



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

December 15, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-205

v.

Woodbine Board of Education (Cape May)
Custodian of Record

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the December 8, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that it dismisses the complaint because the Complainant withdrew the complaint in an e-mail to the GRC on November 18, 2015. Therefore, no further adjudication is required.

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 15th Day of December, 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: December 17, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 15, 2015 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-205

v.

**Woodbine Board of Education (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. All e-mails between William Pikolycky, Mayor, and Lynda Anderson-Towns, Superintendent, between 2011 and 2014, inclusive of the following terms “School Budget,” “school finances,” “state monitor,” “grant,” “donation,” “lawsuit,” “workman’s comp,” “harassment complaint,” “Donald Jenkins,” and “legal bills.”
2. All e-mails between Mayor Pikolycky and all Woodbine Board of Education (“BOE”) members between 2011 and 2014, inclusive of the above terms.
3. All e-mails between Mayor Pikolycky and Custodian between 2011 and 2014, inclusive of the above terms.
4. All e-mails between Michael Benson and Superintendent Anderson-Towns between 2011 and 2014, inclusive of the above terms.
5. All e-mails between Mr. Benson and BOE members between 2011 and 2014, inclusive of the above terms.
6. All e-mails between Mr. Benson and the Custodian between 2011 and 2014, inclusive of the above terms.

Custodian of Record: Allen Parmelee³

Request Received by Custodian: February 19, 2014

Response Made by Custodian: March 12, 2014

GRC Complaint Received: May 22, 2014

Background

September 29, 2015 Council Meeting:

At its September 29, 2015 public meeting, the Council considered the September 22,

¹ Previously represented by Michelle Douglass, Esq. (Northfield, NJ). On August 18, 2015, the Complainant advised the GRC that Ms. Douglass no longer represents him.

² Represented by Kerri Wright, Esq., of Porzio, Bromberg & Newman, P.C. (Morristown, NJ). Previously represented by Susan Hodges, Esq., of Archer & Greiner, P.C. (Haddonfield, NJ).

³ Effective July 28, 2015, the current Custodian of Records is Suzanne R. Fox-Abdill.

2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The current Custodian complied with the Council's June 30, 2015, Interim Order because she responded in the extended time frame by providing over 550 responsive records to the Complainant, identified redactions and the reason therefor in a privilege log, and certified that no records responsive to item Nos. 2 and 5 existed. Finally, the Custodian simultaneously provided certified confirmation of compliance.
2. The GRC must conduct an *in camera* review of the twenty-two (22) redactions over ten (10) chain e-mails to determine the validity of the Custodian's assertion that the entries are exempt under OPRA because they contain attorney-client privileged material. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies of the redacted records, a document or redaction index,⁵ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. 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 October 1, 2015, the Council distributed its Interim Order to all parties. On October 7, 2015, the Custodian's Counsel sought an extension of time until October 16, 2015, to submit a request for consideration. On the same day, the GRC granted said extension.

On October 16, 2015, the Custodian's Counsel filed a request for reconsideration of the Council's September 29, 2015 Interim Order based on a mistake and new evidence.

On November 18, 2015, the Complainant e-mailed the GRC, withdrawing this complaint.

⁴ The *in camera* records may be sent via overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss the complaint because the Complainant withdrew the complaint in an e-mail to the GRC on November 18, 2015. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

December 8, 2015



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

September 29, 2015 Government Records Council Meeting

Harry B Scheeler, Jr.
Complainant

Complaint No. 2014-205

v.

Woodbine Board of Education (Cape May)
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s June 30, 2015, Interim Order because she responded in the extended time frame by providing over 550 responsive records to the Complainant, identified redactions and the reason therefor in a privilege log, and certified that no records responsive to item Nos. 2 and 5 existed. Finally, the Custodian simultaneously provided certified confirmation of compliance.
2. The GRC must conduct an *in camera* review of the twenty-two (22) redactions over ten (10) chain e-mails to determine the validity of the Custodian’s assertion that the entries are exempt under OPRA because they contain attorney-client privileged material. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies of the redacted records, a document or redaction index,² as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

¹ The *in camera* records may be sent via overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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. 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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of September, 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: October 1, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-205

v.

