



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 24, 2015 Government Records Council Meeting

Brian K. Redd
Complainant

Complaint No. 2014-185

v.

Franklin Township Public Schools (Somerset)
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council (“Council”) considered the February 17, 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. Because Ms. Alaigh failed to forward the Complainant’s OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, Ms. Alaigh violated N.J.S.A. 47:1A-5(h). See Werner v. NJ Dep’t of Treasury, Div. of Revenue, GRC Complaint No. 2009-95 (April 2010).
2. The Complainant’s request is an invalid request for information that fails to seek identifiable government records and would have required the original Custodian to create a record in order to properly respond to same. 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). Thus, the original Custodian did not unlawfully deny access to same. N.J.S.A. 47:1A-6; LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Litchult v. Borough of Waldwick Police Dep’t (Bergen), GRC Complaint No. 2010-159 (May 2011).
3. Although Ms. Alaigh violated N.J.S.A. 47:1A-5(h), the GRC has determined that the Complainant’s OPRA request sought information and was thus invalid. Additionally, the evidence of record does not indicate that Ms. Alaigh’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Alaigh’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 24th Day of February, 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: February 26, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 24, 2015 Council Meeting**

Brian K. Redd¹
Complainant

GRC Complaint No. 2014-185

v.

Franklin Township Public Schools (Somerset)²
Custodial Agency

Records Relevant to Complaint:³ Electronic copies via e-mail and on-site inspection of the following information regarding the hiring of full-time permanent teaching positions with Franklin Township Public Schools (“District”) across the four (4) common core subject areas from 2004 through 2014:

1. African American faculty to African American student population ratio.
2. Total number of applicants interviewed broken down by race and gender.
3. Total number of applicants hired by and breakdown in number/percentage by race.
4. Total number of applicants hired by gender and breakdown by number/percentage and race.
5. Total number of teachers employed by the four (4) common core areas and breakdown in number/percentage by race.
6. Retention of staff hired between 2004 and 2014.
7. Total student population by race.

Custodian of Record: Arlene Biesiada⁴

Request Received by Custodian: N/A

Response Made by Custodian: None

GRC Complaint Received: April 30, 2014

Background⁵

Request and Response:

On March 11, 2014, the Complainant submitted an Open Public Records Act (“OPRA”)

¹ No legal representation listed on record.

² Represented by Joshua S. Sklarin, Esq., of Parker, McCay, P.A. (Lawrenceville, NJ).

³ The Complainant included an OPRA request dated December 9, 2013; however, the Complainant only listed the March 11, 2014 OPRA request as at issue in this complaint.

⁴ The original Custodian of Record was John Calavano.

⁵ 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.

request seeking the above-mentioned records.⁶ On March 25, 2014, the Complainant resubmitted his OPRA request to Ms. Surbhi Alaigh, Secretary in School Management, who confirmed receipt of same.

Denial of Access Complaint:

On April 30, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted the subject OPRA request based on the original Custodian’s unclear response to a prior OPRA request. The Complainant stated he sought a statistical breakdown of African American teachers hired as compared to non-minority teachers. The Complainant further noted that he attached a spreadsheet to assist the original Custodian in providing the requested information.

The Complainant argued that he never received a response to the OPRA request within the statutorily mandated seven (7) business day time frame.

Statement of Information:⁷

On December 16, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the original Custodian did not respond to the subject OPRA request because same was directed to the New Jersey Department of Education (“DOE”) and not the District.

The Custodian certified that in January 2014, the Complainant engaged in correspondence with the original Custodian whereby he stated that he would be submitting a formal OPRA request. However, it was not clear that the subject OPRA request was that formal request to which the Complainant referred.

Specifically, the Custodian certified that the Complainant submitted an OPRA request to DOE on March 11, 2014. The Custodian noted that, in an April 3, 2014 e-mail to Mr. Dominic Rota, DOE Custodian, the Complainant mentioned that “[i]ncidentally, [he] also sent [the District] a copy” of the OPRA request per Mr. Rota’s suggestion and was expecting a response from DOE. The Custodian averred that this e-mail suggested that the OPRA request was meant for DOE and that any involvement of the District was “incidental.”

Further, on March 25, 2014, the Complainant submitted the same OPRA request to Ms. Alaigh, who is Mr. Orvyl Wilson’s secretary. The Custodian affirmed that, notwithstanding that the Complainant knew and previously interacted with the original Custodian, he chose to submit the request to Mr. Wilson’s secretary anyway. The Custodian certified that the original Custodian thus never received the subject OPRA request.

The Custodian argued that regardless of whether the original Custodian received the request, same was invalid because it sought information instead of identifiable government

⁶ The evidence of record provides no indication of exactly how many parties were copied on the OPRA request.

⁷ On June 2, 2014, this complaint was referred to mediation. On November 3, 2014, this complaint was referred back to the GRC for adjudication.

records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian asserted that not only does the District not maintain a record similar to the one requested, but that the Complainant sought to require the original Custodian to create a new record. The Custodian noted that the Complainant conceded this fact by attaching a blank spreadsheet to the OPRA request. The Custodian asserted that OPRA does not require custodians to create records: a custodian is only obligated to provide identifiable government records.

