



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 28, 2015 Government Records Council Meeting

Kathleen Giambri
Complainant

Complaint No. 2014-394

v.

Sterling High School District (Camden)
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 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. The Custodian violated OPRA’s immediate access provision by failing to respond immediately to the portions of the Complainant’s OPRA request seeking contracts and salary information. *See* N.J.S.A. 47:1A-5(e); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011-237 (Interim Order dated December 18, 2012). However, the GRC declines to order disclosure of the responsive contracts and salary because the Custodian certified in the SOI that she provided same to the Complainant on November 20, 2014.
2. The Custodian’s failure to respond immediately to the “immediate access” items present in the Complainant’s OPRA request resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian disclosed all responsive records to the Complainant on November 20, 2014. 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 July, 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 30, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2015 Council Meeting**

**Kathleen Giambri¹
Complainant**

GRC Complaint No. 2014-394

v.

**Sterling High School District (Camden)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Ed Deets' employment contract for the 2013-2014 and 2014-2015 school year, resolutions approving the contract, as well as any and all records related to Mr. Deets' titles, positions, salaries, payroll records, lengths of services, dates of separation and reasons therefor, and the amount and type of pensions.
2. Ed Hansen's employment contract for the 2013-2014 and 2014-2015 school year, resolutions approving the contract, as well as any and all records related to Mr. Hansen's titles, positions, salaries, payroll records, lengths of services, dates of separation and reasons therefor, and the amount and type of pensions.
3. The Custodian's employment contract for the 2013-2014 and 2014-2015 school year, resolutions approving the contract, as well as any and all records related to the Custodian's titles, positions, salaries, payroll records, lengths of services, dates of separation and reasons therefor, and the amount and type of pensions.
4. Jack McCulley's employment contract for the 2013-2014 and 2014-2015 school year, resolutions approving the contract, as well as any and all records related to Mr. McCulley's titles, positions, salaries, payroll records, lengths of services, dates of separation and reasons therefor, and the amount and type of pensions.
5. Ron Sahli's employment contract for the 2013-2014 and 2014-2015 school year, resolutions approving the contract, as well as any and all records related to Mr. Sahli's titles, positions, salaries, payroll records, lengths of services, dates of separation and reasons therefor, and the amount and type of pensions.
6. John Tustin's employment contract for the 2013-2014 and 2014-2015 school year, resolutions approving the contract, as well as any and all records related to Mr. Tustin's titles, positions, salaries, payroll records, lengths of services, dates of separation and reasons therefor, and the amount and type of pensions.
7. Any and all time sheets, time cards and/or payroll hourly sheets for Mr. McCulley from July 1, 2013 through June 30, 2014.

¹ No legal representation listed on record.

² Represented by John B. Comegno II, Esq., and Kyle Allen, Esq., of Comegno Law Group, P.C. (Moorestown, NJ).

Custodian of Record: Elizabeth M. Giambrone
Request Received by Custodian: October 31, 2014
Response Made by Custodian: November 12, 2014
GRC Complaint Received: November 25, 2014

Background³

Request and Response:

On October 31, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 12, 2014, the sixth (6th) business day after receipt of the OPRA request, the Custodian responded in writing, advising that the potentially high volume of responsive records requires the Sterling High School District (“District”) to request an extension until November 24, 2014.

On November 14, 2014, the Complainant stated that an extension was acceptable; however, she required immediate disclosure of contracts for the Custodian, Mr. McCulley, and Mr. Sahli. On November 20, 2014, the Custodian again responded in writing, providing access to responsive records along with a privilege log identifying redacted information exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; N.J.S.A. 10:4-12(b)(8); N.J.S.A. 47:1A-10.

Denial of Access Complaint:

On November 25, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she agreed to an extension until November 24, 2014, for most of the responsive information but required immediate disclosure of contracts for the Custodian, Mr. McCulley, and Mr. Sahli, as well as Mr. McCulley’s time sheets. The Complainant contended that the Custodian purposely delayed disclosure of these records.

Statement of Information:

On December 30, 2014, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA request on October 31, 2014. The Custodian certified that the District was closed on November 6, and November 7, 2014 for the annual New Jersey Education Association’s Convention. The Custodian affirmed that she responded in writing to the Complainant on November 12, 2014. The Custodian requested an extension of time until November 24, 2014, due to the potentially large number of responsive records likely requiring review and redaction.

The Custodian certified that the District performed a diligent search to locate records and properly redacted exempt personal, pension-related, and personnel information. N.J.S.A. 47:1A-

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.

1; N.J.S.A. 47:1A-10. The Custodian certified that she responded in writing on November 20, 2014, by providing access to all responsive records. The Custodian affirmed that the Complainant filed the complaint immediately after receiving all responsive records.

The Custodian refuted the Complainant's allegation that she violated OPRA. Specifically, the Custodian asserted that a majority of the Complainant's OPRA request items were invalid because they required research or sought information instead of identifiable government records. 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); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).

