



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

September 30, 2014 Government Records Council Meeting

Michael Inzelbuch, Esq.
Complainant

Complaint No. 2014-92

v.

Lakewood Board of Education (Ocean)
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the requested records are “student records” pursuant to N.J.A.C. 6A:32-1.1, and because the Complainant failed to submit supporting evidence showing that he was an authorized individual that shall have access to said student records under N.J.A.C. 6A:32-7.5, the Custodian lawfully denied the Complainant access to the responsive record. N.J.S.A. 47:1A-6.
2. The Custodian did not unlawfully deny access to request item No. 2 because the Custodian certified in the Statement of Information that such records do not exist and there is no evidence in the record to refute the Custodian’s certification. *See Pusterhofer v. N.J. Dep’t of Educ.*, 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 30th Day of September, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Michael I. Inzelbuch, Esq.¹
Complainant**

GRC Complaint No. 2014-92

v.

**Lakewood Board of Education (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via pickup of:

1. Any and all information that was presented or gathered for the Lakewood Board of Education (“Board”) to consider the residency status of J.V.
2. Any and all information or documentation evidencing the Board’s decision in the matter of J.V.

Custodian of Record: Thomas A. D’Ambola
Request Received by Custodian: February 14, 2014
Response Made by Custodian: February 25, 2014
GRC Complaint Received: February 27, 2014

Background³

Request and Response:

On February 13, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 25, 2014, the sixth (6th) business day after receipt of the request, Ms. Diane Piasentini responded in writing on behalf of the Custodian advising that the information or documentation sought relating to J.V. is a student record exempt from access under OPRA. N.J.A.C. 6A:32-7.5; Popkin v. Englewood Bd. of Educ. (Bergen), GRC Complaint No. 2011-263 (December 2012). Further, Ms. Piasentini stated that the request is invalid because it failed to provide dates or identify specific records. MAG Entm’t v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005). Finally, Ms. Piasentini noted that the Board did not issue a resolution on the subject of J.V.’s residency status.

¹ legal representation listed on record.

² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

On February 25, 2014, the Complainant requested clarification of the Custodian's response. The Custodian's Counsel responded advising that student record information could not be disclosed under OPRA. Counsel asked if the Complainant could obtain the records responsive to item No. 1 from his client and confirmed that no Board action was taken, thus no responsive to item No. 2 exist.

Denial of Access Complaint:

On February 27, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that he represents the interests of J.V.'s parent, who was challenged by the Board over her residency. The Complainant alleged that the Board conducted a hearing with J.V.'s parent without notifying the Complainant. Thus, the Complainant requested all records associated with the alleged residency issue.

The Complainant contended that the Custodian unlawfully denied access to the responsive records. The Complainant alleged that J.V.'s parent executed a record release/authorization allowing him to access J.V.'s records and that he previously obtained records from the District.

Statement of Information:

On March 31, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on February 14, 2014. The Custodian certified that no search was undertaken because he was aware of the records sought: to wit, 1) a hearing notice and 2) investigation reports regarding J.V.'s residency. The Custodian certified that his assistant responded on his behalf on February 25, 2014, denying access to the responsive records as student records (N.J.A.C. 6A:32-7.5; Popkin, GRC 2011-263), that the request was overly broad and thus invalid, and that no resolution was issued by the Board regarding J.V.'s residency.

The Custodian asserted that the Board lawfully denied access to the records responsive to both request items. Specifically, the Complainant's first item sought student records not subject to disclosure under OPRA. The Custodian also certified that no records were provided for item No. 2 because none exist. The Custodian certified that the Board's previous Counsel and Ms. Piasentini both informed him of this fact on February 25, 2014.

Additional Submissions

On September 2, 2014, the GRC sought additional information from the Complainant. Specifically, because the Complainant alleged in the Denial of Access Complaint that he had an executed record release authorization form ("Authorization Form") to obtain J.V.'s records from the parent, the GRC requested the Custodian submit a certification answering the following:

1. Whether the Authorization Form signed by yourself and your client was active at the time of the filing of the subject OPRA request?
2. Please provide a copy of the actual Authorization Agreement for the GRC's review.

The GRC requested that the Custodian's certification be provided by close of business on September 5, 2014.⁴

Analysis

Unlawful Denial of Access

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 also provides that:

[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

N.J.S.A. 47:1A-9(a).

