



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

May 26, 2015 Government Records Council Meeting

Rafael L. Martinez
Complainant

Complaint No. 2014-126

v.

Edison Board of Education (Middlesex)
Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 2015 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. With respect to the Complainant’s request from January 17, 2014, item Nos. 1 and 2 are invalid because they failed to include the senders and/or recipients of the e-mails sought. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Kaplan v. Twp. of Winslow (Camden), GRC Complaint No. 2010-202 (Final Decision dated October 25, 2011). The Custodian has thus lawfully denied access to same. N.J.S.A. 47:1A-6.
2. Because N.J.A.C. 6A:32-7.5 only permits the Complainant access to information regarding S.M. (his daughter) and because he did not provide any evidence supporting that he was allowed to obtain any other student information, the redactions made to the responsive records were lawful. N.J.S.A. 47:1A-9; N.J.A.C. 6A:32-7.1 et seq.; Popkin v. Englewood Bd. of Educ. (Bergen), GRC Complaint No. 2011-263 (December 2012). The Custodian has thus lawfully denied access to those redactions. N.J.S.A. 47:1A-6.
3. The Custodian bore his burden of proving he did not unlawfully deny access to any responsive records because he certified in the Statement of Information that all responsive records were provided to the Complainant. N.J.S.A. 47:1A-6; Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Kohn v. Twp. of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011). Additionally, there is no evidence in the record to refute this certification.



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 26th Day of May, 2015

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: May 28, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 26, 2015 Council Meeting**

**Rafael L. Martinez¹
Complainant**

GRC Complaint No. 2014-126

v.

**Edison Board of Education (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

January 17, 2014 OPRA request:

1. E-mails from August 1, 2013, to January 17, 2014, regarding S.M., the Complainant's daughter.
2. E-mails from August 1, 2013, to January 17, 2014 regarding the girls' junior varsity ("JV") and varsity basketball teams.
3. A link to the rules pertaining to the JP Stevens girls basketball team.

January 29, 2014 OPRA request:

1. E-mails between eight (8) specified e-mail addresses from August 1, 2013, to January 17, 2014, regarding S.M., the Complainant's daughter.
2. Rules pertaining to the JP Stevens girls basketball team that include a rule requiring a note from parents in order to leave a game with a parent rather than on the bus.
3. Rules to which the girls basketball team are required to follow.

February 8, 2014 OPRA request:

1. E-mails between eight (8) specified e-mail addresses from August 1, 2013, to January 17, 2014, regarding S.M., the Complainant's daughter, and the JP Stevens girls basketball team.
2. E-mails between eight (8) specified e-mail addresses from January 13, 2014, to February 10, 2014, regarding the Complainant's OPRA requests.

Custodian of Record: Daniel P. Michaud

Request Received by Custodian: January 17, 2014, January 29, 2014, and February 8, 2014

Response Made by Custodian: January 28, 2014, February 6, 2014, and February 11, 2014

GRC Complaint Received: March 19, 2014

¹ No legal representation listed on record.

² Represented by Douglas M. Silvestro, Esq., of Schwartz, Simon, Edelstein & Celso, LLC (Whippany, NJ).

Background³

Request and Response:

January 17, 2014 OPRA request

On January 17, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to Kathy McKean, Athletic Supervisor, seeking the above-mentioned records. On January 23, 2014, Ms. McKean advised the Complainant that no e-mails regarding S.M. exist, nor do any written basketball rules. On January 25, 2014, the Complainant disputed that no rules existed and renewed his OPRA request.

On January 28, 2014, the Custodian responded in writing, advising that the Complainant’s first two (2) request items were invalid because they failed to identify a sender or recipient. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian also noted that any records that exist are exempt as student records. N.J.A.C. 6A:32-2.1. Finally, the Custodian stated that, as previously stated by Ms. McKean, no rules for the girls basketball team exist. However, the Custodian stated that he was providing the “Permission Form for Interscholastic Sports,” which outlined general rules for participation in athletics.

January 29, 2014 OPRA request

On January 29, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Edison Board of Education (“BOE”) seeking the above-mentioned records. On February 6, 2014, the Custodian responded in writing, advising that under N.J.A.C. 6A:32-7.1 *et seq.*, and not OPRA, he was providing all e-mails between the specific individuals that refer to S.M. The Custodian stated that he redacted all other student information to which the Complainant was not entitled under N.J.A.C. 6A:32-7.1 *et seq.* Additionally, the Custodian stated that he was providing a copy of the BOE’s policies applicable to all student athletes, not just the girls basketball team.

February 8, 2014 OPRA request

On February 8, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. Therein, the Complainant accused the Custodian of ignoring his OPRA requests and disputed redactions made to the responsive records previously provided.

