



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

March 1, 2011

RE: Sharon Simon v. Margate City School District (Atlantic)
GRC Complaint No. 2010-140

To All Parties:

Please find attached the Final Decision of the Government Records Council ("GRC") and the Findings & Recommendations of the Executive Director in the matter of GRC Complaint No.2010-140.

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. Pursuant to New Jersey Court Rule 2:9-7, after filing a notice of appeal from this decision with the Appellate Division, a request for a stay of the decision must be made to the GRC. If the GRC denies such request, a motion to stay the GRC's decision must be made to the Appellate Division.

Requests for a stay of a final decision must be in writing, delivered to the GRC and contemporaneously served upon all parties of the complaint (with a copy of such notice of appeal) pursuant to *N.J.A.C.* 5:105-2.12. Parties must file any objection to a request for a stay within ten (10) business days following receipt of the request. The Executive Director may grant a stay based on consideration of the request and any objection to the request submitted to the GRC. A request for a stay must include a detailed analysis of the issues, which must include the requestor's positions with regard to the following factors that the GRC will include in its decision-making process:

1. The clear likelihood of success on appeal on the merits of the claim;
2. The danger of irreparable harm if the stay is not granted;
3. The absence of substantial injury to other parties if the stay is grant: and
4. The public interest.

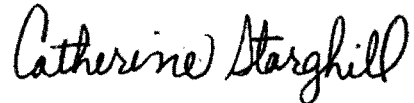
Requests for reconsideration must be completed on the appropriate form, delivered to the GRC within ten (10) business days following receipt of a GRC decision and contemporaneously served upon all parties of the complaint pursuant to *N.J.A.C.* 5:105-2.10. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The GRC, at its own discretion, may reconsider any decision it renders. The request for



reconsideration form is located on the GRC website at www.nj.gov/grc (under "Forms" at the bottom right of the homepage) or may be obtained by contacting the GRC directly at 609-292-6830.

Should you have any questions, please contact your Case Manager.

Thank you,

A handwritten signature in black ink that reads "Catherine Starghill". The signature is written in a cursive style with a large initial 'C'.

Catherine Starghill, Esq.
Executive Director

Enclosures

Parties of the Complaint:

Sharon Simon, Complainant, via Regular Mail and E-Mail

Dr. Theresa DeFranco, Custodian, via Regular Mail and E-Mail

Robert Muccilli, Counsel for Custodian, via Regular Mail and E-Mail



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FINAL DECISION

February 24, 2011 Government Records Council Meeting

Sharon Simon
Complainant

Complaint No. 2010-140

v.

Margate City School District (Atlantic)
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council ("Council") considered the February 15, 2011 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 has certified that no record responsive to the Complainant's OPRA request exist and there is no 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 24th Day of February, 2011

Robin Berg Tabakin, Chair
Government Records Council



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 24, 2011 Council Meeting**

**Sharon Simon¹
Complainant**

GRC Complaint No. 2010-140

v.

**Margate City School District (Atlantic)²
Custodian of Records**

Records Relevant to Complaint: Official copy of transcript from Virginia Polytechnic Institute and State University for Superintendent Dr. DeFranco.

Request Made: June 4, 2010

Response Made: June 7, 2010

Custodian: Dr. Theresa DeFranco³

GRC Complaint Filed: July 1, 2010⁴

Background

June 4, 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.

June 7, 2010

Custodian's response to the OPRA request. The Custodian responds in writing the same business day as receipt of such request. The Custodian states that access to the requested record is denied because a copy of the requested transcript is not in the file. Furthermore, the Custodian states that the Superintendent's position does not require a doctorate, although the Custodian has one.

June 24, 2010

E-mail from the Custodian's Counsel to the Complainant. Counsel states that on May 24, 2010 the Custodian met with three (3) parents, three (3) community members, one (1) School Board member and the Complainant; at that time the Custodian voluntarily made available for review her doctoral dissertation, graduation certificate, and the dated postage-stamped mailing tube in which the graduation certificate was mailed, all of which are in the Custodian's private possession. Custodian's Counsel states that

¹ No legal representation listed on record.

² Represented by Robert A. Muccilli, Esq., of Capehart Scatchard, P.A. (Mount Laurel, NJ).

³ The Custodian is the Superintendent of the School District and whose records are at issue in this complaint.

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

there is no basis to conclude that the Custodian has engaged in a misrepresentation of her credentials. Counsel states that, regarding the Complainant's OPRA request, the Custodian's transcript is not contained in the records of the School District and thus is not subject to disclosure under OPRA. Furthermore, Counsel states that the Board retained him as counsel to provide legal advice as needed on matters determined by the school district.

