



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

VINCENT P. MALTESE, Chairman
COMMISSIONER SUSAN BASS LEVIN
ACTING COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

April 25, 2007 Government Records Council Meeting

Z.T.

Complaint No. 2006-168

Complainant

v.

Bernards Township School District
Custodian of Record

At the April 25, 2007 public meeting, the Government Records Council ("Council") considered the April 18, 2007 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. Since the three (3) employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) did not direct the Complainant to the proper records custodian, or forward the Complainant's OPRA request, the employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) are in violation of OPRA pursuant to N.J.S.A. 47:1A-5.h.
2. While the Complainant in this complaint states that he sent the OPRA request to the Custodian, the Custodian has certified that he never received the OPRA request. Therefore, the Custodian has not unlawfully denied access to the requested records.
3. Although the three (3) employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) did not direct the Complainant to the proper records custodian, or forward the Complainant's OPRA request, the three (3) employees' 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. However, the three (3) employees' actions appear to be at least negligent and ignorant regarding their knowledge of OPRA.

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 25th Day of April, 2007

David Fleisher, Vice Chairman
Government Records Council

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

Robin Berg Tabakin, Secretary
Government Records Council

Decision Distribution Date: May 2, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2007 Council Meeting**

**Z. T.¹
Complainant**

GRC Complaint No. 2006-168

v.

**Bernards Township School District²
Custodian of Records**

Records Relevant to Complaint:

Women in Technology Leadership Award Records

1. Documents Assistant Superintendent, Ms. Rudolph, received on November 28, 2005 regarding the complaint of discrimination based on race in making the award.
2. A list of individuals Assistant Superintendent, Ms. Rudolph, interviewed and any records concerning the interviews.
3. The written results of Assistant Superintendent, Ms. Rudolph's analysis of the prior underclass, senior awards, and supporting documents.
4. All communications including but not limited to phone conversation notes, mail, e-mails and faxed documents, sent from or received by the office of Assistant Superintendent, Ms. Rudolph, regarding the complaint of discrimination based on race in making the award.

2006 Society of Women Engineers ("SWE") Award Records

5. The supportive paragraphs for the Complainant's daughter and Student 2 from Supervisor of the Science Department, Mr. Heineman regarding the 2006 SWE Award.
6. Records regarding information about the selection process for the 2006 SWE, including but not limited to the information given to teachers, voting results, and the number of students who applied for the award and the students' names.

2006 Book Award Records

7. The instructions, guidelines and criteria provided by Assistant Principal of Ridge High School, Mr. Thompson, that was given to the teachers in order to nominate and select students for the 2006 Book Awards.
8. A list of all students who received any Ridge High School Book Awards for the past seven (7) years. The list should contain at minimum the name, race, gender, grade of the students, the title of the awards and the year the awards were issued.

¹ No legal representation listed.

² No legal representation listed.

Request Made: August 18, 2006
Response Made: None
Custodian: Ron Smith
GRC Complaint Filed: September 7, 2006

Background

August 18, 2006

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

April 7, 2006

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

- E-mail from the Complainant to the Assistant Principal of Ridge High School, Mr. Thompson dated August 9, 2006.
- E-mail from the Complainant to the Supervisor of Science and Technology, Mr. Heineman dated August 14, 2006.
- E-mail from the Complainant to the Assistant Superintendent, Ms. Rudolph dated August 18, 2006.
- Complainant's OPRA Request dated August 18, 2006.

The Complainant asserts submitting the OPRA request on August 18, 2006 via facsimile to the district office, and not receiving a response. The Complainant also asserts that he has sent three (3) e-mails to three (3) district employees, Ms. Rudolph, Mr. Thompson and Mr. Heineman, detailing the request and has not received a response from any of them. The Complainant further asserts that it is his understanding that the employees must respond to his request.

The Complainant states that he believes the district employees have deliberately disregarded GRC regulation. The Complainant also states that this is not the first time the employees have violated his rights protected by law. The Complainant further states for example, the employees have denied him access to his daughter's student record and denied his request for a hearing.

September 19, 2006

Offer of Mediation sent to both parties. Both parties declined mediation.

September 22, 2006

E-mail from Assistant Superintendent, Ms. Rudolph to the GRC. The Assistant Superintendent certifies that neither she, Scott Thompson, nor Brian Heineman are the custodian of records for the Bernards Township School District. The Assistant Superintendent also certifies that John Murray was the Custodian of Records until June 30, 2006, and on July 1, 2006 Ron Smith became the Business Administrator and Custodian of Records.

September 25, 2006

Complainant's response to the Assistant Superintendent's certification. The Complainant asserts that the Assistant Superintendent states that the three (3) employees are not the official record custodians of the district, but the Assistant Superintendent did not state why that is relevant. The Complainant also states that if the employees are asserting that they are not liable for the violation of OPRA, they are being intentionally misleading.

The Complainant asserts that he not only sent e-mails to the three (3) employees, but he also faxed the request to the office of Mr. Murray. Therefore, the Complainant asserts that the Assistant Superintendent's statements are irrelevant. The Complainant also asserts that the three (3) employees have the duty to forward the request to the appropriate person according to N.J.S.A. 47:1A-5.h.

The Complainant attests that his complaint is not about who holds the official title of the records custodian, it is about the three (3) employees challenging the law and the GRC's authority over the denial of his right to access the requested records. The Complainant also attests that the employees acted in concert in denying his right to the requested records, disregarding OPRA and ignoring the authority of the GRC. The Complainant further attests that the employees not only violated the law, but they did it willfully, recklessly and coordinately.