**Woodbine Board of Education (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. All e-mails between William Pikolycky, Mayor, and Lynda Anderson-Towns, Superintendent, between 2011 and 2014, inclusive of the following terms “School Budget,” “school finances,” “state monitor,” “grant,” “donation,” “lawsuit,” “workman’s comp,” “harassment complaint,” “Donald Jenkins,” and “legal bills.”
2. All e-mails between Mayor Pikolycky and all Woodbine Board of Education (“BOE”) members between 2011 and 2014, inclusive of the above terms.
3. All e-mails between Mayor Pikolycky and Custodian between 2011 and 2014, inclusive of the above terms.
4. All e-mails between Michael Benson and Superintendent Anderson-Towns between 2011 and 2014, inclusive of the above terms.
5. All e-mails between Mr. Benson and BOE members between 2011 and 2014, inclusive of the above terms.
6. All e-mails between Mr. Benson and the Custodian between 2011 and 2014, inclusive of the above terms.

Custodian of Record: Allen Parmelee³

Request Received by Custodian: February 19, 2014

Response Made by Custodian: March 12, 2014

GRC Complaint Received: May 22, 2014

Background

June 30, 2015 Council Meeting:

At its public meeting on June 30, 2015, the Council considered the March 24, 2015,

¹ Previously represented by Michelle Douglass, Esq. (Northfield, NJ). On August 18, 2015, the Complainant advised the GRC that Ms. Douglass no longer represents him.

² Represented by Kerri Wright, Esq., of Porzio, Bromberg & Newman, P.C. (Morristown, NJ). Previously represented by Susan Hodges, Esq., of Archer & Greiner, P.C. (Haddonfield, NJ).

³ Effective July 28, 2015, the current Custodian of Records is Suzanne R. Fox-Abdill.

Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian performed an extensive search of e-mails for those responsive to the Complainant's OPRA request, the search is ultimately inadequate because he limited his search to the subject line only. *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013). It is thus possible that the Custodian unlawfully denied access to responsive e-mails. N.J.S.A. 47:1A-6. The Custodian must conduct another keyword search that includes the actual content of the e-mails and provide those remaining responsive records. If the Custodian is unable to locate additional responsive e-mails, he must certify to this fact.
2. **The Custodian shall comply with item No. 2 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 1:4-4,⁴ to the Executive Director.⁵**
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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 30, 2015, the Custodian e-mailed the GRC, advising that he would be retiring effective July 1, 2015.

On July 1, 2015, the Council distributed its Interim Order to all parties. On July 13, 2015, the current Custodian contacted the GRC via telephone to advise that Pittsgrove Township Board of Education ("Pittsgrove") would be taking over for the original Custodian. The GRC confirmed this conversation via e-mail to all parties. Therein, the GRC noted that the BOE's response was due by close of business on July 9, 2015, and attached for the current Custodian a copy of the Interim Order. The current Custodian responded by e-mail, advising that Pittsgrove would be designating a custodian at its July meeting. Additionally, the Custodian noted that Alfonzo

⁴ "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."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) 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.

Toney, the BOE's Technology Coordinator, was out on extended leave for personal reasons. For those reasons, the Custodian sought an extension of time until after the meeting.

On August 6, 2015, the Custodian's Counsel advised the GRC that the current Custodian was designated on July 28, 2015 (along with another individual). Counsel stated that the current Custodian wished to comply with the Council's Order; however, fourteen (14) business days would be required to conduct additional searches for responsive records. On August 18, 2015, the GRC granted an extension until August 20, 2015 (extending 14 business days from August 6, 2015).

On the same day, the Complainant objected to any extensions, asserting that the original Custodian was still employed at the time that the GRC disseminated its Order and that he intentionally ignored same. The Complainant noted that he submitted an OPRA request for records that he believed would support his assertions.

On August 20, 2015, the current Custodian responded to the Council's Interim Order. The Custodian certified that she utilized Alfonzo Toney, the BOE's Technology Coordinator, to conduct a search for the responsive e-mails. Specifically, the BOE searched the bodies of all e-mails within the identified individuals' e-mail accounts using the identified search terms. The Custodian certified that Mr. Toney located over 550 e-mails responsive to item Nos. 1, 3, 4 and 6, while no records responsive to item Nos. 2 and 5 existed. The Custodian affirmed that the Custodian's Counsel reviewed the responsive records and redacted twenty-two (22) entries over ten (10) e-mails under the attorney-client privilege exemption. The Custodian certified that she includes a privilege log as part of her compliance.

On September 3, 2015, the Complainant e-mailed the GRC, asserting that he obtained evidence to prove that the original Custodian was well aware of the Council's Order. The Complainant stated that the original Custodian had access to his e-mail account, which he accessed on June 29, 2015, and throughout the month of July 2015. The Complainant attached to his correspondence several e-mails that were sent to or from the original Custodian. The Complainant requested that the GRC determine that the original Custodian knowingly and willfully violated OPRA and should be subject to an assessment of the civil penalty.

