



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
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RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Harry Hersh
Complainant

Complaint No. 2010-291

v.

Lakewood Board of Education (Ocean)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 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 OPRA expressly excludes trade secrets and proprietary commercial or financial information from the definition of a government record, and because Catapult Learning, LLC alleges that their records contain purported trade secrets and proprietary information, the disclosure of which would cause them irreparable harm, Catapult Learning, LLC would be substantially, specifically and directly affected by the outcome of the complaint. Therefore, Catapult Learning, LLC is granted intervenor status in this complaint pursuant to *N.J.A.C. 1:1-16.1(a)*.
2. The Custodian did not timely respond to the Complainant’s OPRA request. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. Because the Complainant’s request fails to identify the specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).



4. Although the Custodian did not timely respond to the Complainant's OPRA request, he did respond to the Complainant on the eighth (8th) business day following receipt of the Complainant's request disclosing all evaluations. Further, the Custodian certified that copies of the curriculum could not be disclosed to the Complainant because they are not government records and that invoices from the consultant and requests for proposals do not exist. 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 28th Day of August, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: September 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Harry Hersh¹
Complainant**

GRC Complaint No. 2010-291

v.

**Lakewood Board of Education (Ocean)²
Custodian of Records**

Records Relevant to Complaint:

1. Full copies of all Lakewood District's phonological awareness experts' evaluations of the Hebrew curriculum programs that the third party providers plan to implement, including the Hebrew curriculum programs' plan details as originally submitted and revised by the third party providers, as well as all of the original evaluations and follow-up evaluations by the Lakewood District's phonological awareness experts.³
2. Copies of all invoices, bills, vouchers for such phonological experts' services and copies of Lakewood Board of Education approvals and checks, both front and back, made in payment thereof.
3. Copies of all requests for proposals, advertisements and any other form of solicitation for the District's use of phonological experts' services, any proposals and resumes received pursuant thereto, contracts entered into, credentials and any correspondence and e-mails relating thereto.

Request Made: October 15, 2010

Response Made: October 27, 2010

Custodian: Robert S. Finger

GRC Complaint Filed: November 5, 2010⁴

Background

September 2, 2010

Letter from the Assistant Superintendent of the Lakewood Board of Education ("Board") to nonpublic school administrators. The Assistant Superintendent informs nonpublic school administrators that the Board's phonological awareness expert evaluated the Hebrew curriculum that the third party providers intend to implement and

¹ No legal representation listed on record.

² Represented by Michael I. Inzelbuch, Esq., (Lakewood, NJ); however, there are no submissions from the Custodian's Counsel to the GRC on file.

³ The Complainant references the letter from the Assistant Superintendent of the Lakewood Board of Education to nonpublic school administrators dated September 2, 2010, to *inter alia* identify the third party providers.

⁴ The GRC received the Denial of Access Complaint on said date.

found that (a) Catapult reading has religious words in the reading section, is poorly sequenced and not motivating or engaging, (b) Catapult grammar is an educationally sound product with no religious language and a little archaic language, (c) Tree of Knowledge is overkill decoding, very poorly sequenced, violates multiple educational principals (sic) and is inappropriate, and (d) Learn It includes religion but is educationally very well thought out. As a result, the Assistant Superintendent states that the Hebrew program cannot commence until the Board receives a revised Hebrew curriculum from the providers as well as a provider certification that no religious content will be included.

October 15, 2010

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. The Complainant indicates that the preferred method of delivery is via pick up by the Complainant.

October 27, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eighth (8th) business day following receipt of such request via return of a conformed copy of the OPRA request form. The Custodian provides copies of records to the Complainant which the Custodian has determined to be responsive to request item number 1 and informs the Complainant that there are no records responsive to request items numbered 2 and 3.

October 29, 2010

Letter from the Complainant to the Custodian. The Complainant states that he understands the Custodian's response to request items numbered 2 and 3; however, the Complainant informs the Custodian that with respect to request item number 1, the Custodian failed to disclose the Hebrew curriculum programs' plan details. The Complainant also informs the Custodian that he received a copy of a single evaluation of Catapult's original plan but no evaluations of other Hebrew curriculum programs submitted by third party providers for implementation. The Complainant further informed the Custodian that he did not receive any requested follow-up plans or evaluations by the Lakewood District's phonological awareness experts.

October 29, 2010

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that he disclosed all of the records he had that were responsive to the Complainant's request and that he would ask the Curriculum Office if they had any other records responsive to the Complainant's request.

