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INTERIM ORDER

March 28, 2007 Government Records Council Meeting

Suzanne Mendes
Complainant
v.
Tinton Falls Board of Education
Custodian of Record

Complaint No. 2006-201

At the March 28, 2007 public meeting, the Government Records Council ("Council") considered the March 26, 2007 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because Richard Wesler, the Director of Special Services, did not properly bear his burden of proving that the Denial of Access was authorized by law at the time of the denial, he is in violation of N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i..
2. Even though the resumes were eventually provided to the Complainant, the Director of Special Services initially violated Executive Order No. 26 (Gov. McGreevey, 2002), which grants access to the resumes of successful candidates once they are hired, when he denied the Complainant access to the requested resumes.
3. Even though the redacted Counsel bills were eventually provided to the Complainant, the Director of Special Services violated N.J.S.A. 47:1A-5.e. by failing to grant the Complainant immediate access to the requested bills.
4. Because the Custodian did not properly bear her burden of proving that the denial of access was authorized by law at the time of the denial, subsequent to the Director of Special Services doing same, she is in violation of N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i.
5. Even though the requested resumes were eventually provided to the Complainant, the Custodian initially violated Executive Order No. 26 (Gov. McGreevey, 2002), which grants access to the resumes of successful candidates once they are hired, when she denied the Complainant access to the resumes subsequent to the Director of Special Services doing same.
6. Even though the redacted Counsel bills were eventually provided to the Complainant, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to grant the

Complainant immediate access to the requested bills subsequent to the Director of Special Services doing same.

7. Because the Custodian has provided the GRC with contradicting legal certifications regarding the disclosure of this resume, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 28th Day of March, 2007

Vincent P. Maltese, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Government Records Council

Decision Distribution Date: April 4, 2007

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
March 28, 2007 Council Meeting

Suzanne Mendes[1] **GRC Complaint No. 2006-201**
Complainant

v.

Tinton Falls Board of Education[2]
Custodian of Records

Records Relevant to Complaint: Resumes of various school personnel and evaluators hired by the District, and the total cost that the child study team has spent in preparation and ongoing litigation of the MM case.

Request Made: October 23, 2006
Response Made: October 24, 2006
Custodian: Tamar Sydney-Gens
GRC Complaint Filed: October 28, 2006

Background

October 23, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above.

October 24, 2006

Response to the OPRA request. The Director of Special Services (not the Custodian) responded to the Complainant's OPRA request one (1) business day following the receipt of such request. The Director of Special Services (or "Director") wrote the Complainant a letter denying her request for resumes of various school personnel stating that this request pertains to confidential personnel records. The Director further denied the Complainant's request for information on the costs related to experts, staff, etc., stating that it is not relevant to the Complainant's dispute with the district, and alleged that fulfilling this request would take staff away from their work.

October 28, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- OPRA request, dated October 23, 2006, and
- Letter from the Director to the Complainant, dated October 24, 2006.

The Complainant asserts that she submitted an OPRA request to the Tinton Falls Board of Education on October 23, 2006. The Complainant contends that the following

[1] No legal representation listed.
[2] Represented by Martin Barger, Esq. (Red Bank, NJ)

business day, the Director of Special Services wrote the Complainant a letter denying her access to the records responsive to the request stating that resumes are part of personnel files and the remaining records responsive are not relevant to the Complainant's dispute with the district. The Director further alleged that fulfilling the Complainant's OPRA request would take the agency's staff away from their work. The Complainant feels that she has wrongly been denied access to the records responsive.

November 8, 2006

Letter from Custodian to GRC. The Custodian states that the resumes requested are being withheld because they contain personal information. The Custodian goes on to assert that the information contained in the resumes are not official records of the Board of Education, but are private records of individuals. Secondly, the Custodian explains that the Counsel fees are not billed in the manner that the Complainant is requesting. The Custodian alleges that Counsel is billed quarterly for all special matters for the Board of Education, including the MM litigation, as well as all other litigation. The Custodian suggests redacting the quarterly bill. However, the Custodian asserts that such redaction will not give the Complainant the fees for the MM litigation.

November 27, 2006

Offer of Mediation sent to both parties.

November 29, 2006

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint.

November 29, 2006)

Request for Statement of Information sent to the Custodian.