Analysis

Compliance

At its June 30, 2015, meeting, the Council ordered the original Custodian to conduct another keyword search that includes the actual content of e-mails over the identified time frame and provide, as appropriate, any additional records located. Further, the Council ordered the original Custodian to certify that no additional records existed. Additionally, the Council ordered the original Custodian to submit certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4. On July 1, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 9, 2015.

On August 20, 2015, the last day to comply with the Council's Order, following two (2) extensions, the current Custodian disclosed over 550 e-mails to the Complainant. Additionally, the Custodian provided a document index that identified twenty-two (22) redactions over ten (10) e-mail chains. Also, the Custodian certified that no records responsive to item Nos. 2 and 5 existed. Finally, the Custodian submitted certified confirmation of compliance to the Executive Director.

Notwithstanding the Custodian's arguably lengthy delay in responding, a determination of the current Custodian's compliance should be gauged by the unique set of circumstances within which she attempted to comply with the Council's Order. Specifically, the BOE experienced significant changes between the Council's June 30, 2015, meeting and the current Custodian's ultimate compliance on August 20, 2015. On June 30, 2015, the original Custodian notified the GRC of his retirement, effective July 1, 2015. Thereafter, the BOE endeavored to share services with Pittsgrove to, among other things, fulfill the custodial duties. To that end, although the current Custodian had been communicating with the GRC since early July, she was not officially designated as Custodian of Record for the BOE until July 28, 2015. From the outset of the original Custodian's retirement, the current Custodian and Custodian's Counsel sought extensions to comply with the Council's Order. Based on the complex transition of custodial duties from the original Custodian to the current Custodian during the compliance time frame, the GRC is satisfied that the current Custodian timely complied with the Council's Order because she operated within appropriately extended time frames.

Therefore, the current Custodian complied with the Council's June 30, 2015, Interim Order because she responded in the extended time frame by providing over 550 responsive records to the Complainant, identified redactions and the reason therefor in a privilege log, and certified that no records responsive to item Nos. 2 and 5 existed. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Finally, the GRC will briefly address the Complainant's assertion that the original Custodian ignored the Council's Order. The GRC acknowledges that it sent the Council's Order to all parties on the effective date of the original Custodian's retirement. Further, the evidence submitted by the Complainant suggests that the original Custodian's e-mail account actively received e-mails thereafter, which he was then forwarding to the appropriate persons, including the current Custodian.

As a point of fact, the GRC has no authority to determine whether an employee's stated retirement date was actually his or her last date on the job. Further, the GRC has no authority to order agencies to delay such a date in order for an outgoing custodian to comply with an order. Thus, while the evidence submitted by the Complainant might indicate that the original Custodian's e-mail account was still active, the GRC received adequate notice of both his retirement and the current Custodian's designation by the BOE. Additionally, the Council has deferred the knowing and willful issue on all parties pending a resolution of all other issues.

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.

In Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁶ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the current custodian provided to the Complainant ten (10) e-mail chains containing twenty-two (22) total redactions. As part of her compliance, the Custodian also included a document index that identifies each redaction as attorney-client privileged material. However, as is typical in cases displaying similar circumstances, the GRC must review the records in order to determine the full applicability of an attorney-client privileged exemption to each redaction.

Therefore, the GRC must conduct an *in camera* review of the twenty-two (22) redactions

⁶ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

over ten (10) chain e-mails to validate the Custodian's assertion that the entries are exempt under OPRA because they contain attorney-client privileged material. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

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.⁷

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's June 30, 2015, Interim Order because she responded in the extended time frame by providing over 550 responsive records to the Complainant, identified redactions and the reason therefor in a privilege log, and certified that no records responsive to item Nos. 2 and 5 existed. Finally, the Custodian simultaneously provided certified confirmation of compliance.
2. The GRC must conduct an *in camera* review of the twenty-two (22) redactions over ten (10) chain e-mails to determine the validity of the Custodian's assertion that the entries are exempt under OPRA because they contain attorney-client privileged material. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies of the redacted records, a document or redaction index,⁹ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. 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.

⁷ The GRC notes that it will no longer consider an award of prevailing party attorney's fees because the Complainant disclosed that he is no longer represented by an attorney.

⁸ The *in camera* records may be sent via overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "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."

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

September 22, 2015



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CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

June 30, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-205

v.

