



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

August 28, 2012 Government Records Council Meeting

Sabino Valdes
Complainant

Complaint No. 2011-50

v.

Union City Board of Education (Hudson)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 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 a copy of the news releases for the meetings held by Union City Board of Education on September 13, 2000 and March 29, 2001 do not exist and because there is no competent, credible 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.

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 28th Day of August, 2012

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: September 5, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Sabino Valdes¹
Complainant**

GRC Complaint No. 2011-50

v.

**Union City Board of Education (Hudson)²
Custodian of Records**

Records Relevant to Complaint: True copy of the news releases for the meetings held by the Union City Board of Education (“UCBOE”) on September 13, 2000 and March 29, 2001.

Request Made: December 23, 2010

Response Made: January 11, 2011

Custodian: Anthony Dragona

GRC Complaint Filed: February 28, 2011³

Background

December 23, 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.

January 5, 2011

Custodian’s response to the OPRA request. The Custodian responds in writing on the second (2nd) business day following receipt of such request.⁴ The Custodian states that due to the Christmas recess, UCBOE’s offices were closed on December 24, 27, 30 and 31. The Custodian also states that UCBOE’s offices were also closed on December 28 and 29 due to a snow emergency. The Custodian further states that due to UCBOE’s office closure, a response to the Complainant’s request is due on January 11, 2011.

January 11, 2011

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

¹ No legal representation listed on record.

² Represented by Susanne Lavelle, Esq. (Union City, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Custodian certifies in the Statement of Information that he received the Complainant’s OPRA request on January 3, 2011.

February 28, 2011

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

- Complainant’s OPRA request dated December 23, 2010
- Custodian’s response to the Complainant’s OPRA request dated January 11, 2011.⁵

The Complainant states that he filed his OPRA request on December 23, 2010 seeking a “true copy of the news release for the meeting held by UCBOE on September 13, 2000 and March 29, 2001. The Complainant also states that the Custodian denied his request on January 11, 2011 via letter because the news releases for these meetings could not be located.

The Complainant states that OPRA places the burden on the Custodian to prove that a denial of access is authorized by law pursuant to N.J.S.A. 47:1A-6. The Complainant asserts that the State Legislature’s intent was not meant for the Custodian to deny access to a government record by claiming that the same cannot be located. The Complainant states that if a record does not exist, the Custodian must deny the request. The Complainant also states that if the Custodian cannot locate the record, then the Custodian must request an extension of time to locate the record pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Complainant further states that any information issued by state agencies for publication is considered public information and must be permanently retained.⁶ The Complainant additionally states that the Custodian cannot deny his request by claiming that he cannot locate the news releases.

The Complainant states that if the Custodian certifies that the news releases responsive were never made, kept or maintained by UCBOE, he requests the Council to instruct the Custodian to deny the Complainant’s OPRA request. The Complainant also states that if the Custodian certifies that if the news releases cannot be located, then the Custodian must request an extension of time to locate said records.

The Complainant does not agree to mediate this complaint.

March 4, 2011

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

March 10, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated December 23, 2010
- Letter from the Custodian to the Complainant dated January 5, 2011
- Letter from the Custodian to the Complainant dated January 11, 2011.

⁵ The Complainant attaches a copy of his OPRA request with the Custodian’s denial stating that the news releases responsive cannot be located.

⁶ The Complainant includes a copy of Records Management Services’ Schedule G100000-005, which states that original news releases must be permanently retained by state agencies.

The Custodian certifies that to the best of his knowledge, UCBOE does not issue news releases for its meetings. The Custodian also certifies that to be sure, Confidential Secretary Eva Festa (“Ms. Festa”) searched through files that contained records related to the September 13, 2000 and March 29, 2001 meetings. The Custodian further certifies that Ms. Festa reviewed the minutes from these meetings and there is no reference to news releases. The Custodian additionally certifies that the search conducted was limited to a review of a few files and the actual minutes, so one half hour was expended in connection with this search.

The Custodian states that according to the Complainant, the State General Record Retention Schedule for G100000-005 provides that news release retention is permanent. However, the Custodian certifies that the School District Record Retention Schedule, M700101-999 does not list news releases.⁷

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 he received nine (9) OPRA requests filed by the Complainant on January 3, 2011.⁸ The Custodian additionally certifies that he responded to the Complainant on January 5, 2011 via letter and informed him that he received his OPRA request, but due to the Christmas recess and UCBOE closure due to snow emergencies, a response was due on January 11, 2011. The Custodian certifies that he responded to the Complainant’s OPRA request on January 11, 2011 via letter informing him that the news releases cannot be located. The Custodian also certifies that the news releases cannot be located and probably do not exist. The Custodian further certifies that UCBOE did not unlawfully deny access to the news releases responsive to his request because the records do 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. 333, 341 (App. Div. 2007), Bent v. Township of Strafford Police Department, 381 N.J. Super. 30, 39 (App. Div. 2005).

Analysis

Whether the Custodian unlawfully denied the Complainant access to a “true copy of the news release for the meetings held by the UCBOE on September 13, 2000 and March 29, 2001”?

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:

⁷ The Custodian includes a copy of the School District Records Retention Schedule, M700101-999.

⁸ Only one (1) of these OPRA requests is in dispute in the Complainant’s Denial of Access Complaint. Sabino Valdes v. Union City Board of Education (Hudson), 2011-50 – Findings and Recommendations of the Executive Director

“... 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 sought a “true copy of the news release for the meetings held by the UCBOE on September 13, 2000 and March 29, 2001.” The Custodian informed the Complainant on January 11, 2011 in writing that access to the news releases responsive to the request was denied because the news releases cannot be located.⁹ The Custodian certified in the SOI that because the news releases could not be located, said record must not be in UCBOE’s possession and therefore does not exist. Conversely, the Complainant asserted in his Denial of Access Complaint that any information issued by state agencies for publication is considered public information and must be permanently retained. The Complainant’s assertion that any information issued by state agencies for publication must be permanently retained is not sufficient competent, credible evidence to establish that such records do, in fact, exist and therefore refute the Custodian’s certification.

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 releases for the meetings held by UCBOE on September 13, 2000 and March 29, 2001 do not exist and because there is no competent, credible evidence in the

⁹ The Custodian timely responded to the Complainant’s OPRA request on January 5, 2011, stating that he will respond to the Complainant’s request on January 11, 2011.

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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian certified in the Statement of Information that a copy of the news releases for the meetings held by Union City Board of Education on September 13, 2000 and March 29, 2001 do not exist and because there is no competent, credible 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.

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012