



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 30, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-172

v.

NJ Department of Education
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the October 21, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s September 30, 2014 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 all of the records responsive to the request via e-mail transmissions.
2. Although the Custodian failed to provide responsive records to the Complainant in the medium sought; the Custodian did comply with the terms of the Council’s September 30, 2014 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions 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 30th Day of January, 2015

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: February 4, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-172

v.

**New Jersey Department of Education²
Custodial Agency**

Records Relevant to Complaint: See Exhibit A³

Custodian of Record: Dominic Rota
Request Received by Custodian: March 5, 2014
Response Made by Custodian: March 14, 2014
GRC Complaint Received: April 21, 2014

Background⁴

September 30, 2014 Council Meeting

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian’s failure to provide the records sought in the medium requested violates OPRA because the evidence of record indicates that the Custodian had the ability to provide the record in the medium requested at the time of the Complainant’s request as well as at the time of the Custodian’s response. N.J.S.A. 47:1A-5(d). *See also McBride v. Twp. of Bordentown (Burlington)*, GRC 2007-217 (August 2009). Accordingly, the Custodian shall disclose to the Complainant the records responsive to the request in the medium requested; to wit, electronically via e-mail.

¹ No legal representation is listed in the record.

² No legal representation listed on record.

³ Although the Complainant failed to attach a copy of the original OPRA request to the complaint, the “State of New Jersey Government Record Request Receipt” reveals that the Custodian acknowledged the Complainant requested e-mail delivery of the records.

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.

Harry B. Scheeler, Jr. v. New Jersey Department of Education, 2014-172 – Supplemental Findings and Recommendations of the Executive Director

2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. 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 October 1, 2014, the Council distributed its September 30, 2014 Interim Order to all parties. On October 8, 2014, the Custodian responded to the Council's Interim Order by providing certified confirmation of compliance to the Executive Director wherein the Custodian stated that he disclosed to the Complainant the records in compliance with the Order via four (4) separate e-mailings.

On October 9, 2014, the GRC was copied on several e-mails between the Complainant and the Custodian, wherein the Complainant indicated that he did not receive all of the records in compliance with the Interim Order. As of mid-day on October 9, 2014, the Complainant informed the GRC that one (1) e-mail was still outstanding from the Custodian. The GRC, in turn, e-mailed the Custodian requesting a certification explaining any extenuating circumstances that may have contributed to non-compliance with the Interim Order. Subsequently, on October 9, 2014, the Custodian forwarded the requested certification to the GRC. Therein, he certified that all records were disclosed in compliance with the Order but that the Complainant acknowledged he had an issue with his .pdf program that resulted in viewing problems associated with some of the .pdf disclosures. The Custodian stated that he confirmed that all pages reported missing by the Complainant were in fact transmitted to him on October 8, 2014. However, the Custodian stated that he also re-transmitted to the Complainant eleven (11) pages of records on October 9, 2014 that the Complainant had reported technical difficulties in receiving on October 8, 2014. On October 11, 2014, the Complainant notified the GRC that he found the missing e-mail in a file that was sent to him by the Custodian and that the Custodian did fully comply with the Interim Order.

Analysis

Compliance

On September 30, 2014, the Council ordered the above-referenced compliance. On October 1, 2014, 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 October 8, 2014. On October 8, 2014, the Custodian forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant all of the records responsive to the request via e-mail transmissions. Although the Complainant, on October 9, 2014, stated that he did not receive all of the records responsive to the request, it

was acknowledged by the parties on that same date that the reason all of the records were not received by the Complainant was because the Complainant was experiencing problems with his .pdf software. The Complainant subsequently confirmed that the Custodian did disclose all of the records responsive to the request.

Accordingly, the Custodian complied with the Council's September 30, 2014 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 all of the records responsive to the request via e-mail transmissions.

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 provide responsive records to the Complainant in the medium sought; the Custodian did comply with the terms of the Council's September 30, 2014 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions 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 September 30, 2014 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 all of the records responsive to the request via e-mail transmissions.
2. Although the Custodian failed to provide responsive records to the Complainant in the medium sought; the Custodian did comply with the terms of the Council's September 30, 2014 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions 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.
Deputy Executive Director

October 21, 2014⁵

⁵ This complaint was prepared for adjudication at the Council's October 28, 2014 meeting, but could not be adjudicated at the October 28, 2014 meeting, the November 18, 2014 meeting, or the December 16, 2014 meeting due to lack of a quorum.

