



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-59

v.

Woodbine Board of Education (Cape May)
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 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 failed to comply fully with the Council’s January 30, 2015, Interim Order because, although he provided the Complainant those records ordered to be disclosed, he failed to submit certified confirmation of compliance to the Executive Director.
2. In this matter, the Custodian performed an insufficient search and may have unlawfully denied access to the responsive truancy complaints because he provided only partially legible copies. Further, the Custodian failed to comply fully with the Council’s January 30, 2015 Interim Order. However, the Custodian provided the Complainant with legible copies of the truancy complaints in response to the Council’s January 30, 2015, Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional or deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 30th Day of June, 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: July 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2014-59

v.

**Woodbine Board of Education (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via email of:

1. All requests for Due Process submitted to Woodbine Elementary Schools (“WES”) in 2012 and 2013
2. All truancy complaints filed by WES in court in 2012 and 2013.

Custodian of Record: Alan Parmalee

Request Received by Custodian: January 10, 2014

Response Made by Custodian: January 24 and January 27, 2014

GRC Complaint Received: January 28, 2014

Background

January 30, 2015 Council Meeting:

At its January 30, 2015, public meeting, the Council considered the Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian’s response to the Complainant’s OPRA request that there were no responsive records constitutes an insufficient search for the records subsequently located. Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007); May v. Twp. of Edison, (Middlesex) GRC Complaint No, 2007-165 (October 2007); Schneble v N.J. Dep’t of Env’t Prot., GRC Complaint 2007-220 (April 2008); Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011); Weiner v. Cnty. of Essex, GRC Complaint No 2013-220 (March 2014).

¹ No legal representation listed on record.

² Represented by Susan Hodges, Esq. of Archer & Greiner (Haddonfield, NJ).

2. The Custodian may have unlawfully denied access to the responsive truancy complaints by having provided only partially legible copies. N.J.S.A. 47:1A-6; Lopez v. Cnty. of Hudson, GRC Complaint No. 2009-267 (March 2011). As the issue was not addressed by the Custodian, and thus the record is unclear, he must either provide fully legible copies of the truancy complaints to Complainant or provide a certification that the original documents in his possession are of the same legibility as those already provided.
3. **The Custodian shall comply with item No. 2 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 1:4-4,³ 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.

Procedural History:

On February 4, 2015, the Council distributed its Interim Order to all parties. On February 9, 2015, three (3) business days after the distribution of the Interim Order, the Custodian responded to the Council's Interim Order by providing copies of fully legible responsive truancy complaints. The Custodian stated that the copies previously provided to Complainant were of the same quality as those in his possession but that he had since obtained the original records for copying and used a new copier to make the fully legible copies. However, the Custodian did not simultaneously provide certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its January 30, 2015, meeting, the Council ordered the Custodian to either provide fully legible copies of the truancy complaints to Complainant or provide a certification that the original records in his possession are of the same legibility as those already provided. Additionally, the Council ordered the Custodian to submit a certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 4, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5)

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 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 has been satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 11, 2015.

On February 9, 2015, the third (3rd) business day after receipt of the Council's Order, the Custodian responded to the Council's Order by providing fully legible copies of the responsive truancy complaints. However, the Custodian failed to submit certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4.

Therefore, the Custodian failed to fully comply with the Council's January 30, 2015 Interim Order because although he provided the Complainant those records ordered to be disclosed, he failed to submit certified confirmation of compliance to the Executive Director.

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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

In this matter, the Custodian performed an insufficient search and may have unlawfully denied access to the responsive truancy complaints because he provided only partially legible copies. Further, the Custodian failed to comply fully with the Council's January 30, 2015, Interim Order. However, the Custodian provided the Complainant with legible copies of the truancy complaints in response to the Council's January 30, 2015, Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional or deliberate. Therefore, the Custodian's

actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply fully with the Council's January 30, 2015, Interim Order because, although he provided the Complainant those records ordered to be disclosed, he failed to submit certified confirmation of compliance to the Executive Director.
2. In this matter, the Custodian performed an insufficient search and may have unlawfully denied access to the responsive truancy complaints because he provided only partially legible copies. Further, the Custodian failed to comply fully with the Council's January 30, 2015 Interim Order. However, the Custodian provided the Complainant with legible copies of the truancy complaints in response to the Council's January 30, 2015, Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional or deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Ernest Bongiovanni
Staff Attorney

Approved By: Dawn SanFilippo
Deputy Executive Director

April 21, 2015⁵

⁵ This complaint was prepared for adjudication at the Council's April 28, 2015, meeting and May 26, 2015, meeting, but could not be adjudicated due to lack of quorum.



