



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Joyce Blay
Complainant

Complaint No. 2007-177

v.

Jackson Board of Education (Ocean)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the May 17, 2011 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 the Custodian certified that within the statutorily mandated response time the Custodian disclosed to the Complainant a copy of the requested bid package for fencing around Jackson Liberty High School, and because the Complainant has failed to provide any credible evidence to contradict the Custodian’s certification, the Custodian has not denied access to said records.
2. Because the Custodian certified that within the statutorily mandated response time the Custodian informed the Complainant in writing that the contract between the Jackson Board of Education and the successful bidder for the Jackson Liberty High School fencing project was nonexistent and still in the process of being drafted, and because the Complainant has failed to provide any credible evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny the Complainant access to the record pursuant to N.J.S.A. 47:1A-1.1. See also Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Pursuant to N.J.S.A. 47:1A-1.1, the Custodian had no duty to fulfill the Complainant’s request for pending records because the records were not in existence at the time of the request.

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 24th Day of May, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: May 26, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Joyce Blay¹
Complainant**

GRC Complaint No. 2007-177

v.

**Jackson Township Board of Education (Ocean)²
Custodian of Records**

Records Relevant to Complaint:³

1. Inspection of the bid package for fencing the perimeter of Jackson Liberty High School (“JLHS”) which was approved by the Jackson Board of Education (“BOE”) on June 26, 2007.
2. Inspection of the contract between the BOE and the successful bidder for the JLHS fencing project.

Request Made: June 27, 2007

Response Made: July 2, 2007

Custodian: Michele Richardson⁴

GRC Complaint Filed: August 3, 2007⁵

Background

June 27, 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.

July 2, 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.⁶ The Custodian states that access to the requested record is denied because the records responsive to the Complainant’s request are in the process of being drafted.

August 3, 2007

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

¹ No legal representation listed on record.

² Marc H. Zitomer, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler, LLC (Morristown, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ The original Custodian was Gregory J. Brennan.

⁵ The Denial of Access Complaint was signed by the Complainant on said date.

⁶ Sally Rizzo sent the response on behalf of the Custodian.

- BOE Bidder's Checklist for Anthony Martinez dated June 19, 2007
- Complainant's OPRA request dated June 27, 2007
- Custodian's response to the OPRA request dated July 2, 2007
- Five (5) pages from an American Institute of Architects' Standard Form of Agreement between the BOE and National Fence Systems, Inc. executed on July 26, 2007
- Handwritten receipt from the Custodian to the Complainant in the amount of \$3.75 marked "photo copies – fence bid" dated July 30, 2007

The Complainant states that she attended a BOE meeting on June 26, 2007, wherein one of the topics concerned funding for installing a fence around the perimeter of JLHS. The Complainant also states the BOE voted to approve award of a contract for the fence installation.

The Complainant states that on June 27, 2007 she submitted an OPRA request to the BOE to inspect the bid package and contract for the fence project at JLHS. The Complainant reminded the Custodian that contracts must be provided immediately for inspection. The Complainant asserts that because she was not contacted by the Custodian she telephoned him on or about June 29, 2007. The Complainant asserts that the Custodian informed her that the BOE did not have the bid package available at that time because the architects were reviewing it; however, the Complainant asserts the Custodian told her that the record would be available for review at the BOE administration building the week of July 2, 2007. The Complainant further asserts that the Custodian informed the Complainant that the contract had not yet been drafted.

The Complainant states that on or about July 2, 2007, she received a telephone call from the secretary for the Superintendent of Schools. The Complainant states the secretary told her the bid package was now available for her inspection, but that the contract was not yet available. The Complainant states that she went to the administration building, and when she inspected the bid package she observed that it was a thick package of blank bid application forms for stadium fencing. The Complainant states that she did not see a copy of the advertisement soliciting bids or a cover letter. The Complainant further states that she said she was not interested in stadium fencing and thereafter departed the administration building.

The Complainant states that she telephoned the Custodian on July 27, 2007 to see if the contract was available and the Complainant states that the Custodian told her that it was available for inspection at the BOE administration building. The Complainant states that she went to the administration building on July 30, 2007 and observed the signed contract which included a copy of the bid package documents for the successful bidder.

The Complainant contends that because the contract had a copy of the bid package documents for the successful bidder, the contract should have been disclosed to her immediately after she submitted her OPRA request, whether the contract was signed or not.

