



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

FINAL DECISION

January 28, 2014 Government Records Council Meeting

Robert Crawford
Complainant

Complaint No. 2012-308

v.

Parsippany-Troy Hills Township Schools (Morris)
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 Supplemental 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 complied with the Council’s December 20, 2013 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant three (3) e-mails from amanc@optonline.net dated February 25, 2011, March 11, 2011 and November 9, 2011.
2. Although the Custodian failed to bear his burden of proving that the denial of access to the requested e-mails was authorized by law, he did disclose the e-mails pursuant to the terms of the Council’s December 20, 2013 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 January, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**Robert Crawford¹
Complainant**

GRC Complaint No. 2012-308

v.

**Parsippany-Troy Hills Township Schools (Morris)²
Custodial Agency**

Records Relevant to Complaint: Copies of all e-mails sent by Anthony Mancuso in which the subject line on the e-mails contained any of the following words: Recap; Emergency Recap and/or Special Meeting Recap and that were sent to amanc@optonline.net and were also copied (cc) or blind copied (bcc) to members of the Board of Education, including the Superintendent. This request includes but is not limited to those e-mails that were sent by Anthony Mancuso to members of the Board of Education, including the Superintendent, that were dated February 25, 2011, March 10, 2011, June 14, 2011, November 9, 2011, January 14, 2012, March 8, 2012, May 24, 2012, and June 26, 2012.

Custodian of Records: Ron Smith³

Request Received by Custodian: September 13, 2012

Responses Made by Custodian: September 25, 2012, October 11, 2012, and November 12, 2012

GRC Complaint Received: November 23, 2012

Background

At its December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 2013 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, found that:

1. The Custodian complied with the Council’s November 19, 2013 Interim Order because the Custodian in a timely manner delivered to the Council in a sealed envelope nine (9) copies of the requested unredacted records and a legal certification in accordance with R. 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection.

¹ No legal representation listed on record.

² Represented by Katherine A. Gilfillan, Esq., of Weiner Lesniak, LLP (Parsippany, NJ).

³ The custodian of records from date of request through preparation and submission of the Statement of Information was Mark Resnick.

2. The Custodian has failed to bear his burden of proving that the denial of access to the requested e-mails was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant in their entirety the three (3) e-mails submitted for *in camera* examination, which are further described as e-mails from amanc@optonline.net dated February 25, 2011, March 11, 2011 and November 9, 2011.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.**
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.

Procedural History:

On December 23, 2013, the Council distributed its December 20, 2013 Interim Order to all parties. On December 23, 2013, the Custodian responded to the Council's Interim Order by providing certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant three (3) e-mails from amanc@optonline.net dated February 25, 2011, March 11, 2011 and November 9, 2011.

Analysis

Compliance

On December 20, 2013, the Council ordered the above-referenced compliance. On December 23, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before December 31, 2013. On December 23, 2013, the same day the Custodian received the Interim Order, he forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant three (3) e-mails from amanc@optonline.net dated February 25, 2011, March 11, 2011 and November 9, 2011.

Therefore, the Custodian complied with the Council's December 20, 2013 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant three (3) e-mails from amanc@optonline.net dated February 25, 2011, March 11, 2011 and November 9, 2011.

Knowing & Willful

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 “... [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]....” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 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 failed to bear his burden of proving that the denial of access to the requested e-mails was authorized by law, he did disclose the e-mails pursuant to the terms of the Council’s December 20, 2013 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 complied with the Council’s December 20, 2013 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant three (3) e-mails from amanc@optonline.net dated February 25, 2011, March 11, 2011 and November 9, 2011.

2. Although the Custodian failed to bear his burden of proving that the denial of access to the requested e-mails was authorized by law, he did disclose the e-mails pursuant to the terms of the Council's December 20, 2013 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: Dawn R. SanFilippo, Esq.
Senior Counsel

January 21, 2014



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

December 20, 2013 Government Records Council Meeting

Robert Crawford
Complainant

Complaint No. 2012-308

v.

Parsippany-Troy Hills Township Schools (Morris)
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 2013 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 complied with the Council’s November 19, 2013 Interim Order because the Custodian in a timely manner delivered to the Council in a sealed envelope nine (9) copies of the requested unredacted records and a legal certification in accordance with R. 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection.
2. The Custodian has failed to bear his burden of proving that the denial of access to the requested e-mails was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant in their entirety the three (3) e-mails submitted for *in camera* examination, which are further described as e-mails from amanc@optonline.net dated February 25, 2011, March 11, 2011 and November 9, 2011.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.¹**
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.

¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the
Government Records Council
On The 20th Day of December, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

**Robert Crawford¹
Complainant**

GRC Complaint No. 2012-308

v.

**Parsippany-Troy Hills Township Schools (Morris)²
Custodial Agency**

Records Relevant to Complaint: Copies of all e-mails sent by Anthony Mancuso in which the subject line on the e-mails contained any of the following words: Recap; Emergency Recap and/or Special Meeting Recap and that were sent to amanc@optonline.net and were also copied (cc) or blind copied (bcc) to members of the Board of Education, including the Superintendent. This request includes but is not limited to those e-mails that were sent by Anthony Mancuso to members of the Board of Education, including the Superintendent, that were dated February 25, 2011, March 10, 2011, June 14, 2011, November 9, 2011, January 14, 2012, March 8, 2012, May 24, 2012, and June 26, 2012.

Custodian of Records: Ron Smith³

Request Received by Custodian: September 13, 2012

Responses Made by Custodian: September 25, 2012, October 11, 2012, and November 12, 2012

GRC Complaint Received: November 23, 2012

Records Submitted for *In Camera* Examination:

1. A two-page e-mail from amanc@optonline.net dated February 25, 2011;
2. A two-page e-mail from amanc@optonline.net dated March 11, 2011; and
3. A two-page e-mail from amanc@optonline.net dated November 9, 2011.

Background

At its November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 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, found that:

¹ No legal representation listed on record.

² Represented by Katherine A. Gilfillan, Esq., of Weiner Lesniak, LLP (Parsippany, NJ).

³ The custodian of records from date of request through preparation and submission of the Statement of Information was Mark Resnick.

1. Custodian Mark Resnick did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. 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).
2. The GRC must conduct an *in camera* review of the requested e-mails dated February 25, 2011, March 11, 2011 and November 9, 2011, to determine the validity of the Custodian's assertion that the records are not subject to disclosure as government records. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), and N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index, as well as a legal certification in accordance with N.J. Court Rule 1:4-4, that the records provided are the records 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.

Procedural History:

On November 20, 2013, the Council distributed its November 19, 2013 Interim Order to all parties. On November 20, 2013, the Custodian responded to the Council's Interim Order by forwarding to the GRC in a sealed envelope nine (9) copies of the requested unredacted records for an *in camera* inspection.

On November 25, 2013, the Custodian forwarded to the GRC a legal certification in accordance with N.J. Court Rule 1:4-4, that the records he had provided are the records requested by the Council for the *in camera* inspection.

Analysis

Compliance

On November 19, 2013, the Council ordered the above-referenced compliance. On November 20, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before November 27, 2013. On November 20, 2013, the same day the Custodian received the Interim Order, he forwarded to the GRC in a sealed envelope nine (9) copies of the

requested unredacted records for an *in camera* inspection. On November 25, 2013, the third (3rd) business day following receipt of the Order, the Custodian forwarded to the GRC a legal certification that the records he had provided are the records requested by the Council for the *in camera* inspection.

Therefore, the Custodian complied with the Council’s November 19, 2013 Interim Order because the Custodian in a timely manner delivered to the Council in a sealed envelope nine (9) copies of the requested unredacted records and a legal certification in accordance with R. 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection.

Unlawful Denial of Access

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. N.J.S.A. 47:1A-6.

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the In Camera Examination
1	Two (2) page e-mail from amanc@optonline.net to lvalori@aol.com ; Lee Seitz; Frank Neglia; andy choffo; achoffo@bohlereing.com ; and (cc) Matt McGrath, dated February 25, 2011.	The e-mail contains comments about a Board meeting.	The e-mail contains information that does not represent official business but rather contains personal opinions of the author as clarified in <u>Lewen v. Robbinsville Public School District (Mercer)</u> , GRC	The subject of the record is “Recap 2-23-2011” The e-mail refers to a “Board of Ed meeting” and makes reference to a budget presentation and “UNFINISHED BUSINESS” discussed at said meeting. As such, because the e-mail contains comments about a Board meeting,

