



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

June 25, 2008 Government Records Council Meeting

J.C. Complaint No. 2008-18
Complainant
v.
Bernards Township School District (Somerset)
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council (“Council”) considered the June 18, 2008 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 based on the inadequate evidence presented in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the records responsive to the Complainant’s request. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the custodian unlawfully denied access, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 25th Day of June, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 1, 2008



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2008 Council Meeting**

**J.C.¹
Complainant**

GRC Complaint No. 2008-18

v.

**Bernards Township School District Board of Education (Somerset)²
Custodian of Records**

Records Relevant to Complaint:

1. All records about the selection process for the 2006 Society of Women Engineers Award, including student applications and supportive paragraphs, the selection process, the names of the nominating committee, the instructions, the voting result, and all communications among involved persons.
2. All records about the selection process for the 2006 University Awards, including the instructions and criteria, the process, the names of the committee members, and all communications among the committee members and involved administrators. A list of all students who received the University Book Award for the past 7 years, including, but not limited to the name, race, gender, and grade of the recipients.
3. All records about the selection process for the 2006 Toyota scholarship, including the selection criteria and process, the names of the committee members, the rating formula, the detailed score sheets for each applicant and all communications among the committee members and administrators.
4. All records about the selection process for the 2007 Sanofi Aventis Pharmaceutical Chemistry Achievement award, including the instructions and criteria, the process, applications and recommendations, and all communications among the committee members and administrators.
5. All records about the district's Continental Math League Program ("CML") for the third, fourth and fifth grades in the last three years (2005-2007), including, but not limited to, the selection criteria, the qualifications and recommendations for all students admitted to CML, the rating formula and the score sheets for all students evaluated, the qualifications of the students who were not initially selected but were later admitted to CML and the reasons for the later admission, and all e-mails among the persons involved in the selection and Bernards Township School District administrators.
6. All current, collective and/or individual agreements or contracts between the Board of Education ("BOE") and Valerie Goger, Regina Rudolph, Francis T. Howlett Jr., Dan Friedman, Cheryl Dyer, Richard Stotler, Brian Heineman, George Villar, Scott Thompson, Kimberly Stocker, Ruthann Dein, Aimee

¹ No legal representation listed on record.

² Represented by Derlys M. Gutierrez, Esq., of Adams Stern Gutierrez & Lattiboudere LLC (Newark, NJ).
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- Mitchell, Steven Brush, and Margret Mitchell (except for the contracts that were already provided by the BOE).
7. All records about the qualification for position (resume), compensation, length of service and amount of pension for Valerie Goger, Regina Rudolph, Francis T. Howlett Jr., Dan Friedman, Cheryl Dyer, Richard Stotler, Brian Heineman, George Villar, Scott Thompson, Kimberly Stocker, Ruthann Dein.
 8. All records about the date and reason of separation for Richard Stotler, Cheryl Dyer, and Mr. Gregg Youngman.

Request Made: December 13, 2007

Response Made: December 18, 2007, January 15, 2008

Custodian: Ron Smith

GRC Complaint Filed: January 22, 2008

Background

December 13, 2007

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 18, 2007

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that the Complainant's request was received and that the Custodian will respond to it on or before January 15, 2008.

December 20, 2007

E-mail from the Complainant to the Custodian. The Complainant states that the Custodian's December 18, 2007 response to her OPRA request did not state a reason why the OPRA request could not be addressed within the statutorily mandated time frame. The Complainant asserts that the date by which the Custodian scheduled a response to her OPRA request, January 15, 2007, is an arbitrary date and not in compliance with the provisions of OPRA.

January 11, 2008

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

- Complainant's OPRA request dated December 13, 2007
- Letter from the Custodian to the Complainant dated December 18, 2007
- E-mail from the Complainant to the Custodian dated December 20, 2007

The Complainant refers to the above-referenced attachments and states that she faxed her OPRA request to the Custodian on December 13, 2007. The Complainant further states she received a letter from the Custodian dated December 18, 2007 wherein the Custodian denied her access to the records responsive to her request within the mandatory seven (7) day period without further explanation. The Complainant contends

the Custodian violated the provisions of OPRA by not complying with her request in a timely manner. The Complainant states she replied to the Custodian on December 20, 2007, in which she asserts the Custodian has no right to exceed the law by violating the terms of OPRA. The Complainant claims that the Custodian has denied her access to the requested records for approximately one (1) month from the date the Custodian received her request without legitimate justification.