Analysis

Forwarding or Directing an OPRA Request

The GRC initially notes that, according to the submissions, there is some dispute as to whom the Complainant initially sent his OPRA request on March 11, 2014. However, neither party submitted any supporting documentation to substantiate this fact. However, there is evidence to support that the Complainant e-mailed his OPRA request to the District on March 25, 2014. Thus, the GRC will conduct its review based on the March 25, 2014 submission date.

OPRA provides that “[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5(h).

In Werner v. NJ Dep’t of Treasury, Div. of Revenue, GRC Complaint No. 2009-95 (April 2010), the complainant submitted an OPRA request on an official OPRA request form. An employee at Revenue received the request and responded to same without forwarding to the custodian. The employee subsequently certified that she processed the request as regular work. The Council held that the employee violated OPRA because “[a]lthough Ms. Harrington’s duties do not include responding to requests made pursuant to OPRA, she still has an obligation to . . .” comply with N.J.S.A. 47:1A-5(h). Id. at 9. The Council further noted that “[b]ecause the Complainant’s request was on the official OPRA request form of the [NJ Dep’t] of Law & Public Safety, Ms. Harrington was alerted to the fact that this was a request for records pursuant to OPRA.” Id. See also Kossup v. City of Newark Police Dep’t, GRC Complaint No. 2006- 174 (February 2007); Morgano v. NJ Office of the Pub. Defender, Essex Cnty., GRC Complaint No. 2008-79 (July 2008)(citing Mourning v. Dep’t of Corrections, GRC Complaint No. 2006-75 (August 2006); Vessio v. NJ Dep’t of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007)).

Here, the evidence of record indicates that Ms. Alaigh received the Complainant’s OPRA request on March 25, 2014 and did not forward same to the original Custodian. Although the OPRA request was not submitted on the District’s official OPRA request form, the Complainant clearly identified the e-mail as an OPRA request for the District as follows: “To Whom it May Concern: O.P.R.A. rep Franklin Township Public Schools.”

Therefore, because Ms. Alaigh failed to forward the Complainant’s OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, Ms. Alaigh violated N.J.S.A. 47:1A-5(h). See Werner, GRC 2009-95.

Validity of Request

Notwithstanding that the Custodian certified in the SOI that the original Custodian never received the subject OPRA request, both parties indicate that, in the least, he received same on March 11, 2014. Although the GRC has chosen not to address whether the original Custodian should have responded to the subject request based on a lack of evidence as to whom it was directed, it will address whether same was valid.

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. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁸ NJ Builders, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant’s request was a request for information, holding that “. . . because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

[MAG] . . .” *Id.* at 6. *See also Ohlson v. Twp. of Edison (Middlesex)*, GRC Complaint No. 2007-233 (August 2009).

Additionally, in *Litchult v. Borough of Waldwick Police Dep’t (Bergen)*, GRC Complaint No. 2010-159 (May 2011), the complainant requested, among other items, charts and graphs, statistics of motor vehicle summons, and criminal/driving under the influence arrests by police officer. The Council determined that these request items were invalid “because the Custodian would have to create government records” and because the complainant failed to “specify an identifiable government record and instead seek information.” *Id.* at 11.

The facts of this complaint are on point with *Litchult*. Specifically, the Complainant sought information in the form of percentage breakdowns and numbers. Additionally, the Complainant attached a spreadsheet to his request to facilitate the original Custodian’s creation of a new record not maintained by the District. For these reasons, the Complainant’s request seeking information and the creation of a record was invalid.

Therefore, the Complainant’s request is an invalid request for information that fails to seek identifiable government records and would have required the original Custodian to create a record in order to properly respond to same. *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. Thus, the original Custodian did not unlawfully deny access to same. *N.J.S.A.* 47:1A-6; *LaMantia*, GRC 2008-140; *Litchult*, GRC 2010-159.

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)).

In this matter, although Ms. Alaigh violated N.J.S.A. 47:1A-5(h), the GRC has determined that the Complainant's OPRA request sought information and was thus invalid. Additionally, the evidence of record does not indicate that Ms. Alaigh's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Alaigh'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. Because Ms. Alaigh failed to forward the Complainant's OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, Ms. Alaigh violated N.J.S.A. 47:1A-5(h). *See* Werner v. NJ Dep't of Treasury, Div. of Revenue, GRC Complaint No. 2009-95 (April 2010).
2. The Complainant's request is an invalid request for information that fails to seek identifiable government records and would have required the original Custodian to create a record in order to properly respond to same. 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). Thus, the original Custodian did not unlawfully deny access to same. N.J.S.A. 47:1A-6; LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Litchult v. Borough of Waldwick Police Dep't (Bergen), GRC Complaint No. 2010-159 (May 2011).
3. Although Ms. Alaigh violated N.J.S.A. 47:1A-5(h), the GRC has determined that the Complainant's OPRA request sought information and was thus invalid. Additionally, the evidence of record does not indicate that Ms. Alaigh's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Alaigh'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
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo
Deputy Executive Director

February 17, 2015