



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

April 30, 2008 Government Records Council Meeting

Chaim Fisher
Complainant
v.

Complaint No. 2006-193

Lakewood Board of Education (Ocean)
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council (“Council”) considered the April 23, 2008 Supplemental 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 no further adjudication is required because the Complainant failed to appear at the scheduled proceeding on March 13, 2008 at the Office of Administrative 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 30th Day of April, 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, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: May 12, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 30, 2008 Council Meeting**

**Chaim Fisher¹
Complainant**

GRC Complaint No. 2006-193

v.

**Lakewood Board of Education²
Custodian of Records**

Records Relevant to Complaint: Catapult Learning's revised, detailed proposal, as reviewed by the Board of Education on September 28, 2006 (only the pages detailing the budget).³

Request Made: October 5, 2006 and October 24, 2006

Response Made: October 12, 2006, October 31, 2006 and April 12, 2007

Custodian: Edward Luick

GRC Complaint Filed: November 3, 2006

Background

June 27, 2007

Government Records Council's ("Council") Interim Order. At its June 27, 2007 public meeting, the Council considered the June 20, 2007 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, found that:

1. Because the requested proposal was incorporated as part of the contract between the Lakewood BOE and Catapult Learning for Title I services which was approved by the Board on September 28, 2006 (prior to the Complainant's OPRA requests), the requested proposal is a government record pursuant to N.J.S.A. 47:1A-1.1 and is subject to immediate public access as part of the approved contract. Thus, the Custodian's assertion that the requested proposal is exempt as deliberative material or information which if disclosed, would give an advantage to bidders pursuant to N.J.S.A. 47:1A-1.1 is invalid. As such, the Custodian has not borne his burden of proving a lawful denial of access to the requested proposal pursuant to N.J.S.A. 47:1A-6.

2. The Custodian's assertion that the Complainant already possesses the requested proposal is not a lawful reason for a denial of access pursuant to Thomas

¹ No legal representation listed on record.

² Represented by Michael I. Inzelbuch, Esq. (Lakewood, NJ).

³ Additional records were requested; however, said records are not the subject of this complaint.

Caggaino v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006).

3. The Custodian violated N.J.S.A. 47:1A-5.e. by not providing the Complainant with immediate access to the requested pages of Catapult Learning's proposal detailing the budget.
4. Because the Custodian unlawfully denied the Complainant access to the requested proposal at the time of the requests dated October 5, 2006 and October 24, 2006 and violated N.J.S.A. 47:1A-5.e. by not providing immediate access to the requested proposal until April 12, 2007 (over six months after the request), it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint shall be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

July 5, 2007

Council's Interim Order distributed to the parties.

August 7, 2007

Complaint transmitted to the Office of Administrative Law.

March 19, 2008

Letter from the Office of Administrative Law ("OAL") to the Government Records Council ("GRC"). OAL states that it is returning GRC Complaint No. 2006-193 to the GRC for appropriate disposition because the Complainant failed to appear at the scheduled proceeding on March 13, 2008. OAL also states that any excuse for the Complainant's failure to appear must be mailed to the GRC and all other parties within thirteen (13) days of this notice.

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that no further adjudication is required because the Complainant failed to appear at the scheduled proceeding on March 13, 2008 at the Office of Administrative Law.

Prepared By:

Dara Lownie

Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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INTERIM ORDER

June 27, 2007 Government Records Council Meeting

Chaim Fisher
Complainant
v.