			Complaint No. 2008-211 (February 2011); therefore it is not “made, maintained or kept on file...in the course of official business” pursuant to <u>N.J.S.A. 47:1A-1.1</u> and is thus not subject to disclosure under OPRA.	this record is a government record and is subject to disclosure in its entirety.
2	Two (2) page e-mail from amanc@optonline.net to lvalori@aol.com ; Lee Seitz; Frank Neglia; andy choffo; achoffo@bohlere.ng.com ; and (cc) Matt McGrath, dated March 11, 2011.	The e-mail contains comments about a Board meeting.	The e-mail contains information that does not represent official business but rather contains personal opinions of the author as clarified in <u>Lewen v. Robbinsville Public School District (Mercer)</u> , GRC Complaint No. 2008-211 (February 2011); therefore it is not “made, maintained or kept on file...in the course of official business”	The subject of the record is “Recap 3-10-2011” The e-mail refers to a meeting, “the BOED,” going into and coming out of closed session, and “Committee Reports.” As such, because the e-mail contains comments about a Board meeting, this record is a government record and is subject to disclosure in its entirety.

			pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and is thus not subject to disclosure under OPRA.	
3	Two (2) page e-mail from amanc@optonline.net to Anthony mancuso dated November 9, 2011.	The e-mail contains comments about a Board meeting.	The e-mail contains information that does not represent official business but rather contains personal opinions of the author as clarified in <u>Lewen v. Robbinsville Public School District (Mercer)</u> , GRC Complaint No. 2008-211 (February 2011); therefore it is not “made, maintained or kept on file...in the course of official business” pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and is thus not subject to disclosure under OPRA.	The subject of the record is “Recap 11-8-2011” The e-mail refers to “the meeting,” “the Board,” closed session, and business such as budget constraints. As such, because the e-mail contains comments about a Board meeting, this record is a government record and is subject to disclosure in its entirety.

Although the Custodian cited to Lewen, *supra*, as legal authority to deny access, the facts in Lewen can be distinguished from the facts here. In Lewen, the Council did not find that the requested e-mails were not government records, but rather that one (1) e-mail within a chain was

not a government record because an *in camera* examination revealed that the e-mail's content consisted of a personal message. Here, the e-mails contain extensive commentary about Board meetings, as opposed to the personal message in Lewen that was completely unrelated to government business. *See* DARM circular 03-10-ST.

Thus, the Custodian unlawfully denied access to the requested e-mails because the e-mails contain comments about Board meetings and as such are government records subject to disclosure. Further, the Custodian has not provided any other legal reason for denying access.

Although not raised by the Custodian as a reason for denying access, the GRC further analyzed the records submitted for *in camera* examination to determine if those records may be exempt from access as advisory, consultative or deliberative ("ACD") material.

OPRA excludes from the definition of a government record "... inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

In O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms ... "advisory, consultative, or deliberative" in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The GRC's examination found that the requested e-mails are not pre-decisional records containing opinions, recommendations, or advice about Board policies. Rather, they contained commentary about Board meetings that had already occurred. As such, the e-mails are not exempt from access as ACD material.

Accordingly, the Custodian has failed to bear his burden of proving that the denial of access to the requested e-mails was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant in their entirety the three (3) e-mails submitted for *in camera* examination, which are further described as e-mails from amanc@optonline.net dated February 25, 2011, March 11, 2011 and November 9, 2011.

Knowing & Willful

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. The Custodian complied with the Council's November 19, 2013 Interim Order because the Custodian in a timely manner delivered to the Council in a sealed envelope nine (9) copies of the requested unredacted records and a legal certification in accordance with R. 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection.
2. The Custodian has failed to bear his burden of proving that the denial of access to the requested e-mails was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant in their entirety the three (3) e-mails submitted for *in camera* examination, which are further described as e-mails from amanc@optonline.net dated February 25, 2011, March 11, 2011 and November 9, 2011.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.⁴**
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: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

December 10, 2013

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

November 19, 2013 Government Records Council Meeting

Robert Crawford
Complainant

Complaint No. 2012-308

v.