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

January 30, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-59

v.

Woodbine Board of Education (Cape May)
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council ("Council") considered the October 21, 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 response to the Complainant's OPRA request that there were no responsive records constitutes an insufficient search for the records subsequently located. Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), May v. Twp. of Edison, (Middlesex) GRC Complaint No. 2007-165 (October 2007), Schneble v N.J. Dep't of Env't Prot., GRC Complaint 2007-220 (April 2008), Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011), Weiner v. Cnty. of Essex, GRC Complaint No 2013-220 (March 2014).
2. The Custodian may have unlawfully denied access to the responsive truancy complaints by having provided only partly legible copies. N.J.S.A. 47:1A-6; Lopez v. Cnty. of Hudson, GRC Complaint No. 2009-267 (March 2011). As the issue was not addressed by the Custodian, and thus the record is unclear, he must either provide fully legible copies of the truancy complaints to Complainant or provide a certification that the original documents in his possession are of the same legibility as those already provided.
3. **The Custodian shall comply with item No. 2 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**

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

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 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 3, 2015

record has been made available to the Complainant but the Custodian may withhold delivery of the record until the financial obligation has been satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2014-59

v.

**Woodbine Board of Education (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via email of:

1. All requests for Due Process submitted to Woodbine Elementary Schools (“WES”) in 2012 and 2013
2. All truancy complaints filed by WES in court in 2012 and 2013.

Custodian of Record: Alan Parmalee

Request Received by Custodian: January 10, 2014

Response Made by Custodian: January 24 and January 27, 2014

GRC Complaint Received: January 28, 2014

Background³

Request and Response:

On January 10, 2014 the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above mentioned records. On January 16, 2014, five (5) business days after receipt of the request, the Custodian responded in writing advising that no such records existed. The Custodian also addressed other OPRA requests made by Complainant on January 10 and January 13, 2014.⁴ On January 24, 2014, nine (9) business days after his receipt of the request, the Custodian provided the requested Due Process documents. On January 27, 2014, ten (10) business days after the receipt of the request, the Custodian provided copies of four municipal court complaints for truancy.

¹ No legal representation listed on record.

² Represented by Susan Hodges, Esq. of Archer & Greiner (Haddonfield, NJ).

³ 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.

⁴ The Custodian’s initial letter response addressed two other OPRA requests by Complainant. To those “remaining items” in these requests, the Custodian advised he needed an extension until January 24, 2014. Complainant may have believed the extension applied to the relevant records here, and granted an “additional extension” to January 27, 2014.

Denial of Access Complaint:

On January 28 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that although the requested records were provided to him on January 24, 2014, and January 27, 2014, respectively, the Custodian originally denied the records existed. Further the truancy complaints provided on January 27 were only partially legible.

Statement of Information:

On March 10, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified he received the Complainant’s OPRA request on January 10, 2014. The Custodian also certified that he provided the relevant documents to Complainant on January 24 and January 27, 2014.

Additional Submissions:

On June 4, 2014, the Complainant stated that he advised the Custodian via a January 31, 2014 email that the copies of the truancy complaints provided to him were “barely readable.” The Complainant further requested that the Custodian compare the copies of documents provided to him to the original documents to determine if they are consistent in legibility. The Custodian never replied.

Analysis

Insufficient Search

A custodian is obligated to search for and find identifiable government records listed in an OPRA request. Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007). In May v. Twp. of Edison (Middlesex), GRC Complaint No, 2007-165 (October 2007) the complainant requested schematic floor plans of Edison High School. The custodian initially denied the request by stating the request had to be made to the Board of Education. After the Denial of Access Complaint was filed, the custodian made the records available to complainant and indicated she misunderstood the request, thinking they were for Board of Education records. The Council held that “[e]ven though the Custodian eventually made the requested floor plans available to the Complainant after she realized that the initial denial was a mistake, the Custodian violated OPRA by denying the Complainant access to the requested records.”