August 20, 2007

Offer of Mediation sent to both parties.

August 22, 2007

The Custodian agrees to mediation.

August 24, 2007

The Complainant agrees to mediation.

August 28, 2007

The complaint is referred for mediation.

July 22, 2009

The complaint is referred back from mediation to the GRC for adjudication.

July 23, 2009

E-mail from the GRC to the Complainant. The GRC provides the Complainant with an opportunity to amend her complaint in the event that some issues were resolved during the mediation process and no longer need to be adjudicated.

July 23, 2009

Request for the Statement of Information (“SOI”) sent to the Custodian.

July 30, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated June 27, 2007
- Custodian’s response to the OPRA request dated July 2, 2007

The Custodian certifies that her search for the requested records involved retrieving a copy of the bid package for the JLHS fence project and determining the status of the contract between the BOE and the vendor with respect to said fence project.

The Custodian also certifies that no records that may have been responsive to the request were destroyed because they must be retained for seven (7) years in accordance with Record Series Number M700105-999 of the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that the Custodian received the Complainant’s OPRA request on June 27, 2007, wherein the Complainant requested the records that are relevant to this complaint. The Custodian further certifies that the Complainant requested “a bid package for fencing and gates.”⁷ The Custodian certifies that the Custodian determined that a blank bid package containing the bid specifications to which each bidder was required to respond was responsive to the Complainant’s request. The

⁷ The precise terminology in the Complainant’s OPRA request is “Please provide for review and/or copy upon request bid package for fencing and gates around J.L.H.S; contract for winning bid...”
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Custodian also certifies that the Complainant requested a “contract for [the] winning bid.” The Custodian certifies that at the time of the Complainant’s request no such record existed because a contract was in the process of being drafted. The Custodian further certifies that the terms of the draft contract contained provisions that were subject to modification during subsequent negotiations between the BOE and the vendor.

The Custodian certifies that the Custodian’s representative disclosed a copy of the blank bid package to the Complainant on July 2, 2007.⁸ The Custodian further certifies that the Complainant later stated that she was actually requesting a copy of the bid application as completed by the successful bidder.

The Custodian further certifies that the Custodian’s representative gave the Complainant a written response to the Complainant’s OPRA request dated July 2, 2007, denying the Complainant access to the requested contract because the contract was in the process of being drafted by legal counsel.

The Custodian argues that the Custodian lawfully denied the Complainant access to the contract because the Complainant requested a contract for the winning bid of the JLHS fence project and no such record existed at the time of the Complainant’s OPRA request. The Custodian cites Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) as authority for lawfully denying the Complainant access to said record. The Custodian also certifies that the at the time of the request the requested contract was in draft form and subject to revision, therefore the Custodian argues that the record was also exempt from disclosure because it constituted advisory, consultative or deliberative (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1. Finally, the Custodian argues that the record was undergoing attorney review at the time of the Complainant’s request and therefore was exempt from disclosure because it was subject to the attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies that despite the fact the requested bid package was disclosed to the Complainant and the requested contract was lawfully withheld from disclosure, the Custodian nonetheless disclosed to the Complainant on or about July 30, 2007 both a bid package completed by the winning bidder and a fully executed contract. The Custodian states that in Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004), the Council determined that records that did not exist at the time of the request were subsequently disclosed to the requestor after they came into being, therefore the Council dismissed the complaint. The Custodian argues that the Council’s decision in Gillespie should apply to the instant complaint; that is, because the BOE fulfilled the Complainant’s request, including disclosure of records that were not in existence at the time of the complaint, the complaint should be dismissed.

⁸ The Custodian notes that Monday, July 2, 2007 was the date of disclosure in Item #8 and Item #10 of the SOI; however, in Item #9 of the SOI the date of disclosure was stated to be Monday, July 9, 2007. Because the Complainant in the Denial of Access Complaint indicates that July 2, 2007 was the date of disclosure and the Custodian’s written response to the Complainant’s OPRA request is dated July 2, 2007, it is undisputed by the parties that July 2, 2007 was the date of disclosure.

August 3, 2009

E-mail from the Complainant to the GRC. The Complainant acknowledges that she received the Custodian's SOI and intends to respond to it. The Complainant states she meets both exceptions to the post-SOI submission requirement:

1. The Complainant contends the custodian failed to respond to the request, therefore the complainant should be permitted to respond to the legal arguments asserted in the custodian's Statement of Information.
2. The Complainant also asserts her argument or evidence was not available at the time of the initial submission therefore it should now be accepted.

