



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**

**June 26, 2012 Government Records Council Meeting**

Sabino Valdes  
Complainant

Complaint No. 2011-15

v.

Union City Board of Education (Hudson)  
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 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:

1. Because the Custodian certified in the Statement of Information that a copy of the news release for a special meeting, not a hearing held by the Union City Board of Education on July 1, 2003 does not exist and because there is no evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
2. Pursuant to N.J.S.A. 47:1A-7.b and Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services, GRC Complaint No. 2007-296 (March 2008), the Council does not have the authority over the Union City Board of Education’s records retention schedule. See Kwanzaa v. NJ Department of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Gillespie v. Newark Public Schools (Essex), GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); Katinsky v. River Vale Township (Bergen), GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC’s authority to adjudicate); Toscano v. NJ Department of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian); and Van Pelt v. Edison Township Board of Education (Middlesex), GRC Complaint No. 2007-179 (January 2008)(the GRC does not have authority over which records a government agency must maintain).

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 26<sup>th</sup> Day of June, 2012

Steven F. Ritardi, Esq., Acting 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: June 28, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 26, 2012 Council Meeting**

**Sabino Valdes<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-15**

v.

**Union City Board of Education (Hudson)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of the news release for a special meeting, not a hearing, held by the Union City Board of Education (“UCBOE”) on July 1, 2003.<sup>3</sup>

**Request Made:** December 20, 2010

**Response Made:** January 4, 2011

**Custodian:** Anthony Dragona

**GRC Complaint Filed:** January 18, 2011<sup>4</sup>

**Background**

**December 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.

**December 21, 2010**

Custodian’s response to the OPRA request. The Custodian responds in writing on the Complainant’s OPRA request form on the first (1<sup>st</sup>) business day following receipt of such request. The Custodian informs the Complainant that he is in receipt of the Complainant’s OPRA request. The Custodian states that due to the Christmas holiday, the UCBOE offices are closed on December 24, 2010, December 27, 2010, December 30, 2010 and December 31, 2010. The Custodian also states that he will respond to the Complainant’s request on January 4, 2011.

**January 4, 2011**

Letter from the Custodian to the Complainant. The Custodian states that access to the news release responsive to the Complainant’s request is denied because the news release cannot be located.

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

<sup>2</sup> Represented by Susanne Lavelle, Esq. (Union City, NJ).

<sup>3</sup> The Complainant sought additional items not at issue here in.

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

**January 18, 2011**

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

- Complainant’s OPRA request dated December 20, 2010
- Custodian’s response to the Complainant’s OPRA request dated January 4, 2011.

The Complainant states that he filed his OPRA request on December 20, 2010 seeking a copy of the news release for UCBOE’s special meeting held on July 1, 2003. The Complainant also states that the Custodian denied his request on January 1, 2011 because the news release could not be located.<sup>5</sup>

The Complainant states that is the responsibility of the Board Secretary to provide the public with an adequate notice showing where and when UCBOE will hold its meetings pursuant to N.J.S.A. 10:4-10. The Complainant also states that in 2003 it was the Custodian’s responsibility to file the news release at issue in this complaint. However, the Complainant states that according to the Custodian, he was not the Board Secretary in 2003. However, the Complainant states that the July 1, 2003 special meeting minutes are signed by the Custodian as Interim Board Secretary. The Complainant also states that the UCBOE President read aloud at the special meeting on July 1, 2003 a statement that “[o]n or about June 29, 2003 public notice of this meeting was delivered by messenger and or facsimile to the Jersey Journal/Hudson County Dispatch.” The Complainant states that because the Custodian was the Interim Board Secretary in 2003 and a public notice of the July 1, 2003 meeting was delivered to the Jersey Journal, then the Custodian must have the news release at issue in this complaint.

The Complainant argues that if the Council accepts the Custodian’s argument that the news release cannot be located, then every custodian would be invited to violate OPRA by simply stating that the requested records cannot be located. The Complainant requests that the Council order the Custodian to locate and disclose the news release; however, if the news release cannot be located, then the Complainant requests that the GRC conduct a hearing pursuant to *N.J.A.C. 5:105-2.7*.<sup>6</sup>

The Complainant does not agree to mediate this complaint.

