



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

August 24, 2010 Government Records Council Meeting

Russell Miller
Complainant

Complaint No. 2009-191

v.

Westwood Regional School District (Bergen)
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 17, 2010 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. The Custodian has violated N.J.S.A. 47:1A-5.e. by not providing immediate access to the bills and vouchers requested and unlawfully denied access to the Complainant.
2. Because the Complainant identifies types of government records (*architect and engineer costs, publicity costs, staff costs and any other related service cost to the project*) within a specific date (*presumably the project timeframe was anticipated by the Complainant since only the costs for a particular project was requested*), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian’s search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding *bills and vouchers* and provide them to the requestor. The Council declines to order the Custodian to disclose all bills and vouchers related to the sports complex project to the Complainant since the Custodian did so on July 19, 2010 in response to the GRC’s request for additional information necessary to complete the investigation of this complaint.
3. Although the Custodian violated N.J.S.A. 47:1A-5.e. by not providing immediate access to the requested bills and vouchers and unlawfully denied access to the Complainant and erroneously asserted that the Complainant’s OPRA request was broad and unclear requiring clarification in order for the Custodian to fulfill the request, the Custodian did provide the requested records in response to the GRC’s request for additional information necessary to complete the investigation of this



complaint on July 19, 2010. Therefore, 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.

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 August, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: August 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 24, 2010 Council Meeting**

**Russell Miller¹
Complainant**

GRC Complaint No. 2009-191

v.

**Westwood Regional School District (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Cost related to athletic complex. Attachment to request stated³: Costs for the conceptual plans for the sports complex proposed at the Westwood High School property; include architect and engineer costs, publicity costs, staff costs and any other related service cost to the project.

Request Made: March 20, 2009⁴

Response Made: March 27, 2009

Custodian: Keith Rosado, School Business Administrator/Board Secretary

GRC Complaint Filed: June 3, 2009⁵

Background

March 17, 2009

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 with an attachment describing the records requested in detail.

March 27, 2009

E-mail from the Complainant to the Custodian (at 11:38 a.m.). The Complainant informs the Custodian that there was an attachment with the OPRA request and that he will send it to the Custodian again. Further, the Complainant states that he is looking for disbursements, payments, compensation and contracted costs.

March 27, 2009

E-mail from the Custodian to the Complainant (at 11:56 a.m.). The Custodian states that he has the attachment now but is not quite sure what the Complainant is

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Custodian asserts in the Statement of Information that he did not receive the attachment with the OPRA request.

⁴ The Custodian certifies in the Statement of Information that he received the OPRA request on March 20, 2009 (contrary to the Complainant's assertion that he submitted the request on March 17, 2009).

⁵ The GRC received the Denial of Access Complaint on said date.

requesting. The Custodian also states that he has the cost for all the professional services, but the bid requires the winner to reimburse the district for the initial cost of the design and conceptual plans for the sports complex. The Custodian asks the Complainant what records he is requesting. Further, the Custodian states that he needs this information to fulfill the request.

March 27, 2009

E-mail from the Complainant to the Custodian (at 2:19 a.m.). The Complainant states that he will call or stop by the office next week.

June 3, 2009⁶

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the Complainant’s OPRA request with attachment dated March 17, 2009 included.

The Complainant asserts that when he picked up a record from the Custodian in response to a different OPRA request, he verbally asked for the records responsive to the OPRA request subject of this complaint. The Complainant further asserts that he was instructed to fill out a records request form, but has yet to receive a response.

The Complainant agrees to mediate this complaint.

July 22, 2009

Offer of Mediation sent to the Custodian.⁷

July 30, 2009

Email from the Custodian to the GRC. The Custodian states that he has tried to contact the Complainant via e-mail to clarify what records the Complainant specifically wants. The Custodian further states that he never received a response back from the Complainant.

August 20, 2009

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

August 31, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 17, 2009.
- E-mail from Complainant to Custodian dated March 27, 2009 (11:38 a.m.).
- E-mail from Custodian to Complainant dated March 27, 2009 (11:56 a.m.).
- E-mail from Complainant to Custodian dated March 27, 2009 (2:19 p.m.).

The Custodian certifies that no search has been undertaken because the Complainant is asking for a record to be created and not for a particular record that exists. The Custodian further certifies that he has made numerous attempts to have the Complainant clarify the request so that the Custodian may fulfill it.

⁶ The Denial of Access Complaint is dated June 1, 2009.

⁷ There is no record of the Custodian specifically agreeing to or not agreeing to mediate this complaint. Russell Miller v. Westwood Regional School District (Bergen), 2009-191 – Findings and Recommendations of the Executive Director

June 18, 2010

E-mail with letter attached from the GRC to the Custodian. The GRC informs the Custodian that additional information is required to complete the investigation in this matter. Specifically, the GRC directs the Custodian to provide a certification answering the following questions within five (5) business days or by end of business on Friday, June 25, 2010:

1. At the time that you received the records request (March 20, 2009), did any bills and vouchers for the cost incurred for the construction of the sports complex at the Westwood High School exist:
2. At the time you received the records request (March 20, 2009), did a proposal of the itemized costs for the construction of the sports complex at the Westwood High School exist?

July 6, 2010

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until July 16, 2010 to respond to the GRC's letter dated June 18, 2010. The Custodian explains that he was on vacation from June 19-27 and returned to work on Monday, June 28, 2010. Further, the Custodian states that the week of June 28, 2010 was spent preparing for the final Board of Education meeting for the 2009-2010 school year, as well as finalizing payments and closing out for the end of the district's fiscal year.