Complaint No. 2006-193

Lakewood Board of Education
Custodian of Record

At the June 27, 2007 public meeting, the Government Records Council ("Council") considered the June 20, 2007 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 as amended. The Council, therefore, finds that:

1. Because the requested proposal was incorporated as part of the contract between the Lakewood BOE and Catapult Learning for Title I services which was approved by the Board on September 28, 2006 (prior to the Complainant's OPRA requests), the requested proposal is a government record pursuant to N.J.S.A. 47:1A-1.1 and is subject to immediate public access as part of the approved contract. Thus, the Custodian's assertion that the requested proposal is exempt as deliberative material or information which if disclosed, would give an advantage to bidders pursuant to N.J.S.A. 47:1A-1.1 is invalid. As such, the Custodian has not borne his burden of proving a lawful denial of access to the requested proposal pursuant to N.J.S.A. 47:1A-6.
2. The Custodian's assertion that the Complainant already possesses the requested proposal is not a lawful reason for a denial of access pursuant to Thomas Caggaino v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006).
3. The Custodian violated N.J.S.A. 47:1A-5.e. by not providing the Complainant with immediate access to the requested pages of Catapult Learning's proposal detailing the budget.
4. Because the Custodian unlawfully denied the Complainant access to the requested proposal at the time of the requests dated October 5, 2006 and October 24, 2006 and violated N.J.S.A. 47:1A-5.e. by not providing immediate access to the requested proposal until April 12, 2007 (over six months after the request), it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or



unintentional. As such, this complaint shall be referred to the Office of Administrative Law for 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 27th Day of June 2007

Vincent Maltese, 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 5, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2007 Council Meeting**

**Chaim Fisher¹
Complainant**

GRC Complaint No. 2006-193

v.

**Lakewood Board of Education²
Custodian of Records**

Records Relevant to Complaint: Catapult Learning's revised, detailed proposal, as reviewed by the Board of Education on September 28, 2006 (only the pages detailing the budget).³

Request Made: October 5, 2006 and October 24, 2006

Response Made: October 12, 2006, October 31, 2006 and April 12, 2007

Custodian: Edward Luick

GRC Complaint Filed: November 3, 2006

Background

October 5, 2006

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

October 12, 2006

Custodian's response to the OPRA request. The Custodian responds to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that the requested record is denied because at the September 28, 2006 Board of Education ("BOE") meeting, the BOE worked to clarify the original proposal, which the Custodian claims the Complainant already has. The Custodian states that BOE continued negotiations on various aspects of the requested record. The Custodian also states that the final resolution was Board approval of a contract with Catapult Learning to provide Title I services to non-public schools for the 2006-2007 school year.

October 24, 2006

Complainant's second OPRA request on an official OPRA request form. The Complainant requests the records relevant to this complaint listed above.

¹ No legal representation listed on record.

² Represented by Michael I. Inzelbuch, Esq. (Lakewood, NJ).

³ Additional records were requested; however, they are not the subject of this complaint.

October 31, 2006

Custodian's response to the Complainant's second OPRA request. The Custodian responds to the OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that the request is denied because the requested proposal is a work in progress and not available for public viewing.

November 3, 2006

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

- Custodian's response to the Complainant's OPRA request dated October 12, 2006,
- Complainant's second OPRA request dated October 24, 2006 and
- Custodian's response to the Complainant's second OPRA request dated October 31, 2006.

The Complainant states that he submitted an OPRA request on October 5, 2006. The Complainant states that he received a response from the Custodian on October 12, 2006 in which the Custodian denied the request. Additionally, the Complainant states that he submitted a second OPRA request on October 24, 2006 and received a response from the Custodian on October 31, 2006 in which the Custodian again denied his request.

The Complainant states that the BOE asserts that the requested proposal does not have to be disclosed. The Complainant claims that the reason the BOE is withholding the record is to hide the fact that a competing, superior proposal was tendered, and that the BOE chose the alleged inferior proposal submitted by Catapult Learning. The Complainant states that the other proposal, submitted by Non Public Educational Services, Inc., was provided in response to his OPRA request which is the subject of this complaint.

November 27, 2006

Offer of Mediation sent to both parties.

November 27, 2006

E-mail from Complainant to GRC. The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint.

November 29, 2006

Request for the Statement of Information sent to the Custodian.

December 6, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated October 5, 2006,
- Custodian's response to the OPRA request dated October 12, 2006 and
- Complainant's second OPRA request dated October 24, 2006.

