



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 25, 2019 Government Records Council Meeting

Charlene Barth
Complainant

Complaint No. 2017-121

v.

Rutgers University (Somerset)
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 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 April 30, 2019 Interim Order because he responded in the extended time frame providing to the Complainant the responsive Request for Proposal response and simultaneously providing certified confirmation of compliance to the Council Staff.
2. Although the original Custodian unlawfully denied access to the Complainant’s OPRA request, the Complainant is now in possession of the responsive record through timely compliance. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 25th Day of June 2019

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: June 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Charlene Barth¹
Complainant**

GRC Complaint No. 2017-121

v.

**Rutgers University (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all proposals” submitted in response to Request for Proposal (“RFP”) No. R-17-3121 (Commencement Photography Services), with redactions where appropriate.

Custodian of Record: Casey Woods³

Request Received by Custodian: April 17, 2017

Response Made by Custodian: April 19, 2017

GRC Complaint Received: May 22, 2017

Background

April 30, 2019 Council Meeting:

At its April 30, 2019 public meeting, the Council considered the April 23, 2019 Findings and Recommendations of the Council Staff 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 original Custodian unlawfully denied access to the responsive bids (except for the successful bid). N.J.S.A. 47:1A-6. Specifically, there is no advantage to competitors in disclosure of the unsuccessful bids that can be gleaned from the record. Thus, the current Custodian must disclose those bids, with redactions where applicable, to the Complainant.
2. **The Custodian shall comply with conclusion No. 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**

¹ No legal representation listed on record.

² Represented by Elizabeth Minott, Esq. (New Brunswick, NJ).

³ The original Custodian of Record was Daniel Faltas.

redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶

3. The Council defers analysis of whether the original 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 May 2, 2019, the Council distributed its Interim Order to all parties. On May 9, 2019, the Custodian e-mailed the Government Records Council ("GRC") seeking an extension of time to comply with the Order. On the same day, the GRC granted a five (5) business day extension, or until May 16, 2019.

On May 16, 2019, the Custodian responded to the Council's Interim Order, copying the Complainant. Therein, the Custodian certified that he was simultaneously providing to the Complainant the only unsuccessful bidder's response to RFP No. R-17-3121.

Analysis

Compliance

At its April 30, 2019 meeting, the Council ordered the Custodian to all responsive bids, with redactions where applicable. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On May 2, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 9, 2019.

On May 9, 2019, the fifth (5th) business day after receipt of the Council's Order, the Custodian sought an extension to comply, which the GRC granted through May 16, 2019. Within the extended time frame, the Custodian responded providing "the only other response" for RFP No. R-17-3121. The GRC notes that the submission did not contain any redactions. The Custodian also included certified confirmation of compliance to Council Staff.

Therefore, the Custodian complied with the Council's April 30, 2019 Interim Order because he responded in the extended time frame providing to the Complainant the responsive

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

RFP response and simultaneously providing certified confirmation of compliance to the Council Staff.

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)).

Although the original Custodian unlawfully denied access to the Complainant’s OPRA request, the Complainant is now in possession of the responsive record through timely compliance. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s April 30, 2019 Interim Order because he responded in the extended time frame providing to the Complainant the responsive Request for Proposal response and simultaneously providing certified confirmation of compliance to the Council Staff.
2. Although the original Custodian unlawfully denied access to the Complainant’s OPRA request, the Complainant is now in possession of the responsive record through timely compliance. Additionally, the evidence of record does not indicate that the original

Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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: Frank F. Caruso
Acting Executive Director

June 18, 2019



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 30, 2019 Government Records Council Meeting

Charlene Barth
Complainant

Complaint No. 2017-121

v.

Rutgers University
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council ("Council") considered the April 23, 2019 Findings and Recommendations of the Council Staff 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 original Custodian unlawfully denied access to the responsive bids (except for the successful bid). N.J.S.A. 47:1A-6. Specifically, there is no advantage to competitors in disclosure of the unsuccessful bids that can be gleaned from the record. Thus, the current Custodian must disclose those bids, with redactions where applicable, to the Complainant.
2. **The Custodian shall comply with conclusion No. 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, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
3. The Council defers analysis of whether the original 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 The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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 April 2019

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: May 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

**Charlene Barth¹
Complainant**

GRC Complaint No. 2017-121

v.

**Rutgers University (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all proposals” submitted in response to Request for Proposal (“RFP”) No. R-17-3121 (Commencement Photography Services), with redactions where appropriate.

Custodian of Record: Casey Woods³
Request Received by Custodian: April 17, 2017
Response Made by Custodian: April 19, 2017
GRC Complaint Received: May 22, 2017

Background⁴

Request and Response:

On April 17, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 19, 2017, the original Custodian responded in writing denying access to responsive records under the “advantage to competitors and bidders” exemption at N.J.S.A. 47:1A-1.1. The original Custodian stated that disclosure of the bids, including those vendors not selected, would discourage future interested vendors from bidding on RFPs.

Denial of Access Complaint:

On May 22, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she was unlawfully denied access to the responsive records for multiple reasons. The Complainant first pointed to page 14 of the RFP, which stated that “the presumption applicable to all Bids is that bid forms, proposals,

¹ No legal representation listed on record.

² Represented by Elizabeth Minott, Esq. (New Brunswick, NJ).

³ The original Custodian of Record was Daniel Faltas.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

documents and responses submitted to [Rutgers University (“Rutgers”)] *are releasable under OPRA.*” (Emphasis added). The Complainant further argued that no precedent for denying bids of otherwise benign services existed. The Complainant argued that to the contrary, Stockton University recently disclosed all bids it received for a similar RFP within days of the original Custodian’s denial here.