January 31, 2008

Offer of Mediation sent to both parties.

January 31, 2008

The Custodian agrees to mediate this complaint. (The Complainant does not respond to the Offer of Mediation).

February 7, 2008

Request for the Statement of Information sent to the Custodian.

February 11, 2008

Custodian's Statement of Information ("SOI") with numerous attachments.³ Although the Custodian included eighty-five (85) pages of miscellaneous school records and documents as attachments to the SOI, the Custodian lists the following records as being responsive to the Complainant's OPRA request and certifies that he provided the records in their entirety to the Complainant:

- Letter titled "Nomination of (Student) for the 2005 Women in Technology Leadership Award" from Ridge High School to the Murray Center for Women in Technology, New Jersey Institute of Technology dated February 5, 2005
- Memo titled "Re: V.T." from the Office of the Assistant Superintendent to Valerie Goger with attachments dated February 27, 2006
- Official student transcript of V.T. dated October 3, 2006
- Letter addressed to the Office of Civil Rights, U.S. Department of Education, copied to Valerie Goger and Regina Rudolph dated October 12, 2006
- Contract between Valerie Goger and the Bernards Township Board of Education for the school years of 2005-2006 and 2006-2007
- Contract between Regina Rudolph and the Bernards Township Board of Education for the school years of 2005-2006 and 2006-2007
- Ridge High School "Faculty Handbook" (2006-2007)

None of the attachments provided by the Custodian are relevant to the instant complaint.

³ The Custodian fails to attach a copy of the OPRA records request upon which the Complaint is based in compliance with Item #6 of the SOI. Instead the Custodian submits a statement having no relevance to this complaint as Item #6. The Custodian also fails to complete Item #7 and Item #8 of the SOI, which are requests for the date the Custodian received the OPRA records request and the date the Custodian responded to the OPRA records request, respectively. The Custodian submits the document index; however, it is incomplete and inaccurate. The records responsive to the Complainant's request are not addressed.

The Custodian certifies that his search for the requested records involved finding the letters and memos requested. The Custodian also certifies that the records responsive to the request must be retained by the agency permanently in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian contends that he has completely complied with the Complainant's OPRA requests, and considers continued requests from the Complainant to be harassment.

February 11, 2008

Letter from GRC to the Custodian. The GRC informs the Custodian that his SOI is deficient.

February 15, 2008

Telephone call from the Custodian's Counsel to the GRC. The Custodian's Counsel places his appearance on the record and requests an extension of time to prepare the legal argument for the SOI.

February 15, 2008

Facsimile transmission from the GRC to the Custodian's Counsel. The GRC grants the Custodian's Counsel a five (5) business day extension of time to prepare and submit to the GRC the legal argument for the SOI.

February 27, 2008

Facsimile transmission from the GRC to the Custodian's Counsel. The GRC confirms Counsel's telephone request for a second five (5) business day extension of time to prepare and submit to the GRC the legal argument for the SOI. An extension of time was granted until March 4, 2008.

March 4, 2008

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel replies to the GRC's February 11, 2008 letter to the Custodian by presenting the Custodian's legal argument with the following attachments:

- Letter from Assistant Superintendent of the Bernards Township Board of Education Regina Rudolph to the Complainant dated January 10, 2006
- Memorandum from Assistant Superintendent of the Bernards Township Board of Education Regina Rudolph, to Superintendent Valerie Goger dated February 27, 2006
- Letter from the United States Department of Education Office for Civil Rights dated November 14, 2006
- A Summons and Complaint for J.C., Z.T. and V.T. v. Valerie Goger, et al., Superior Court of New Jersey, Law Division – Somerset County, Docket No. L-852-07
- The Custodian's response to the OPRA request dated December 18, 2007
- The Complainant's Denial of Access Complaint dated January 11, 2008

The Custodian's Counsel asserts that the December 18, 2007 letter in response to the Complainant's OPRA request was a reasonable response given the scope and voluminous nature of the Complainant's request. Counsel further contends the response could be characterized as a request for an extension of time.

Counsel states that the instant complaint is one of several seeking the same or similar information and contends that the motive behind the Complainant's repeated records requests is allegedly the Complainant's contention that the School District discriminated against the Complainant's daughter by failing to nominate her for specific awards. Counsel states that this was confirmed by correspondence received from the United States Department of Education Office of Civil Rights by the School District in August 2006.

