



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

March 27, 2012 Government Records Council Meeting

Sabino Valdes
Complainant

Complaint No. 2011-24

v.

New Jersey Department of Education,
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 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 because the Custodian certified in the Statement of Information that no “original transcript ... [to] include a date stamp and the raised seal of the transcriber” exists, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. New Jersey Department of Education, 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 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: April 5, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

**Sabino Valdes¹
Complainant**

GRC Complaint No. 2011-24

v.

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

Records Relevant to Complaint: On-site inspection of the original transcript of a recorded proceeding before Administrative Law Judge (“ALJ”) Stephen G. Weiss on May 7, 2002 in the matter of OAL Docket No. EDU-3620-01. The record must include a date stamp and the raised seal of the transcriber.

Request Made: January 18, 2011

Response Made: January 24, 2011

Custodian: Beth Auerswald³

GRC Complaint Filed: February 4, 2011⁴

Background

January 18, 2011

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.

January 24, 2011

Custodian’s response to the OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that access to the requested record is denied because the New Jersey Department of Education (“DOE”) does not have an original transcript from the May 7, 2002 proceeding with a date-stamp and raised seal from the transcriber.⁵

February 4, 2011

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

¹ No legal representation listed on record.

² Represented by DAG Joyce Williams, on behalf of the NJ Attorney General.

³ Ms. Maria Casale assumed the position of Custodian of Record on August 15, 2011.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Custodian also sent the Complainant a copy of the Government Records Request Receipt dated January 24, 2011 with her response thereon.

- Complainant's OPRA request dated January 18, 2011.
- Letter from the Custodian to the Complainant dated January 24, 2011.
- Government Records Request Receipt dated January 24, 2011 with the Custodian's response thereon.

The Complainant states that he submitted an OPRA request to DOE on January 18, 2011. The Complainant states that the Custodian responded on January 24, 2011 denying access to the requested transcript because DOE did not have an original copy complete with date stamp and raised seal.

The Complainant states that in 2003, transcripts of an administrative hearing were to be prepared in accordance with the Office of Administrative Law's ("OAL") Uniform Administrative Procedures Rules. *N.J.A.C. 1:1-14.11(h)(1)*. The Complainant states that at that time, *N.J.A.C. 1:1-14.11(g)* allowed for transcripts required by law to be filed with a Court clerk to be public records subject to access under the old Right-To-Know Law.⁶ The Complainant further states that *N.J.A.C. 1:1-18.1(f)* required that "[w]ithin 10 days after the initial decision is filed with the agency head, the Clerk shall certify the entire record with original exhibits to the agency head." The Complainant states that because transcripts filed with the clerk were public records, same filed with individual agencies remain accessible to the public.

The Complainant asserts that his multiple attempts to review an original copy of the May 7, 2002 transcript has been met with various responses from DOE. The Complainant states that he previously requested the transcript from DOE in 2007 and was told by the custodian at the time that DOE no longer maintained the transcript. The Complainant states he again requested the transcript from DOE and was initially granted access on August 14, 2008; however, DOE advised on August 19, 2008 that re-examination of the transcript revealed that DOE does not have a date stamped copy of the transcript. The Complainant states that DOE granted inspection of the transcript with the "transcriber's raised seal," on September 15, 2010.⁷ The Complainant states that now DOE has denied access to transcript stating that it does not maintain an original copy complete with date stamp and raised seal.

The Complainant contends that DOE's conflicting responses appear to be an attempt to discourage him from requesting the records. The Complainant argues that not just the transcript, but other records previously sought, seem to disappear and sometimes reappear as a result of the Complainant's repeated OPRA requests.⁸ The Complainant argues that DOE's conflicting responses serve to build a case against frivolous complaints against the Complainant.

⁶ OPRA replaced the Right-To-Know Law on July 2, 2002.

⁷ The Government Records Request Receipt dated September 15, 2010 provided as part of the Denial of Access Complaint indicates that the custodian at the time actually denied access to the Complainant's OPRA request for the transcript, stating that same was invalid as a duplicate request and adding that DOE could not locate the original transcript in 2008. The custodian further notes that he notified the Complainant on September 9, 2010 to schedule an appointment for on-site inspection; however, there is no indication that the transcript at issue herein was made available as part of that inspection.

⁸ The Complainant cites to two (2) situations in which DOE granted or denied OPRA requests for a statement of items and transmittal form only to later change its response following submission of another OPRA request.

The Complainant notes that it appears the transcript at issue has been missing since 2003. The Complainant states that specifically on July 24, 2003, DOE acknowledged receipt of the Complainant's appeal of the OAL decision, yet the transcript at issue was missing from the list of transcripts received by DOE. The Complainant asserts that Counsel for the Union City Board of Education ("UCBOE") wrote a letter to DOE stating that said transcript was forwarded to DOE but Counsel had no knowledge of whether OAL forwarded the original transcript to DOE. The Complainant states that the UCBOE maintains an unofficial copy of the transcript that it forwarded to DOE. The Complainant asserts that the foregoing means one of two things: either DOE is withholding the transcript at issue or OAL never provided same to DOE.⁹

The Complainant states that "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). The Complainant further states that OPRA provides 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 thereto, 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 contends that DOE has claimed over the years that the requested transcript was never received; the Complainant argues that original transcripts must be permanently preserved by agencies. The Complainant argues that without a copy of the written consent form authorizing destruction of the transcript or evidence proving that DOE never received the transcript from OAL, there is no way of knowing if the transcript actually exists within DOE's files. The Complainant asserts that in order to reach a proper determination in this complaint, the GRC should obtain a copy of the written consent or evidence proving that OAL never forwarded the transcript to DOE (*i.e.* a certification from OAL or statement of items filed by DOE).

