



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**JON S. CORZINE**  
*Governor*

**JOSEPH V. DORIA, JR.**  
*Commissioner*

**FINAL DECISION**

**June 11, 2009 Government Records Council Meeting**

Almeta Walker  
Complainant

Complaint No. 2008-20

v.

East Orange Board of Education (Essex)  
Custodian of Record

At the June 11, 2009 public meeting, the Government Records Council (“Council”) considered the May 20, 2009 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:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to N.J.S.A. 47:1A-5.g. and John Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Custodian’s response to the Complainant’s OPRA request is insufficient because the Custodian failed to specifically grant or deny access or cite a specific basis for denying access to the records requested.
3. Because the Complainant’s OPRA request is not a request for specific identifiable government records, the Complainant’s OPRA request for a list of all contractors and subcontractors at the Cecily Tyson School and for the names, addresses, and union status of those contractors and subcontractors is invalid. The Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment LLC. V. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Corey Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008).



4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., because the Custodian certified in the Statement of Information that no records responsive existed at the time of Complainant's request, and there is no credible evidence in the record to refute the Custodian's certification, there is no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), Thomas Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008).
  
5. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA. While the Custodian's response to the OPRA request was untimely and legally insufficient, the Complainant's request was invalid because it sought information instead of records. The Custodian attempted to accommodate the Complainant by creating a record specifically for the Complainant's OPRA request despite the invalid nature of the OPRA request. Therefore, the Custodian's actions do not show that the Custodian had knowledge of the wrongfulness of his actions. It is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access and insufficient response appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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 11<sup>th</sup> Day of June, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: June 16, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 11, 2009 Council Meeting**

**Almeta Walker<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-20**

v.

**East Orange Board of Education (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. List of all contractors and subcontractors for the new Cicely Tyson school
2. Names, addresses, payroll, and union status for contractors and subcontractors on the new Cicely Tyson school

**Request Made:** November 26, 2007

**Response Made:** December 14, 2007

**Custodian:** Victor Demming<sup>3</sup>

**GRC Complaint Filed:** January 26, 2008<sup>4</sup>

**Background**

**November 26, 2007**

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, 2007**

Custodian's response to the OPRA request. The Custodian responds via e-mail to the Complainant's OPRA request on the fourteenth (14<sup>th</sup>) business day following receipt of such request. The Custodian states that the requested records are attached and to contact the Custodian if the Complainant has a problem.

The Custodian also attaches an e-mail dated December 13, 2007 from Sharon Russell, a fellow East Orange Board of Education employee. In the e-mail, Ms. Russell confirms that on December 12, 2007, a copy of the Complainant's OPRA request was sent to David Christiansen, Senior Project Manager of Joseph Jingoli & Son, Inc. (Construction Company), for the Cicely Tyson School Project. Ms. Russell's e-mail

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

<sup>2</sup> Represented by Nicholas Dotoli, Esq., of Schwartz Simon Edelstein Celso & Kessler, LLC (Morristown, NJ).

<sup>3</sup> All correspondence between the Complainant and the Custodian was handled by Ms. Jamie Adams, the Custodian's secretary.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

states that on November 23, 2007, Mr. Christiansen made an appointment with the Complainant to discuss the records sought in the OPRA request but the Complainant failed to appear. Ms. Russell's e-mail also states that Mr. Christiansen makes and maintains payroll records for the Cecily Tyson School Project. Ms. Russell's e-mail further states that those payroll records are not sent to the East Orange Board of Education representative, Mr. Carmen Restaino, but are sent directly to the State of New Jersey.<sup>5</sup>

**January 4, 2008**

E-mail from the Custodian to the Complainant. The Custodian states that the record responsive to Request Item No. 1 is attached. The Custodian attaches an e-mail from Sharon Russell dated January 4, 2008 containing a letter from David Christiansen which lists the contractor and subcontractors who performed work on the new Cicely Tyson School.

**January 21, 2008**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated November 26, 2007. The Complainant states that she was denied access to the records requested. The Complainant agrees to mediate this complaint.

**February 6, 2008**

Offer of Mediation sent to the Custodian.

**February 8, 2008**

Facsimile transmission from Custodian to the GRC. The Custodian attaches the December 14, 2007 and January 4, 2008 e-mails sent to the Complainant.<sup>6</sup>

**March 24, 2008**

The Custodian fails to respond to the Offer of Mediation.

**March 24, 2008**

Request for the Statement of Information sent to the Custodian.

**May 12, 2008**

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel states he did not receive the request for the Statement of Information in a timely manner and requests a thirty (30) day extension of time within which to complete the Statement of Information.

**May 12, 2008**

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel writes to confirm the thirty (30) day extension of time until June 12, 2008 to file the Statement of Information.

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<sup>5</sup> This e-mail does not name a specific agency.

<sup>6</sup> Neither the December 14, 2007 nor the January 4, 2008 e-mail named a specific agency within the State of New Jersey to which the requested payroll records were sent.

**June 11, 2008**

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated November 26, 2007
- E-mail from Sharon Russell to the Custodian dated December 13, 2007
- E-mail from the Custodian to the Complainant dated December 14, 2007
- E-mail from the Custodian to the Complainant dated January 4, 2008

The Custodian certifies that via e-mail on December 14, 2007, the Custodian informed the Complainant that the record requested in Request Item No. 2 did not exist. The Custodian further certifies that on December 17, 2007, the Complainant was instructed to submit her request for payroll information to the New Jersey School Development Authority.<sup>7</sup> The Custodian argues that he cannot provide records that do not exist. The Custodian certifies that on January 4, 2008, the Custodian transmitted the names and address of all contractors and subcontractors.

