



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 28, 2014 Government Records Council Meeting

Jeremy Fultz
Complainant

Complaint No. 2013-154

v.

Trenton Public School District (Mercer)
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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:

1. The Custodian failed to fully comply with the Council’s December 20, 2013 Interim Order because although she provided the responsive records to the Complainant via his preferred method of delivery within the prescribed time frame, she failed to simultaneously provide certified confirmation of compliance to the Executive Director until January 16, 2014 (three (3) business days after the prescribed time frame expired).
2. Although the Custodian unlawfully denied access to the responsive records and further failed to fully comply with the Council’s December 20, 2013 Interim Order, she provided said records to the Complainant via his preferred method of delivery within the prescribed time to comply with the Council’s Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 28th Day of January, 2014

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: January 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**Jeremy Fultz¹
Complainant**

GRC Complaint No. 2013-154

v.

**Trenton Public School District (Mercer)²
Custodial Agency**

Records Relevant to Complaint: Copies via mail of project documents (plans and specifications) for two bidding projects for heating, ventilation and air conditioning (“HVAC”) upgrade projects at Wilson, Joyce Kilmer and Thomas Jefferson Elementary Schools.

Custodian of Record: Georgette H. Bowman

Request Received by Custodian: May 14, 2013

Response Made by Custodian: May 16, 2013 and May 22, 2013

GRC Complaint Received: May 23, 2013

Background

December 20, 2013 Council Meeting:

At its December 20, 2013 public meeting, the Council considered the December 10, 2013 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. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive records because there is no evidence in the record supporting that disclosure of generic project documents would provide an advantage to bidders and competitors. N.J.S.A. 47:1A-6. Further, the School District’s policy of hand-delivery does not supersede OPRA. Paff v. Cnty. of Sussex, GRC Complaint No. 2008-38 (July 2008). Thus, the Custodian must disclose same in the Complainant’s requested method of delivery.

2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

¹ No legal representation listed on record.

² Represented by Sybil Trotta, Esq. (Trenton, NJ).

redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On December 23, 2013, the Council distributed its Interim Order to all parties. On January 14, 2014, Custodian's Counsel e-mailed the GRC advising that the Trenton Public School District ("District") was closed from December 23, 2013 and returned to work on January 6, 2014. Counsel stated that the District received the Council's Order at that time and sent the responsive records to the Complainant via FedEx Express. Counsel asserted that the District was thus in compliance with the Council's Order.

On the same day, the GRC noted that the Order also required the Custodian to submit certified confirmation of compliance to the Executive Director and that compliance would not be satisfied until the GRC received same. The Custodian's Counsel responded acknowledging that certified confirmation of compliance would be submitted.⁵

On January 16, 2014, the Custodian responded to the Council's Interim Order certifying that she received same on January 6, 2014 upon the District's reopening following winter break. The Custodian certified that on January 10, 2014, she sent the responsive records to the Complainant via FedEx. The Custodian affirmed that the Complainant notified all parties of his receipt of the records in a January 14, 2014 e-mail.

Analysis

Compliance

At its December 20, 2013 meeting, the Council ordered the Custodian to disclose the responsive project documents via the Complainant's preferred method of delivery and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On December 23, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Because the District was closed from December 23, 2013, to January 6, 2014, the Custodian's response was due by close of business on January 13, 2014.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁵ The Complainant responded to this e-mail exchange confirming that he received the records on January 13, 2014.

On January 10, 2014, the fourth (4th) business day after receipt of the Council's Order, Custodian's Counsel advised the GRC via telephone that the records were sent to the Complainant via his preferred method of delivery and recapitulated this fact in a January 14, 2014 e-mail. However, the Custodian did not provide her certified confirmation of compliance until January 16, 2014.

Therefore, the Custodian failed to fully comply with the Council's December 20, 2013 Interim Order because although she provided the responsive records to the Complainant via his preferred method of delivery within the prescribed time frame, she failed to simultaneously provide certified confirmation of compliance to the Executive Director until January 16, 2014 (three (3) business days after the prescribed time frame expired).

