

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

FINAL DECISION

January 31, 2007 Government Records Council Meeting

Suzanne Mendes
Complainant

Complaint No. 2006-200

v.

Monmouth Regional High School
Custodian of Record

At the January 31, 2007 public meeting, the Government Records Council (“Council”) considered the January 24, 2007 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) At the time of the request, the Custodian unlawfully denied the Complainant access to the requested records because resumes of successful candidates are disclosable pursuant to NJ. Exec. Order No. 26 (Aug. 13, 2002). Subsequently, the records responsive were provided to the Complainant by the Custodian on November 29, 2006.
- 2) In view of the fact that the Custodian sought legal advice from its legal counsel and promptly released the records responsive once she received a copy of Executive Order No. 26, it is concluded that 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. However, the Custodian’s unlawful denial was negligent since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 31st Day of January, 2007

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: February 5, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2007 Council Meeting**

**Suzanne Mendes¹
Complainant**

GRC Complaint No. 2006-200

v.

**Monmouth Regional High School²
Custodian of Records**

Records Relevant to Complaint: Resumes of school personnel³.

Request Made: October 20, 2006

Response Made: October 25, 2006

Custodian: Maria Parry

GRC Complaint Filed: November 1, 2006

Background

October 20, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above.

October 25, 2006

Custodian's response to the OPRA request. The Custodian denied the Complainant's OPRA request in writing four (4) business days after receiving the request. The Custodian explained that the resumes are exempt under N.J.S.A. 47:1A-10, which states that personnel records are not considered public documents.

November 1, 2006

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

- October 20, 2006 OPRA request, and
- October 25, 2006 response from Custodian.

¹ No legal representation listed.

² Represented by Martin Barger, Esq. of *Reussille, Mausner, Carotenuto, Barger & Steel*, 345 Broad Street, Red Bank, New Jersey 07701

³ Additional records were requested but are not subject of this complaint.

The Complainant asserts that she spoke with the Custodian on October 31, 2006. The Complainant had e-mailed the Custodian stating that she had not received a response to her October 20, 2006 OPRA request. The Complainant declares that the Custodian informed the Complainant that the Custodian had sent the Complainant a response letter via certified mail on October 25, 2006. The Complainant asserts that she never received such a letter. The Complainant further states that the Custodian informed her verbally that her request for resumes has been denied. The Complainant declares that the Custodian denied the resumes pursuant to N.J.S.A. 47:1A-10, which states that personnel records are not considered public records. The Complainant asserts that the Custodian has knowingly and willfully violated OPRA. The Complainant declares that the Custodian should be well versed in OPRA and should have been aware of Executive Order No. 26 before unlawfully denying the Complainant access to the records responsive to the request. The Complainant alleges that the Custodian had access to the GRC and could have sought advice as to which specific records are exempt from disclosure under OPRA, as the Complainant did. The Complainant alleges that the Custodian chose to unlawfully deny the Complainant access to the records responsive by simply stating that the records were exempt under N.J.S.A. 47:1A-10.

November 27, 2006

Offer of Mediation sent to both parties.

November 29, 2006

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint.

November 29, 2006

Request for Statement of Information sent to the Custodian.

November 29, 2006

Letter from Custodian to Complainant. The Custodian acknowledges that the resumes requested by the Complainant are releasable pursuant to New Jersey Executive Order No. 26. The Custodian attaches the requested resumes for the Complainant.

December 1, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- October 20, 2006 OPRA request,
- October 25, 2006 letter from Custodian to Complainant with attachments, and
- November 29, 2006 letter from Custodian to Complainant with attachments.

The Custodian certifies that the initial denial of this OPRA request was based on advice from the Monmouth Regional High School Board Attorney, who was not aware of New Jersey Executive Order No. 26. The Custodian certifies that once the GRC provided the Custodian with Executive Order No. 26, the records responsive were immediately

provided to the Complainant. The Custodian asserts that the denial of access was an honest mistake.

Analysis

Whether the Custodian unlawfully denied access to the requested resumes?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[t]he provisions of OPRA shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to OPRA; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9.a.

In addition, Executive Order No. 26 states that:

“No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. *The resumes of successful candidates shall be disclosed once the successful candidate is hired.*” (Emphasis added.) N.J. Exec. Order No. 26 (Gov. McGreevey, Aug. 13, 2002)

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The Complainant asserts that she spoke with the Custodian on October 31, 2006. The Complainant had previously e-mailed the Custodian stating that she had not received a response to her October 20, 2006 OPRA request. The Complainant declares that the Custodian informed the Complainant that a letter had been sent via certified mail on October 25, 2006 to the Complainant. The Complainant asserts that she never received such a letter. The Complainant further states that the Custodian informed her verbally that her OPRA request has been denied. The Complainant declares that the Custodian denied access to the resumes pursuant to N.J.S.A. 47:1A-10, which states that personnel records are not considered public records.

The Custodian certifies that the initial denial of this OPRA request was based on advice from the Monmouth Regional High School Board Attorney, who was not aware of Executive Order No. 26. The Custodian certifies that once the GRC provided the Custodian with Executive Order No. 26, the records responsive were immediately provided to the Complainant. The Custodian asserts that the denial of access was an honest mistake.

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. 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.

Although the Custodian's response to the Complainant was timely, and the Custodian provided the records responsive on November 29, 2006 (twenty-six (26) business days after the OPRA request), the Custodian's initial response constituted an unlawful denial because the Custodian is vested with the legal responsibility of granting and denying access in accordance with the law.

Whether the Custodian's delay in access to the requested resumes rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

"... If 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.

In this case the Complainant asserts that the Custodian knowingly and willfully denied her access to the records responsive. The Complainant declares that the Custodian should be well versed in OPRA and should have been aware of Executive Order No. 26 before unlawfully denying access to the records responsive. The Complainant alleges that the Custodian had access to the GRC and could have sought advice as to which specific records are exempt under OPRA, as the Complainant did when filing her Denial of Access Complaint. The Complainant alleges that the Custodian chose to unlawfully deny the Complainant access to the records responsive by simply stating that the records were exempt under N.J.S.A. 47:1A-10.

The Custodian certifies that she made an honest mistake when denying the Complainant access to the records responsive. The Custodian further asserts that upon receipt of Executive Order No. 26 from the GRC, she promptly released the records responsive to the Complainant.

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 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fieder 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 (App. Div. 1996) at 107).

The Custodian certifies that the initial denial of this OPRA request was based on advice from the Monmouth Regional High School Board Attorney, who was not aware of Executive Order No. 26. The Custodian certifies that once the GRC provided the Custodian with Executive Order No. 26, the records responsive were immediately provided to the Complainant. The Custodian asserts that the denial of access was an honest mistake.

In view of the fact that the Custodian sought legal advice from its legal counsel and promptly released the records responsive once she received a copy of Executive Order No. 26, it is concluded that 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. However, the Custodian’s unlawful denial was negligent

since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

- 2) At the time of the request, the Custodian unlawfully denied the Complainant access to the requested records because resumes of successful candidates are disclosable pursuant to NJ. Exec. Order No. 26 (Aug. 13, 2002). Subsequently, the records responsive were provided to the Complainant by the Custodian on November 29, 2006.

- 2) In view of the fact that the Custodian sought legal advice from its legal counsel and promptly released the records responsive once she received a copy of Executive Order No. 26, it is concluded that 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. However, the Custodian's unlawful denial was negligent since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Rebecca A. Steese
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

January 24, 2007