EXHIBIT A

Pursuant to *Elcavage v. West Milford Township (Passaic)*, GRC Complaint No. 2009-08 (April 2010) I request the following emails using the 3 part test. Emails between 1. Richard Stepura, Wayne Knight, Glenn Forney, Ronald Fisher, James Riehman 2. Subjects: Woodbine, WES, Woodbine School District, Woodbine Board of Education, State Monitor, State Takeover, budget, budget deficit, lawsuit, TORT, Harry Scheeler, Press of Atlantic City, Cape May County Herald, Allen Parmelee, Lynda Anderson-Towns. Timeframe 2013 until March 5, 2014. Emails between 1. Richard Stepura, Wayne Knight, Glenn Forney, Ronald Fisher, James Riehman AND Melissa Rodriguez Melissa.Rodriguez@dhs.state.nj.us, melissawdbn2@aol.com, mrodriguez@woodbine.capemayschools.com, Michael Benson mbenson@bbattorneys.net, Lynda Anderson-Towns ltowns@woodbine.capemayschools.com, William Pikolycky boroughofwoodbine@gmail.com, mayor@boroughofwoodbine.net, Allen Parmelee aparmelee@woodbine.capemayschools.com, Susan Hodges shodges@archerlaw.com. 2. Subjects: Woodbine, WES, Woodbine School District, Woodbine Board of Education, State Monitor, State Takeover, budget, budget deficit, lawsuit, TORT, Harry Scheeler, Press of Atlantic City, Cape May County Herald. Timeframe 2013 until March 5, 2014.



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

September 30, 2014 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-172

v.

NJ Department of Education
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council ("Council") considered the September 23, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to provide the records sought in the medium requested violates OPRA because the evidence of record indicates that the Custodian had the ability to provide the record in the medium requested at the time of the Complainant's request as well as at the time of the Custodian's response. N.J.S.A. 47:1A-5(d). See also McBride v. Township of Bordentown (Burlington), GRC 2007-217 (August 2009). Accordingly, the Custodian shall disclose to the Complainant the records responsive to the request in the medium requested; to wit, electronically via e-mail.
2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. 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 "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."

² 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 30th Day of September, 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: October 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-172

v.

**New Jersey Department of Education²
Custodial Agency**

Records Relevant to Complaint: See Exhibit A³

Custodian of Record: Dominic Rota
Request Received by Custodian: March 5, 2014
Response Made by Custodian: March 14, 2014
GRC Complaint Received: April 21, 2014

Background⁴

Request and Response:

On March 5, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 14, 2014, the seventh (7th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that he had identified over 25,000 e-mails that could be responsive to the Complainant’s request based upon the names, subjects and timeframes. The Custodian asked the Complainant to clarify the request by narrowing the scope of same so that the Custodian could identify those e-mails responsive to the request. Subsequently, the Complainant states that he did reduce the number of the e-mail subjects requested.⁵ On March 31, 2014, the Custodian states that he was unable to disclose the responsive records via e-mail due to the file size and e-mail limitations. The Custodian further states that he will disclose the records on a CD, upon receipt of a \$2.49 fee from the Complainant to cover the cost of the disc and shipping charges.

¹ No legal representation is listed in the record.

² No legal representation listed on record.

³ Although the Complainant failed to attach a copy of the original OPRA request to the complaint, the “State of New Jersey Government Record Request Receipt” reveals that the Custodian acknowledged the Complainant requested e-mail delivery of the records.

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.

⁵ The evidence of record does not identify the date upon which the Complainant narrowed the scope of the request. Moreover, there is no record request on file other than Exhibit A.

Denial of Access Complaint:

On April 21, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that On March 5, 2014, he submitted an OPRA request to the Custodian and that the Custodian responded to the request on March 14, 2014, informing the Complainant that the request resulted in 25,000 e-mails. The Complainant states that he took issue with the number of e-mails his request allegedly generated, but that he did reduce the number of e-mail subjects. The Complainant states that the Custodian informed him via e-mail on March 31, 2014, that due to the size of the file the records could not be e-mailed to him; therefore, he would have to pay a \$2.49 fee to obtain the records on CD.

