

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

FINAL DECISION

January 31, 2007 Government Records Council Meeting

Frederick Rembis
Complainant

Complaint No. 2006-186

v.

Clifton Board of Education
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. As the Custodian certifies that she provided the Complainant with all existing requested records or certifies that the requested records do not exist, the Custodian would not have unlawfully denied access to the requested records, except that the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g.
2. The Custodian is in violation of N.J.S.A. 47:1A-5.e for not providing immediate access to the requested budgets and public employee salary information.
3. The GRC administers OPRA and adjudicates denial of access complaints. The GRC does not have authority over the accuracy of those records disclosed pursuant to OPRA.
4. In light of the legal standards established for knowing and willful violations and the fact that the Custodian has released those documents which exist and certified that the unreleased records do not exist, the Custodian’s actions do not meet the legal standard for a knowing and willful violation pursuant to OPRA or unreasonable denial of access under the totality of the circumstances in this case. However, the Custodian’s actions do appear to be at least negligent regarding her knowledge of OPRA.

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 2, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Frederick Rembis¹
Complainant**

GRC Complaint No. 2006-186

v.

**Clifton Board of Education²
Custodian of Records**

Records Relevant to Complaint:

1. The student population, tax levy, total budget, and/or access to all public records containing said information for the academic years 2001-2002 through 2005-2006
2. The District's table of organization including a list of all employees' names, titles, salaries, benefits, and/or access to all public records containing said information for the academic years 2000-2001 and 2005-2006
3. The District's classroom utilization data, including for each school the following:
 - each classroom and the capacity for each period
 - the number of students actually using the classroom
 - the room's use
 - access to all public records containing said information.

Request Made: September 4, 2006

Response Made: November 2, 2006³

Custodian: Karen Perkins

GRC Complaint Filed: October 6, 2006

Background

September 4, 2006

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

October 6, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") with the Complainant's OPRA request dated September 4, 2006 attached. The Complainant states that he submitted his OPRA request to the Clifton Board of Education ("BOE") on September 4, 2006 and asserts that he has received no response from the Custodian.

¹ No legal representation listed on record.

² Represented by Anthony D'Elia, Esq. of Chasan, Leyner, Bariso, Lamparello, P.C. (Secaucus, NJ).

³ Response was verbal.

October 20, 2006

Offer of Mediation sent to both parties.

October 23, 2006

Complainant's signed Agreement to Mediate. The Custodian did not agree to mediate this complaint.

October 30, 2006

Request for Statement of Information sent to the Custodian.

November 7, 2006

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

- Letter from Custodian to GRC dated November 7, 2006
- Complainant's OPRA request dated September 4, 2006

The Custodian certifies receiving the Complainant's OPRA request on September 5, 2006. She also certifies that she attempted to call the Complainant each day from October 27, 2006 until she finally reached him on November 2, 2006 to notify him that the requested records were available for pickup. The Custodian certifies that the Complainant picked up the requested records on November 6, 2006.

November 10, 2006

The Complainant's response to the Custodian's SOI. The Complainant claims that the Custodian has substantially, but not completely complied with his September 4, 2006 OPRA request. He states that he will notify the Custodian of any missing information until such information is released.

November 13, 2006

E-mail from Custodian's Secretary to GRC. The Secretary states that the Custodian's response to this complaint was forwarded to the Complainant via certified mail on November 8, 2006.

November 13, 2006

Letter from Complainant to Custodian. The Complainant asserts that the information provided to him on November 6, 2006 in response to his OPRA request did not include the following:

1. the monetary value of benefits for BOE employees for the academic years 2000-2001 and 2005-2006
2. the classroom capacities for the academic year 2005-2006.

November 14, 2006

Letter from Complainant to Custodian. The Complainant contends that there are inconsistencies among the student population, tax levy, and total budget data for the academic year 2001-2002, which was provided in 2002 and again in 2006. The Complainant requests that the Custodian identify which figures are correct.

November 26, 2006

E-mail from Complainant to GRC. The Complainant asserts that the Custodian has not provided all of the requested information and that some of the information provided is incorrect. He claims that the Custodian, through the BOE's attorney, is refusing to release some of the requested information.

