



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

October 31, 2007 Government Records Council Meeting

Jeffrey May
Complainant

Complaint No. 2007-165

v.

Township of Edison (Middlesex)
Custodian of Record

At the October 31, 2007 public meeting, the Government Records Council (“Council”) considered the October 24, 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. Even though the Custodian eventually made the requested floor plans available to the Complainant after she realized that the initial denial was a mistake, the Custodian has violated OPRA by denying the Complainant access to the requested records. Therefore, the Custodian unlawfully denied access to the requested floor plans and has failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. Because the Custodian made available to the Complainant the requested records as soon as she realized that her office mistakenly denied the Complainant’s OPRA request, it is concluded that 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. However, the Custodian’s unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 October, 2007

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman
Government Records Council

Decision Distribution Date: November 16, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 31, 2007 Council Meeting**

**Jeffrey May¹
Complainant**

GRC Complaint No. 2007-165

v.

**Township of Edison (Middlesex)²
Custodian of Records**

Records Relevant to Complaint:

State approved schematic floor plans for the following rooms of Edison High School, which were rehabilitated within the last five (5) years: Rooms 120, 121, 123, 125, 127, 128, 129, and 132.

Request Made: April 5, 2007

Response Made: April 11, 2007

Custodian: Reina A. Murphy

GRC Complaint Filed: July 18, 2007

Background

April 5, 2007

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

April 11, 2007

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that the Edison Board of Education is an autonomous body. The Custodian provides the Complainant with the telephone number of the Board of Education so that he may submit his request with them.

July 18, 2007

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

- Complainant's OPRA request dated April 3, 2007³
- Letter from the Custodian to the Complainant dated April 11, 2007

¹ No legal representation listed on record.

² Represented by Jeffrey Lehrer, Esq. (Warren, NJ).

³ The Complainant also includes the certified mail receipt indicating that the OPRA request was received on April 5, 2007.

The Complainant asserts that the Custodian denied his OPRA request by stating that the Edison Board of Education is an autonomous body, therefore the Complainant should submit his request directly to them. The Complainant also asserts that he spoke with the Construction Code Official's secretary and was sent to the Custodian. The Complainant further asserts that on April 11, 2007, his OPRA request was denied and he was directed to make his OPRA request with the Edison Board of Education.

The Complainant contends that he checked with the Division of Community Affairs (Mr. Battisti) and was told that since Edison took on the enforcement of Uniform Commercial Code requirements under rehabilitation via Form 124, the municipality definitely must retain copies of the plans.

The Complainant attests that he does not wish to participate in mediation.

August 1, 2007

Request for the Statement of Information sent to the Custodian.

August 2, 2007

Letter from the Custodian to the Complainant. The Custodian states that the Complainant's request was mistakenly denied by her office because her office was under the impression that the Complainant was seeking Board of Education documents, and that is why the Complainant was directed to the Board of Education. The Custodian also states that after review, it was discovered that the Complainant's OPRA request was for Township Building permit records. The Custodian further states that pursuant to a conversation between the Complainant and the Custodian, the records are now available for the Complainant's review.

August 7, 2007

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

- Complainant's OPRA request dated April 3, 2007
- Letter from the Custodian to the Complainant dated April 11, 2007
- Letter from the Custodian to the Complainant dated August 2, 2007

The Custodian asserts that her office mistakenly denied the Complainant's request at first because it was unclear that the records were Township records, but has made the requested records available to the Complainant on August 2, 2007.

List of all records responsive to Complainant's OPRA request (include the number of pages for each record).	List of all records provided to Complainant, in their entirety or with redactions (include the date such records were provided).	If records were disclosed with redactions, give a general nature description of the redactions.	If records were denied in their entirety, give a general nature description of the record.	List the legal explanation and statutory citation for the denial of access (including redactions) as required under <u>N.J.S.A. 47:1A-6</u> .
All Building	All Building	None	Request was	Board of

Department permit files relating to request	Department permit files relating to request (provided on August 2, 2007)		denied at first because it was unclear that the records were Township records	Education being an autonomous body
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September 22, 2007

The Complainant’s Response to the Custodian’s SOI. The Complainant states that although he will not forget about the complaint, he believes that since the Custodian has apologized, the most prudent result would be a letter cautioning the Township to be more careful regarding the processing of OPRA requests.

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 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.

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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

The evidence of record shows that the Complainant requested floor plans and the Custodian admits that the Township had those plans on file. Even though the Custodian eventually made the requested floor plans available to the Complainant after she realized

that the initial denial was a mistake, the Custodian has violated OPRA by denying the Complainant access to the requested records. Therefore, the Custodian unlawfully denied access to the requested floor plans and has failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

Whether the delay in access to the requested records rises to the level of a knowing and willful violation of OPRA?

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 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 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).

Because the Custodian made the requested records available to the Complainant as soon as she realized that her office mistakenly denied the Complainant’s OPRA request, it is concluded that 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. However, the Custodian’s unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Even though the Custodian eventually made the requested floor plans available to the Complainant after she realized that the initial denial was a mistake, the Custodian has violated OPRA by denying the Complainant access to the requested records. Therefore, the Custodian unlawfully denied access to the requested floor plans and has failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
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Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

October 24, 2007