Finally, the Complainant stated that the awarded contract was valid through April 2020. The Complainant argued that any “chilling effect” argument was erroneous for two (2) reasons. The Complainant first argued that if Rutgers believed the “chilling effect” premise, the OPRA statement on page 14 would have been worded differently. Second, the Complainant contended that the purpose of receiving these bids was to better understand her company’s “competitive position in the marketplace relative to other bidders.” The Complainant argued that disclosure would allow vendors to determine if their products/services were competitively priced or whether that vendor could exceed institutional requirements. The Complainant contended that disclosure would only benefit Rutgers and the State.

Statement of Information:

On June 22, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the original Custodian received the Complainant’s OPRA request on April 17, 2017. The Custodian certified that the original Custodian obtained the responsive bids from purchasing, which totaled 75 pages. The Custodian affirmed that the original Custodian responded in writing on April 19, 2017 denying access to the requested records under N.J.S.A. 47:1A-1.1.

The Custodian stated that Rutgers regularly received OPRA requests seeking RFP responses. The Custodian averred that it historically would notify the winning bidder of the request and only disclose that bid response to a requestor. The Custodian asserted that Rutgers routinely denied access to the unsuccessful bids because doing so would put the University at a competitive disadvantage.

The Custodian affirmed that here, the winning bid was disclosed to the Complainant; however, she subsequently submitted the OPRA request in question. The Custodian argued that disclosing losing bids would put those vendors at a competitive disadvantage. The Custodian asserted that unlike winning bidders, losing bidders should not have details of their business made public because they were considered for a public contract. The Custodian noted that winning bidders previously objected to disclosure under a trade secret argument but Rutgers rejected those claims because the winning proposals necessarily contained information on how public funds were spent and should be subject to public review. The Custodian argued that to extend this logic to losing proposals would discourage potential vendors from bidding on future RFPs. The Custodian further argued that disclosure of the losing proposals could lead to collusion between competitors, especially in fields where vendors are scarce.

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 additionally provides that “[a] government record shall not include the following . . . information which, if disclosed, would give an advantage to competitors or bidders.” N.J.S.A. 47:1A-1.1. In situations where a requestor sought access to bids during the selection process, the Council has determined that same are exempt from disclosure under this exemption. See Renna v. Cnty. of Union, GRC Complaint No. 2003-100 (February 2004), Fisher v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2006-193 (Interim Order dated June 27, 2007), and Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011). However, the Council has not previously addressed the issue of whether the exemption still applied to unsuccessful bids once the winning bid was selected. Further, New Jersey Courts appear to not have offered guidance on such a situation. Thus, the disclosability of unsuccessful bidder submissions appears to be a novel issue before the GRC.

In Newark Morning Ledger, Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011), the court was tasked with determining whether the trial court erred in requiring disclosure of an unredacted promoter licensing agreement. Defendants had redacted the agreement citing, among other exemptions, an advantage to competitors and bidders. In finding that the exemption did not apply, the court looked to Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 366 (App. Div. 2010):

The plaintiff taxpayer sought release of the appraisals to determine the value of the property in an effort to prevent further development. Id. at 360, 362. The defendant's brief objected on several grounds, which included the competitive disadvantage exception, but this issue was not argued before the trial court. Id. at 365. We rejected application of the exemption to the facts presented, which showed the defendant Township had the appraisals for over two years and had not commenced any negotiations to purchase the land, holding: “To contend that the mere potential for future negotiations, without a strong showing that negotiations are probable, satisfies the OPRA competitive advantage exemption ‘subverts the broad reading of OPRA as intended by the Legislature.’” Id. at 379 (quoting Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535, (2005)). We therefore, rejected the defendant's argument that OPRA's competitive advantage exemption applied. Ibid.

[NJSEA, 423 N.J. Super. at 164.]

In the instant matter, the GRC must take into account how it addressed previous bid disclosures during the negotiation process against those situations where the courts found in favor of disclosure after such a process occurred. To that end, the instant complaint is inapposite to Renna, Fisher, and Bond because the bid process ended with the selection of successful bidder, whose bid was previously disclosed to the Complainant.

The facts of this complaint are more on point with NJSEA, 423 N.J. Super. 140 and that court's analysis of Tractenberg. Specifically, the bids in question are no longer the subject of negotiations and there is no evidence in the record to support the original and current Custodians' assertions regarding nondisclosure. The GRC disagrees that unsuccessful bids have a higher standard of non-disclosure simply because those bidders were not awarded a contract. The GRC further disagrees that disclosure of unsuccessful bids would result in a chilling effect amongst future bidders, as they were alerted to the potential that all bids "are releasable under OPRA." See No. R-17-3121, Section 6.12 at 14. Finally, the GRC does not agree that collusion would occur if the bids were disclosed with reasonable redactions to protect certain proprietary and trade secret information, as is supported under OPRA. N.J.S.A. 47:1A-1.1.

Accordingly, the original Custodian unlawfully denied access to the responsive bids (except for the successful bid). N.J.S.A. 47:1A-6. Specifically, there is no advantage to competitors in disclosure of the unsuccessful bids that can be gleaned from the record. Thus, the current Custodian must disclose those bids, with redactions where applicable, to the Complainant.

Knowing & Willful

The Council defers analysis of whether the original 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 Council Staff respectfully recommends the Council find that:

1. The original Custodian unlawfully denied access to the responsive bids (except for the successful bid). N.J.S.A. 47:1A-6. Specifically, there is no advantage to competitors in disclosure of the unsuccessful bids that can be gleaned from the record. Thus, the current Custodian must disclose those bids, with redactions where applicable, to the Complainant.
2. **The Custodian shall comply with conclusion No. 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, if applicable. Further, the Custodian shall simultaneously deliver⁵**

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷

3. The Council defers analysis of whether the original 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: Frank F. Caruso
Acting Executive Director

April 23, 2019

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.