November 5, 2010

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

- Letter from the Assistant Superintendent of the Board to nonpublic school administrators dated September 2, 2010
- Complainant's OPRA request dated October 15, 2010
- Custodian's response to the OPRA request dated October 27, 2010

- Letter from the Complainant to the Custodian dated October 29, 2010
- E-mail from the Custodian to the Complainant dated October 29, 2010

The Complainant states that he submitted his OPRA request dated October 15, 2010 on that same date to the Custodian via e-mail. The Complainant states he also sent a copy of his request to the Custodian via certified mail.

The Complainant states that he picked up the Custodian's response to his request on October 27, 2010 but that the response was incomplete because not all of the records the Complainant requested were disclosed to him. The Complainant states that he notified the Custodian that he did not receive all of the requested records by a letter dated October 29, 2010. The Complainant further states that the Custodian replied to the Complainant's October 29, 2010 letter on that same date by informing the Complainant that the Custodian disclosed to him all of the records responsive to his request and that he would ask the Curriculum Office if they had any other records responsive to the Complainant's request. The Complainant states that he received no further communications after October 29, 2010 from the Custodian.

The Complainant does not agree to mediate this complaint.

November 17, 2010

Letter from Akinyemi Akiwowo, Esq., of Genova, Burns & Giantomasi, to the GRC. Mr. Akiwowo states that he represents Catapult Learning, LLC ("Catapult"). Mr. Akiwowo further states that Catapult intends to intervene in the complaint to protect its rights to certain confidential and proprietary trade secret information and he requests GRC information concerning the complaint.

November 18, 2010

Letter from the GRC to Mr. Akiwowo. The GRC informs Mr. Akiwowo that the GRC understands that Catapult intends to move to intervene in the complaint and sends a copy of the GRC case file to Mr. Akiwowo.

November 19, 2010

Letter from Mr. Akiwowo to the GRC. Mr. Akiwowo informs the GRC that Catapult is moving to intervene in the complaint. In support of his motion, Mr. Akiwowo informs the GRC that Catapult asserts that they, although not initially a party, are substantially, specifically, and directly affected by the outcome of this matter. In support of Catapult's assertion, Mr. Akiwowo states that Catapult is a provider of educational services to public, charter, private and religious schools and that the Complainant has requested records from the Custodian which includes confidential and proprietary trade secret information central to their business and marketing model. Mr. Akiwowo contends that if the requested records are disclosed, they will reveal Catapult's unique instructional intervention programs and specialized support services that contain trade secrets and would fundamentally impair Catapult's ability to compete in the educational services market. Mr. Akiwowo states that Catapult believes that the Complainant is employed by Tree of Knowledge Learning Center ("Tree of Knowledge"), which is one of Catapult's direct competitors, and that Catapult will suffer irreparable harm if the Council orders disclosure of Catapult's proprietary information to the Complainant.

November 29, 2010

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

November 29, 2010

E-mail from the Custodian to the GRC. The Custodian states that he is no longer employed by the Board and that the SOI request has been forwarded to the Custodian’s Counsel.

December 4, 2010

E-mail from the Custodian to the GRC. The Custodian states that the Custodian’s Counsel will complete the SOI; however the Custodian provides what he characterizes as an “unofficial response” to the complaint which he tells the GRC to attach to the SOI form which is being prepared by the Custodian’s Counsel.

December 8, 2010

E-mail from the GRC to the Custodian. The GRC acknowledges receipt of the Custodian’s response to the complaint but informs the Custodian that it cannot accept the response as the SOI or partial SOI unless and until it is certified by the Custodian.

December 8, 2010

E-mail from the Custodian to the GRC. The Custodian informs the GRC that he will discuss his response with Counsel and reply back to the GRC directly.

December 8, 2010

E-mail from the GRC to Mr. Akiwowo. The GRC informs Mr. Akiwowo that the GRC has reviewed and granted his motion to allow Catapult to enter the complaint as an intervening party.

December 9, 2010

E-mail from Mr. Akiwowo to the GRC. Mr. Akiwowo informs the GRC that he wants to make sure he will have sufficient time to present Catapult’s legal argument opposing disclosure of records relating to Catapult’s proprietary information. Mr. Akiwowo also asks the GRC if the Complainant intends to mediate the complaint.

