



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

January 31, 2017 Government Records Council Meeting

Cheryl Link
Complainant

Complaint No. 2015-259

v.

Pennsauken Township Board of Education (Camden)
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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 the Custodian bore his burden of proof that he lawfully denied access to the requested records because he certified in the Statement of Information, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 31st Day of January, 2017

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 3, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Cheryl Link¹
Complainant**

GRC Complaint No. 2015-259

v.

**Pennsauken Township Board of Education (Camden)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the following records regarding Special Counsel:

1. Request for Proposal (“RFP”).
2. General description for Special Counsel.
3. Scope of work.
4. Parameter for workload.
5. Number of support staff with hourly rates.
6. Contract.

Custodian of Record: John Deserable³
Request Received by Custodian: July 16, 2015
Response Made by Custodian: July 21, 2015
GRC Complaint Received: August 12, 2015

Background⁴

Request and Response:

On July 16, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 21, 2015, the Custodian responded in writing, stating that the responsive records were not in electronic format. The Custodian stated that the Pennsauken Township Board of Education (“BOE”) would have to charge between \$25.00 and \$50.00 to scan and prepare the responsive records for disclosure. The Custodian thus requested that the Complainant mail a \$50.00 deposit to the BOE. The Custodian also alternatively offered inspection free of charge with the option to pay for copies.

¹ No legal representation listed on record.

² Represented by Frank Cavallo, Esq., of Parker McCay, P.A. (Mt. Laurel, NJ).

³ The current Custodian of Records is Noreen Boston.

⁴ 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.

On July 22, 2015, the Complainant e-mailed the Custodian expressing confusion over the proposed fee. The Complainant noted that the BOE previously did not charge for electronic records. The Complainant stated that she believed the total responsive pages would be less than ten (10). The Complainant asked when that policy changed and further sought justification for the \$50.00 fee. On the same day, the Custodian responded to the Complainant, stating that the BOE received RFPs in hard copy; thus, the charge covered scanning all records. The Custodian stated that the Complainant's original OPRA request generally sought "Special Counsel" RFPs and not any specific one. The Custodian stated that the Complainant could send him another OPRA request for a specific RFP and he would adjust the rate.

On July 23, 2015, the Complainant e-mailed the Custodian, requesting clarification as to whether the BOE awarded only one contract to a special counsel. The Complainant noted that the BOE previously posted to its website a legal notice awarding a special counsel contract to Michael Joyce, Esq., at its April 23, 2015 business meeting. The Complainant stated that, if the legal notice is accurate, she would "stand behind" the subject OPRA request as valid. The Complainant also again reiterated her confusion with any applicable charge and sought justification for the cost. There was no further communication between the parties.

Denial of Access Complaint:

On August 12, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that the BOE posted a legal notice to its website referencing "Special Counsel." The Complainant stated that she submitted her OPRA request after finding no agenda items related to the notice in the April 23, and June 8, 2015 meeting minutes.

The Complainant contended that the Custodian failed to respond to her July 23, 2015 e-mail or provide any responsive records.

Statement of Information:

On August 19, 2015, the GRC requested a completed Statement of Information ("SOI") from the Custodian. After failing to respond within the provided five (5) business days, on September 1, 2015, the GRC sent a "No Defense" letter to the Custodian requesting a completed SOI within three (3) business days of receipt.

On September 4, 2015, the Custodian sent a letter to the GRC. Therein, the Custodian confirmed that the Complainant submitted an OPRA request on July 16, 2015. The Custodian stated that he responded by providing an applicable charge based on the number of records requested and the process of scanning them. The Custodian noted that he also offered inspection to the Complainant at no initial cost.

The Custodian stated that any confusion on the part of this request was due to his mistaken thought that the Special Counsel notice was advertised. The Custodian stated that, after appointing Mr. Joyce, the BOE realized that no notice was advertised. The Custodian stated that based on this, Mr. Joyce was not retained for special counsel work. The Custodian noted that Mr.

Joyce did apply for the Special Counsel position but was not hired. The Custodian stated that “those records” were maintained by the BOE and are available for review.

On September 8, 2015, the GRC e-mailed the Custodian confirming receipt of his September 4, 2015 letter. The GRC also stated that the Custodian was still required to submit a formal SOI as soon as possible.

On September 17, 2015, the Custodian filed an SOI. The Custodian certified that he received the Complainant’s OPRA request on July 16, 2015. The Custodian certified that he responded in writing on July 21, 2015. The Custodian certified that, despite the initial confusion on his part, he determined that no records responsive to the Complainant’s OPRA request existed.

Additional Submissions:

On January 12, 2017, the GRC sought additional information from the current Custodian. Specifically, the GRC noted that the original Custodian’s initial response, September 4, 2015 letter, and SOI caused confusion as to whether any records responsive to the Complainant’s OPRA request existed. Thus, the GRC requested that the current Custodian submit a legal certification answering the following:

1. Do any records responsive to the Complainant’s July 16, 2015 OPRA request exist? The current Custodian may also want to include dialogue on how she reached the answer to this question.

The GRC requested that the current Custodian provide the requested legal certification by close of business on January 18, 2017.

On January 17, 2017, the current Custodian responded to the GRC’s request for additional information. Therein, the current Custodian certified that she confirmed with Gail Miller, Purchasing Agent, that the BOE never created an RFQ for the Special Counsel position. The current Custodian noted that Mr. Joyce submitted a proposal for the BOE Solicitor position, but he was later appointed to the Special Counsel position. The current Custodian thus certified that the original Custodian correctly stated that no RFQ existed.

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian initially identified responsive records. However, the Custodian subsequently explained in a letter to the GRC on September 4, 2015, that the BOE never hired Mr. Joyce as Special Counsel due to an advertisement issue. Thus, the Custodian implied that no RFQ or corresponding records existed. The Custodian then caused additional confusion by stating that Mr. Joyce applied for the position and that "those records" were available for inspection. Thereafter, in the SOI, the Custodian certified that no records responsive to the Complainant's request existed. The current Custodian corroborated this fact in a supplemental certification on January 17, 2017, where she affirmed that the BOE never created an RFP for the Special Counsel position.

Accordingly, the Custodian bore his burden of proof that he lawfully denied access to the requested records because he certified in the SOI, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

In closing, the GRC notes that the charge issue is mooted because of the nonexistence of records. However, it should be noted that OPRA provides that "electronic records . . . shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs." N.J.S.A. 47:1A-5(b); McBride v. Borough of Mantoloking (Ocean), GRC Complaint No. 2009-138 (Interim Order dated April 8, 2010). In very limited circumstances, the GRC has allowed custodians to charge a fee where it represented an actual cost other than for "supplies." *See Paff v. Twp. of Teaneck (Bergen)*, GRC Complaint No. 2010-09 (Interim Order dated May 24, 2011). Thus, it is likely that, had the fee remained an issue, the Custodian would have had to justify how the proposed fee represented the actual cost necessary to provide the Complainant electronic copies of records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian bore his burden of proof that he lawfully denied access to the requested records because he certified in the Statement of Information, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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

January 24, 2017