Additionally, the Custodian stated that OPRA only classifies certain limited records as subject to the "immediate access" provisions. The Custodian stated that, here, the Complainant only argued that she was not provided immediate access to three (3) contracts and time sheets. The Custodian stated that OPRA provides that immediate access "shall ordinarily" be granted; however, the facts here support that the Complainant's OPRA request was anything but ordinary. The Custodian argued that the Complainant initially consented to an extension of time; yet, she filed a complaint to punish and harass the District.

The Custodian contended that this frivolous complaint was filed in bad faith by the Complainant on behalf of Educational Business Services ("EBS"), solely for the purpose to harass the District. *See* Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2007-20 *et seq.* (September 2007). The Custodian asserted that the Complainant began an "ignominious" campaign on October 30, 2014, by filing twenty-six (26) OPRA requests seeking at least 176 items over approximately eighteen (18) business days. The alleged purpose was to harass, annoy, and substantially disrupt the District. The Custodian asserted that it is impossible to calculate the number of responsive records, although she estimated that the number is in the thousands. The Custodian contended that this campaign was the result of a recently concluded investigation into EBS and the Complainant's husband by the New Jersey Department of Education, Office of Fiscal Accountability & Compliance ("OFAC"), which found that he had several conflicts of interest with the Hi-Nella Board of Education, Hi-Nella Township, South Jersey Technology Partnership ("SJTP"). The Custodian noted that this complaint is one (1) of six (6) filed on the same day.

The Custodian stated that, due to ongoing issues with the Complainant and EBS, the District sought judicial relief in Camden County Superior Court by filing an Order to Show Cause with Temporary Restraints. The Custodian stated that on December 3, 2014, the Honorable Judge Nan S. Famular granted the District's request for temporary restraints to enjoin EBS from submitting additional OPRA requests and relieve the District of its obligation to complete any outstanding OPRA requests.

Analysis

Immediate Access

OPRA provides that "[i]mmediate access ordinarily shall be granted to budgets, bills,

vouchers, contracts, including collective negotiation agreements and *individual employment contracts*, and *public employee salary* and overtime information.” N.J.S.A. 47:1A-5(e)(emphasis added).

In Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the “immediate access language of OPRA [N.J.S.A. 47:1A-5(e)] suggests that the Custodian was . . . obligated to immediately notify the Complainant . . .” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond, or requesting clarification of the request. Additionally, if immediate access items are contained within a larger OPRA request containing a combination of records requiring a response within seven (7) business days and immediate access records requiring an immediate response, a custodian still has an obligation to respond to immediate access items immediately. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

Moreover, in Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011-237 (Interim Order dated December 18, 2012), the complainant’s OPRA request sought a contract. The custodian responded on the fourth (4th) business day by providing access to a contract. However, the Council determined that the custodian violated N.J.S.A. 47:1A-5(e) because she “failed to immediately respond to the Complainant’s OPRA request for a contract . . .” Id. at 4.

In the instant matter, the Complainant’s OPRA request sought contracts, resolutions, documents identifying disclosable personnel information, and time sheets for six (6) individuals. Of these items, only contracts and salary⁴ are considered “immediate access” records: time sheets are not included in this definition. N.J.S.A. 47:1A-5(e). As such, the Custodian was obligated to immediately grant access, deny access, seek clarification, or request additional time to provide contracts and salary information to the Complainant. However, the evidence of record shows that the Custodian did not initially respond to the Complainant’s OPRA request seeking an extension of time until November 12, 2014, or the fifth (5th) business day after receipt of same. The Custodian’s response time here exceeded the custodian’s response in Kaplan by one (1) business day. Thus, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to those portions of the Complainant’s OPRA seeking “immediate access” records.

Accordingly, the Custodian violated OPRA’s immediate access provision by failing to respond immediately to the portions of the Complainant’s OPRA request seeking contracts and salary information. See N.J.S.A. 47:1A-5(e); Herron, GRC 2006-178; Kohn, GRC 2011-330; Kaplan, GRC 2011-237. However, the GRC declines to order disclosure of the responsive contracts, salary information, and time sheets because the Custodian certified in the SOI that she provided same to the Complainant on November 20, 2014.

⁴ The Council has previously held that requests seeking excepted personnel information as provided for in N.J.S.A. 47:1A-10 constitutes a valid request because OPRA specifically identifies this information as “government records.” See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010).

The GRC declines to address whether this complaint was frivolous and filed with intent to harass the District. Notwithstanding the evidence presented, the District has successfully litigated this issue in Superior Court. Thus, no analysis on this issue is required.

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)).

Here, the Custodian’s failure to respond immediately to the “immediate access” items present in the Complainant’s OPRA request resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian disclosed all responsive records to the Complainant on November 20, 2014. 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 violated OPRA’s immediate access provision by failing to respond immediately to the portions of the Complainant’s OPRA request seeking contracts and salary information. *See* N.J.S.A. 47:1A-5(e); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Kohn v. Twp. of Livingston (Essex), GRC

Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011-237 (Interim Order dated December 18, 2012). However, the GRC declines to order disclosure of the responsive contracts and salary because the Custodian certified in the SOI that she provided same to the Complainant on November 20, 2014.

2. The Custodian's failure to respond immediately to the "immediate access" items present in the Complainant's OPRA request resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian disclosed all responsive records to the Complainant on November 20, 2014. 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
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

July 21, 2015