December 9, 2010

E-mail from the GRC to Mr. Akiwowo. The GRC informs Mr. Akiwowo that he will have ample time to present Catapult’s legal argument. The GRC also informs Mr. Akiwowo that the Complainant has refused mediation.

December 19, 2010⁵

Custodian’s SOI with no attachments.

The Custodian certifies that he was the Custodian until November 19, 2010. The Custodian further certifies that copies of the curriculum requested by the Complainant

⁵ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

could not be disclosed to the Complainant because they are not government records subject to disclosure. The Custodian further certifies that all evaluations responsive to the complainant's request were disclosed to the Complainant.

The Custodian certifies that bills from the consultant and requests for proposals were not disclosed to the Complainant because the records do not exist. The Custodian states that the reason no responsive records exist is that the consultant's fee did not exceed the quote or bid threshold so there was no requirement under the Public Contracts Law to solicit quotes, bids or a request for proposal. The Custodian certifies that, as a substitute, he disclosed to the Complainant a copy of the Board's resolution hiring the consultant.

July 22, 2011

Letter from Mr. Akiwowo to the GRC. Mr. Akiwowo submits to the GRC his legal argument with attachments opposing disclosure of the requested records to the Complainant. Mr. Akiwowo states that the Complainant requested information submitted by Catapult in response to the Board's 2009 Request for Proposal for Contracted Professional Services for Basic Skills (Title I) Non-public Instructional Services ("RFP"). Mr. Akiwowo states that in response to the RFP Catapult designed a program narrowly tailored to the goals and requirements outlined in the RFP and that it contains a confidentiality statement which provides "this information is confidential and proprietary to Catapult Learning. It is for internal use and distribution only. Distribution of this document beyond employees of Catapult Learning is prohibited."

Mr. Akiwowo states that pursuant to N.J.S.A. 47:1A-1.1., proprietary commercial or financial information obtained from any source is exempt from disclosure. Mr. Akiwowo cites Lamorte Burns and Company v. Walters, 167 N.J. 285, 299-301 (2001) as holding that three (3) factors must be considered in evaluating a claim that information is confidential and proprietary: (1) that a party has expended its resources developing the information, (2) the information is not generally disclosed to the public, and (3) if the information is disclosed, it is disclosed for a limited purpose with a provision for confidentiality. Mr. Akiwowo argues that Catapult expended its resources developing the information provided in response to the Board's RFP, that the information is not generally disclosed to the public, and that the information was disclosed for the limited purpose of responding to the RFP with a provision for confidentiality.

Mr. Akiwowo states that similar to the court's decision in Audio Technical Services, Ltd v. Department of the Army, 487 F. Supp. 779 (DC D.C. 1979), the information submitted by Catapult to the Board contains Catapult's design concepts including methods and procedures and that disclosure of the information would impair the ability of the Board to obtain such detailed information in the future because bidders would be reluctant to submit information that would put them at a competitive disadvantage.

Mr. Akiwowo states that it is beyond dispute that Catapult has met its burden that the requested records are exempt from disclosure under the "proprietary commercial or

financial information” and “advantage to competitors” sections of OPRA.⁶ Mr. Akiwowo contends that Catapult has demonstrated that the disclosure of the documents sought by the Complaint would severely undermine Catapult’s ability to compete in the educational services market, especially since Catapult believes that the Complainant is employed by Catapult’s competitor, Tree of Knowledge. Mr. Akiwowo asserts that the information sought by the Complainant is proprietary commercial or financial information that is expressly exempt from disclosure pursuant to OPRA and case law. As such, Mr. Akiwowo asks the GRC to dismiss the complaint.

April 23, 2012

E-mail from the GRC to the Complainant. The GRC asks the Complainant to inform the GRC if he received any of the requested records from the Custodian since he filed his complaint.⁷

August 14, 2012

E-mail from the GRC to the Complainant. The GRC asks the Complainant to inform the GRC if he received any of the requested records from the Custodian since he filed his complaint. The GRC also asks the Complainant to submit to the GRC a description of any such records received.⁸

Analysis

Whether Catapult Learning, LLC, should be granted intervenor status?

OPRA provides that:

“A government record shall not include...trade secrets and proprietary commercial or financial information obtained from any source...”
N.J.S.A. 47:1A-1.1.

OPRA further provides that:

“A government record shall not include...information which, if disclosed, would give an advantage to competitors or bidders...” N.J.S.A. 47:1A-1.1.