Parsippany-Troy Hills Township Schools (Morris)
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council ("Council") considered the November 12, 2013 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. Custodian Mark Resnick did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. 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).
2. The GRC must conduct an *in camera* review of the requested e-mails dated February 25, 2011, March 11, 2011 and November 9, 2011, to determine the validity of the Custodian's assertion that the records are not subject to disclosure as government records. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), and N.J.S.A. 47:1A-1.1.
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 in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records 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 19th Day of November, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 20, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2013 Council Meeting**

**Robert Crawford¹
Complainant**

GRC Complaint No. 2012-308

v.

**Parsippany-Troy Hills Township Schools (Morris)²
Custodial Agency**

Records Relevant to Complaint: Copies of all e-mails sent by Anthony Mancuso in which the subject line on the e-mails contained any of the following words: Recap; Emergency Recap and/or Special Meeting Recap and that were sent to amanc@optonline.net and were also copied (cc) or blind copied (bcc) to members of the Board of Education, including the Superintendent. This request includes but is not limited to those e-mails that were sent by Anthony Mancuso to members of the Board of Education, including the Superintendent, that were dated February 25, 2011, March 10, 2011, June 14, 2011, November 9, 2011, January 14, 2012, March 8, 2012, May 24, 2012, and June 26, 2012.

Custodian of Records: Ron Smith³

Request Received by Custodian: September 13, 2012

Responses Made by Custodian: September 25, 2012, October 11, 2012, and November 12, 2012

GRC Complaint Received: November 23, 2012

Background⁴

Request and Responses:

On September 13, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On September 25, 2012, the eighth (8th) business day following receipt of said request, the Custodian responded in writing requesting an additional twenty-one (21) day extension of time to retrieve and assemble the requested records.

¹ No legal representation listed on record.

² Represented by Katherine A. Gilfillan, Esq., of Weiner Lesniak, LLP (Parsippany, NJ).

³ The custodian of records from date of request through preparation and submission of the Statement of Information was Mark Resnick.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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On October 11, 2012, within the extended time period for addressing the Complainant's request, the Custodian notified the Complainant that he was still in the process of gathering and reviewing information with respect to the Complainant's request and would need an extension of time for thirty (30) additional business days to complete the search.

On November 12, 2012, the Custodian notified the Complainant that an archive search located e-mails dated February 25, 2011, March 11, 2011 and November 9, 2011, but failed to locate any of the other e-mails requested. The Custodian further informed the Complainant that the three e-mails responsive to the request are not government records pursuant to N.J.S.A. 47:1A-1.1 and would not be disclosed.

Denial of Access Complaint:

On November 23, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant states that he provided his OPRA request to the Custodian on September 13, 2012, and that the Custodian responded in writing to the request on November 12, 2012, denying the request.

The Complainant states that he did not limit his request for the e-mails to eight (8) dates, but requested all e-mails sent by Anthony Mancuso that matched the criteria set forth in the request. The Complainant states that there are four (4) issues that need to be addressed by the GRC.

First, the Complainant states that Board members often use personal e-mail accounts to send and receive Parsippany-Troy Hills Township Schools ("District") business. The Complainant contends that such e-mails are subject to disclosure. Second, the Complainant states that e-mails may have been sent to the target recipient(s) via blind copying. Third, the Complainant questions why the Custodian was unable to locate five out of eight e-mails for the dates provided in the OPRA request. Fourth, the Complainant questions why the located e-mails are not government records. The Complainant states that the Custodian cannot simply assert that the requested records are not government records because OPRA provides that custodians must inform requestors of the specific basis for denying access to a record.

Statement of Information:

On December 12, 2012, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's OPRA request on September 13, 2012, and that he responded to the request on September 25, 2012, October 11, 2012, and November 12, 2012.

The Custodian certifies that a thorough search, including a manual search, was conducted for e-mails which met the Complainant's requirements and several e-mails were located for 2011 but no e-mails were located for 2012. The Custodian certifies that the responsive e-mails were sent from Anthony Mancuso's personal computer through the District's electronic mail system and that Mr. Mancuso denied having any e-mails responsive to the Complainant's request on his privately owned computer. The Custodian further certifies that all of the 2011 e-mails were

searched to see if any matched the dates provided by the Complainant and three (3) such e-mails were located: an e-mail consisting of two pages dated February 25, 2011, an e-mail consisting of two pages dated March 11, 2011, and an e-mail consisting of two pages dated November 9, 2011.