The Custodian certifies receiving the Complainant's OPRA requests on October 5, 2006 and October 24, 2006. The Custodian certifies that the requested proposal submitted by Catapult Learning has not been provided to the Complainant as the record is

still a work in progress. In support of the denial of access to the requested record, the Custodian contends that N.J.S.A. 47:1A-1.1 regarding unfair advantage to bidders should the record be disclosed should prevent disclosure of the requested records, and also claims that the proposal contains material which is deliberative in nature. The Custodian certifies that the cost analysis summaries contained in the requested record are used by the vendor in determining the proposal costs.

January 8, 2007

Complainant's response to the Custodian's SOI. The Complainant asserts that this matter has received press coverage, specifically on September 26, 2006, the Ocean County Observer ran a cover page article regarding the alleged bid-rigging involving the contract which is the subject of this complaint.

The Complainant states that he has several issues with the Custodian's SOI. First, the Complainant states that the Custodian certified that a copy of the SOI would simultaneously be sent to the Complainant when sent to the GRC. The Complainant contends that he has received no such copy, except as provided by the GRC. Second, the Complainant states that he requested a copy of Catapult Learning's proposal on two (2) separate occasions and the Custodian denied both requests. The Complainant states that the Custodian first denied the existence of the requested record and then denied the Complainant access to said record on the basis that the record was a work in progress. The Complainant contends there is no "work in progress" exemption to access. Additionally, the Complainant takes issue with the three (3) new reasons for the denial of access that the Custodian raises in his SOI. The Complainant questions whether OPRA provides that a Custodian may present new arguments and reasons for a denial of access at any time following the initial denial.

The Complainant provides the following responses to the Custodian's reasons for the denial of access which are included in the Custodian's SOI:

Advantage to Bidders

The Complainant contends that by October 5, 2006, the date the Complainant filed his OPRA request, the requested record could no longer present an advantage to bidders because the contract had already been awarded on September 28, 2006. The Complainant asserts that the bidding process had ended. Additionally, the Complainant states that pursuant to N.J.S.A. 47:1A-5.e., immediate access shall ordinarily be granted to contracts.

Deliberative in Nature

The Complainant states that pursuant to N.J.S.A. 47:1A-1.1, inter-agency or intra-agency advisory, consultative, or deliberative material is not considered a government record. The Complainant asserts that this citation does not apply to material provided by Catapult Learning or any outside source. Further, the Complainant contends that even if the requested record was considered inter-agency or intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1, the GRC's decision in Richard Gober v. City of Burlington, GRC Complaint No. 2003-139 (April 2004) states that

factual information is not considered inter-agency or intra-agency advisory, consultative, or deliberative material. As such, the Complainant asserts that this exemption does not apply to the requested record.

Cost Analysis Summaries Used By the Vendor in Determining the Proposed Cost

The Complainant states that this reason for the denial of access asserted by the Custodian fails to cite any legal authority for nondisclosure of a requested record and thus is meaningless.

Moreover, the Complainant states that the Custodian did provide access to a similar record (a detailed cost proposal for these same services) submitted by a competing bidder. The Complainant questions why the Custodian would release said record, yet cite several reasons for not releasing the requested proposal for Catapult Learning.

April 12, 2007

Letter from Custodian to GRC with the following attachments:

- Letter from Suzanne Ochse, Director of the Office of Title I Program Planning and Accountability to Edward Luick, Superintendent of the Lakewood BOE, dated September 15, 2005,
- Lakewood Board of Education meeting minutes dated May 31, 2006,
- Lakewood Board of Education meeting minutes dated July 26, 2006,
- August 25, 2006 *Ocean County Observer* article entitled, “\$11M is owed to Jewish schools, probe reveals”,
- August 31, 2006 *Asbury Park Press* article entitled, “Board: Why were funds mismanaged?”,
- September 13, 2006 *Asbury Park Press* article entitled, “Title I finds’ misuse alleged; schools deny it”,
- Complainant’s OPRA request dated September 21, 2006,
- September 26, 2006 *Ocean County Observer* article entitled, “Unfair bidding process for school services?”,
- Letter from Robert H. Crosby, President of NonPublic Educational Services Inc. (“NESI”) to Chet Galdo, President of the Lakewood Board of Education, dated September 27, 2006,
- Lakewood Board of Education meeting minutes dated September 28, 2006,
- Custodian’s response to the OPRA request dated September 29, 2006,
- Complainant’s OPRA request dated October 5, 2006,
- Custodian’s response to the OPRA request dated October 12, 2006,
- NESI’s OPRA request dated November 17, 2006,
- Letter from Edward Luick, Superintendent of the Lakewood BOE, to NESI dated November 29, 2006,
- Letter from Edward Luick, Superintendent of the Lakewood BOE, to the Complainant dated December 1, 2006,
- Lakewood Board of Education’s Request for Proposal for Title I Services for the 2006-2007 school year,

- Contract between Lakewood Board of Education and Catapult Learning LLC for Title I services for the 2006-2007 school year (including Title I Proposal - Budget Schedule marked “DRAFT”),
- E-mail from Meir Hertz to Edward Luick, Superintendent, dated January 9, 2007,
- Letter from Edward Luick, Superintendent, to Complainant dated January 17, 2007,
- E-mail from Meir Hertz to Edward Luick, Superintendent, dated January 18, 2007 and
- Complainant’s OPRA request dated January 11, 2007.

The Custodian states that the enclosed contract for Title I services includes the figure of \$310,019 for administrative and capital outlay, a figure which the Custodian states that he assumes the Complainant has been seeking. Additionally, attached to the contract is the budget schedule marked “DRAFT” for which the Custodian states consultation and deliberation was on-going at the time of the OPRA request pursuant to footnote 1 of the contract between the Lakewood BOE and Catapult Learning.

April 20, 2007

Letter from Complainant to GRC. The Complainant states that he is in receipt of the Custodian’s letter dated April 12, 2007 and all attachments. The Complainant states that among the three hundred forty (340) pages he received from the Custodian was the one (1) page document that he had requested entitled “Budget Schedule” marked “DRAFT”. The Complainant asserts that none of the other three hundred thirty nine (339) pages are responsive to his request. Additionally, the Complainant states that at no time prior to April 12, 2007 did the Custodian provide the requested record, contrary to the Custodian’s assertion in his April 12, 2007 letter to the GRC.

April 30, 2007

Letter from GRC to Custodian. The GRC requests a certification from the Custodian identifying the exact documents that were reviewed and approved by the Board of Education on September 28, 2006 regarding the contract for Title I Services with Catapult Learning.

May 7, 2007

Custodian’s certification in response to GRC’s request. The Custodian certifies that enclosed is Catapult Learning’s Title I Proposal dated September 27, 2006 marked draft which was used to develop the agreement between Catapult Learning and the Lakewood BOE. The Custodian certifies that also enclosed is the agreement between the Lakewood BOE and Catapult Learning, which the BOE approved on September 28, 2006, and which was developed from the draft proposal; however the Custodian also certifies that a contract had to be finalized thereafter. Additionally, the Custodian certifies that he has enclosed the minutes of the Lakewood BOE meeting dated September 28, 2006 where formal action was taken approving the agreement between the Lakewood BOE and Catapult Learning.

May 15, 2007⁴

⁴ Additional correspondence was submitted by the parties; however said correspondence is not relevant to this complaint.

Letter from Complainant to GRC. The Complainant asserts that based on the Custodian's certification dated May 7, 2007, there is no doubt that the Custodian consistently denied the requested proposal for more than six (6) months.

Analysis

Whether the Custodian unlawfully denied access to the requested proposal?

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 ... The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material. A government record shall not include... information which, if disclosed, would give an advantage to competitors or bidders...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA mandates that:

“[i]mmediate access ordinarily shall be granted to *budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.*” (Emphasis added.) N.J.S.A. 47:1A-5.e.