August 4, 2009⁹

The Complainant's response to the Custodian's SOI with the following attachments:

- Page 16 from the BOE Bidder's Checklist signed by Anthony Martinez dated June 19, 2007
- Memo from Superintendent Thomas Gialanella to the BOE dated June 25, 2007
- Complainant's OPRA request dated June 27, 2007
- Page 9 from an American Institute of Architects' Standard Form of Agreement between the BOE and National Fence Systems, Inc. executed on July 26, 2007
- Handwritten receipt from the Custodian to the Complainant in the amount of \$3.75 marked "photo copies – fence bid" dated July 30, 2007
- Letter from the Complainant to the Custodian dated September 27, 2007
- Letter from the Custodian to the Complainant dated October 1, 2007
- Letter from the Complainant to the Custodian dated October 4, 2007
- E-mail from the Complainant to the GRC dated August 1, 2009
- E-mail from the GRC to the Complainant dated August 3, 2009

The Complainant has failed to successfully argue that her submission should be accepted by the GRC. First, the Custodian in this matter did respond to her OPRA request. In fact, the Complainant states in her complaint that the Custodian responded to her OPRA request on July 2, 2007. Second, the evidence the Complainant is now offering for consideration by the GRC consists of correspondence exchanged with the Custodian during the period of time that the complaint was in mediation, and as such, will not be considered by the GRC in the adjudication of the complaint. Further, the Complainant does not respond to the argument set forth in the SOI. Rather, the Complainant submitted the correspondence to the GRC for the following stated purpose: "[t]he purpose of my correspondence was to remind the district that even if a contract I request through [OPRA] is not immediately available for inspection, I still expect to see the document when it is available..."

⁹ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
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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...The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian...*If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record.* If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” N.J.S.A. 47:1A-5.g. (Emphasis added.)

OPRA further provides that:

“a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived...” N.J.S.A. 47:1A-5.i.

But, OPRA provides:

“...A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA]: ... any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1.

“...A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA] ... “any record within the attorney-client privilege.” 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. 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.

Here, it is undisputed between the parties that the Complainant submitted her OPRA request to the Custodian on June 27, 2007. It is also undisputed that the Custodian’s representative responded in writing to the Complainant’s OPRA request on July 2, 2007, three (3) business days following receipt of the request.

Item #1 of the Complainant’s request - inspection of the bid package for fencing the perimeter of Jackson Liberty High School (“JLHS”) which was approved by the Jackson Board of Education (“BOE”) on June 26, 2007.

The Custodian certified that the Custodian at that time of the request determined that a blank bid package containing the bid specifications to which each bidder was required to reply was responsive to the Complainant’s request for Item #1. The Complainant stated that on July 2, 2007, she went to the Custodian’s office after the Custodian’s representative called her and told her that the bid package was available for inspection. The Custodian certified that the Custodian’s representative disclosed a copy of the blank bid package to the Complainant on that same date. The Complainant stated that she inspected the bid package but was not interested in a blank bid package. The Custodian certified that the Complainant stated she wanted to see a bid package that had been filled out by the winning bidder, but the Custodian further averred that the Complainant failed to state in her OPRA request that she requested a bid package completed by the winning bidder. The Complainant failed to provide any credible evidence to contradict the Custodian’s certification with respect to the requested bid package.

Therefore, because the Custodian certified that within the statutorily mandated response time the Custodian disclosed to the Complainant a copy of the requested bid package for fencing around JLHS, and because the Complainant has failed to provide any credible evidence to contradict the Custodian’s certification, the Custodian has not denied access to said records.

Item #2 of the Complainant's request - inspection of the contract between the BOE and the successful bidder for the JLHS fencing project.

The Custodian certified that the Custodian's representative provided the Complainant with a written response dated July 2, 2007, wherein the Custodian denied the Complainant access to the requested contract because the document was in the process of being drafted by legal counsel. Accordingly, the record requested by the Complainant did not exist at the time of her request. The Custodian cites Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005) as authority for the Custodian's denial of the Complainant's request.

The Custodian also certified that because the requested contract was still a draft document subject to negotiation and revision at the time of the request, it was ACD material and exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian further certified that the agency was receiving and acting upon legal advice during the contract drafting process, therefore the draft document was also not subject to disclosure because it constituted attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

It is unnecessary to discuss whether the draft contract constitutes ACD material and/or attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1., because the record requested by the Complainant was nonexistent at the time of the request.