Woodbine Board of Education (Cape May)
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council ("Council") considered the March 24, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian performed an extensive search of e-mails for those responsive to the Complainant's OPRA request, same is ultimately inadequate because he limited his search to the subject line only. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013). It is thus possible that the Custodian unlawfully denied access to responsive e-mails. N.J.S.A. 47:1A-6. The Custodian must conduct another keyword search that includes the actual content of the e-mails and provide those remaining responsive records. If the Custodian is unable to locate additional responsive e-mails, he must certify to this fact.
2. **The Custodian shall comply with item No. 2 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 record(s) 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.

4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of June, 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: July 1, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-205

v.

**Woodbine Board of Education (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. All e-mails between William Pikolycky, Mayor and Lynda Anderson-Towns, Superintendent, between 2011 and 2014 inclusive of the following terms “School Budget,” “school finances,” “state monitor,” “grant,” “donation,” “lawsuit,” “workman’s comp,” “harassment complaint,” “Donald Jenkins,” and “legal bills.”
2. All e-mails between Mayor Pikolycky and all Woodbine Board of Education (“BOE”) members between 2011 and 2014 inclusive of the above terms.
3. All e-mails between Mayor Pikolycky and Custodian between 2011 and 2014 inclusive of the above terms.
4. All e-mails between Michael Benson, and Superintendent Anderson-Towns between 2011 and 2014 inclusive of the above terms.
5. All e-mails between Mr. Benson and BOE members between 2011 and 2014 inclusive of the above terms.
6. All e-mails between Mr. Benson and the Custodian between 2011 and 2014 inclusive of the above terms.

Custodian of Record: Allen Parmelee

Request Received by Custodian: February 19, 2014

Response Made by Custodian: March 12, 2014

GRC Complaint Received: May 22, 2014

Background³

Request and Response:

On February 18, 2014, the Complainant submitted an Open Public Records Act

¹ Represented by Michelle Douglass, Esq. (Northfield, NJ).

² Represented by Susan Hodges, Esq., of Archer & Greiner, P.C. (Haddonfield, 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.

("OPRA") request to the Custodian seeking the above-mentioned records. On February 19, 2014, Superintendent Anderson-Towns contacted Mayor Pikolycky and Mr. Benson seeking assistance in responding to the Complainant's OPRA request. On February 21, 2014, the Complainant advised that he reviewed Superintendent Anderson-Town's e-mail to Mayor Pikolycky and Mr. Benson. The Complainant stressed that his request sought records from the BOE and not the Borough of Woodbine ("Borough").

On March 12, 2014, the Custodian responded in writing providing 78 responsive pages of records to the Complainant.

On May 7, 2014, the Complainant asserted that the Custodian's response was incomplete. The Complainant asked the Custodian to produce retention schedules for any e-mails that were deleted. The Complainant requested that the Custodian respond by May 14, 2014.

Denial of Access Complaint:

On May 22, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant argued that the Custodian's response was incomplete.

The Complainant stated that it has been his experience that when requesting records from a public agency concerning controversial or potentially embarrassing issues, an agency will attempt to hide or deny that records exist. The Complainant noted that, when more than one (1) agency is involved, this issue can be solved by submitting OPRA requests to each agency. The Complainant acknowledged that, most of the time, a requestor receives different responses from the agencies; to wit, records not received from one agency will be provided by the other.

To this end, the Complainant asserted that after receiving the Borough's response, he discovered an e-mail from Superintendent Anderson-Towns seeking aid from Mayor Pikolycky and Mr. Benson in responding to the request. The Complainant alleged that the usual purpose of this action, which he referred to as a "negotiated release," is so that both agencies can disclose the same records, thus giving the appearance that no other records existed.

To support his argument, the Custodian stated that he submitted an identical request to the Borough and received over 300 e-mails. The Complainant estimated that at least 100 of those e-mails were responsive to the OPRA request at issue here; however, the Custodian only provided 20 or so e-mails on March 12, 2014. The Complainant noted that, on May 7, 2014, he advised the Custodian that the response was incomplete and sought retention schedules for records that may have been destroyed, but the Custodian did not respond. The Complainant provided three (3) e-mails that he received from the Borough as an example of those the BOE failed to disclose.

Finally, the Complainant contended that the Custodian and Superintendent Anderson-Towns must comply with OPRA and do not have the right to dictate their level of transparency. The Complainant argued that their failure to provide all responsive records resulted in an unlawful denial of access to same. The Complainant thus requested that the GRC: 1) determine

that the Custodian unlawfully denied access those records not provided; 2) order disclosure of the outstanding records; and 3) determine that the Complainant is entitled to prevailing party attorney's fees for the time spent consulting with an attorney on this issue.