December 8, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- OPRA request, dated October 23, 2006
- Letter from the Director to the Complainant, dated October 24, 2006,
- Letter from Custodian to GRC, dated November 8, 2006,
- The requested resumes of school personnel, and
- The requested bills and vouchers for specialists and Counsel.

The Director of Special Services asserts that in response to the Complainant's OPRA request a letter was sent to the Complainant denying access to resumes of various school personnel stating that this request pertains to confidential personnel records. The Director asserts that he further denied the Complainant's request for information on the costs related to experts, staff, etc., stating that this information is not relevant to the disposition of the Complainant's dispute with the district, and alleges that fulfilling this request would take staff away from their work.

The Custodian asserts that the resumes requested are being withheld because they contain personal information. The Custodian goes on to assert that the information contained within a resume is not an official record of the Board of Education, but rather a private record of an individual.

The Custodian explains that the fees requested for Counsel are not billed in the manner that the Complainant is requesting. The Custodian alleges that Counsel is billed

quarterly for all special matters for the Board of Education, including the MM litigation, as well as all other litigation. The Custodian suggests redacting the quarterly Counsel bill. However, the Custodian asserts that such redaction will not give the Complainant the specific fees for the MM litigation

The Custodian certifies that attached to the SOI are all of the records responsive to the Complainant's OPRA request that are maintained by the Custodian. Additionally, the Custodian certifies that there are four (4) resumes that are unavailable because the Tinton Falls Board of Education does not employ these people, and therefore does not have their resumes on file.

January 3, 2007

Letter from Custodian to GRC. The Custodian certifies that all records responsive to the Complainant's OPRA request have been provided to the Complainant.

January 8, 2007

Letter from Complainant to GRC. The Complainant provides the GRC with a resume that she was denied access to following her October 23, 2006 OPRA request. The Complainant asserts that the Custodian legally certified that this resume was not kept on file, as this teacher is not employed by the school district. The Complainant declares that she gained access to this resume through a non-OPRA request for her son's student records.

January 8, 2007

Letter from GRC to Custodian. The GRC seeks clarification from the Custodian in light of the contradicting certification previously provided, in which the Custodian legally certified that this resume was not kept on file but later provided the Complainant with the resume in response to a non-OPRA request for student records. The GRC asks for an explanation of the contradicting facts.

January 12, 2007

Letter from Custodian to GRC. The Custodian submits a certification explaining that at the time of the request, and at the time the complaint was filed, the resume was not in her possession. However, a secretary requested a copy of the resume, which was received just prior to the Custodian submitting the SOI. Therefore, the resume was provided to the Complainant pursuant to the subsequent non-OPRA request for a student record with the other documents (neither the GRC nor the Complainant received this resume with the Statement of Information).

January 16, 2007

Letter from the Complainant to the GRC. The Complainant provides the GRC with a legal certification in which she contests the statements made by the Custodian. The Complaint certifies that on November 27, 2006 she went to the Custodian's office to inspect and copy her son's education file. At that time, she saw the resume in question and requested a copy of it, as well as many other records. The Complainant asserts that due to a dispute over the cost of copying the records, she left the Custodian's office without a copy of the resume.

The Complainant further asserts that after receiving a copy of the Custodian's Statement of Information, dated December 8, 2006, she noticed that the resume was not

included and the Custodian legally certified that the resume was not in her possession. The Complainant then asserts that because she knew the Custodian had the resume on file, she decided to pay for the copy of her son's file and submit the resume as evidence that the Custodian did in fact have the resume on file.

The Complainant declares that she does not believe the resume was just recently received by the school. The Complainant points out that there is a handwritten note on the top of the resume which shows that the resume was received in July of 2006. The Complainant asserts that this indicates that the resume was in the Custodian's possession long before the Complainant's OPRA request was made, not requested after the fact, as the Custodian has legally certified.

February 7, 2007

Letter from Custodian to GRC. The Custodian submits a legal certification in which she claims that she does not look through the student's educational files and therefore, she was unaware that this resume was in the Complainant son's file.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

> "…government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*…" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

> "… any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* … or *that has been received* in the course of his or its official business …" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

> "*Immediate access ordinarily shall be granted to* budgets, *bills*, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." (Emphasis added) N.J.S.A. 47:1A-5.e.

