



NEW JERSEY GOVERNMENT RECORDS COUNCIL
Administrative Complaint Disposition – Complaint Voluntarily Withdrawn

GRC Complaint No.: 2011-169

Complainant: Heather Marsh

Public Agency: Jefferson Township Board of Education (Morris)

Custodian of Record: Dora Zeno

Date of Request: February 23, 2011

Date of Complaint: May 12, 2012¹

Complaint Disposition: The Complainant voluntarily withdrew this complaint in writing to the GRC on July 2, 2012.

Applicable OPRA Provision: None.

Effective Date of Disposition: July 31, 2012

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

Date: July 24, 2012

Distribution Date: August 1, 2012

¹ The GRC received the Denial of Access Complaint on said date.



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 26, 2012 Government Records Council Meeting

Heather Marsh
Complainant

Complaint No. 2011-169

v.

Jefferson Township Board of Education (Morris)
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council ("Council") considered the June 19, 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 the Custodian failed 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, the Custodian's violation of OPRA 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).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the e-mails responsive to request Item Nos. 1, 2, and 3 in order to determine whether the redactions made to such records are lawful.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the records provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting 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: June 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

**Heather Marsh¹
Complainant**

GRC Complaint No. 2011-169

v.

**Jefferson Township Board of Education (Morris)²
Custodian of Records**

Records Relevant to Complaint:

1. All e-mails from Fay Servedio and/or Julianne Masticola to/from/between Dr. Fuchs and/or other board members regarding the donation from the Boy's Lacrosse Parents' Association from September 2010 through [February 23, 2011].
2. All e-mails from Faye Servedio and/or Julianne Masticola to/from/between Dr. Fuchs and/or other board members that reference the soccer varsity coach from January 2011 through [February 23, 2011].
3. E-mails concerning the lacrosse coach between any Board of Education ("Board") members and district staff between January 2011 through [February 23, 2011].³

Request Made: February 23, 2011

Response Made: March 9, 2011

Custodian: Dora E. Zeno

GRC Complaint Filed: May 12, 2011⁴

Background

February 23, 2011

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.

March 9, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the tenth (10th) business day following receipt of such request. The Custodian states that the requested e-mails were redacted by the Board attorney. The Custodian asserts that she informed the Complainant in a

¹ No legal representation listed on record.

² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King (Florham Park, NJ).

³ Additional records not at issue in this complaint were also requested by the Complainant.

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

telephone call that the e-mails had to be redacted as advisory, consultative, and deliberative (“ACD”) material under OPRA.

May 12, 2011

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

- Complainant’s OPRA request dated February 23, 2011
- Letter from the Custodian to the Complainant dated March 9, 2011⁵

The Complainant states that his only dispute is that the e-mails he received from the Custodian were completely redacted and unreadable. The Complainant contends that these redactions are a knowing and willful violation of OPRA and requests that the GRC review his Complaint to insure that he was not unlawfully denied access to the requested e-mails.

The Complainant does not agree to mediate this complaint.

May 13, 2011

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

May 26, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated February 23, 2011
- Letter from the Custodian to the Complainant dated March 9, 2011⁶

The Custodian certifies that her search for the requested records in the Township’s e-mail archives yielded three (3) e-mails responsive to the Custodian’s request. The Custodian certifies that none of the responsive e-mails were destroyed. The Custodian further certifies that she forwarded the Complainant the responsive records on March 4, 2011. The Custodian also certifies that the e-mails were redacted pursuant to OPRA because the responsive e-mails were pre-decisional in nature and consisted of interagency, advisory, consultative, and deliberative material. The Custodian cites In Re Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000), in support of the proposition that the pre-decisional subject matter contained in the requested e-mails is exempt from disclosure under OPRA. The Custodian certifies that the responsive e-mails were prepared by Board members prior to the Board’s discussion and action on issues discussed at its February 22, 2011 public meeting.

The Custodian argues that the Board has met their burden of proving that the e-mails responsive to the Complainant’s request are pre-decisional and deliberative in nature and that In Re Liquidation demands that the burden be shifted to the Complainant to show that there is a compelling need for access that overrides Board’s need for

⁵ The Complainant attached additional documentation that is not relevant to the adjudication of this complaint.

⁶ The Custodian attached additional documentation that is not relevant to the adjudication of this complaint. Heather Marsh v. Jefferson Township Board of Education (Morris), 2011-169 – Findings and Recommendations of the Executive Director

privacy. The Custodian maintains that the e-mails do not represent the views of the Board as a whole and do not necessarily represent final opinions of the Board. The Custodian contends that the e-mails are analogous to draft documentation and that their contents are not an accurate reflection of the Board's views. The Custodian further asserts that there has not been an unlawful denial of access.

Analysis

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

OPRA also 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.

Further, OPRA 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.⁷ 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).

Here, the Custodian did not respond to the Complainant's February 23, 2011 OPRA request until March 9, 2011, the tenth (10th) business day following the receipt of the Complainant's request. While the Custodian's response was in writing, the

⁷ 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 was made three (3) days after the statutorily mandated seven (7) business days.

Therefore, because the Custodian failed 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, the Custodian's violation of OPRA 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).

Whether the Council must conduct an *in camera* examination of the redacted e-mails responsive to the Complainant's OPRA request?

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 ... *A government record shall not include the following information which is deemed to be confidential ... criminal investigatory records ...* 'Criminal investigatory record' means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding. ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

In the instant matter, the Custodian provided the Complainant with the requested e-mails with redactions on March 9, 2011. The Custodian certified in her SOI that the redactions were made because the e-mails contained advisory, consultative, and/or deliberative material that is exempt from disclosure under OPRA pursuant to In Re Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000).

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁸ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The Court stated that:

⁸ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Heather Marsh v. Jefferson Township Board of Education (Morris), 2011-169 – Findings and Recommendations of the Executive Director 4

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The Court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7.f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the Court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7.f., which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Accordingly, the Council must act on its discretion and pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the e-mails responsive to request Item Nos. 1, 2, and 3 in order to determine whether the redactions made to such records are lawful.

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?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed 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, the Custodian's violation of OPRA 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).

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the e-mails responsive to request Item Nos. 1, 2, and 3 in order to determine whether the redactions made to such records are lawful.
3. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹¹, that the records provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012

⁹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁰ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."