The Complainant notes that in an earlier complaint he filed against DOE, the Custodian located certain records responsive to his request so he withdrew the complaint.¹⁰ The Complainant states that the transcript at issue herein was not located, thus the Complainant submitted another request for same that DOE denied on January 24, 2011.

The Complainant requests that the GRC order DOE to disclose the responsive transcript or produce valid evidence that proves it never received same from OAL.

⁹ The Complainant discussed the facts of a previous complaint against OAL, GRC Complaint No. 2010-287, in which the custodian destroyed records without executing a Request and Authorization for Records Disposal form. The Complainant subsequently withdrew said complaint.

¹⁰ The Complainant voluntarily withdrew Valdes v. New Jersey Department of Education, GRC Complaint No. 2010-288 (February 2011) on January 31, 2011.

The Complainant does not agree to mediate this complaint.

March 16, 2011

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

March 23, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated January 18, 2011.
- Letter from the Custodian to the Complainant dated January 24, 2011.
- Government Records Request Receipt dated January 24, 2011 with the Custodian’s response thereon.

The Custodian certifies that her search for the requested records involved speaking with and showing the OPRA request to the staff member charged with administrative oversight of cases that are appealed to the State Board of Education. The Custodian certifies that the staff member searched through three (3) boxes and an accordion file that pertain to the Complainant’s tenure case. The Custodian certifies that the only May 7, 2002 transcript found was an unofficial copy without a date stamp or raised seal.

The Custodian also certifies that the last date upon which records that may have been responsive to the 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 is not applicable in this complaint.

The Custodian certifies that she received the Complainant’s OPRA request on January 18, 2011. The Custodian certifies that she responded in writing on January 24, 2011 denying access to the requested record because DOE does not maintain an original copy with a date-stamped and raised seal from the transcriber. The Custodian certifies that DOE possesses an unofficial copy of the transcript without a date stamp and raised seal.

The Custodian certifies that she has offered the Complainant the opportunity to inspect every record in DOE’s possession that comprises part of the Complainant’s tenure case file and subsequent appeals in order to clear the apparent confusion over what records DOE has in its possession. The Custodian certifies that there are numerous boxes available for his review.¹¹ The Custodian certifies that to date, the Complainant has not contacted the Custodian to schedule an appointment.

¹¹ The Custodian references her January 3, 2011 response to an OPRA request not at issue herein in which the Custodian advises the Complainant that he may review all records held by DOE in order to clear up any confusion as to which records DOE actually possesses.

Analysis

Whether the Custodian unlawfully denied access to the requested transcript?

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 arguing that DOE has provided conflicting responses to his past requests for the original transcript with date stamp and the raised seal of the transcriber. The Complainant noted that it appears the transcript at issue has been missing since 2003. The Complainant asserted that the UCBOE maintains an unofficial copy of the transcript that it forwarded to DOE. The Complainant asserted that either DOE is withholding the transcript at issue or OAL never provided same to DOE. The Complainant thus requested that the GRC order DOE to disclose the responsive transcript or produce valid evidence that proves it never received same from OAL.

In the SOI, the Custodian certified that she denied access to the Complainant’s OPRA request because DOE does not maintain an original transcript complete with date stamp and raised seal. The Custodian further certified that DOE maintains an unofficial copy of the transcript.

The crux of the issue herein is whether the Custodian unlawfully denied access to the Complainant's OPRA request for on-site inspection of "the original transcript ... in the matter of OAL Docket No. EDU-3620-01 ... [to] include a date stamp and the raised seal of the transcriber." The evidence of record supports the fact that DOE does not possess an original transcript that includes a date stamp and raised seal of the transcriber. Specifically, in the Denial of Access Complaint, the Complainant notes that the UCBOE provided DOE with an unofficial copy of the transcript that the Custodian certified to possessing in the SOI. Moreover, contrary to the Complainant's assertions regarding past DOE responses, the evidence of record indicates that DOE custodians have never granted access to an original copy of the requested transcript with a date stamp and raised seal of the transcriber. Further, the Custodian certified in the SOI that DOE did not maintain an original transcript, but does possess an unofficial transcript without the date stamp and raised seal. The Complainant has submitted no evidence to refute the Custodian's certification.

In Pusterhofer v. New Jersey Department of Education, 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 averred that the requested record was nonexistent. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record can not (sic) be released and there was no unlawful denial of access."

Therefore, because the Custodian certified in the SOI that no "original transcript ... [to] include a date stamp and the raised seal of the transcriber" exists, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian certified in the Statement of Information that no "original transcript ... [to] include a date stamp and the raised seal of the transcriber" exists, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 2012