



## 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

LORI GRIFA  
Commissioner

### FINAL DECISION

#### December 20, 2011 Government Records Council Meeting

David Herron  
Complainant

Complaint No. 2010-268

v.

Montclair Board of Education (Essex)  
Custodian of Record

At the December 20, 2011 public meeting, the Government Records Council (“Council”) considered the December 13, 2011 [Supplemental, if applicable] 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 (Interim Order October 31, 2007). Moreover, the Custodian’s response is insufficient because she failed to respond to each request item individually and failed to specifically state that the records at issue herein did not exist. *See Paff v. Willingboro Board of Education (Burlington)*, GRC Complaint No. 2007-272 (May 2008) and Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-149 (June 2010).
2. The Custodian certified in the Statement of Information that no records responsive to the Complainant’s OPRA request exists and the Complainant herein 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. The Custodian’s failure to respond in writing within the statutorily mandated time frame resulted in a “deemed” denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., and the Custodian’s response was insufficient pursuant to Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), and Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-149 (June 2010), because she failed to respond to each request item individually and failed to specifically state that the records at issue herein did not exist. However,



the Custodian lawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because she certified that no records responsive existed and there is no evidence in the record to refute the Custodian's certification. 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 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.

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 20<sup>th</sup> Day of December, 2011

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 22, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 20, 2011 Council Meeting**

**David Herron<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-268**

v.

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

**Records Relevant to Complaint:** Copies of:

1. List of students selected for the National Merit Commended, National Merit Semi-Finalist and National Merit Finalist for 2006, 2007 and 2008 on official National Merit Corporation letterhead.
2. List of students selected for the National Achievement Program Students Commended, National Achievement Semi-Finalist and National Achievement Finalist for 2006, 2007 and 2008 on official National Merit Corporation letterhead.
3. List of students selected for the National Hispanic Recognition Program Commended, National Hispanic Recognition Program Semi-Finalist and National Hispanic Recognition Program Finalist for 2006, 2007 and 2008 on official National Merit Corporation letterhead.<sup>3</sup>

**Request Made:** September 20, 2010

**Response Made:** October 4, 2010

**Custodian:** Dana Sullivan

**GRC Complaint Filed:** October 12, 2010<sup>4</sup>

**Background**

**September 20, 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.

**October 4, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the tenth (10<sup>th</sup>) business day following receipt of

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

<sup>2</sup> Represented by Derlys M. Gutierrez, Esq., of Adams, Stern, Gutierrez, & Lattiboudere, LLC (Newark, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

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

such request. The Custodian notes on the Complainant's OPRA request form that access to the records responsive to the request items listed above is granted.<sup>5</sup>

**October 12, 2010**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching Complainant's OPRA request form dated September 20, 2010 with the Custodian's notes thereon dated October 4, 2010.<sup>6</sup>

The Complainant states that he submitted an OPRA request to the Montclair Board of Education ("BOE") on September 20, 2010. The Complainant states that he went to the BOE on October 4, 2010 to pick up records and was informed by Ms. Sonya Rold ("Ms. Rold"), Assistant to the Custodian, that Mr. Scott White ("Mr. White"), Director of Guidance at Montclair High School, was still working on the request.<sup>7</sup>

The Complainant states that he again spoke with Ms. Rold on October 8, 2010 who advised that Mr. White was still working on the request. The Complainant states that Mr. White provided no reason for delaying access to the requested records and provided no date certain upon which said records would be available.

The Complainant does not agree to mediate this complaint.

**October 29, 2010**

Letter from the Custodian's Counsel to the GRC. Counsel asserts that the BOE disputes the Complainant's allegation that access to the responsive records was denied. Counsel asserts that the BOE could only partially comply with the Complainant's OPRA request because the only lists maintained and located were those provided to the Complainant (which are not at issue herein) on October 4, 2010. Counsel asserts that the records at issue are not maintained by the BOE nor is the BOE under any obligation to maintain same.

Counsel states that the BOE will provide the GRC with a document index and a certification of the Custodian on November 1, 2010.