In Schneble v. NJ Dep’t of Env’t Prot., GRC Complaint 2007-220 (April 2008), the custodian initially responded to the OPRA request by stating that no responsive records existed. The complainant, however, as part of her Denial of Access complaint, submitted emails which were responsive to her own request. The custodian certified that upon receipt of the e-mails attached to the Complaint, he again searched through DEP files and this time found records responsive to the request. The GRC held that because the custodian performed an inadequate initial search, he unlawfully denied access to the requested records.

Further, in Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011), the Council held that the custodian denied access as a result of an initial inadequate search pursuant to complainant's OPRA request and failed to bear the burden of proving due diligence in searching for the records. Specifically, a search one year after the initial search located the records in the same area within an office that the custodian admitted having looked through a year earlier.

Most recently, in Weiner v. Cnty. of Essex, GRC Complaint No 2013-220 (March 2014), the complainant requested emails relating to the presence of County employees at certain events. The custodian initially denied the request stating there were no responsive records. However seven (7) business days later, the custodian provided two responsive records consisting of emails obtained from the Essex County Youth Services Commission and Division of Housing and Community Development. The Council determined that to be an unlawful denial of access. The Council reasoned that "it is among a custodian's duties to perform a complete search for the requested records before responding to an OPRA request as doing so will help ensure that the Custodian's response is accurate and has an appropriate basis in law." Id. at 3.

As in Lebbing, and Weiner, the Custodian here advised the Complainant on January 16, 2014, that no responsive records existed. The Complainant advised the Custodian that he had personal knowledge of the existence of such records and urged the Custodian to check more thoroughly. Only after the Complainant discussed the matter with the Board's attorney were the records provided. The Custodian did not dispute those assertions. More significantly, the Custodian's SOI offered no explanation regarding how the search was conducted.

Therefore, the Custodian's response to the Complainant's OPRA request that there were no responsive records constitutes an insufficient search for the records subsequently located. Weiner, GRC 2013-220; Schneble, GRC 2007-220.

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 Lopez v. Cnty. of Hudson, GRC Complaint No. 2009-267 (March 2011) the custodian provided records to the complainant which were partially illegible, but provided the fully legible records as part of the SOI and thus legible records existed at the time of the complainant's OPRA request. The Council held "the [c]ustodian's provision of illegible records to the [c]omplainant in response to the OPRA request when legible records existed constituted a limitation on the right of access accorded by OPRA pursuant to N.J.S.A. 47:1A-1 and a violation of OPRA."

Here, as in Lopez, the records of the truancy reports for 2012-2013 are faint and difficult or impossible to read. The Council cannot determine if the records provided are of the same quality of those in the possession of the custodian. The Custodian has not explained the circumstances of such nor the reason for the illegible documents.

Therefore, the Custodian may have unlawfully denied access to the responsive truancy complaints by having provided only partly legible copies. N.J.S.A. 47:1A-6; Lopez, GRC 2009-267. As the issue was not addressed by the Custodian, and thus the record is unclear, he must either provide fully legible copies of the truancy complaints to Complainant or provide a certification that the original documents in his possession are of the same legibility as those already provided.

Knowing and Willful

The Council defers analysis as to 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 response to the Complainant's OPRA request that there were no responsive records constitutes an insufficient search for the records subsequently located. Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), May v. Twp. of Edison, (Middlesex) GRC Complaint No. 2007-165 (October 2007), Schneble v N.J. Dep't of Env't Prot., GRC Complaint 2007-220 (April 2008), Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011), Weiner v. Cnty. of Essex, GRC Complaint No 2013-220 (March 2014).
2. The Custodian may have unlawfully denied access to the responsive truancy complaints by having provided only partly legible copies. N.J.S.A. 47:1A-6; Lopez v. Cnty. of Hudson, GRC Complaint No. 2009-267 (March 2011). As the issue was not addressed by the Custodian, and thus the record is unclear, he must either provide fully legible copies of the truancy complaints to Complainant or provide a certification that the original documents in his possession are of the same legibility as those already provided.
3. **The Custodian shall comply with item No. 2 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 1:4-4,⁵ to the Executive Director.⁶**

⁵ "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."

⁶ 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 has been satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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: Ernest Bongiovanni, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

October 21, 2014⁷

⁷ This complaint was prepared for adjudication at the Council's October 28 and November 18, and December 16, 2014 meetings, but could not be adjudicated due to lack of quorum.
Harry B. Scheeler, Jr. v. Woodbine Board of Education (Cape May), 2014-59 - Findings and Recommendations of the Executive Director