OPRA states in part:

> "Notwithstanding the provisions of [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency … shall not be made available for public access…" N.J.S.A. 47:1A-10

Also, New Jersey Executive Order No. 26 states that:

> "No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. *The resumes of successful candidates shall be disclosed once the successful candidate is hired."* (Emphasis added.) Executive Order No. 26 (Gov. McGreevey, 2002.)

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

> "…[t]he public agency shall have the burden of proving that the denial of access is authorized by law…" N.J.S.A. 47:1A-6.

The Complainant asserts that she submitted an OPRA request to the Custodian on October 23, 2006. The Complainant contends that the following business day, the Director denied the Complainant's request for various resumes, as well as information on the costs related to experts, staff, etc. The Director denied the Complainant access to the resumes requested stating that they contained personal information, thus making them unreleasable. The Director denied access to the remaining records responsive stating that the records are not relevant to the Complainant's dispute with the district, and that fulfilling this request would take staff away from their work.

The Complainant contends that even when the Custodian certified that all records responsive to the OPRA request have been provided, the Custodian was still denying the Complainant access to one resume. The Complainant provides the GRC with a resume that she was denied access to following her October 23, 2006 OPRA request. The Complainant alleges that while the Custodian legally certified that this resume was not kept on file because this teacher was not employed by the school district, the Complainant gained access to this resume through a separate request to the Custodian for her son's student records subsequent to the OPRA request that is subject of this complaint.

The Complainant certifies that the Custodian has provided the GRC with a false legal certification. The Complainant certifies that although the Custodian certifies that the resume was requested by a secretary after the Complainant's OPRA request was made, the resume was clearly on file since July of 2006, as the resume is marked "rec'd 7/06." The Complainant alleges that the Custodian had access to this resume, as it was kept on file, and was intentionally and unlawfully denying the Complainant access to same.

The Custodian asserts that the Director of Special Services wrote the Complainant a letter denying her request for resumes of various school personnel stating that this request pertains to confidential personnel records, without the Custodian's knowledge. The Director of Special Service further denied the Complainant's request for information on the costs related to experts, staff, etc., stating that it is not relevant to the

Complainant's dispute with the district, and that fulfilling this request would take staff away from their work.

Later, the Custodian denied the Complainant access to the resumes requested because they contain personal information which the Complainant is not entitled to access. The Custodian declares that the information contained within a resume is not an official record of the Board of Education, but instead a private record of an individual.

The Custodian further certifies that the fees requested for Counsel are not billed in the manner that the Complainant is requesting. The Custodian alleges that Counsel is billed quarterly for all special matters for the Board of Education, including the MM litigation, as well as all other litigation. The Custodian suggests redacting the quarterly Counsel bill. However, the Custodian asserts that such redaction will not give the Complainant the specific fees for the MM litigation.

The Custodian certifies that attached to the SOI are all of the records responsive to the Complainant's OPRA request, redacted as necessary. In response to the Complainant's accusation that the Custodian had one resume allegedly responsive to the OPRA request, and was unlawfully denying the Complainant access to same, the Custodian certifies that at the time of the request, and at the time the complaint was filed, the resume was not in the Custodian's possession. However, the Custodian certifies that a secretary requested a copy of the resume subsequent to the OPRA request subject of this complaint, which was received just prior to the Complainant submitting the SOI. The Custodian further certifies that she does not look through the children's educational files and therefore she was not aware that the requested resume was in the Complainant's son's file.

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. 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 Custodian in this matter also denied the Complainant access to the requested resumes by simply stating that the information contained in a resume is not a public record. At the time of the request, the Complainant was unlawfully denied access to the resumes because pursuant to N.J.S.A. 47:1A-6, a public agency has the burden of proving that the denial of access is authorized by law. The Custodian denied the Complainant's request for various resumes without citing a legal explanation for such. Additionally, pursuant to Executive Order No. 26 (Gov. McGreevey, 2002), the resumes of successful candidates shall be disclosed once the successful candidate is hired. In this case, the Custodian not only unlawfully denied the Complainant access to the records responsive without proving the denial of access is authorized by law, the Custodian also violated Executive Order No. 26 (Gov. McGreevey, 2002), by not releasing the resumes requested.