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. 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 Custodian certifies that he denied the Complainant's October 5, 2006 and October 24, 2006 OPRA requests because the requested proposal is a work in progress. In support of the denial of access to the requested record, the Custodian cites N.J.S.A.

47:1A-1.1 regarding advantage to bidders should the records be disclosed and claims that the proposal contains material which is deliberative in nature.

Additionally, the Custodian certifies that the requested proposal (which the Custodian provided to the GRC and the Complainant on April 12, 2007) was used to develop the agreement between the Lakewood BOE and Catapult Learning for Title I Services, which the Board approved on September 28, 2006.

Because the requested proposal was incorporated as part of the contract between the Lakewood BOE and Catapult Learning for Title I Services which was approved by the Board on September 28, 2006 (prior to the Complainant's OPRA requests), the requested proposal is a government record pursuant to N.J.S.A. 47:1A-1.1 and is subject to immediate public access as part of the approved contract. Thus, the Custodian's assertion that the requested proposal is exempt as deliberative material or information which, if disclosed, would give an advantage to bidders pursuant to N.J.S.A. 47:1A-1.1, is invalid. As such, the Custodian has not borne his burden of proving a lawful denial of access to the requested proposal pursuant to N.J.S.A. 47:1A-6.

OPRA does not limit the number of times a requestor may ask for the same record even when the record was previously provided. In Thomas Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006),⁵ the GRC held that "...the fact that the records were previously provided to the Complainant on several occasions is not a lawful basis to deny access to the records requests..." The same ruling applies in this instant matter. The Custodian's assertion that the Complainant already possesses the requested proposal is not a lawful reason for a denial of access pursuant to Caggiano.

Further, OPRA provides that immediate access ordinarily shall be granted to budgets and contracts pursuant to N.J.S.A. 47:1A-5.e. As the Complainant's request was for the pages of a proposal detailing the budget, which became part of the contract between the Lakewood Board of Education, the Custodian should have granted immediate access to the requested record. However, the Custodian did not release the requested proposal until approximately six (6) months following the dates of the Complainant's requests. As such, the Custodian violated N.J.S.A. 47:1A-5.e by not providing the Complainant with immediate access to the requested pages of Catapult Learning's proposal detailing the budget.

Whether the Custodian's delay in access to the requested proposal 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

⁵ Thomas Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250 and 2005-252 (January 2006).

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 at 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 (App. Div. 1996) at 107).

Because the Custodian unlawfully denied the Complainant access to the requested proposal at the time of the requests dated October 5, 2006 and October 24, 2006 and violated N.J.S.A. 47:1A-5.e. by not providing immediate access to the requested proposal until April 12, 2007 (over six months after the request), it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint shall be referred to the Office of Administrative Law for 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:

1. Because the requested proposal was incorporated as part of the contract between the Lakewood BOE and Catapult Learning for Title I services which was approved by the Board on September 28, 2006 (prior to the Complainant’s OPRA requests), the requested proposal is a government record pursuant to N.J.S.A. 47:1A-1.1 and is subject to immediate public access as part of the approved contract. Thus, the Custodian’s assertion that the requested proposal is exempt as deliberative material or information which if disclosed, would give an advantage

- to bidders pursuant to N.J.S.A. 47:1A-1.1 is invalid. As such, the Custodian has not borne his burden of proving a lawful denial of access to the requested proposal pursuant to N.J.S.A. 47:1A-6.
2. The Custodian's assertion that the Complainant already possesses the requested proposal is not a lawful reason for a denial of access pursuant to Thomas Caggaino v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006).
 3. The Custodian violated N.J.S.A. 47:1A-5.e. by not providing the Complainant with immediate access to the requested pages of Catapult Learning's proposal detailing the budget.
 4. Because the Custodian unlawfully denied the Complainant access to the requested proposal at the time of the requests dated October 5, 2006 and October 24, 2006 and violated N.J.S.A. 47:1A-5.e. by not providing immediate access to the requested proposal until April 12, 2007 (over six months after the request), it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint shall be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

June 20, 2007