December 27, 2006

Letter from GRC to Custodian. The GRC requests a legal certification, signed by the Custodian, in response to the following questions:

1. Are the following records made, maintained, kept on file, or received by the Clifton Board of Education:
 - The monetary value of benefits for BOE employees for the academic years 2000-2001 and 2005-2006
 - The classroom capacities for the academic year 2005-2006.
2. If said documents are made, maintained, kept on file, or received by the BOE, have they been provided to the Complainant? If so, on what date? If said documents have not been provided to the Complainant, please provide a legal explanation for non-disclosure. Please include any responsive documentation.

December 29, 2006

Letter of representation from Custodian's Counsel.

January 4, 2006

Custodian's certification in response to the GRC's letter dated December 27, 2006. The Custodian certifies that the Clifton BOE does not maintain any records summarizing the monetary value of benefits for BOE employees for the academic years 2000-2001 and 2005-2006. The Custodian also certifies that the BOE does not maintain any records for the classroom capacities for the academic year 2005-2006.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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 states that:

“[i]mmediate access ordinarily shall be granted to *budgets*, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and *public employee salary and overtime information*.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA provides that:

“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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 states that he submitted his OPRA request to the Clifton BOE on September 4, 2006. He states that he did not receive a response to his request until receiving some of the requested records on November 6, 2006, approximately two (2) months following the date of his request. The Complainant asserts that the following items were not included with the documents the Custodian provided:

1. the monetary value of benefits for BOE employees for the academic years 2000-2001 and 2005-2006
2. the classroom capacities for the academic year 2005-2006.

Additionally, the Complainant claims that the student population, tax levy, and total budget data information provided on November 6, 2006 are incorrect.

The Custodian certifies receiving the Complainant’s OPRA request on September 5, 2006. She certifies that she attempted to call the Complainant each day from October 27, 2006 until she finally reached him on November 2, 2006 and notified him that the requested records were available for pickup. The Custodian certifies that the Complainant picked up the requested records on November 6, 2006. Regarding the Complainant’s assertion that two (2) requested records were not released, the Custodian certifies that the following records do not exist on file with the BOE:

1. the monetary value of benefits for BOE employees for the academic years 2000-2001 and 2005-2006
2. the classroom capacities for the academic year 2005-2006.

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.

Further, pursuant to N.J.S.A. 47:1A-5.i., a custodian must either grant or deny access to a government record within seven (7) business days of receiving said request. Here, the Custodian certifies receiving the Complainant's request on September 5, 2006, but did not attempt to respond until October 27, 2006, which is more than one month following the date of the request. The Custodian also certifies providing the Complainant with the requested records on November 6, 2006, with the exception of the following records which the Custodian certifies do not exist on file with the BOE:

1. the monetary value of benefits for BOE employees for the academic years 2000-2001 and 2005-2006
2. the classroom capacities for the academic year 2005-2006.

Although the Custodian has provided the Complainant with all records responsive, or certified that the requested records do not exist, the Custodian's response goes well beyond the statutorily mandated seven (7) business days required to respond to requests, resulting in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.

Additionally, a Custodian must promptly comply with an OPRA request or provide a written explanation as to why he/she cannot comply with the request pursuant to N.J.S.A. 47:1A-5.g. In Kathleen Fallstick v. Haddon Township and Haddon Township Business Partners, Inc., GRC Complaint No. 2004-73 (October 2004), the Council found that "the Township violated N.J.S.A. 47:1A-5.g. by not providing the requestor with a written response to the subject requests." In this complaint, the Custodian never provided the Complainant with a written response either granting or denying access to the requested records. Therefore, the Custodian is in violation of N.J.S.A. 47:1A-5.g. for not providing a written response to the Complainant.

N.J.S.A. 47:1A-5.e. provides that immediate access ordinarily shall be granted to budgets and public employee salary information. As the Complainant's request involved both these items, the Custodian should have adhered to this section of OPRA. However, the Custodian did not provide said information until approximately two (2) months following the date of the Complainant's request. As such, the Custodian is in violation of N.J.S.A. 47:1A-5.e for not providing immediate access to the requested budgets and public employee salary information.