The Complainant asserts that despite the clear violation of OPRA, the Assistant Superintendent's letter itself has provided further compelling evidence that faced with GRC's investigation, they still have no intention to comply by the law, but they worked on searching for pretext. The Complainant also asserts that the Assistant Superintendent's letter shows that she is unable to suggest who holds the requested records, if not the three (3) named employees, and the Assistant Superintendent's response is obviously a continued resistance to GRC and to complying with the law.

October 12, 2006

The Custodian, Ron Smith, certifies that he never received the Complainant's OPRA request form dated August 18, 2006.

October 18, 2006

The Complainant's response to the Custodian's certification. The Complainant states that this is a straightforward case concerning a boldfaced violation of OPRA, and the three (3) employees simply acted in coordination to deny his rights under OPRA, just as they did to his other requests regarding his daughter's student record. The Complainant also states that the employees lack minimal respect for the laws and the law enforcement agencies of the government. The Complainant further states that even faced with GRC's investigation process, the employees continued to challenge the authority of the GRC and show no intention at all to comply with OPRA.

The Complainant asserts that according to N.J.S.A. 47:1A-6, the public agency shall have the burden of proving that the denial of access is authorized by law, and if it is determined that access has been improperly denied, the court or agency head shall order

that access be allowed. The Complainant asserts that the three (3) employees have failed their burden of proof, and they had no right to deny his request. Also, the Complainant asserts that by stating that the employees do not hold the official title of records custodian, and the fact that the employees did not share the request with the appropriate custodian, increases the liability of these three (3) employees.³

Analysis

Whether certain employees of the custodial agency violated OPRA by not forwarding the request to the Custodian or directing the Complainant to the Custodian pursuant to N.J.S.A. 47:1A-5h?

OPRA provides that:

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

The Complainant asserts submitting the OPRA request on August 18, 2006 via facsimile to the district office, and not receiving a response. The Complainant also asserts that he has sent three (3) e-mails to three (3) district employees, Ms. Rudolph, Mr. Thompson and Mr. Heineman, detailing the request and has not received a response from any of them. The Complainant further asserts that it is his understanding that the employees must respond to his request.

The Complainant asserts that he not only sent e-mails to the three (3) employees, but he also faxed the request to the office of Mr. Murray. Therefore, the Complainant asserts that the Assistant Superintendent’s statements are irrelevant. The Complainant also asserts that the three (3) employees have the duty to forward the request to the appropriate person according to N.J.S.A. 47:1A-5.h.

The Assistant Superintendent certifies that neither she, Scott Thompson, nor Brian Heineman are the custodian of records for the Bernards Township School District. The Assistant Superintendent also certifies that John Murray was the Custodian of Records until June 30, 2006, and on July 1, 2006 Ron Smith became the Business Administrator and Custodian of Records.

In the prior GRC decision, Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006), the Council found that pursuant to the fact that the employee who received the request did not advise the Complainant properly, thereby preventing the Complainant’s request from reaching the Custodian, that employee in the Ombudsman’s office was in violation of N.J.S.A. 47:1A-5.h.

Therefore, since the three (3) employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) did not direct the Complainant to the proper records custodian, or forward the

³ The Complainant asserts that the employees have also violated district policy 8310. Z.T. v. Bernards Township School District, 2006-168– Findings and Recommendations of the Executive Director

Complainant's OPRA request, the employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) are in violation of N.J.S.A. 47:1A-5.h.

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 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 he not only sent e-mails to the three (3) employees, but he also faxed the request form to the office of Mr. Murray. The Custodian, Ron Smith, certifies that he never received the Complainant's OPRA request dated August 18, 2006.

Also, in Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006), the Council found that pursuant to the fact that the Custodian certified that she did not receive the Complainant's OPRA request until January 20, 2006 and consequently responded in a timely manner on January 24, 2006, she is not in violation of N.J.S.A. 47:1A-5.i or N.J.S.A. 47:1A-5.g.

While the Complainant in this complaint states that he sent the OPRA request to the Custodian, the Custodian has certified that he never received the OPRA request. Therefore, the Custodian has not unlawfully denied access to the requested records.

Whether the three (3) named employees' 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?

The 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 states that he believes that the district employees have deliberately disregarded GRC regulation. The Complainant attests that his complaint is not about who holds the official title of the records custodian, it is about the three (3) employees challenging the law and the GRC’s authority over the denial of his right to access the requested records. The Complainant also attests that the employees acted in concert in denying his right to the requested records, disregarding OPRA and ignoring the authority of the GRC. The Complainant further attests that the employees not only violated the law, but they did it willfully, recklessly and coordinately.

The Assistant Superintendent certifies that neither she, Scott Thompson, nor Brian Heineman are the custodian of records for the Bernards Township School District. The Assistant Superintendent also certifies that John Murray was the Custodian of Records until June 30, 2006, and on July 1, 2006 Ron Smith became the Business Administrator and Custodian of Records.

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).

Although the three (3) employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) did not direct the Complainant to the proper records custodian, or forward the Complainant’s OPRA request, the three (3) employees’ 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. However, the three (3) employees' actions appear to be at least negligent and ignorant regarding their knowledge of OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Since the three (3) employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) did not direct the Complainant to the proper records custodian, or forward the Complainant's OPRA request, the employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) are in violation of OPRA pursuant to N.J.S.A. 47:1A-5.h.
2. While the Complainant in this complaint states that he sent the OPRA request to the Custodian, the Custodian has certified that he never received the OPRA request. Therefore, the Custodian has not unlawfully denied access to the requested records.
3. Although the three (3) employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) did not direct the Complainant to the proper records custodian, or forward the Complainant's OPRA request, the three (3) employees' 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. However, the three (3) employees' actions appear to be at least negligent and ignorant regarding their knowledge of OPRA.

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 18, 2007