**January 19, 2011**

Request for the SOI sent to the Custodian.

**January 19, 2011**

E-mail from Custodian’s Counsel to the GRC. Counsel requests an extension of time to complete the SOI until January 28, 2011.

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<sup>5</sup> The Custodian responded to the Complainant’s request on January 4, 2011.

<sup>6</sup> *N.J.A.C. 5:105-2.7(a)* states, “If the Council is unable to make a determination as to the accessibility of a record based upon the complaint and the custodian's response thereto, the Council may conduct a hearing, pursuant to N.J.S.A. 47:1A-7.e, and in conformity with the rules provided for administrative hearings by a public agency in contested cases pursuant to the Administrative Procedures Act...and the Uniform Administrative Procedures Rules...”

### **January 19, 2011**

E-mail from the GRC to Custodian's Counsel. The GRC grants Counsel's request for an extension of time until January 28, 2011 to complete the SOI.

### **January 26, 2011**

Custodian's SOI with the following attachments:<sup>7</sup>

- Complainant's OPRA request dated December 20, 2010
- Letter from the Custodian to the Complainant dated December 21, 2010
- Custodian's response to the Complainant's OPRA request dated January 4, 2011.

The Custodian certifies that public notice responsive to the request must be permanently kept in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").<sup>8</sup>

The Custodian certifies that he has held the position of Interim Board Secretary and Custodian since March 2006. The Custodian also certifies that he also held the position of Interim Board Secretary from July 2003 through December 2003. The Custodian further certifies that the Complainant filed eight (8) OPRA requests on December 20, 2010.<sup>9</sup> The Custodian additionally certifies that he responded to the Complainant's OPRA request in this matter on December 21, 2010 and informed him that because of the Christmas recess and the closure of the UCBOE's offices, the Custodian would respond to the OPRA request herein on January 4, 2011. The Custodian certifies that he responded to the Complainant's OPRA request on January 4, 2011 informing him that the news release cannot be located.

The Custodian certifies that because the Complainant's first of several OPRA requests for the news release at issue herein occurred more than two (2) years ago, it is impossible to recall or estimate the amount of time expended in connection with searching for the news release at issue herein. The Custodian also certifies that when the Complainant filed the instant OPRA request, Confidential Secretary Eve Festa searched through the July 1, 2003 meeting file and found no public notices or news releases for the meeting. The Custodian certifies that he conducted a reasonable search for the news release responsive to the Complainant's OPRA request. The Custodian also certifies that he did not unlawfully deny access to the news release and has borne his burden of proving due diligence in searching for said record pursuant to N.J.S.A. 47:1A-6. The Custodian further certifies that UCBOE could not have violated OPRA if the Custodian conducted a reasonable search to locate the news release responsive and if said record cannot be located. The Custodian also certifies that because the news release cannot be located after such an extensive search said record must not be in UCBOE's possession and therefore does not exist. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005), *O'Shea and Paff v. Borough of Emerson*, 2008 WL 2328239 (Law. Div. 2008), *Paff v. New Jersey Department of Labor*, 392 N.J. Super.

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<sup>7</sup> The Custodian includes additional material not relevant to the adjudication of this complaint.

<sup>8</sup> The Complainant's request states that he is seeking a news release, but the Custodian argues that the Complainant is actually requesting a copy of the public notice of the July 1, 2003 special meeting.

<sup>9</sup> The Complainant only disputes one (1) of these OPRA requests in his Denial of Access Complaint.

333, 341 (App. Div. 2007), Bent v. Township of Strafford Police Department, 381 N.J. Super. 30, 39 (App. Div. 2005).

The Custodian certifies that although public notices must be permanently maintained, he cannot explain why the news releases or public notices are not properly filed. The Custodian also certifies that the public notice for the July 1, 2003 special meeting was delivered to the Jersey Journal on June 29, 2003 and his term as Interim Board Secretary did not begin until July 1, 2003. The Custodian also certifies that during his term as Interim Board Secretary from July through December 2003 and from March 2006 to the present, he did not and does not personally file the public notices.