Knowing & Willful

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 “. . . [i]f 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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 unlawfully denied access to the responsive records and further failed to fully comply with the Council's December 20, 2013 Interim Order, she provided said records to the Complainant via his preferred method of delivery within the prescribed time to comply with the Council's Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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. The Custodian failed to fully comply with the Council's December 20, 2013 Interim Order because although she provided the responsive records to the Complainant via his preferred method of delivery within the prescribed time frame, she failed to simultaneously provide certified confirmation of compliance to the Executive Director until January 16, 2014 (three (3) business days after the prescribed time frame expired).
2. Although the Custodian unlawfully denied access to the responsive records and further failed to fully comply with the Council's December 20, 2013 Interim Order, she provided said records to the Complainant via his preferred method of delivery within the prescribed time to comply with the Council's Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

January 21, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

December 20, 2013 Government Records Council Meeting

Jeremy Fultz
Complainant

Complaint No. 2013-154

v.

Trenton Public School District (Mercer)
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council ("Council") considered the December 10, 2013 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. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive records because there is no evidence in the record supporting that disclosure of generic project documents would provide an advantage to bidders and competitors. N.J.S.A. 47:1A-6. Further, the School District's policy of hand-delivery does not supersede OPRA. Paff v. County of Sussex, GRC Complaint No. 2008-38 (July 2008). Thus, the Custodian must disclose same in the Complainant's requested method of delivery.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the
Government Records Council
On The 20th Day of December, 2013

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: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

**Jeremy Fultz¹
Complainant**

GRC Complaint No. 2013-154

v.

**Trenton Public School District (Mercer)²
Custodial Agency**

Records Relevant to Complaint: Copies via mail of project documents (plans and specifications) for two bidding projects for heating, ventilation and air conditioning (“HVAC”) upgrade projects at Wilson, Joyce Kilmer and Thomas Jefferson Elementary Schools.

Custodian of Record: Georgette H. Bowman

Request Received by Custodian: May 14, 2013

Response Made by Custodian: May 16, 2013 and May 22, 2013

GRC Complaint Received: May 23, 2013

Background³

Request and Response:

On May 14, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request via e-mail to the Custodian seeking the above-mentioned records. On May 16, 2013, the Custodian responded in writing requesting that the Complainant complete and submit his OPRA request on the District’s official OPRA request form. On May 21, 2013, the Complainant sought a status update and reminded the Custodian that less than two (2) business days to respond remained. On May 22, 2013, the sixth (6th) business day after receipt of the request, the Custodian denied access to the responsive records under the advantage to competitors and bidders exemption. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On May 23, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that he submitted his OPRA request after being advised by an employee of the School District that they do not mail project

¹ No legal representation listed on record.

² Represented by Sybil Trotta, Esq. (Trenton, NJ).

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.

documents to requestors and that the Complainant would have to retrieve the records from the School District. The Complainant states that for this reason, he specifically requested that the records be sent via scheduled FedEx pickup at no cost to the School District. The Complainant asserts that the Custodian had an obligation to provide the responsive records in the medium and/or method of delivery requested. N.J.S.A. 47:1A-5(d).

The Complainant disputes the Custodian's May 22, 2013 denial of access because the Custodian did not indicate which portions of the records would give an advantage to competitors or bidders. The Complainant further asserts that he would post the records to a members-only database and not widely distribute same. The Complainant further contends that it is common for bidders to post bids online anyway. The Complainant contends that nondisclosure would put his members at a disadvantage to potential competitors accessing bids from the potential bidders' websites.

Statement of Information:

On August 9, 2013, the Custodian filed a Statement of Information ("SOI").⁴ The Custodian certifies that on May 9, 2013, the District dispersed an "Advertisement for Bid for Mechanical HVAC Upgrade Projects" requiring interested parties to pick up the bid packages. The Custodian certifies that the Complainant attempted to receive the records under OPRA via express mail and contrary to the directions in the ad. The Custodian certifies that she thus denied access to the requested records totaling 263 pages stating that "... sensitive business information ... would certainly give an advantage to competitors or bidders if such information were widely disclosed and could result in collusion or bid-rigging ..." N.J.S.A. 47:1A-1.1.