The New Jersey Administrative Code provides that:

“Any person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene.”
N.J.A.C. 1:1-16.1(a)

⁶ This is the first time Mr. Akiwowo alluded to the section of OPRA that provides “A government record shall not include...information which, if disclosed, would give an advantage to competitors or bidders...” N.J.S.A. 47:1A-1.1.; however, he did cite similar language by quoting the court’s characterization of proprietary information in Gill v. N.J. Department of Banking and Insurance, 404 N.J. Super. 1 (App. Div. 2008).

⁷ The Complainant did not respond to the GRC’s e-mail.

⁸ The Complainant did not respond to the GRC’s e-mail.

“Persons or entities permitted to intervene shall have all the rights and obligations of a party to the proceeding.” *N.J.A.C.* 1:1-16.1(b)

On November 19, 2010, Catapult moved to enter this complaint as an intervenor. Catapult asserted that they, although not initially a party, are substantially, specifically, and directly affected by the outcome of this matter. In support of their assertion Catapult stated that they are a provider of educational services to schools and that the Complainant requested records from the Custodian which included confidential and proprietary trade secret information central to their business and marketing model.⁹ Specifically, Catapult stated that the requested records, if disclosed, would reveal Catapult’s unique instructional intervention programs and specialized support services that contain trade secrets and would fundamentally impair its ability to compete in the educational services market. Catapult further stated that they believe the Complainant is employed by Tree of Knowledge. Catapult asserted that Tree of Knowledge is one of their direct competitors and therefore they would suffer irreparable harm if the Council should order disclosure of its proprietary information to the Complainant.

Here, because the Denial of Access Complaint was instituted with an administrative agency; to wit, the GRC, the decision to grant intervenor status lies in the GRC’s discretion. *See Gill v. New Jersey Department of Banking and Insurance*, 404 N.J. Super. 1, 10 (App. Div. 2008). In its motion for intervenor status, Catapult asserted that the records which it submitted to the Board as one of the third party providers contained confidential and proprietary trade secret information which, if disclosed, would reveal their unique instructional intervention programs and specialized support services that contain trade secrets.

The GRC notes that Catapult is making an argument to exempt their records from disclosure, which is cognizant under *N.J.S.A.* 47:1A-1.1. as records that contain trade secrets and proprietary information. OPRA expressly excludes such records from the definition of a government record. Therefore, if Catapult was denied the opportunity to present facts and legal argument in opposition to the Denial of Access Complaint from their perspective, and the relevant records were subsequently disclosed, Catapult could suffer irreparable harm. As such, Catapult would be substantially, specifically and directly affected by the outcome of the complaint and *N.J.A.C.* 1:1-16.1(a) provides that “[a]ny person or entity not initially a party...who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene.”

Accordingly, because OPRA expressly excludes trade secrets and proprietary commercial or financial information from the definition of a government record, and because Catapult alleges that their records contain purported trade secrets and proprietary information, the disclosure of which would cause them irreparable harm, Catapult would be substantially, specifically and directly affected by the outcome of the complaint.

⁹ In request item number 1 the Complainant seeks in part “...the Hebrew curriculum programs’ plan details as originally submitted and revised by the third party providers...” The Complainant makes reference to a letter from the Assistant Superintendent of the Board to nonpublic school administrators dated September 2, 2010 and the letter refers to Catapult as one of the third party providers.

Therefore, Catapult is granted intervenor status in this complaint pursuant to *N.J.A.C.* 1:1-16.1(a).

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA also provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant stated that his OPRA request was provided to the Custodian on October 15, 2010. The Custodian failed to certify as to the date he received the Complainant's request; however, the Custodian did not dispute the Complainant's assertion that the request was provided to the Custodian on October 15, 2010. The Complainant stated that he received the Custodian's response to his request by picking up the request at the Board's office on October 27, 2010. The Custodian failed to certify as to the date he made the response to the Complainant's request; however, the Custodian did not dispute the Complainant's assertion that the response to the Complainant's request was made on October 27, 2010. Further, the evidence of record reveals the

¹⁰ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Custodian's response to the Complainant's OPRA request is dated October 27, 2010, which is the eighth (8th) business day following the Custodian's receipt of the request. Thus, the Custodian's failure to respond in a timely manner results in a "deemed" denial.