July 19, 2010

E-mail from the Complainant to the GRC. The Complainant states that he received a certified letter from the Board of Education indicating that he can pick up the requested records for the cost of \$2.46. The Complainant indicates that he will send the Business Administrator notice that he will pick up the records in a few days. Further, the Complainant asks if there is a penalty for the Custodian's knowing and willful behavior.

July 19, 2010

E-mail from the GRC to the Complainant. The GRC informs the Complainant that it will evaluate this complaint for a determination of whether the Custodian knowingly and willfully denied access to the requested records as part of the adjudicatory process. The GRC further informs the Complainant that it is still awaiting the Custodian's response to the questions sent on July 18, 2010. Lastly, the GRC states that this complaint will be adjudicated at the next monthly GRC meeting (pending review) after all the requested information is received.

July 19, 2010⁸

Letter certification from the Custodian to the GRC. The Custodian certifies that the Complainant's original request for public records was never denied. The Custodian certifies that he asked the Complainant for more details so that the Custodian can fulfill the request with the proper records. Further, the Custodian certifies that on Friday, July

⁸ The Complainant submitted additional information that is not relevant to the adjudication of this Denial of Access Complainant.

16, 2010 the Complainant was notified by certified/return receipt mail that all records responsive to the request were copied and ready for pick up. The Custodian also certifies that the Complainant contacted the Custodian via e-mail on Monday, 19, 2010 to state that he would pick up the records this week. Lastly, the Custodian certifies that he believes by submitting the records responsive to the request that the GRC will be satisfied and the complaint will be closed.

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:

“[i]mmediate 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.” N.J.S.A. 47:1A-5.e.

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.

In this case, the evidence of record shows that the Custodian communicated with the Complainant regarding the request via e-mail on March 27, 2009 or the fifth (5th) business day after receiving the request. Specifically, the Custodian stated that he has the cost for all the professional services, but the bid requires the winner to reimburse the district for the initial cost of the design and conceptual plans for the sports complex. Additionally, the Custodian requested clarification of the Complainant's request.

In the attachment to the OPRA request, the Complainant specifically detailed his request as the "costs for the conceptual plans for the sports complex proposed at the Westwood High School property to include architect and engineer costs, publicity costs, staff costs and any other related service cost to the project." The cost associated with the conceptual plans for the sports complex project are evidenced by bills and vouchers paid by the district.

OPRA provides that "[i]mmediate 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. Therefore, the Custodian's failure to provide the Complainant with such immediate access records results in the unlawful denial of these records. The unlawful denial of access to these records is further supported by the Custodian's own admission in his March 27, 2009 response to the request when he stated that "he has the cost for all the professional services." Thus, the Custodian has violated N.J.S.A. 47:1A-5.e. by not providing immediate access to the bills and vouchers requested and unlawfully denied access to the Complainant.

The Custodian certified in the Statement of Information that he needed clarifying information in order to fulfill the request. Also, the Custodian certified that the Complainant is asking for a record to be created and not for a particular record that exists. Effectively, the Custodian asserts that the request is broad and unclear because the Complainant has not requested specifically identifiable records. In response to the GRC's request for additional information regarding the existence of bills and vouchers relating to the conceptual plans for the sports complex at the time the Complainant made his OPRA request, the Custodian disclosed the records responsive to the Complainant (on July 19, 2010).

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.*" (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁹ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”¹⁰

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

Because the Complainant identifies types of government records (*architect and engineer costs, publicity costs, staff costs and any other related service cost to the project*) within a specific date (*presumably the project timeframe was anticipated by the Complainant since only the costs for a particular project was requested*), MAG and Bent do not apply to the request relevant to this complaint. The Custodian’s search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding *bills and vouchers* and provide them to the requestor. The Council declines to order the Custodian to disclose all bills and vouchers related to the sports complex project to the Complainant since the Custodian did so on July 19, 2010 in response to the GRC’s request for additional information necessary to complete the investigation of this complaint.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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.

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁰ As stated in Bent, *supra*.

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:

“... If 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, 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, 107 (App. Div. 1996).

Although the Custodian violated N.J.S.A. 47:1A-5.e. by not providing immediate access to the requested bills and vouchers and unlawfully denied access to the Complainant and erroneously asserted that the Complainant’s OPRA request was broad and unclear requiring clarification in order for the Custodian to fulfill the request, the Custodian did provide the requested records in response to the GRC’s request for additional information necessary to complete the investigation of this complaint on July 19, 2010. Therefore, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has violated N.J.S.A. 47:1A-5.e. by not providing immediate access to the bills and vouchers requested and unlawfully denied access to the Complainant.
2. Because the Complainant identifies types of government records (*architect and engineer costs, publicity costs, staff costs and any other related service cost to the project*) within a specific date (*presumably the project timeframe was anticipated by the Complainant since only the costs for a particular project was requested*), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford

Police Department, 381 N.J.Super. 30 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding *bills and vouchers* and provide them to the requestor. The Council declines to order the Custodian to disclose all bills and vouchers related to the sports complex project to the Complainant since the Custodian did so on July 19, 2010 in response to the GRC's request for additional information necessary to complete the investigation of this complaint.

3. Although the Custodian violated N.J.S.A. 47:1A-5.e. by not providing immediate access to the requested bills and vouchers and unlawfully denied access to the Complainant and erroneously asserted that the Complainant's OPRA request was broad and unclear requiring clarification in order for the Custodian to fulfill the request, the Custodian did provide the requested records in response to the GRC's request for additional information necessary to complete the investigation of this complaint on July 19, 2010. Therefore, 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.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

August 17, 2010