The Custodian certifies that the three e-mails responsive to the request do not represent official business of the District but rather offer the personal opinions regarding the conduct of certain Board members during a public meeting. The Custodian cites Lewen v. Robbinsville Public School District (Mercer), GRC Complaint No. 2008-211 (February 2011), in support of his denial of access. The Custodian states that in Lewen the Council determined that e-mails which contained information that was not official business but rather a personal message were not “made, maintained or kept on file...in the course of official business” pursuant to N.J.S.A. 47:1A-1.1 and therefore not disclosable under OPRA. The Custodian certifies that despite the denial of access, no responsive records have been destroyed.

Analysis

Timeliness

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. *Id.* Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ 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, there is no dispute between the parties that the request was received by the Custodian on September 13, 2012, and the evidence of record reveals that the Custodian responded in writing to the request on September 25, 2013, the eighth (8th) business day following receipt of said request.

Therefore, Custodian Mark Resnick did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. 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.

⁵ 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.

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Unlawful Denial of Access

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 Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 2010), the Council set forth the criteria for a valid e-mail request. In Elcavage the Council determined that “...in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof...”

Here, the Complainant identified the sender and recipient, as well as the subject of the e-mails; however, he failed to include a range of dates during which the e-mails were transmitted. The Complainant did set forth eight (8) dates, but made it clear that the request was not limited to those specific dates. Therefore, because the request failed to include a time parameter during which the e-mails were sought, the Custodian properly looked only to the specified dates contained in the request to identify the records responsive to the request. By doing so, the Custodian located three (3) e-mails responsive to the request:

1. A two-page e-mail from amanc@optonline.net dated February 25, 2011;
2. A two-page e-mail from amanc@optonline.net dated March 11, 2011; and
3. A two-page e-mail from amanc@optonline.net dated February 25, 2011.

In Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), 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 certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian’s certification. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access.”

Here, the Custodian certified that a thorough search, including a manual search, was conducted for e-mails which met the Complainant’s requirements and the three aforementioned e-mails were located for the year 2011 but no e-mails were located for 2012. There is no evidence in the record to refute the Custodian’s certification.

Therefore, since the Custodian certified that no e-mails for June 14, 2011, January 14, 2012, March 8, 2012, May 24, 2012, and June 26, 2012 exist, and because the Complainant did not submit any evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer, supra.*

The Custodian determined that the three (3) e-mails responsive to the request that he did locate were not subject to disclosure because they were not government records pursuant to N.J.S.A. 47:1A-1.1. The Custodian reached this conclusion because he certified that the content of the e-mails does not represent the official business of the District but rather personal opinions of the author. The Custodian cited to Lewen v. Robbinsville Public School District (Mercer), GRC Complaint No. 2008-211 (February 2011) as legal authority to deny access. However, in Lewen, the Council did not find that the requested e-mails were not government records, but rather that one (1) e-mail within a chain was not a government record because an *in camera* examination revealed that the e-mail's content consisted of a personal message.

A personal message is likely to differ substantially from a personal opinion. A personal message, as suggested in DARM circular 03-10-ST, *Managing Electronic Mail: Guidelines and Best Practices*, which was cited in Lewen, is a message completely unrelated to government business. DARM gave as examples "let's do lunch" and "can I catch a ride." Conversely, a personal opinion may, and often is, related to government business when such an opinion appears in a government communication.

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review.⁶ The Court stated that:

"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-7f. 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

⁶ See Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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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-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption." *Id.*

Here, the Custodian certified that the requested e-mails were denied because they do not represent official business of the District but rather transmit the sender's personal opinions; therefore the records are not subject to disclosure as government records. N.J.S.A. 47:1A-1.1.

Therefore, the GRC must conduct an *in camera* review of the requested e-mails dated February 25, 2011, March 11, 2011 and November 9, 2011, to determine the validity of the Custodian's assertion that the records are not subject to disclosure as government records. *See Paff, supra*, and N.J.S.A. 47:1A-1.1.

Knowing & Willful

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. Custodian Mark Resnick did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. 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).
2. The GRC must conduct an *in camera* review of the requested e-mails dated February 25, 2011, March 11, 2011 and November 9, 2011, to determine the validity of the Custodian's assertion that the records are not subject to disclosure as government records. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005), and N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index⁸, as well as a legal certification in accordance with N.J. Court Rule 1:4-4,⁹**

⁷ 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.

⁸ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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that the records provided are the records 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: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

November 12, 2013

⁹ "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."

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