### **January 28, 2011**

Facsimile from Complainant to the GRC. The Complainant responds to the Custodian's SOI. The Complainant states that pursuant to N.J.S.A. 47:3-17, "[n]o person shall destroy, sell or otherwise dispose of any public record...which are under his or in his care or custody...without written consent from the Bureau of Archives." The Complainant also states that the public agency "shall have the burden of proving that the denial of access is authorized by law..." pursuant to N.J.S.A. 47:1A-6. The Complainant further states that "[i]f the Council is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response...the Council shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases..." N.J.S.A. 47:1A-7.e. The Complainant states that the Board Secretary shall "keep and maintain in his office all...records and documents belonging to the Board..." pursuant to N.J.S.A. 18A:17-9. The Complainant also states that because the Custodian was the Interim Board Secretary on July 1, 2003, he is responsible for keeping and maintaining any records pertinent to public meetings. The Complainant further states that the Custodian expects the Council to accept the Custodian's reasons for not locating the news release as mere mistakes and blames his staff for losing government records that must permanently exist in his office.

The Complainant states that if the Council accepts the Custodian's arguments then the Council's determination would be a clear sanction for all State agency custodians to withhold information from the public by claiming that same cannot be located. The Complainant requests the Council to instruct UCBOE to disclose the news release relevant to the July 1, 2003 special meeting. The Complainant also asserts that if the Custodian fails to produce the news release, the Council must conduct a hearing pursuant to N.J.S.A. 47:1A-7.e.

### **February 18, 2011**

Letter from Custodian's Counsel to the GRC enclosing a supplemental legal certification from the Custodian. The Custodian certifies that he made a mistake in the SOI regarding the DARM retention schedule for public meeting notices. The Custodian certifies that the retention schedule for official public meeting notices is three (3) years.<sup>10</sup>

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<sup>10</sup> The Custodian certified in the SOI that official public meeting notices must be permanently retained. The Custodian includes a copy of the School District Records Retention Schedule, M700202-999, but a review of this schedule reveals that it appears to be for forms used from 1976 through 1984.

### **February 23, 2011**

Facsimile from the Complainant to the GRC. The Complainant states that he is in receipt of the Custodian's supplemental certification dated February 18, 2011. The Complainant also states that unlike an official public notice, which the Custodian certifies must be maintained for three (3) years by public agencies, news releases must be permanently retained by State agencies.<sup>11</sup>

### **March 4, 2011**

Letter from Custodian's Counsel to the GRC, enclosing a supplemental legal certification from the Custodian correcting an error made in his February 18, 2011 certification. The Custodian certifies that he mistakenly provided the DARM retention and destruction schedule for official public meeting notices, not news releases.<sup>12</sup> The Custodian also certifies that there is no record retention schedule for news releases in the School District Record Retention Schedule. The Custodian further certifies that the Complainant provided a copy of the State's General Retention Schedule and not the School District Record Retention Schedule. The Custodian additionally certifies that he denied a copy of the requested news release because the news release could not be located and therefore does not exist pursuant to N.J.S.A. 47:1A-6.

### **March 7, 2011**

Facsimile from the Complainant to the GRC. The Complainant states that he is in receipt of the Custodian's supplemental certification dated March 4, 2011. The Complainant also states that a news release is any information issued by any State agency for publication, including public meeting notices. The Complainant further states that UCBOE previously provided the Complainant with a copy of a news release to the Jersey Journal dated June 2, 2000.<sup>13</sup>

## **Analysis**

### **Whether the a copy of the “news release for a special meeting, not a hearing, held by UCBOE on July 1, 2003” exists?**

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:

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<sup>11</sup> The Complainant includes a copy of the DARM schedule G100000-005, however, this schedule is the State Agency General Records Retention Schedule and not the School District Records Retention Schedule.

