



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

Margaret Snyder
Complainant

Complaint No. 2010-122

v.

Montague Board of Education (Sussex)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 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. Pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the records responsive because the Custodian mistakenly informed the Complainant that the requested copy of Rose Musto’s MA diploma was exempt from disclosure under OPRA as a personnel record before actually searching Rose Musto’s personnel file to locate a copy of her MA diploma; said search revealed that no record responsive to the request existed. *See also* Oskay v. New Jersey State Parole Board, 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), 2008-90 (June 2009).
2. Notwithstanding the Custodian’s insufficient search for responsive records, because the Custodian certified that no records responsive to the Complainant’s request exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. Although the Custodian failed to adequately search Ms. Musto’s personnel file before denying the Complainant access to the requested record, which resulted in an unlawful denial of access pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), because no records responsive to the request exist, 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.

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 October, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: November 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Margaret Snyder¹
Complainant**

GRC Complaint No. 2010-122

v.

**Montague Board of Education (Sussex)²
Custodian of Records**

Records Relevant to Complaint: A copy of Learning Disabilities Teacher Consultant Rose Musto's master's diploma.

Request Made: May 13, 2010

Response Made: May 19, 2010

Custodian: John W. Waycie, Business Administrator/Board Secretary

GRC Complaint Filed: June 17, 2010³

Background

May 13, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA.

May 19, 2010⁴

Custodian's response to the OPRA request. The Custodian responds in writing 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 the document is exempt from disclosure under OPRA as it is part of a confidential personnel record.

May 19, 2010

E-mail from the Complainant to the GRC. The Complainant states that she sent in an OPRA request to the Custodian requesting a copy of Rose Musto's master's ("MA") diploma. In addition, the Complainant states that her request was denied because it is exempt from disclosure as part of a confidential personnel record. Lastly, the Complainant states that she was unsure if public school teacher/administrators credentials and degrees and licenses are public information.

¹ No legal representation listed on record.

² Represented by James Fox, Esq., of Morris, Downing, and Sherred (Newton, NJ).

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

⁴ The Custodian's response is on an official OPRA request form which was completed by the Custodian.
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May 21, 2010

E-mail from the GRC to the Complainant. The GRC informs the Complainant that in Bonanno v. Garfield Board of Education, GRC Complaint No. 2006-62 (June 2008), the Council held that copies of educational degrees are considered government records pursuant to N.J.S.A. 47:1A-10 (information which discloses conformity with specific educational qualifications required for public employment is subject to disclosure with appropriate redactions).

May 24, 2010

E-mail from the Complainant to the Custodian. The Complainant states that she received a telephone call from the Custodian's office on May 21, 2010 stating that the requested record would be available to pick up on May 24, 2010 and the cost would be \$0.75 per page. The Complainant also states that on the morning of May 24, 2010 she received another telephone call from the Custodian's office stating that Ms. Musto meets all the requirements to be a Learning Disabilities Teacher Consultant ("LDTC") and that the Complainant's OPRA request will not be fulfilled. Lastly, the Complainant informs the Custodian that the document requested is a public record and she will be filing a Denial of Access Complaint because the Custodian has still not complied with her OPRA request.

May 24, 2010

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that the school district does not have a copy of Rose Musto's MA diploma and therefore cannot provide the Complainant with a copy of the requested record.

June 17, 2010

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

- Complainant's OPRA request dated May 13, 2010
- Custodian's response to Complainant's OPRA request dated May 19, 2010
- E-mail from the Complainant to the GRC dated May 19, 2010
- E-mail from the GRC to the Complainant dated May 21, 2010
- E-mail from the Custodian to the Complainant dated May 24, 2010
- E-mail from the Complainant to the Custodian dated May 24, 2010

The Complainant states that she requested a copy of Rose Musto's MA diploma.

The Complainant does not agree to mediate this complaint.

June 21, 2010

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

⁵ The Complainant does not set out any arguments in her Denial of Access Complaint
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June 24, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated May 13, 2010
- Letter from the Custodian to the Complainant dated May 19, 2010

The Custodian certifies that on May 13, 2010 he received the Complainant's OPRA request via e-mail for a copy of LDTC Rose Musto's MA diploma. The Custodian also certifies that on May 19, 2010 he denied a copy of the MA diploma because it was exempt from disclosure under OPRA as it is part of a personnel record. However, the Custodian also certifies that at the time of the denial, the personnel file was not checked to see if a copy of the requested record was contained therein.