June 28, 2010

Letter from the Complainant to Christopher Storcella, Margate City School Board President. The Complainant states that attached is a copy of the OPRA request made on June 4, 2010 which was denied on June 7, 2010. The Complainant requests that Mr. Storcella provide a statutory basis for the denial of access to the requested records.

July 1, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:⁵

- Complainant's OPRA request dated June 4, 2010
- Letter from the Custodian to the Complainant dated June 7, 2010
- Letter from the Custodian's Counsel to the Complainant dated June 24, 2010
- Letter from the Complainant to Mr. Storcella dated June 28, 2010

The Complainant asserts that the Custodian's credentials have come into question due to discrepancies on her resume. The Complainant states that she filed an OPRA request on June 4, 2010 and received a denial of access to such request on June 7, 2010. The Complainant further states that she received a letter from Custodian's Counsel on June 24, 2010 regarding the denial of access to the requested record. Lastly, the Complainant states that she sent a certified letter to Mr. Storcella on June 28, 2010 asking for the statutory basis for the OPRA denial.

The Complainant does not agree to mediate this complaint.

July 20, 2010

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

July 23, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 4, 2010
- Letter from the Custodian to the Complainant dated June 7, 2010 (with attachments)
- Letter from Custodian's Counsel to the Complainant dated June 24, 2010

The Custodian certifies that the Complainant submitted an OPRA request on June 4, 2010 seeking an official copy of Dr. DeFranco's transcript from Virginia Polytechnic Institute. The Custodian certifies that she responded in writing to the Complainant's

⁵ The Complainant attaches additional materials not relevant to the adjudication of this complaint.

request on June 7, 2010. The Custodian explains that she denied the request because no responsive record exists. The Custodian further states that she advised the Complainant that the Superintendent's position does not require a doctorate. The Custodian argues that the School District has no obligation to produce a record that does not exist among its records in response to an OPRA request.

September 28, 2010

Letter from the Complainant to the GRC. In response to the Custodian's SOI, the Complainant asserts that there is no factual basis in the record for the Custodian to assert that the School District never received a transcript related to the Superintendent's degree. The Complainant cites to the School District Board Policy, Section 4111 Recruitment, Selection and Hiring⁶ and argues that the School District requires the Superintendent to provide a copy of a transcript as part of the hiring process and, furthermore, that OPRA requires the retention of that document. The Complainant further argues that she does not believe that the GRC can determine whether the Board has complied with the law based on assertion by Custodian's Counsel who has no personal knowledge of the facts.

October 1, 2010

Letter from Custodian's Counsel to the GRC. Custodian's Counsel responds to the Complainant's letter dated September 28, 2010. Custodian's Counsel states that Margate School District Board Policy Section 4111, Recruitment, Selection and Hiring⁷ was not adopted until October 14, 2009, after the Board of Education appointed the Superintendent. Further, Custodian's Counsel states that the Superintendent was appointed on January 14, 2009, effective July 1, 2009.

October 18, 2010

Letter from the Complainant to the GRC. The Complainant contends there is no factual basis in the record to support the Custodian's contention that the School District never received a copy of the requested record in its course of official business. The Complainant also argues that it would be inappropriate for the GRC to accept the Custodian's signed SOI because the Custodian has a vested interest in not producing the record. The Complainant states that the Board Secretary is responsible for ensuring the documents are received, verifying credentials, and reporting to the Board on the process.

November 2, 2010

E-mail from the Complainant to the GRC. The Complainant asserts that she has evidence to support her argument that the record requested is in fact "made, maintained or kept in the course of official business." The Complainant states that two (2) years ago she requested and obtained similar records for a former Superintendent and former

⁶ "The Superintendent of Schools shall take steps to verify the academic credentials of any potential candidate for employment, and ensure any degrees cited, academic coursework or credits completed, or titles claimed by an individual have been granted by an accredited institution of higher education. For Superintendent of Schools candidates, the board shall take similar steps. This includes, but is not limited to, ensuring the candidates supplied official transcripts to verify that credentials are from an accredited institution. The board secretary shall have responsibility for ensuring the documents are received, verifying credentials, and reporting to the board on the process. Documents shall not be accepted from non-accredited institutions or any fraudulent source."

⁷Custodian's Counsel included a copy of the Board's policy with his letter.

Principal. Thus, the Complainant argues that the District does in fact request, retrieve and maintain academic transcripts in the personnel files for new hires.