Counsel asserts that the Complainant and Z.T., the father of V.T., have demonstrated a protracted history of filing several complaints against the School District with the purpose to harass the School District. Counsel argues that the instant complaint is yet another form of harassment and should be dismissed as frivolous. In support of his position, Counsel states that the Complainant and/or Z.T. have also filed:

- A discrimination complaint with the United States Department of Education Office of Civil Rights against the School District in 2006
- A legal action in Superior Court on May 24, 2007, wherein numerous officers and employees of the School District are named defendants, See J.C., et al., supra
- An OPRA request dated October 8, 2007
- A Denial of Access Complaint in November 2007

Custodian's Counsel asserts that the Complainant's request primarily involves student information that is protected by federal and state law, regulation and administrative orders and for these reasons is exempt from disclosure. Counsel asserts that the Complainant also requested staff information protected by law. Counsel cites *N.J.A.C. 6:3-6.1* and *N.J.A.C. 6:3-6.3* and the Council's decision in Bava v. Bergen County School District, GRC Complaint No. 2003-84 (January 2004) in support of his position. In addition, Counsel contends the Complainant's request was overly broad, burdensome and illegal in many respects.

Counsel represented that two (2) documents requested by the GRC, a copy of the OPRA request to which the Custodian responded and the document index, were attached; however, these documents were not attached to this letter received by the GRC.

March 5, 2008

Letter from the GRC to the Custodian. The GRC returns pages numbered three (3) and four (4) of the Custodian's SOI because Items No. 6 through 10 are incomplete and/or not responsive. The GRC requests the Custodian promptly correct the deficiencies. Further, the GRC advises the Custodian that the GRC is unclear whether certain records requested by the Complainant were disclosed, since the Custodian certified that he had disclosed the records but Custodian's Counsel argued that the same records were exempt from disclosure pursuant to law. The GRC asks the Custodian to clarify whether the records were disclosed or not disclosed.

March 5, 2008

Telephone call from Custodian's Counsel to the GRC. Custodian's Counsel requests a copy of the Custodian's SOI.

March 5, 2008

Facsimile transmission from the GRC to the Custodian's Counsel. The GRC confirms Counsel's telephone request this date for a copy of the Custodian's SOI and forwards the SOI to Counsel.

March 5, 2008

E-mail from the Complainant to the GRC. The Complainant acknowledges receipt of a copy of the GRC's letter to the Custodian this date. The Complainant states that she never received copies of any submissions from the Custodian to the GRC and wants the Custodian to provide copies of all the Custodian's submissions so she can reply if she so desires. The Complainant also demands that the GRC retract the second extension of time the GRC granted to Custodian's Counsel to prepare and submit the Custodian's legal argument to the GRC.

March 6, 2008

E-mail from the GRC to the Complainant. The Complainant is informed by the GRC that it is the GRC's prerogative to grant extensions of time for party submissions and therefore her demand that the GRC retract its second extension of time granted to Custodian's Counsel is denied. The Complainant is also advised that the GRC encourages both parties to the complaint to copy each other on any submissions to the GRC. The Complainant is advised that the GRC will forward to her copies of any file documents she needs upon her request

March 6, 2008

Facsimile transmission from the GRC to the Custodian. The Custodian is informed that he certified in the SOI that he sent a copy of the SOI to the Complainant but the Complainant states she never received the copy. The GRC asks the Custodian to send a duplicate copy of the SOI to the Complainant.

March 12, 2008

Telephone call from the Custodian's Counsel to the GRC. Counsel informs the GRC that he is in receipt of the GRC's March 5, 2008 letter to the Custodian seeking clarification of the SOI. Counsel advises the GRC that he will fax the Custodian's clarification to the GRC no later than March 17, 2008.

March 13, 2008

E-mail from the Complainant to the GRC. The Complainant informs the GRC that, contrary to the GRC's directions, the Custodian never forwarded a copy of the SOI to her.

March 14, 2008

E-mail from the GRC to the Complainant. The GRC forwards a copy of the Custodian's SOI to the Complainant.

March 17, 2008

E-mail from the Complainant to the GRC. The Complainant acknowledges receipt of the Custodian's SOI forwarded to her by the GRC. The Complainant indicates she wants to reply to the SOI, but two (2) documents referenced as attachments, the OPRA request and document index, were not attached.