<sup>12</sup> The Custodian resubmits Item No. 9 of the SOI.

<sup>13</sup> The Complainant includes a copy of the DARM schedule G100000-005, however this the State Agency General Records Retention Schedule, not the School District Record Retention Schedule, indicating that State agencies must permanently retain original news releases. The Complainant also includes a copy of a news release to the Jersey Journal dated June 2, 2000. However, the Complainant was not seeking a copy of the news release to the Jersey Journal dated June 2, 2000 in the instant complaint.

“... 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’s OPRA request dated December 20, 2010 sought a “a copy of the news release for a special meeting, not a hearing held by UCBOE on July 1, 2003.” The Custodian informed the Complainant on January 4, 2011 in writing that access to the news release responsive to the request was denied because the news release cannot be located.<sup>14</sup> The Custodian certified in the SOI that because the news release could not be located after such an extensive search said record must not be in UCBOE’s possession and therefore does not exist. Conversely, the Complainant asserted that since the Custodian was the Interim Board Secretary in 2003 and a public notice of the July 1, 2003 meeting was delivered to the Jersey Journal, then the Custodian must have the news release at issue in this complaint. The Complainant’s assertion of the news release being submitted to the Jersey Journal is not sufficient competent evidence to refute the Custodian’s certification. Furthermore, the news release was sent to the Jersey Journal prior to the Custodian assuming responsibility as Interim Board Secretary.

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 responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant’s request existed. The complainant failed to submit any evidence to refute the custodian’s certification. The GRC held that the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the Statement of Information that a copy of the news release for a special meeting, not a hearing held by UCBOE on July 1,

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<sup>14</sup> The Custodian timely responded to the Complainant’s OPRA request on December 21, 2010 that he will respond to the Complainant’s request on January 4, 2011.



2003 does not exist and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

### **Whether the Council has authority over UCBOE's records destruction schedule?**

OPRA provides that the Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied.

N.J.S.A. 47:1A-7.b. delineates the powers of the GRC. The GRC administers OPRA and adjudicates denial of access complaints filed under OPRA.

In this complaint, the Complainant asserted on January 28, 2011 in a response to the Custodian's SOI that pursuant to, N.J.S.A. 47:3-17 "[n]o person shall destroy, sell or otherwise dispose of any public record...which are under his or in his care or custody...without written consent from the Bureau of Archives." The Complainant also asserted in his response that the news release must be permanently maintained in the Custodian's office.

In Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services, GRC Complaint No. 2007-296 (March 2008), the Council held that pursuant to N.J.S.A. 47:1A-7.b. it has no authority to determine whether the Division of Vocational Rehabilitation Services correctly followed their records retention policy.

Pursuant to N.J.S.A. 47:1A-7.b and Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services, GRC Complaint No. 2007-296 (March 2008), the Council does not have the authority over UCBOE's records destruction schedule. *See* Kwanzaa v. NJ Department of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Gillespie v. Newark Public Schools (Essex), GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); Katinsky v. River Vale Township (Bergen), GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate); Toscano v. NJ Department of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian); and Van Pelt v. Edison Township Board of Education (Middlesex), GRC Complaint No. 2007-179 (January 2008)(the GRC does not have authority over which records a government agency must maintain).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified in the Statement of Information that a copy of the news release for a special meeting, not a hearing held by the Union City Board of Education on July 1, 2003 does not exist and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
2. Pursuant to N.J.S.A. 47:1A-7.b and Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services, GRC Complaint No. 2007-296 (March 2008), the Council does not have the authority over the Union City Board of Education's records retention schedule. *See* Kwanzaa v. NJ Department of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Gillespie v. Newark Public Schools (Essex), GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); Katinsky v. River Vale Township (Bergen), GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate); Toscano v. NJ Department of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian); and Van Pelt v. Edison Township Board of Education (Middlesex), GRC Complaint No. 2007-179 (January 2008)(the GRC does not have authority over which records a government agency must maintain).

Prepared By: Harlyne A. Lack, Esq.  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

June 19, 2012