Despite the fact that the Custodian failed to provide a written response to the Complainant's request within the statutorily mandated seven (7) business days, or provide immediate access to the requested budgets and salary information, the Custodian certifies that she provided the Complainant with all existing requested records on November 6, 2006. The Complainant asserts that he did not receive two (2) of the requested records. The Custodian certifies that the following records do not exist on file with the BOE:

1. the monetary value of benefits for BOE employees for the academic years 2000-2001 and 2005-2006
2. the classroom capacities for the academic year 2005-2006.

In John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Council held that, "pursuant to N.J.S.A. 47:1A-1.1, the Custodian would not have unlawfully denied access to records, except that his delay in response created a 'deemed' denial. Moreover, the Custodian has not borne the burden of providing a lawful reason for the denial of access to the Complainant's request pursuant to N.J.S.A. 47:1A-6, thus violating N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g."

The facts of this complaint are similar to those in Paff in that the Custodian certifies that she provided the Complainant with all existing requested records or certifies that the requested records do not exist. Therefore, the Custodian would not have unlawfully denied access to the requested records, except that the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g.

Whether the Government Records Council has authority over the accuracy of records disclosed pursuant to N.J.S.A. 47:1A-7.b?

OPRA provides that "[t]he Government Records Council shall... receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian..." N.J.S.A. 47:1A-7.b.

The Complainant claims that the student population, tax levy, and total budget data information provided on November 6, 2006 are incorrect. The Custodian certifies that she provided the Complainant with the information outlined on one page from the District's audits.

N.J.S.A. 47:1A-7.b delineates the power of the GRC. In Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), the Council held that it does not have authority over the accuracy of the document's content pursuant to N.J.S.A. 47:1A-7.b. The GRC administers OPRA and adjudicates denial of access complaints. In this complaint, the Custodian certifies that she has provided the Complainant with the responsive records. The GRC has no authority over the accuracy of those records disclosed pursuant to OPRA.

Whether the Custodian's actions rise 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.

The Complainant states that he submitted his OPRA request to the Clifton BOE on September 4, 2006. He states that he did not receive a response to his request until receiving some of the requested records on November 6, 2006, approximately two (2) months following the date of his request. The Complainant asserts that the following items were not included with the documents the Custodian provided:

3. the monetary value of benefits for BOE employees for the academic years 2000-2001 and 2005-2006
4. the classroom capacities for the academic year 2005-2006.

Additionally, the Complainant claims that the student population, tax levy, and total budget data information provided on November 6, 2006 are incorrect.

The Custodian certifies receiving the Complainant's OPRA request on September 5, 2006. She certifies that she attempted to call the Complainant each day from October 27, 2006 until she finally reached him on November 2, 2006 and notified him that the requested records were available for pickup. The Custodian certifies that the Complainant picked up the requested records on November 6, 2006. Regarding the Complainant's assertion that two (2) requested records were not released, the Custodian certifies that the following records do not exist on file with the BOE:

3. the monetary value of benefits for BOE employees for the academic years 2000-2001 and 2005-2006
4. the classroom capacities for the academic year 2005-2006.

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 (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 (App. Div. 1996) at 107).

In light of the legal standards set forth above and the fact that the Custodian has released those documents which exist and certified that the unreleased records do not exist, the Custodian's actions do not meet the legal standard for a knowing and willful violation pursuant to OPRA or unreasonable denial of access under the totality of the circumstances in this case. However, the Custodian's actions do appear to be at least negligent regarding her knowledge of OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

5. As the Custodian certifies that she provided the Complainant with all existing requested records or certifies that the requested records do not exist, the Custodian would not have unlawfully denied access to the requested records, except that the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g.
6. The Custodian is in violation of N.J.S.A. 47:1A-5.e for not providing immediate access to the requested budgets and public employee salary information.
7. The GRC administers OPRA and adjudicates denial of access complaints. The GRC does not have authority over the accuracy of those records disclosed pursuant to OPRA.
8. In light of the legal standards established for knowing and willful violations and the fact that the Custodian has released those documents which exist and certified that the unreleased records do not exist, the Custodian's actions do not meet the legal standard for a knowing and willful violation pursuant to OPRA or unreasonable denial of access under the totality of the circumstances in this case. However, the Custodian's actions do appear to be at least negligent regarding her knowledge of OPRA.

Prepared By:

Dara Lownie
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

January 24, 2007