Statement of Information:

On July 1, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on February 19, 2014. The Custodian certified that the BOE performed a database search of 77,000 e-mails (for his and Superintendent Anderson-Towns' e-mail accounts alone) to locate e-mails between the identified individuals for the relevant time period with a subject line containing the identified terms. The Custodian noted that the Complainant's specified criteria amounted to approximately 484 combinations of search terms. The Custodian affirmed that this search resulted in 108 pages of records, some of which were duplicates. The Custodian certified that he responded on March 12, 2014 to provide the responsive records to the Complainant.

The Custodian stated that, at the time that he received the Complainant's OPRA request, he consulted the GRC's "Handbook for Records Custodians" (5th Edition – January 2011), and determined that the request was valid. The Custodian certified that he provided all e-mails that he located based on the search criteria provided in the Complainant's OPRA request.

Analysis

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.

Initially, the GRC notes that there is no dispute that the Complainant's OPRA request was valid under OPRA. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Complainant's contention is that the Custodian failed to provide e-mails that he confirmed he came into possession of as part of the Borough's response to an identical OPRA request. In the absence of an actual denial to the responsive e-mails that the Complainant alleged he did not receive, the threshold issue is whether the Custodian performed an adequate search to locate all responsive records.

The Council has maintained that it is among a custodian's duties to do a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian's response is accurate and has an appropriate basis in law. *See* Weiner v. Cnty. of Essex, GRC Complaint No. 2013-220 (March 2014) at 3 (*citing* Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008)).

Additionally, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013), the Council was tasked with determining whether the custodian properly denied access to an OPRA request for e-mails containing two (2) vague terms. The Council determined that the request was valid and reasoned that:

[A] valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails or documents stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to correspondence, a custodian may be required to search an appropriate file relevant to the subject. In both cases, e-mails and correspondence, a completed “subject” or “regarding” line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails and correspondence to determine if same is responsive: in other words, conduct research.

Id. at 5-6.

Although the standard provides that “a completed ‘subject’ or ‘regarding’ line *may be* sufficient,” the Council noted that the search sufficiency will differ on a case-by-case basis.

In this matter, the Complainant alleged that he received upwards of 80 e-mails from the Borough that he did not receive as part of the Custodian’s response. In the SOI, the Custodian certified that he performed a search of over 77,000 e-mails utilizing 484 combinations of search terms. Although the Custodian clearly performed an extensive search, he also certified that his search was limited by the appearance of responsive terms in the subject line.

While the search, on its face, is consistent with the standard set forth in Verry, the Complainant has provided examples to support that the Custodian did not provide all responsive records. Specifically, the three (3) e-mails that the Complainant attached to the Denial of Access Complaint have the subject line “WES.” None of the terms in the OPRA request captured this subject line; however, the e-mails are responsive to the Complainant’s OPRA request. It is clear from the evidence of record that the Custodian’s limiting his search to only the subject line was problematic. For these reasons, the GRC is not satisfied that the Custodian’s search, although extensive, sufficiently located all responsive records.

Therefore, although the Custodian performed an extensive search of e-mails for those responsive to the Complainant’s OPRA request, same is ultimately inadequate because he limited his search to the subject line only. *See Verry*, GRC 2013-43 *et seq.* It is thus possible that the Custodian unlawfully denied access to responsive e-mails. N.J.S.A. 47:1A-6. The Custodian must conduct another keyword search that includes the actual content of the e-mails and provide

those remaining responsive records. If the Custodian is unable to locate additional responsive e-mails, he must certify to this fact.

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian performed an extensive search of e-mails for those responsive to the Complainant's OPRA request, same is ultimately inadequate because he limited his search to the subject line only. *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013). It is thus possible that the Custodian unlawfully denied access to responsive e-mails. N.J.S.A. 47:1A-6. The Custodian must conduct another keyword search that includes the actual content of the e-mails and provide those remaining responsive records. If the Custodian is unable to locate additional responsive e-mails, he must certify to this fact.
2. **The Custodian shall comply with item No. 2 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 1:4-4,⁴ to the Executive Director.⁵**
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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁴ "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."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) 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.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo
Deputy Executive Director

March 24, 2015⁶

⁶ This complaint was prepared for adjudication at the Council's March 31, April 28, and May 26, 2015 meetings, but could not be adjudicated due to lack of quorum.