**November 5, 2010**

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

**November 22, 2010**

E-mail from Ms. Rold to the GRC attaching a copy of Custodian Counsel's letter to the GRC dated October 29, 2010. Ms. Rold states that attached is the document requested by the GRC.<sup>8</sup>

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<sup>5</sup> The Complainant retrieved records not at issue herein on the same day and was advised by Ms. Rold that a search for the records at issue herein was being conducted. Ms. Rold gave no date certain upon which the BOE would respond.

<sup>6</sup> The Complainant also attached copies of records which are not at issue in this complaint.

<sup>7</sup> The evidence of record indicates that the Custodian provided the records not at issue in this complaint.

<sup>8</sup> Ms. Rold appears to have submitted Counsel's letter in response to the GRC's request for the SOI.

### **November 26, 2010**

Letter from GRC to the Custodian. The GRC states that it provided the Custodian with a request for an SOI on November 5, 2010 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

### **December 14, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request form dated September 20, 2010 with the Custodian's notes thereon dated October 4, 2010.
- Complainant's Denial of Access Complaint dated October 12, 2010.

The Custodian certifies that her search for the requested records involved requesting that high school staff members search for the responsive records.<sup>9</sup>

The Custodian certifies that she received the Complainant's OPRA request on September 20, 2010. The Custodian certifies that she responded on October 4, 2010 providing access to records not at issue in this complaint.

The Custodian certifies that no records responsive to the Complainant's OPRA request items at issue herein exist. The Custodian further certifies that the BOE is not required to maintain these records.

### **Analysis**

**Whether the Custodian's failure to respond to the OPRA request in writing within seven (7) business days of receipt thereof results in a "deemed" denial of the request?**

OPRA also 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.

Further, OPRA provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than*

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<sup>9</sup> The Custodian did not certify to whether any records responsive to the Complainant's OPRA 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 as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

*seven business days after receiving the request ... In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request ...* (Emphasis added.) N.J.S.A. 47:1A-5.i.

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.<sup>10</sup> 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 (Interim Order October 31, 2007).

The Custodian herein responded in writing on the tenth (10<sup>th</sup>) business day after receipt of the Complainant's OPRA request noting on the OPRA request form that access to request Items No. 1 through No. 3 was granted and providing access to records not at issue in this complaint. However, the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated time frame as required under OPRA.

Additionally, the evidence of record indicates that the Custodian granted access to all three request items; however, each item sought five (5) individual records. The Custodian's response was insufficient because she failed to respond to each request item individually. See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008). Moreover, the Custodian's response is insufficient because she failed to state in her response that the records at issue herein did not exist. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-149 (June 2010).

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, supra. Moreover, the Custodian's response is insufficient because she failed to respond to each request item individually and failed to specifically state that the records at issue herein did not exist. See Paff, supra, and Verry, supra.

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<sup>10</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

## 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 stating that he never received the records at issue herein. The Custodian certified in the SOI that no records responsive existed and that the BOE was not required to maintain same. The Complainant has submitted no evidence to refute the Custodian’s certification in this regard.

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.

Similarly in this complaint, the Custodian certified in the SOI that no records responsive to the Complainant’s OPRA request exists 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 “deemed” denial of the Complainant’s OPRA request 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).

The Custodian’s failure to respond in writing within the statutorily mandated time frame resulted in a “deemed” denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., and the Custodian’s response was insufficient pursuant to Paff, *supra*, and Verry, *supra*, because she failed to respond to each request item individually and failed to specifically state that the records at issue herein did not exist. However, the Custodian lawfully denied access to the requested records pursuant to Pusterhofer, *supra*, because she certified that no records responsive existed and there is no evidence in the record to refute the Custodian’s certification. 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 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.

### **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 (Interim Order October 31, 2007). Moreover, the Custodian's response is insufficient because she failed to respond to each request item individually and failed to specifically state that the records at issue herein did not exist. *See* Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) and Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-149 (June 2010).
2. The Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request exists and the Complainant herein 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. The Custodian's failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., and the Custodian's response was insufficient pursuant to Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), and Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-149 (June 2010), because she failed to respond to each request item individually and failed to specifically state that the records at issue herein did not exist. However, the Custodian lawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because she certified that no records responsive existed and there is no evidence in the record to refute the Custodian's certification. 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 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.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

December 13, 2011