The rules of the State Board of Education and the Commissioner of Education define a "student record" as ". . . information related to an individual student *gathered within or outside the school district and maintained within the school district*, regardless of the physical form in which it is maintained." N.J.A.C. 6A:32-1.1 (emphasis added). The rules of the State Board of Education and the Commissioner of Education provide that "[o]nly authorized organizations, agencies or persons as defined herein shall have access to student records . . . persons from outside the school if they have the written consent of a parent . . ." N.J.A.C. 6A:32-7.5(e)(13).

In Popkin, GRC 2011-263, the complainant sought a settlement agreement between the Board of Education and parents of a special education student. Following the Denial of Access Complaint, the Board argued that the settlement agreement was a student record exempt from disclosure under N.J.A.C. 6A:32. The Council agreed, holding that:

[B]ecause the requested record is a student record pursuant to N.J.A.C. 6A:32-1.1, and because N.J.A.C. 6A:32-7.5 provides that only authorized persons enumerated in the regulation shall have access to student records, and because the evidence of record reveals the Complainant is not such an authorized person, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access . . .

⁴ The Complainant did not respond to the GRC's request additional information.

Id. at 8.

Regarding item No. 1 of the Complainant's OPRA request seeking access to records relating to J.V.'s residency hearing, the Custodian denied access citing N.J.A.C. 6A:32-7.5 and Popkin, GRC 2011-263. In the Denial of Access Complaint, the Complainant noted that he had an executed Authorization Form to obtain J.V.'s records from the parent and previously obtained records from the District in the past. Thus, in accordance with N.J.A.C. 6A:32-7.5 and its exceptions to access, the GRC requested from the Complainant additional information in the form of certification regarding the existence of the Authorization Form. However, the Complainant failed to respond to the GRC's request, and has failed to provide adequate evidence that he had permission to access J.V.'s record from the parent.

The GRC is satisfied that this complaint is on point with the facts in Popkin. Specifically, the responsive records fall within the definition of a "student record" for purposes of N.J.A.C. 6A:32-1.1. Further, the Complainant failed to provide evidence supporting his Denial of Access Complaint allegation that he had authorization to obtain J.V.'s student records from the parent; thus, not allowing him to meet one of the exceptions set forth in N.J.A.C. 6A:32-7.5.

Therefore, because the requested records are "student records" pursuant to N.J.A.C. 6A:32-1.1, and because the Complainant failed to submit supporting evidence showing that he was an authorized individual that shall have access to said student records under N.J.A.C. 6A:32-7.5, the Custodian lawfully denied the Complainant access to the responsive record. N.J.S.A. 47:1A-6.

Regarding item No. 2 of the Complainant's OPRA request, in Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. 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.

In the instant matter, the Custodian initially responded advising no resolution existed because the District did not issue one. The Custodian further certified to this fact in the SOI, noting that both himself and Counsel advised the Complainant of such on February 25, 2014.

Accordingly, the Custodian did not unlawfully deny access to request item No. 2 because the Custodian certified in the SOI that such records do not exist and there is no evidence in the record to refute the Custodian's certification. *See* Pusterhofer, GRC 2005-49.

Finally, the GRC notes that the Custodian argued in the SOI that the Complainant's request was overly broad. However, as noted in Popkin, GRC 2011-263, the Custodian was able to identify two (2) records responsive to the request. Thus, because the Custodian was able to identify responsive records, the request was sufficiently clear for the Custodian to identify the responsive record within the statutorily mandated time frame. Id. at 5-6. *See* Bond v. Borough of

Washington (Warren), GRC Complaint No. 2009-324 (March 2011); Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the requested records are “student records” pursuant to N.J.A.C. 6A:32-1.1, and because the Complainant failed to submit supporting evidence showing that he was an authorized individual that shall have access to said student records under N.J.A.C. 6A:32-7.5, the Custodian lawfully denied the Complainant access to the responsive record. N.J.S.A. 47:1A-6.
2. The Custodian did not unlawfully deny access to request item No. 2 because the Custodian certified in the Statement of Information that such records do not exist and there is no evidence in the record to refute the Custodian’s certification. *See Pusterhofer v. N.J. Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 2014