November 9, 2010

E-mail from Ms. Kelly M. Estevam, Esq.,⁸ to the GRC. Ms. Estevam states that the Board does have copies of the transcripts of a former Superintendent, Dr. Dominic Potena and the former Principal, Ms. Michelle Carney-Ray. Ms. Estevam also states that copies of these records were given to the Complainant pursuant to a previous OPRA request. Ms. Estevam argues that production of these records merely proves that the Board provides copies of transcripts pursuant to OPRA requests when they are in the Board's possession. Lastly, Ms. Estevam states that the Board does not have copies of Dr. DeFranco's transcript in its possession.⁹

December 13, 2010

E-mail from the Complainant to the GRC. The Complainant states that according to the Margate School Board Policy 3570 the School Board may add a reasonable special charge if the request is for a record not routinely maintained by the district. The Complainant states that the Board could pass the cost of obtaining the record to the individual making the request in cases where the requested record is not in the Board's files but can be obtained without creating an administrative or financial hardship.¹⁰

The Complainant further states that the Custodian and the School Board have acknowledged that the requested transcript is not in the file; the Complainant asserts that the Custodian and School Board can obtain the transcript with minimal administrative and financial hardship pursuant to School Board Policy 3570. The Complainant also states that at the December 2, 2010 Margate City Commission Meeting, Mr. Storcella was asked by Margate Commissioner Blumberg why the Board denied the Complainant's OPRA request when the requested transcript could be obtained from the University within three (3) to five (5) business days for \$10.00. The Complainant states that Mr. Storcella stated that the School Board had discussed and considered providing the transcript but was advised by outside counsel not to provide the record because another request might be made for a tax return.

December 16, 2010¹¹

Letter from Custodian's Counsel to the GRC. In response to the Complainant's e-mail dated December 13, 2010, Counsel states that Board Policy 3570 provides for access to public records of the School District in accordance with OPRA. Custodian's Counsel also states that the policy language addresses the issue of what happens when the records are not kept by the School District in the medium sought by the requestor. Custodian's

⁸ Ms. Estevam is an associate of the Custodian's Counsel.

⁹ In an e-mail to the GRC dated November 11, 2010, Ms. Estevam stated that the individual for whom the Board previously disclosed transcripts was the former Principal, Dr. McGinley and further stated that she accidentally typed the current Principal's name when she meant to type the former Principal's name.

¹⁰ Margate School Board Policy 3570 states in pertinent part that, "[a]ccess shall be granted in the medium or some other meaningful medium, unless the request is for a record in a medium not routinely used by the district, not routinely developed or maintained by the district; or requiring a substantial amount of manipulation or programming of information technology. In these cases, the board may add a special reasonable charge."

¹¹ The Complainant submitted additional correspondence not relevant to the adjudication of this complaint. Sharon Simon v. Margate City School District (Atlantic), 2010-140 – Findings and Recommendations of the Executive Director 4

Counsel further states that this language does not require the School District to disclose a record which it does not possess or require that the record be obtained so that it can be disclosed to a requestor. Counsel also states that the Complainant misinterpreted the policy language and her presumption pertaining to it is incorrect.

Counsel states that the Complainant appears to acknowledge in her e-mail dated December 13, 2010 that the requested record is not in the School District's possession. Counsel further states that the Complainant raised the School District's denial of her request in the public comment period at the meeting of the City Commissioners on December 2, 2010 and at that time stated that she is aware that the requested record is not in the School District's files and further acknowledged that the school District cannot be made to disclose something that is not in its files. Custodian's Counsel states that at that meeting the Board President stated that the School District does not possess the requested transcript and further stated that if the School District had possessed the requested record it would have been provided to the Complainant. Custodian's Counsel states that the Board President explained that the School District is not required under OPRA to provide a record that it does not possess and asserted that the School District cannot be expected to require an employee to go out and obtain a record simply because a member of the public has made an OPRA request for it, especially when the School District does not actually possess the record requested.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

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.

In the matter before the Council, the Custodian certified in the SOI that the record responsive to the Complainant’s OPRA request is not “made maintained or kept” in the School District’s files, nor has it “been received” in the course of official business. Thus, the Custodian certifies that the requested record could not be provided. The Complainant contends that the School District requires the Superintendent to supply a copy of a transcript as part of the hiring process. However, the Custodian’s Counsel asserts that this board policy was not adopted until after the Superintendent was appointed. Furthermore, the Complainant asserts that since she made an OPRA request two (2) years ago for similar records and was provided with such records, the District does in fact keep copies of transcripts for new hires in the course of its official business.

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.

The Complainant’s assertions regarding the School District having the record, however, do not rise to the level of competent, credible evidence sufficient to refute the Custodian’s certification herein that no records responsive to the Complainant’s request for an official copy of the Superintendent’s transcript from Virginia Polytechnic Institute and State University.

Therefore, because the Custodian has certified that no record responsive to the Complainant’s OPRA request exist and there is no 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian has certified that no record responsive to the Complainant’s OPRA request exist and there is no 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: Catherine Starghill, Esq.
Executive Director

February 15, 2011

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

A handwritten signature in cursive script, appearing to read "Charles A. Richman", with a long horizontal flourish extending to the right.

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: March 1, 2011