The Custodian certifies that the New Jersey Local Public Contracts Law requires all bid ads to be published in an official newspaper of the municipality for a set amount of time prior to receipt of any bids. N.J.S.A. 40A:11-23(a). The Custodian certifies that the ad must contain a description of the contract, the manner of obtaining bid specifications and submitting bids, and the time and place at which bids are received and opened. N.J.S.A. 40A:11-23(b). The Custodian certifies that the bid specifications contained detailed information regarding what exact documents must be submitted with the bids. Id.

The Custodian contends that the School District relies on Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004), Fisher v. Lakewood Board of Education (Ocean), GRC Complaint No. 2006-193 (Interim Order dated June 27, 2007), and Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011). The Custodian argues that all three (3) complaints upheld denials of bids submitted to public agencies, in one case after the bids were publically opened as required under the Contracts Law. The Custodian asserts that an Appellate Division decision under OPRA's predecessor, the Right To Know Law, held similarly regarding a list of contractors who bid on projects. O'Neill Elec. Co., Inc. v. Bd. of Chosen Freeholders of Cnty. Of Warren, 297 N.J. Super. 473 (App. Div. 1997).

⁴ On July 11, 2013, this complaint was referred to mediation. On July 26, 2013, the complaint was referred back to the GRC for adjudication.

Analysis⁵

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.

OPRA further provides that: “[a] government record shall not include the following information which is deemed to be confidential ... information which, if disclosed, would give an advantage to competitors or bidders ...” N.J.S.A. 47:1A-1.1.

In the SOI, the Custodian argued that disclosure of the requested project documents contain “... sensitive business information ... [that] would certainly give an advantage to competitors or bidders if such information were widely disclosed and could result in collusion or bid-rigging ...” The Custodian relied on Renna, GRC 2003-100, Fisher, 2006-193 and Bond, GRC 2009-324. However, those decisions centered on access to actual bid proposals submitted by potential vendors and not the standard project documents at issue here, which are sent to a vendor in order for same to prepare a bid. Thus, those decisions are inapposite here because the Complainant sought basic project documents and not the actual bids submitted by vendors.

Further, there is no evidence to support that mailing the records, or even providing the records to a FedEx deliveryman (essentially by pickup) could result in collusion or bid-rigging. Essentially, the chance of using the project documents to conduct these practices is essentially the same whether the records are mailed or picked up. The Custodian further asserts no other arguments as to how disclosure of generic project documents would provide an unfair advantage to bidders and competitors.

The Custodian also argued that the Complainant attempted to circumvent the ad, which specifically stated that the responsive documents must be picked up. However, there is no evidence to support that the ad or the process for ads set forth in the Local Public Contracts Law is binding on someone requesting these records under OPRA. Further, the Council has previously determined that an agency’s policy limiting the “... public’s right of access ...” by providing a single method of delivery for disclosure did not supersede OPRA. Paff v. County of Sussex, GRC Complaint No. 2008-38 (July 2008).

Therefore, the Custodian failed to bear her burden of proving a lawful denial of access to the responsive records because there is no evidence in the record supporting that disclosure of generic project documents would provide an advantage to bidders and competitors. N.J.S.A. 47:1A-6. Further, the School District’s policy of hand-delivery does not supersede OPRA. Paff, GRC 2008-38. Thus, the Custodian must disclose same in the Complainant’s requested method of delivery.

⁵ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

The GRC notes that on May 16, 2013, the Custodian requested that the Complainant complete an official OPRA request form. The GRC further notes that there is no evidence in the record that the Complainant submitted his request on the School District's official form as requested by the Custodian. However, the GRC notes that the Custodian's request that the Complainant complete an official OPRA request form is an impermissible limitation on access pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed OPRA request clearly invoked OPRA and made clear the nature of the request.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive records because there is no evidence in the record supporting that disclosure of generic project documents would provide an advantage to bidders and competitors. N.J.S.A. 47:1A-6. Further, the School District's policy of hand-delivery does not supersede OPRA. Paff v. County of Sussex, GRC Complaint No. 2008-38 (July 2008). Thus, the Custodian must disclose same in the Complainant's requested method of delivery.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager
December 10, 2013

Approved By: Brandon D. Minde, Esq.
Executive Director

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⁷ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.