Additionally, the Custodian certifies that on May 21, 2010 he received an e-mail from the Complainant which included the e-mail from the GRC to the Complainant, referencing Bonanno v. Garfield Board of Education, GRC Complaint No. 2006-62 (June 2008). Furthermore, the Custodian certifies that after receipt of said e-mail, the Custodian reviewed same with his attorney, James Fox, Esq., and then called the Complainant and informed her that a copy of Rose Musto's MA diploma would be available for pickup after 12:00 noon on May 24, 2010. Additionally, the Custodian certifies that on the morning of May 24, 2010 he went to the Chief School Administrator's Office to retrieve a copy of Rose Musto's MA diploma and realized that her file did not contain a copy of the requested MA diploma. Lastly, the Custodian certifies that the Complainant was called on the morning of May 24, 2010 and informed that the school did not have a copy of the requested record.

July 10, 2010

E-mail from the Complainant to the GRC. The Complainant asserts that she received the Custodian's SOI. In addition, the Complainant states that a copy of the MA diploma is supposed to be kept on file, especially pursuant to the No Child Left Behind Act. The Complainant also states that the Custodian should ask Ms. Musto to bring a copy of her diploma over to the school to comply with the Complainant's OPRA request.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or

in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The evidence of record shows that the Complainant filed an OPRA request seeking a copy of LDTC Rose Musto’s MA diploma on May 13, 2010. The evidence of record further shows that the Custodian responded in writing within the statutorily mandated seven (7) business days response time stating that her request is denied because it is a personnel record. The Custodian certified that he reconsidered his decision after receiving a copy of an e-mail from the GRC to the Complainant stating that the GRC held in Bonanno v. Garfield Board of Education, GRC Complaint No. 2006-62 (June 2008) that copies of diplomas are considered disclosable government records. However, the Custodian further certified that, upon investigation into the file in question, said file did not contain a copy of the requested MA diploma. The Complainant has submitted no evidence to refute the Custodian’s certification in this regard.

In Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), the custodian initially responded to the complainant’s OPRA request by stating that no records responsive existed. The complainant, however, submitted e-mails which were responsive to her request with the Denial of Access Complaint. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and this time located record responsive to this request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied the Complainant access to the requested records.

Like the custodian in Schneble, *supra*, the Custodian in the instant matter mistakenly informed the Complainant that the request was denied because the record was exempt from disclosure as part of a confidential personnel record. Additionally, the Custodian certified in his SOI that he did not search Rose Musto’s personnel file to find the MA diploma at the time of the denial of access. Only after receipt of Complainant’s e-mail dated May 21, 2010 did the Custodian check Rose Musto’s personnel file to retrieve a copy of her MA degree. However, the Custodian realized only after checking Rose Musto’s personnel file on May 24, 2010 that a copy of her MA diploma does not exist. Even though the Custodian’s response was made on the seventh (7th) business day

after receipt of the request, the Custodian's search for responsive records was insufficient.

Therefore, pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the records responsive because the Custodian mistakenly informed the Complainant that the requested copy of Rose Musto's MA diploma was exempt from disclosure under OPRA as a personnel record before actually searching Rose Musto's personnel file to locate a copy of her MA diploma; said search revealed that no record responsive to the request existed. *See also* Oskay v. New Jersey State Parole Board, 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), 2008-90 (June 2009).

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed, and the Complainant provided no evidence to refute the Custodian's certification.

Notwithstanding the Custodian's insufficient search for responsive records, because the Custodian herein certified that no records responsive to the Complainant's request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Whether the Custodian's insufficient search for the requested record 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 failed to adequately search Ms. Musto's personnel file before denying the Complainant access to the requested record, which resulted in an unlawful denial of access pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), because no records responsive to the request exist, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that

1. Pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the records responsive because the Custodian mistakenly informed the Complainant that the requested copy of Rose Musto's MA diploma was exempt from disclosure under OPRA as a personnel record before actually searching Rose Musto's personnel file to locate a copy of her MA diploma; said search revealed that no record responsive to the request existed. *See also* Oskay v. New Jersey State Parole Board, 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), 2008-90 (June 2009).
2. Notwithstanding the Custodian's insufficient search for responsive records, because the Custodian certified that no records responsive to the Complainant's request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. Although the Custodian failed to adequately search Ms. Musto's personnel file before denying the Complainant access to the requested record, which resulted in an unlawful denial of access pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), because no records responsive to the request exist, 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.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010