On February 11, 2014, the Custodian responded in writing advising that he did not ignore the Complainant’s OPRA requests. The Custodian noted that the Complainant acknowledged receipt of the Custodian’s February 6, 2014, response. The Custodian noted that any records redacted or withheld were student records not subject to access under OPRA pursuant to N.J.A.C. 6A:32-7.1 *et seq.* However, the Custodian provided records to the Complainant which

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.

needed to be redacted because of the presence of other student names and/or information. Finally, the Custodian noted that aside from the Complainant's e-mailed OPRA request, no other records responsive to OPRA request item No. 2 exist.

On the same day, the Complainant resubmitted this request and threatened to file a complaint if the Custodian did not respond by February 12, 2014, and clarify what constitutes a "student record." On February 12, 2014, the Custodian's Counsel advised the Complainant that the BOE provided the Complainant with all responsive records, 171 pages in total. Counsel noted that some pages were redacted because they contained other student names or information, to which the Complainant is not entitled under OPRA, the Family Educational Rights & Privacy Act, or any other statute or regulation. Counsel stated that, in records where S.M. was mentioned in a multi-page document, the Complainant received only that page containing S.M.'s name with redactions for all other student information. For example, a 12 page list of students eligible to play high school sports contained S.M.'s name: the single page on which her name appeared was provided, and the other 11 pages were withheld.⁴

Notwithstanding the Custodian's response, the Complainant subsequently resubmitted his OPRA request for a third (3rd) time.

Denial of Access Complaint:

On March 19, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant alleged that each response from the BOE was incomplete despite the fact that he narrowed the scope of his OPRA request on multiple occasions. The Complainant contended that he was repeatedly denied access to responsive records either because some were exempt as student records or because no records existed.

Statement of Information:

On April 4, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA requests on January 17 and January 29, 2014. The Custodian certified that he responded in writing on multiple occasions to provide responsive records. The Custodian affirmed that he provided the Complainant with all records responsive to the Complainant's OPRA requests, although some information was redacted in accordance with N.J.A.C. 6A:32-7.1 et seq.

The Custodian argued that the BOE provided all records that the Complainant was allowed to obtain within the parameters of N.J.A.C. 6A:32-7.5. Specifically, those records consisted of a number of policies for scholastic sports and e-mails regarding S.M. and/or the girls basketball team (171 pages in total). The Custodian contended that the redacted portions of each record concerned a student other than S.M. and was thus properly redacted.

⁴ In each of the follow-up requests, the Complainant continuously exclaimed that he was entitled to personnel records under OPRA. However, at no point did the Complainant actually request records considered to fall within the parameters of a personnel record as indicated in N.J.S.A. 47:1A-10.

Analysis

Validity of Request

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 New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.”* N.J.S.A. 47:1A-1.

MAG, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁵ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The GRC established criteria deemed necessary under OPRA to specifically request an email communication in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07

⁵ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

(April 2010). The Council determined that to be valid, such requests must contain: (1) the content and/or subject of the email, (2) the specific date or range of dates during which the email(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. *See Elcavage*, GRC 2009-07; *Sandoval v. NJ State Parole Bd.*, GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in *Elcavage* to other forms of correspondence, such as letters. *See Armenti v. Robbinsville Bd. of Educ. (Mercer)*, GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

With respect to the Complainant's January 17, 2014, request, items No. 1 and 2 sought e-mails for a specific time period regarding an identifiable subject. However, the request items failed to identify senders and/or recipients. The Custodian denied access to these items on the basis that same were invalid.⁶ Based on the criteria set forth in *Elcavage*, GRC 2009-07, the GRC is satisfied that these two (2) items were invalid. *See also Kaplan v. Twp. of Winslow (Camden)*, GRC Complaint No. 2010-202 (Final Decision dated October 25, 2011)(holding that the complainant's request was invalid because it failed to identify senders and/or recipients).

Therefore, request item Nos. 1 and 2 are invalid because they failed to include the senders and/or recipients of the e-mails sought. *MAG*, 375 *N.J. Super.* at 546; *Bent*, 381 *N.J. Super.* at 37; *NJ Builders*, 390 *N.J. Super.* at 180; *Schuler*, GRC 2007-151; *Elcavage*, GRC 2009-07; *Kaplan*, GRC 2010-202. The Custodian has thus lawfully denied access to same. *N.J.S.A.* 47:1A-6.

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.

The Complainant filed the instant complaint arguing that he was repeatedly denied access to responsive records either because of a "student record" exemption or because no records exist. In the SOI, the Custodian certified that he provided all responsive records that existed. Further, the Custodian asserted that he lawfully denied access to portions of records exempt from disclosure under *N.J.A.C.* 6A:32-7.1 *et seq.*

Based on the duplicative nature of the Complainant's OPRA requests and request items, the GRC will address the following issues in separate parts as follows: 1) whether the Custodian lawfully redacted records under *N.J.A.C.* 6A:32-7.1 *et seq.*; and 2) whether the Custodian provided all records that were responsive to the Complainant's OPRA request.