March 18, 2008⁴

Letter from the Custodian's Counsel to the GRC. Counsel informs the GRC that she has reviewed the Custodian's SOI, and that the Custodian submitted all of the requested records to the Complainant via FedEx on January 15, 2008. Counsel states she has enclosed a certification from the Custodian concerning the records the Custodian disclosed to the Complainant along with another copy of those records.⁵ The documents enclosed with this letter are different than the documents the Custodian had attached to the SOI. Counsel also encloses a copy of receipt number 864617204110 for a FedEx Airbill addressed to the Complainant dated January 15, 2008.⁶

March 19, 2008

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the GRC never received the attachments to the Custodian's SOI that the Complainant requested in her e-mail to the GRC dated March 17, 2008. The GRC further informs the Complainant that the GRC attempted to obtain additional records as well as a clarification with respect to the Custodian's SOI but that no clarification or records were forthcoming. The GRC advises the Complainant that the GRC has started the adjudication of this complaint without further input from the Custodian and that if the Complainant intends to respond to the Custodian's SOI she should do so promptly.

March 19, 2008

E-mail from the Complainant to the GRC. The Complainant informs the GRC that she will respond to the Custodian's SOI by March 21, 2008.

March 21, 2008

The Complainant's Response to the Custodian's SOI. The Complainant states that the Custodian:

- Did not provide a lawful response to the Complainant's OPRA request within the seven (7) business day time period pursuant to OPRA as evidenced by the Custodian's December 18, 2007 letter in reply to the Complainant's request
- Did not disclose all of the records requested by the Complainant
- Lied on his certification by stating that he forwarded the SOI simultaneously to the GRC and the Complainant and that he provided the type of records he certified he had provided to the Complainant

⁴ This letter and the enclosures were sent via regular mail and were received by the GRC on March 24, 2008.

⁵ Custodian's Counsel enclosed sixty-eight (68) pages of documents that are purported to be the records responsive to the Complainant's OPRA request.

⁶ Counsel also attached an additional receipt which is not relevant to the adjudication of this complaint. J.C. v. Bernards Township School District (Somerset), 2008-18 – Findings and Recommendations of the Executive Director

- Failed to cite the lawful reason for denying the Complainant access to the requested records, and therefore failed to meet the burden of proving that such denial of access was authorized by law
- Failed to provide a complete document index pursuant to the court’s decision in Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App.Div. 2007)
- Failed to support his argument that the Complainant’s OPRA request was overly broad or frivolous
- Asserted *post hoc* claims that are barred by the legal doctrines of estoppel, laches and waiver

The Complainant states that the Custodian’s claim that he disclosed all the records requested was subsequently contradicted by Custodian’s Counsel when Counsel stated that student records are not public records that can be disclosed. The Complainant insists that the Custodian should be punished for falsifying the SOI.⁷

March 24, 2008

The Complainant’s Amended Response to the Custodian’s SOI. The Complainant contends that the inconsistencies in the submissions to the GRC prepared by Custodian’s Counsel and dated March 4, 2008 and March 18, 2008 reflect deception and bad faith on the part of the Custodian. The Complainant repeats her assertion that the Custodian did not submit to the Complainant all documents available that are responsive to the OPRA request. Accordingly, the Complainant contends that the statement of Custodian’s Counsel to that effect is not true.

The Complainant further contends the Custodian is circumventing her request by stating that he has provided “all of the documents **available**” (emphasis added by the Complainant). The Complainant states that certain records responsive to the request were arbitrarily found to be unavailable by the Custodian. The Complainant contends that all records responsive to the request that were unavailable should have been listed on a document index by the Custodian. By doing so, the Complainant contends the reasons for record unavailability could have been conveyed to her.

May 14, 2008

Letter from the GRC to Custodian’s Counsel. The GRC informs Counsel that the GRC received two (2) conflicting legal arguments from two (2) different attorneys in the law firm. The GRC also informs Counsel that the Custodian’s SOI is incomplete and not responsive to the Denial of Access Complaint. Custodian’s Counsel is given a five (5) business day period to submit a properly prepared SOI and legal argument.

May 21, 2008

Letter from Custodian’s Counsel to the GRC. Custodian’s Counsel states that the Custodian is not presently available for consultation and requests a five (5) business day extension of time to respond to the GRC’s letter dated May 14, 2008.

⁷ Additional arguments were submitted by the Complainant; however, such arguments were either not relevant to this complaint or restate facts/assertions already presented to the GRC.