The Custodian's Counsel argues that because none of the records sought by the Complainant were made, maintained, kept on file or received in the ordinary course of business by the Custodian, they do not meet the definition of a government record as set forth in N.J.S.A. 47:1A-1.1.<sup>8</sup> The Custodian's Counsel further argues that this complaint should be dismissed for the reasons stated above.

### 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:

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<sup>7</sup> This assertion is not substantiated by the evidence of record.

<sup>8</sup> The Custodian provided a list of contractors and subcontractors to the Complainant on January 4, 2008. However, it appears that this list was created specifically in response to this OPRA request.

“...[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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this case, the Custodian responded in writing to the Complainant’s OPRA request on the fourteenth (14<sup>th</sup>) business day following receipt of same, attaching an e-mail which stated that certified payroll sheets are sent to the State of New Jersey. The Custodian’s response failed to specifically grant access or deny access to the specific records requested. Additionally, the Custodian’s response is legally insufficient because it does not address each item requested individually.

In John Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the complainant submitted a multi-item OPRA request. The GRC held that a custodian had a duty to respond to each item of an OPRA request. The GRC found that because the custodian failed to respond to each request item individually, the custodian’s response was legally insufficient. *See* John Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)(holding that the custodian’s response to the complainant’s OPRA request was legally insufficient because the custodian cited a specific basis for denying access for all but one of the items requested). *See also* Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007)(holding that because the custodian provided an incomplete basis for the denial of access to the requested records, the Custodian failed to bear her burden of proving that a denial of access was authorized by law at the time of the denial).

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Moreover, pursuant to N.J.S.A. 47:1A-5.g. and John Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Custodian's response to the Complainant's OPRA request is insufficient because the Custodian failed to specifically grant or deny access or cite a specific basis for denying access to each of the records requested.

Nevertheless, Request Items No. 1 and 2 of the Complainant's OPRA request seek information rather than identifiable government records. Request Item No. 1 seeks a list of all contractors and subcontractors. Request Item No. 2 seeks a list of the names, addresses, union status and payroll for all contractors and subcontractors.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (March 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only "identifiable" government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (October 2005)<sup>9</sup>, the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>10</sup>

Moreover, in Corey Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008), the GRC determined that the Complainant's OPRA request was invalid because the Complainant did not specify an identifiable government record, but instead sought information.

Therefore, because the Complainant's OPRA request is not a request for specific identifiable government records, the Complainant's OPRA request for a list of all contractors and subcontractors at the Cecily Tyson School and for the names, addresses, and union status of those contractors and subcontractors is invalid.<sup>11</sup> The Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment LLC. V. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Corey Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008).

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<sup>9</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>10</sup> As stated in Bent.

<sup>11</sup> The Custodian provided a list of contractors and subcontractors to the Complainant on January 4, 2008. However, it appears that this list was created specifically in response to this OPRA request. Custodians are not required under OPRA to create records which do not otherwise exist. Mag, supra.



Lastly, the Complainant's request for payroll records is valid. However, the Custodian has certified that the requested payroll records do not exist at the East Orange Board of Education. The Complainant has submitted no evidence to refute this certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone records showing a call made to him from the New Jersey Department of Education. The Custodian certified that no records responsive to the Complainant's request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Moreover, in Thomas Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008), the complainant stated that the custodian denied access to his November 30, 2007 OPRA request by advising the complainant that no records responsive existed. The custodian certified that BOE did not possess the requested proposal at the time of the complainant's OPRA request. Pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra, the GRC ruled that because the custodian responded to the OPRA request stating that no records responsive existed, the custodian did not unlawfully deny the complainant access to the record requested.

Although the Custodian herein violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., because the Custodian certified in the SOI that no records responsive existed at the time of Complainant's request, and there is no credible evidence in the record to refute the Custodian's certification, there is no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), Thomas Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008).

**Whether the Custodian's delay in access to the requested records 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 violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA. While the Custodian's response to the OPRA request was untimely and legally insufficient, the Complainant's request was invalid because it sought information instead of records. The Custodian attempted to accommodate the Complainant by creating a record specifically for the Complainant's OPRA request despite the invalid nature of the OPRA request. Therefore, the Custodian's actions do not show that the Custodian had knowledge of the wrongfulness of his actions. It is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access and insufficient response appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to N.J.S.A. 47:1A-5.g. and John Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Custodian's response to the Complainant's OPRA request is insufficient because the Custodian failed to specifically grant or deny access or cite a specific basis for denying access to the records requested.
3. Because the Complainant's OPRA request is not a request for specific identifiable government records, the Complainant's OPRA request for a list of all contractors and subcontractors at the Cecily Tyson School and for the

names, addresses, and union status of those contractors and subcontractors is invalid. The Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment LLC. V. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Corey Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008).

4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., because the Custodian certified in the Statement of Information that no records responsive existed at the time of Complainant's request, and there is no credible evidence in the record to refute the Custodian's certification, there is no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), Thomas Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008).
5. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA. While the Custodian's response to the OPRA request was untimely and legally insufficient, the Complainant's request was invalid because it sought information instead of records. The Custodian attempted to accommodate the Complainant by creating a record specifically for the Complainant's OPRA request despite the invalid nature of the OPRA request. Therefore, the Custodian's actions do not show that the Custodian had knowledge of the wrongfulness of his actions. It is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access and insufficient response appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

May 20, 2009