Redaction of Student Records

OPRA also provides that:

⁶ The GRC notes that the Complainant subsequently submitted two (2) new OPRA requests and additional clarifications that cured this deficiency.

[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 regulations 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 regulations 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 . . . the parent of the student under the age of 18 . . .” N.J.A.C. 6A:32-7.5(e)(1).

In Popkin v. Englewood Bd. of Educ. (Bergen), GRC Complaint No. 2011-263 (December 2012), 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 . . .

Id. at 8. *See also* Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014).

The Council’s prior decisions in this case indicate that an individual may have access to “student records” if they meet one of the codified exceptions present in the State Board of Education’s regulations. Here, the Custodian provided a significant number of e-mails and redacted attachments that included information on all students except for his daughter, S.M. Although the Complainant took issue with these redactions, he did not provide any evidence authorizing him to obtain any student information other than that of S.M., for which N.J.A.C. 6A:32-7.5 allows him access. For these reasons, the GRC is satisfied that the Complainant lawfully denied access to the redacted information.

Accordingly, because N.J.A.C. 6A:32-7.5 only allowed the Complainant to have access to information regarding S.M. (his daughter), and because he did not provide any evidence supporting that he was allowed to obtain any other student information, the redactions made to

the responsive records were lawful. N.J.S.A. 47:1A-9; N.J.A.C. 6A:32-7.1 et seq.; Popkin, GRC 2011-263. The Custodian has thus lawfully denied access to those redactions. N.J.S.A. 47:1A-6.

Provision of All Responsive Records

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian certified that the record provided to the complainant was the only record responsive to the request. *Id.* The Council found that there had thus been no unlawful denial of access. *Id.* See also Kohn v. Twp. of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011)(holding custodian did not unlawfully deny access when he certified that he provided all responsive records to complainant, and there existed no credible evidence in record to refute such certification).

The issue of whether the Custodian provided all responsive records is complicated by the rapid interaction of the parties over a short period of time. Specifically, the Complainant submitted three (3) OPRA requests and multiple clarifications over a period of eighteen (18) business days. Further, the Custodian responded on several occasions over that time period, either advising that no records exist, providing access to records, or advising that all responsive records were provided. To this end, the Custodian certified in the SOI that he provided 171 pages of records to the Complainant between February 6 and February 12, 2014. Those records consisted of a number of policies for scholastic sports and e-mails regarding S.M. and/or the girls basketball team. The Custodian also attached these records to the SOI.

The GRC conducted a comprehensive review of the responsive records and has determined that these records adequately apply to the Complainant's various requests for e-mails regarding S.M., e-mails regarding the girls' basketball team, and rules applicable to the girls basketball team. Additionally, although the Complainant contended that he was routinely denied access to records, the evidence reveals that the Custodian provided a multitude of records and advised the Complainant that no other records exist. Moreover, the Custodian certified to this fact in the SOI.

Therefore, the Custodian bore his burden of proving he did not unlawfully deny access to any responsive records because he certified in the SOI that all responsive records were provided to the Complainant. N.J.S.A. 47:1A-6; Burns, GRC 2005-68; Kohn, GRC 2009-203 & 2009-211. Additionally, there is no evidence in the record to refute this certification.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. With respect to the Complainant's request from January 17, 2014, item Nos. 1 and 2 are invalid because they failed to include the senders and/or recipients of the e-mails sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151

(February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Kaplan v. Twp. of Winslow (Camden), GRC Complaint No. 2010-202 (Final Decision dated October 25, 2011). The Custodian has thus lawfully denied access to same. N.J.S.A. 47:1A-6.

2. Because N.J.A.C. 6A:32-7.5 only permits the Complainant access to information regarding S.M. (his daughter) and because he did not provide any evidence supporting that he was allowed to obtain any other student information, the redactions made to the responsive records were lawful. N.J.S.A. 47:1A-9; N.J.A.C. 6A:32-7.1 et seq.; Popkin v. Englewood Bd. of Educ. (Bergen), GRC Complaint No. 2011-263 (December 2012). The Custodian has thus lawfully denied access to those redactions. N.J.S.A. 47:1A-6.
3. The Custodian bore his burden of proving he did not unlawfully deny access to any responsive records because he certified in the Statement of Information that all responsive records were provided to the Complainant. N.J.S.A. 47:1A-6; Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Kohn v. Twp. of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011). Additionally, there is no evidence in the record to refute this certification.

Prepared By: Ernest Bongiovanni
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

May 19, 2015