



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

August 11, 2009 Government Records Council Meeting

Kathleen Fallstick
Complainant

Complaint No. 2008-156

v.

Haddon Township (Camden)
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the July 22, 2009 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:

1. Because the requested record is disclosable pursuant to N.J.S.A. 47:1A-10, N.J.S.A. 47:1A-9.b., Executive Order No. 26 (McGreevey 2002), and Mendes v. Tinton Falls Board of Education, GRC Complaint No. 2006-201 (March 2007), the Custodian has violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the requested record.
2. Although the Custodian violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the requested record, the Custodian certified that after consulting with the Township Attorney, she ultimately provided the Complainant with a redacted copy of Ms. Burns’ resume. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 11th Day of August, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 17, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Kathleen Fallstick¹
Complainant**

GRC Complaint No. 2008-156

v.

**Haddon Township (Camden)²
Custodian of Records**

Records Relevant to Complaint: A copy of the resume submitted by Kathleen Burns for the position of Administrator for the Haddon Township Business Improvement District.

Request Made: July 9, 2008

Response Made: July 15, 2008

Custodian: Antoinette Jakeman

GRC Complaint Filed: July 21, 2008³

Background

July 9, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant electronically requests the records relevant to this complaint listed above on an official OPRA request form.

July 15, 2008

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail 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 pursuant to N.J.S.A. 47:1A-10, the record requested is exempt from disclosure as a personnel record.

July 21, 2008

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

- Complainant's OPRA request dated July 9, 2008;
- E-mail from the Custodian to the Complainant dated July 15, 2008;
- Haddon Township Resolution # 2008-069;
- Haddon Township meeting minutes of March 18, 2008;

¹ No legal representation listed on record.

² Represented by Richard Klineburger, III, Esq., of Klineburger & Nussey (Haddonfield, NJ).

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

- A list of OPRA’s 24 exemptions to disclosure.⁴

The Complainant states that Haddon Township appointed Kathleen Burns as Business Improvement District Director pursuant to Resolution 2008-069 at the March 18, 2008 meeting of the Board of Commissioners. The Complainant also states that she submitted an OPRA request for a copy of Kathleen Burns’ resume on July 9, 2008. The Complainant further states that she received an e-mail denying her access to the requested record pursuant to N.J.S.A. 47:1A-10 on July 15, 2008. The Complainant asserts that the qualifications of an individual who is hired by a public agency and paid with tax money are of public interest.

The Complainant did not agree to mediate this complaint.

July 24, 2008

Request for the Statement of Information sent to the Custodian.

July 31, 2008

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated July 9, 2008;
- E-mail from the Custodian to the Complainant dated July 15, 2008;
- A list of OPRA’s 24 exemptions to disclosure;
- Executive Order No. 26;
- Letter from the Custodian to the Complainant dated July 31, 2008;⁵
- Redacted copy of Kathleen Burns’ resume.

The Custodian certifies that she received the Complainant’s OPRA request on July 9, 2008, and that she denied the Complainant’s OPRA request on July 15, 2008 pursuant to N.J.S.A. 47:1A-10. The Custodian further certifies that she received the Complainant’s Denial of Access Complaint on July 24, 2008, as well as Executive Order 26.⁶ The Custodian certifies that, after consulting with the Township Attorney, she provided the Complainant with a redacted copy of Kathleen Burns’ resume on July 31, 2008.

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.

⁴ It is GRC procedure to list attachments in chronological order. However, these entries are listed in order of relevance for the sake of clarity.

⁵ This letter is not included in the Background as a separate entry because the Custodian provides essentially the same information in the letter as the SOI and on the same date.

⁶ The GRC did not include a copy of Executive Order No. 26 with the request for the SOI.

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 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.*” (Emphasis added.) N.J.S.A. 47:1A-9.a.

OPRA states in part:

“Notwithstanding the provisions of [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency ... shall not be made available for public access, except that ... *data contained in information which disclose conformity with specific experiential, education or medical qualifications required for government employment ...*” N.J.S.A. 47:1A-10 (Emphasis added.)

Also, Executive Order No. 26 (McGreevey 2002) states that:

“No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. *The resumes of successful candidates shall be disclosed once the successful candidate is hired.*” (Emphasis added.)

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 requested a copy of the resume of Kathleen Burns. Ms. Burns was appointed the Business Improvement District Administrator by Haddon Township. The Custodian denied the Complainant access to the requested record stating that it was exempt from disclosure under OPRA as a personnel record.

OPRA provides that all government records are subject to public access unless exempt. N.J.S.A. 47:1A-1. OPRA also states personnel records are not government records except for data contained in information which disclose conformity with specific experiential, education or medical qualifications required for government employment. N.J.S.A. 47:1A-10. OPRA further provides that it shall not abrogate any exemption 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.

Executive Order No. 26 (McGreevey 2002) states in relevant part that “the resumes of successful candidates shall be disclosed once the successful candidate is hired.” In North Jersey Media Group Inc. v. State of New Jersey, Department of Personnel, 389 N.J. Super. 527, at 535 (2006), the complainant sought records identifying the educational qualification of an employee. The court stated that “in examining the plain language of EO26, the court finds that only the ‘resumes of successful candidates’ are disclosed to the public.”

Further, in Suzanne Mendes v. Tinton Falls Board of Education, GRC Complaint No. 2006-201 (March 2007), the custodian denied the complainant access to the requested resumes, stating that the information contained in a resume is not a public record. The GRC held that the complainant was unlawfully denied access to the requested resumes because Executive Order No. 26 (McGreevey 2002), explicitly grants access to the resumes of successful candidates once they are hired.

Because the requested record is disclosable pursuant to N.J.S.A. 47:1A-10, N.J.S.A. 47:1A-9.b., Executive Order No. 26 (McGreevey 2002), and Suzanne Mendes v. Tinton Falls Board of Education, GRC Complaint No. 2006-201 (March 2007), the Custodian violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the requested record.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div.1996).

Although the Custodian violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the requested record, the Custodian certified that after consulting with the Township Attorney, she ultimately provided the Complainant with a redacted copy of Ms. Burns’ resume. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the requested record is disclosable pursuant to N.J.S.A. 47:1A-10, N.J.S.A. 47:1A-9.b., Executive Order No. 26 (McGreevey 2002), and Mendes v. Tinton Falls Board of Education, GRC Complaint No. 2006-201 (March 2007), the Custodian has violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the requested record.
2. Although the Custodian violated N.J.S.A. 47:1A-6 by unlawfully denying the Complainant access to the requested record, the Custodian certified that after consulting with the Township Attorney, she ultimately provided the Complainant with a redacted copy of Ms. Burns’ resume. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s denial of access appears negligent and heedless since

she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 22, 2009