Pursuant to N.J.S.A. 47:1A-1.1., a government record is only responsive to an OPRA request if it has "been made, maintained or kept on file...or has been received in the course of [the public agency's] official business ...". Because the requested contract was still *in the process of being drafted at the time of the request*, it was not a "contract between the BOE and the successful bidder for the JLHS fencing project" as requested by the Complainant.

In Pusterhofer, supra, the Complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that averred that the requested record was nonexistent. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record can not (sic) be released and there was no unlawful denial of access."

Accordingly, because the Custodian certified that within the statutorily mandated response time the Custodian informed the Complainant in writing that the contract between the BOE and the successful bidder for the JLHS fencing project was nonexistent and still in the process of being drafted, and because the Complainant failed to provide any credible evidence to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to the record pursuant to N.J.S.A. 47:1A-1.1. See also Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

Whether the Custodian has a duty under OPRA to make a requested nonexistent record available when it later comes into existence?

The Complainant stated that from the time of her OPRA request she repeatedly contacted the Custodian to find out when she could inspect the requested contract. The Complainant stated that she felt compelled to “remind the [Custodian] that even if a contract I request through [OPRA] is not immediately available for inspection, I still expect to see the document when it is available.” The Complainant stated that she finally telephoned the Custodian on July 27, 2007 (the day after the contract was executed) to see if the contract was available for inspection and the Custodian informed the Complainant that it was then available. The Complainant stated that she went to the Custodian’s office on July 30, 2007 and inspected the signed contract which also included a copy of the bid package documents for the successful bidder.

The Custodian certified that on July 30, 2007, the Complainant was provided with all documents responsive to her request; therefore the Custodian certified that the BOE fulfilled the Complainant’s request, and as such, the complaint should be dismissed. The Custodian cites Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004) as standing for the principle that once nonexistent records come into existence, and are disclosed to the complainant, the complaint should be dismissed because all records responsive to the request had then been provided.

Both the Complainant and the Custodian appear to be misinterpreting OPRA. OPRA does provide that:

“...a custodian of a government record shall [grant or deny access to the record] as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available...” N.J.S.A. 47:1A-5.i. But, “If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record.” N.J.S.A. 47:1A-5.g.

However, the operative language is “government record.” If a government record does not exist at the time the complainant makes his/her OPRA request, as here, the custodian does not have a duty to make the requested record available if and when it later comes into existence.

The Custodian had no duty under OPRA to disclose the requested contract once it was complete and fully executed on July 26, 2007. To the extent that the Council’s decision in Gillespie, *supra*, appears to impose a duty upon a records custodian to later disclose records that were not in existence at the time of the OPRA request, such decision is vacated. The GRC desires to make it clear that an OPRA request is viable only with respect to government records that are ***in existence at the time the request is received by the custodial agency***. An OPRA request cannot be filed prospectively such that when or if the requested records come into existence said request will make them subject to disclosure.

Even though the Custodian informed the Complainant on June 27, 2007, that a copy of the JLHS fencing project contract with an appended copy of the successful bidder's documentation was available for examination, the Custodian had no legal obligation to do so because the record's existence post-dated the Complainant's OPRA request for said record.

Accordingly, pursuant to N.J.S.A. 47:1A-1.1., the Custodian had no duty to fulfill the Complainant's request for pending records because the records were not in existence at the time of the request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that within the statutorily mandated response time the Custodian disclosed to the Complainant a copy of the requested bid package for fencing around Jackson Liberty High School, and because the Complainant has failed to provide any credible evidence to contradict the Custodian's certification, the Custodian has not denied access to said records.
2. Because the Custodian certified that within the statutorily mandated response time the Custodian informed the Complainant in writing that the contract between the Jackson Board of Education and the successful bidder for the Jackson Liberty High School fencing project was nonexistent and still in the process of being drafted, and because the Complainant has failed to provide any credible evidence to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to the record pursuant to N.J.S.A. 47:1A-1.1. See also Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Pursuant to N.J.S.A. 47:1A-1.1., the Custodian had no duty to fulfill the Complainant's request for pending records because the records were not in existence at the time of the request.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

May 17, 2011¹⁰

¹⁰ This complaint was prepared for adjudication on August 6, 2009; however, said complaint was not adjudicated due to the Council's lack of quorum.
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