The Complainant states that the Custodian’s refusal to provide the responsive records in the medium requested is a violation of OPRA. The Complainant states that the Custodian could comply with OPRA by breaking the large file into smaller files and sending those files to him via numerous e-mails. The Complainant demands the Custodian be found in violation of OPRA and that the Council order disclosure of the records as requested.

Statement of Information:

On May 1, 2014, the GRC sent the Custodian a request for the Statement of Information (“SOI”). The Custodian failed to submit the SOI to the GRC.

Analysis

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.

OPRA provides that a custodian must provide the requested records in the medium requested if the agency maintains the records in said medium. N.J.S.A. 47:1A-5(d).

In McBride v. Township of Bordentown (Burlington), GRC 2007-217 (August 2009), the complainant’s request sought access to records via e-mail but the custodian in the response offered to provide the records via CD-ROM or floppy disk. The Council determined that the custodian had the ability to provide the requested records in the medium requested at the time of the complainant’s request and at the time of the custodian’s response but failed to provide the records in the medium requested. As such, the Council found that the Custodian’s failure to provide the requested records in the medium requested was a violation of N.J.S.A. 47:1A-5(d).

Similarly here, the Complainant sought access to the requested records via e-mail but the Custodian offered to provide the records via CD. Further, the evidence of record reveals the custodian had the ability to provide the requested records in the medium requested at the time of

the complainant's request and at the time of the custodian's response because the parties were communicating via e-mail during those times. Although, based upon statements made in the parties' e-mail correspondence, there may have been extenuating circumstances precluding electronic transmission of the responsive records, the Custodian failed to submit the SOI to the GRC certifying to the nature and extent of such extenuating circumstances. N.J.A.C. 5:105-2.4. Accordingly, the GRC is left to adjudicate this complaint based only on the information submitted in the complaint.

Therefore, the Custodian's failure to provide the records sought in the medium requested violates OPRA because the evidence of record indicates that the Custodian had the ability to provide the record in the medium requested at the time of the Complainant's request as well as at the time of the Custodian's response. N.J.S.A. 47:1A-5(d). *See also McBride*, 2007-217. Accordingly, the Custodian shall disclose to the Complainant the records responsive to the request in the medium requested; to wit, electronically via e-mail.

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's failure to provide the records sought in the medium requested violates OPRA because the evidence of record indicates that the Custodian had the ability to provide the record in the medium requested at the time of the Complainant's request as well as at the time of the Custodian's response. N.J.S.A. 47:1A-5(d). *See also McBride v. Township of Bordentown (Burlington)*, GRC 2007-217 (August 2009). Accordingly, the Custodian shall disclose to the Complainant the records responsive to the request in the medium requested; to wit, electronically via e-mail.
2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**

⁶ "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."

⁷ 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.

3. 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: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 2013

EXHIBIT A

Pursuant to *Elcavage v. West Milford Township (Passaic)*, GRC Complaint No. 2009-08 (April 2010) I request the following emails using the 3 part test. Emails between 1. Richard Stepura, Wayne Knight, Glenn Forney, Ronald Fisher, James Riehman 2. Subjects: Woodbine, WES, Woodbine School District, Woodbine Board of Education, State Monitor, State Takeover, budget, budget deficit, lawsuit, TORT, Harry Scheeler, Press of Atlantic City, Cape May County Herald, Allen Parmelee, Lynda Anderson-Towns. Timeframe 2013 until March 5, 2014. Emails between 1. Richard Stepura, Wayne Knight, Glenn Forney, Ronald Fisher, James Riehman AND Melissa Rodriguez Melissa.Rodriguez@dhs.state.nj.us, melissawdbn2@aol.com, mrodriguez@woodbine.capemayschools.com, Michael Benson mbenson@bbattorneys.net, Lynda Anderson-Towns ltowns@woodbine.capemayschools.com, William Pikolycky boroughofwoodbine@gmail.com, mayor@boroughofwoodbine.net, Allen Parmelee aparmelee@woodbine.capemayschools.com, Susan Hodges shodges@archerlaw.com. 2. Subjects: Woodbine, WES, Woodbine School District, Woodbine Board of Education, State Monitor, State Takeover, budget, budget deficit, lawsuit, TORT, Harry Scheeler, Press of Atlantic City, Cape May County Herald. Timeframe 2013 until March 5, 2014.