The Director's reasons for denying the Complainant access to the total costs of the child study team in preparation and ongoing litigation of the MM case are not consistent with the requirements of OPRA. The Director's decision that the Complainant be denied access to these records because they are irrelevant to her pending dispute with the school board is prohibited by OPRA. Pursuant to N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i., a denial of access to public records must be authorized by law at the time of

the denial. Pursuant to N.J.S.A. 47:1A-1 "…government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions…" OPRA does not require a requestor to explain why he or she is requesting records. In this case, the Complainant requested these records under OPRA and should have been provided with same within the statutorily mandated seven (7) business days. Additionally, OPRA requires that bills and vouchers be provided to requestors immediately. N.J.S.A. 47:1A-5.e.

Therefore, the Director of Special Services violated OPRA when he denied the Complainant access to the requested resumes.

Whether the Custodian's actions rise to the level of a knowing and willful violation of the OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

> "[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA], as amended and supplemented, 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.

The Complainant asserts that although the Custodian certified that all records responsive to the OPRA request were provided, the Custodian continues to deny the Complainant access to one resume. The Complainant provides the GRC with a resume to which she was denied access following her October 23, 2006 OPRA request. The Complainant alleges that although the Custodian legally certified that this resume was not kept on file and was therefore unavailable, the Complainant gained access to this resume through a separate request to the Custodian for the Complainant's son's student records because this teacher was not employed by the school district.

The Complainant certifies that the Custodian has provided a false legal certification to the GRC. The Complainant certifies that although the Custodian's certification states that the resume was requested by a secretary after the Complainant's OPRA request was made, the resume was actually on file since July of 2006, because the resume is marked "rec'd 7/06." The Complainant alleges that since this resume was kept on file since July, 2006, the Custodian had access to this resume and intentionally and unlawfully denied the Complainant access to same.

The Custodian certifies that at the time of the request, and at the time the Denial of Access complaint was filed, the resume was not in the Custodian's possession.

However, the Custodian certifies that a secretary requested a copy of the resume, which was received just prior to the Complainant submitting the SOI on December 8, 2006. The Custodian further certifies that she does not look through the children's educational files and therefore, she was not aware that the requested resume was in the Complainant's son's file.

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 at 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 (Berg); 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 (App. Div. 1996) at 107).

Neither party disputes that the resume in question is marked "rec'd 7/2006," and was kept on file in the Complainant son's student file. However, the Custodian certifies that the resume was released to the Complainant after a secretary requested it following the Complainant's October 23, 2006 OPRA request. The Custodian also certifies that she does not look through the children's educational files when fulfilling OPRA requests. Because the evidence of record provided by the Custodian conflicts as to whether the Custodian was or was not in possession of the resume, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this case should be referred to the Office of Administrative Law for determination 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 Richard Wesler, the Director of Special Services, did not properly bear his burden of proving that the Denial of Access was authorized by law at the time of the denial, he is in violation of N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i..
2. Even though the resumes were eventually provided to the Complainant, the Director of Special Services initially violated Executive Order No. 26 (Gov. McGreevey, 2002), which grants access to the resumes of successful candidates once they are hired, when he denied the Complainant access to the requested resumes.
3. Even though the redacted Counsel bills were eventually provided to the Complainant, the Director of Special Services violated N.J.S.A. 47:1A-5.e. by failing to grant the Complainant immediate access to the requested bills.
4. Because the Custodian did not properly bear her burden of proving that the denial of access was authorized by law at the time of the denial, subsequent to the

Director of Special Services doing same, she is in violation of N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i.

5. Even though the requested resumes were eventually provided to the Complainant, the Custodian initially violated Executive Order No. 26 (Gov. McGreevey, 2002), which grants access to the resumes of successful candidates once they are hired, when she denied the Complainant access to the resumes subsequent to the Director of Special Services doing same.
6. Even though the redacted Counsel bills were eventually provided to the Complainant, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to grant the Complainant immediate access to the requested bills subsequent to the Director of Special Services doing same.
7. Because the Custodian has provided the GRC with contradicting legal certifications regarding the disclosure of this resume, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By:

Rebecca A. Steese
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

March 28, 2007