records Relevant to Complaint:

October 5, 2013 Request: Copy of the contract for services between Salem County Special Services School District and New Life Academy.

October 9, 2013 Request: Copy of the contract for services between Salem County Special Services School District (“SCSSSD”) and New Life Academy (“New Life”).

Custodian of Record: Andrew Eubanks³

Request Received by Custodian: October 5, 2013;⁴ October 9, 2013

Response Made by Custodian: N/A

GRC Complaint Received: October 28, 2013

Background⁵

Request and Response:

On October 5, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 9, 2013, the Complainant submitted an almost identical OPRA request seeking the above-mentioned records. There is no evidence that the Custodian responded to either request.

¹ No legal representation listed on record.

² Represented by Mark G. Toscano, Esq. Comegno Law Group, P.C. (Moorestown, NJ).

³ The original Custodian was Melanie Allen, but has since resigned her position.

⁴ Since October 5, 2013 was a Saturday, it is assumed that the Custodian received the OPRA request on Monday, October 7, 2013.

⁵ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rahim R. Caldwell v. Salem County Special Services School District, 2013-318 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On October 28, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on October 5, 2013, he submitted an OPRA request via email, addressed to the Superintendent of SCSSSD, John Swain (“Mr. Swain”). The Complainant also sought the name of SCSSSD’s custodian of records. The Complainant alleges that he has not received a response to his first request.

On October 9, 2013, the Complainant submitted a second OPRA request, but addressed to the former SCSSSD Custodian, Melanie Allen (“Ms. Allen”). The Complainant alleged that he similarly has not received a response to his second request. The Complainant provided a document allegedly demonstrating the date and time he delivered the emails to Mr. Swain and Ms. Allen. The document indicated that the October 5, 2013 and October 9, 2013 requests were delivered at 11:43AM and 10:11PM, respectively.

Statement of Information:

On November 18, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he had not received the Complainant’s emails prior to receiving the Denial of Access Complaint. Additionally, the Custodian certified that neither Mr. Swain nor Ms. Allen received the Complainant’s emailed OPRA requests. The Custodian further certified that neither request was located after a search of Mr. Swain’s and Ms. Allen’s email inboxes and spam folders. Therefore, the Custodian argued that no unlawful denial of access occurred, and asserted that a Custodian cannot unlawfully deny access to an OPRA request that he never received.

The Custodian also certified that had he received the Complainant’s OPRA requests, he would have timely responded. The Custodian claimed that there are no responsive records to the Complainant’s request for a contract between SCSSSD and New Life. Instead, the Custodian stated that New Life is encompassed within Vineland City Board of Education’s (“Vineland BOE”) jurisdiction. Therefore, the Custodian claimed, any services provided by New Life would be pursuant to an agreement between Vineland BOE and SCSSSD. Thus, the Custodian included in his SOI the contract between Vineland BOE and SCSSSD for the 2012-2013 academic year.

Analysis

Unlawful Denial of Access

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.

In Pusterhofer v. N.J. Dep’t of Educ., 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 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.

Here, the Complainant claimed that he sent his OPRA requests via email. The Custodian however, certified that he did not obtain the Complainant's OPRA requests prior to receiving the Denial of Access Complaint. Additionally, the Custodian certified that neither Mr. Swain nor Ms. Allen received the Complainant's requests. However, irrespective of the factual dispute of whether or not the Custodian received the OPRA requests, the Custodian certified in his SOI that no responsive records existed. Moreover, the Complainant has not provided credible evidence to refute the Custodian's certification that no records exist. The Custodian's accommodation in providing a record which was not requested, but believed to be helpful to the Complainant, does not negate the fact that, a custodian cannot unlawfully deny access to records which do not exist. *See Pusterhofer*, GRC No. 2005-49.

Therefore, the Custodian has met her burden of proof that he did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian certified that no responsive records exist, and there is no credible evidence in the record to refute the Custodian's certification. *See Pusterhofer*, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has met her burden of proof that he did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian certified that no responsive records exist, and there is no credible evidence in the record to refute the Custodian's certification. *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014