May 27, 2008

Facsimile transmission from the GRC to Custodian's Counsel. Custodian's Counsel is granted until May 28, 2008 to respond to the GRC's request for additional information. Counsel is advised that this will be the third and final extension of time granted by the GRC due to the Custodian's unavailability.

May 27, 2008

Letter from the Custodian's Counsel to the GRC.⁸ The Custodian's Counsel replies to the GRC's May 14, 2008 by forwarding the Custodian's SOI and Counsel's legal argument. The Custodian's Counsel states that the prior submissions the GRC received were intended to convey to the GRC what the Custodian believes to be the harassing nature of this complaint. Counsel contends that the OPRA request was made on December 13, 2008 and the complaint was filed on December 18, 2008. Counsel further contends that certain items did not have to be disclosed; however, the Custodian provided those items on January 15, 2008.

Counsel forwards the Custodian's completed SOI.⁹ Counsel asserts that the Complainant did not give the Custodian enough time to search and provide the records requested, especially since the request was received a couple weeks before the Christmas break. Counsel asserts that the Complainant filed the Denial of Access Complainant immediately after she was notified the records would be produced on January 15, 2008. Counsel states that this is not the first time records of this nature have been requested by the Complainant and her family. Finally, Counsel contends that the Custodian complied with the records request completely and provided all of the information requested that is subject to OPRA disclosure despite the request being overly burdensome, onerous, frivolous and with intention to harass.

June 2, 2008

E-mail from the Complainant to the GRC. The Complainant states she is amending her prior replies to the Custodian's submission dated March 21, 2008 and March 24, 2008 to reflect a reply to the Custodian's submission dated May 27, 2008. The Complainant points out that, contrary to the Custodian's contention, the Custodian did not submit all the records responsive to the request because the Custodian indicates in the document index that he did not provide resumes, pension records and certain contracts/agreements. The Complainant also states that she did not file her Denial of Access Complaint days after her OPRA request as asserted by the Custodian but rather four (4) weeks after her OPRA request. The Complainant contends this was in excess of the seven (7) business day statutory response time period. The Complainant further contends that the Custodian modified the records retention period significantly in the recent submission. The Complainant contends the Custodian violated OPRA by

⁸ This submission was received via FedEx delivery on May 29, 2008; however, the Custodian's Counsel provided the GRC with proof that it was dispatched on May 27, 2008 priority overnight to arrive on the due date. Accordingly, the GRC informed the parties that the submission would be deemed received by the due date.

⁹ The Custodian failed to prepare a new certification; he merely forwarded a copy of his original certification dated February 11, 2008. The Custodian also circled three (3) paragraphs as his averments and struck the remaining two (2) paragraphs. One of the paragraphs he struck was intended to be his averment that the documents attached to the SOI were true copies.

unlawfully denying access to the requested records and obstructed the GRC's adjudication process by lying and making baseless counterclaims.

June 4, 2008

E-mail from the Complainant to the GRC. The Complainant contends that the Superintendent of the BOE admitted the existence of a contract between the Bernards Township BOE and the Bernards Township Administrator's Association in a November 17, 2005 e-mail. The Complainant states that she requested this same contract in her OPRA request but the Custodian denied the existence of such a record in the SOI.

June 7, 2008

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel contends that the Complainant made an erroneous statement to the GRC in the Complainant's e-mail to the GRC dated June 4, 2008. Counsel states that the Complainant contends the Custodian denied the existence of a contract; however, Counsel states the Complainant requested employment contracts for certain individuals, not contracts between the BOE and an association of administrators. Counsel contends that such a contract would have been disclosed by the Custodian if the Complainant had requested a responsive collective bargaining agreement.

June 9, 2008

E-mail from the Complainant to the GRC. The Complainant contends she did include collective bargaining agreements in her OPRA request and the Custodian therefore unlawfully denied her request for such a record. The Complainant further contends the Custodian's Counsel is attempting to mislead the GRC.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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 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. . A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

Based on the inadequate evidence presented in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the records responsive to the Complainant’s request. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the custodian unlawfully denied access, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that based on the inadequate evidence presented in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the records responsive to the Complainant’s request. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the custodian unlawfully denied access, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By:

John E. Stewart
Case Manager/*In Camera* Attorney

Approved By:

Catherine Starghill, Esq.
Executive Director

June 18, 2008