Therefore, the Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

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. 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, the Custodian certified that copies of the curriculum requested by the Complainant, which were part of request item number 1, could not be disclosed to the Complainant because they are not government records subject to disclosure. However, the Custodian certified that all evaluations responsive to request item number 1 were disclosed to the Complainant. The Custodian further certified that bills from the consultant and requests for proposals, which were part of request items numbered 2 and 3, were not disclosed to the Complainant because the records do not exist.

It was unnecessary, however, for the Custodian to disclose any of the requested records because the Complainant's request is invalid under OPRA. The Complainant's request is invalid because he has failed to name a specific identifiable government record and because the request is overly broad.

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). As the court noted in invalidating MAG's request under OPRA:

"Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* at 549.

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.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹¹ 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."¹²

Moreover, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² As stated in Bent, *supra*.

documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*" (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Further, 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..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f 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." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..." Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant's request sought:

- Item No. 2: "From the Borough Engineer's files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 3: From the Borough Engineer's files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
- Item No. 4: From the Borough Attorney's files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 5: From the Borough Attorney's files: all documents related to the development or modification to North Street, to the south and east of Wilson St."

In the instant complaint, request item number 1 seeks "[f]ull copies of all Lakewood District's phonological awareness experts evaluations of the Hebrew curriculum programs that the third party providers plan to implement, including the Hebrew curriculum programs' plan details as originally submitted and revised by the third party providers, as well as all of the original evaluations and follow-up evaluations by the Lakewood District's phonological awareness experts."

The Complainant's request is not a valid OPRA request. This request is overly broad and requires the Custodian to conduct research to locate the records responsive to the Complainant's request because it is not clear which third party providers the Complainant is referencing. The Complainant does not name the third party providers, but rather, refers the Custodian to a letter from the Assistant Superintendent of the Board to nonpublic school administrators which contains the names of third party providers. However, the letter does not make clear whether the third party providers named in it are the only third party providers or just those third party providers that were the subject of the phonological awareness experts' evaluations. Moreover, the complaint is overly broad because the Complainant also requested the Hebrew curriculum programs' plan details as originally submitted and the Hebrew curriculum programs' plan details as originally revised, but the Complainant does not provide the Custodian with a date or date range for the original submissions or the revised submissions. The complainant also requests the original evaluations and the follow-up evaluations but does not provide the Custodian with a date or a date range for either the original or follow-up evaluations.

Request item numbers 2 and 3 each seek numerous records. Request item number 2 is overly broad because by requesting records for "phonological experts' services" the Complainant is referencing more than one (1) phonological expert, but does not provide a name or date range during which the phonological experts were retained by the Board. Furthermore, the Complainant links this request to the first request which in itself was overly broad. As part of request item number 2 the Complainant also requests Board of Education "approvals" but does not make clear for what the approvals are sought. For example, the Complainant does not make clear whether he is seeking the approvals for hiring phonological experts or the approvals authorizing payment to the phonological experts.

Request item number 3 seeks numerous records. Among other records the Complainant requested "...any proposals and resumes received pursuant [to the District's use of phonological experts' services] contracts entered into, credentials and any correspondence and e-mails relating thereto." The Complainant has failed to provide names, dates, or a subject for e-mails and correspondence or even a date range for any of the other records.

Therefore, because the Complainant's request fails to identify the specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Whether the Custodian's actions rise 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.

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 (Felder 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).

Here, although the Custodian did not timely respond to the Complainant’s OPRA request, he did respond to the Complainant on the eighth (8th) business day following receipt of the Complainant’s request disclosing all evaluations. Further, the Custodian certified that copies of the curriculum could not be disclosed to the Complainant because they are not government records and that invoices from the consultant and requests for proposals do not exist. 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. Because OPRA expressly excludes trade secrets and proprietary commercial or financial information from the definition of a government record, and because Catapult Learning, LLC alleges that their records contain purported trade secrets and proprietary information, the disclosure of which would cause them irreparable harm, Catapult Learning, LLC would be substantially, specifically and directly affected by the outcome of the complaint. Therefore,

Catapult Learning, LLC is granted intervenor status in this complaint pursuant to *N.J.A.C. 1:1-16.1(a)*.

2. The Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. Because the Complainant's request fails to identify the specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Although the Custodian did not timely respond to the Complainant's OPRA request, he did respond to the Complainant on the eighth (8th) business day following receipt of the Complainant's request disclosing all evaluations. Further, the Custodian certified that copies of the curriculum could not be disclosed to the Complainant because they are not government records and that invoices from the consultant and requests for proposals do not exist. 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 By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012