



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

January 31, 2017 Government Records Council Meeting

Debra Anne Leporino
Complainant

Complaint No. 2016-98

v.

South Plainfield Public Schools (Middlesex)
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has borne his burden of proof that he lawfully denied access to the requested phone bills, text messages, or other documentation described in the Complainant’s March 4, 2016 OPRA request. He certified that no responsive records exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t. of Educ., GRC 2005-49 (July 2005).
3. While the Custodian’s initial response, disclosing the two redacted e-mails, was insufficient due to his failure to cite a specific basis for the redactions, the GRC need not order disclosure because the Complainant now possesses the unredacted e-mails. Additionally, the Custodian has certified that all e-mails responsive to the request were located, and the Complainant has not provided competent, credible evidence to refute the Custodian’s certification. Therefore, the GRC declines to order disclosure, as the Complainant now possesses the two (2) responsive e-mails, without redactions.
4. Although the Custodian unlawfully denied access to the requested records by failing to respond to the Complainant’s clarification e-mail in the seven business days



mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant's March 4, 2016 OPRA request by conducting a search and ultimately disclosing the two (2) responsive records located. Additionally, the Custodian certified that no other existing records were located, and the Complainant did not provide evidence to the contrary. Although he initially did not sufficiently respond by failing to provide the lawful basis for redactions he made, the Custodian's Counsel later disclosed the records to the Complainant without redactions. 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 and 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 31st Day of January, 2017

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, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Debra Anne Leporino¹
Complainant**

GRC Complaint No. 2016-98

v.

**South Plainfield Public Schools (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies of all personal/professional e-mails; all personal/professional phone bills (including text messages); all BOE meeting minutes³; all Executive Board meeting minutes; and any/all documentation to and from Mrs. Darlene Cullen or any/all “freelance” employees of TAPinto, including Mr. Michael Shapiro, owner of TAPinto Franchise; and any/all documentation resulting from the distribution of a TAPinto letter at the January 6, 2016 BOE meeting.

Custodian of Record: Alex Ferreira

Request Received by Custodian: March 4, 2016

Response Made by Custodian: March 8, 2016; March 23, 2016; April 11, 2016; April 18, 2016

GRC Complaint Received: April 6, 2016

Background⁴

Request and Response:

On March 4, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant attached a copy of a January 6, 2016 letter from Ms. Darlene Tedesco-Cullen of TAPinto, addressed to the Board of Education, which referenced the Complainant and stated that the Complainant was not an employee of TAPinto. That same day, the Custodian called the Complainant to discuss the request and later responded in writing, seeking additional clarification as to the individuals referenced. The Custodian asked if the Complainant was referring to the Board, administrators, or specific staff, as well as a clarification of the time period for the search.

¹ No legal representation listed on record.

² Represented by Eric Andrews, Esq. (Florham Park, NJ).

³ The Complainant did not raise a denial of access issue with respect to the request for minutes and therefore the GRC declines to adjudicate this portion of the request.

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.

The Complainant wrote to the Custodian on March 8, 2016, providing the clarification requested. She wrote that with respect to correspondence sought, she sought records involving all Board members, administrators, and BOE staff members. She further stated that she sought copies of the referenced records from Board of Education members to the Republican Party members, Democratic Party members, all Borough Council members, Borough Council Committee members, and Borough Council Administrative Staff. In a later e-mail that same day, the Complainant clarified that the time period was September 10, 2015, to March 4, 2016.

On March 16, 2016, the Complainant sent a follow-up e-mail regarding the request to the Custodian and called him on March 18, 2016. On March 23, 2016, the Custodian wrote to the Complainant advising that he did not see her March 8, 2016 clarification e-mail until “earlier this week” and requested an extension of time to respond until April 11, 2016, due to the district offices being closed the next week.

On April 11, 2016, the Custodian wrote to the Complainant, seeking an additional extension until April 18, 2016 in order to process the portion of her request seeking e-mails, text messages, and phone calls. He further stated that, other than the letter dated January 6, 2016, there was no additional correspondence to/from the Board regarding the search topics provided in the Complainant’s clarification e-mail. He additionally noted that with respect to the portion of the Complainant’s request seeking meeting minutes, no meeting minutes presented “any specific discussion” regarding the referenced topic. He added that all approved minutes were posted on the district website.

On April 18, 2016, Ms. Debra Schroeder, from the South Plainfield Board of Education Business Office, responded to the Complainant’s request, attaching two (2) e-mails responsive to the request. She wrote that based upon a conducted search, no additional correspondence was located and the matter was therefore closed. The attached e-mails contained redactions to the e-mail addresses of the senders and recipients. The attached e-mails consisted of the following: (1) a one page e-mail dated January 5, 2016, from Alex Ferreira with the subject “Complaint filed with the County office; and (2) a two page e-mail chain containing the first e-mail and subsequent correspondence dated January 6, 2016 at 11:21 AM and 1:47 PM.

Denial of Access Complaint:

On April 6, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that, as of the time of the filing of her Complaint, she had not received a response from the Custodian. In a separate e-mail to the GRC on April 18, 2016, the Complainant noted that Ms. Schroeder’s April 18 response contained no reasoning for the redactions the Custodian made. She made no further legal arguments.

Statement of Information:

On August 1, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 4, 2016. The Custodian certified that he responded in writing that same day, seeking clarification as to the

Complainant's request. He certified that the Complainant clarified the request on March 8, 2016, but that "unfortunately, [the Custodian] did not notice" that e-mail in his inbox. He certified that, at the time of the Complainant's March 16, 2016 e-mail seeking a follow-up, he was not aware that she had in fact clarified her request on March 8, 2016. He certified that he "discover[ed]" that she had in fact clarified her request on March 23, 2016, and thereafter wrote to the Complainant seeking an extension of time until April 11, 2016, to respond.

The Custodian certified that his search for responsive records included contacting all Board of Education members on April 8, 2016, and requesting that any correspondence responsive to the request be forwarded to his office. The Custodian attached a copy of the request sent to the Board of Education members, which reprinted the language from the Complainant's OPRA request and subsequent clarification e-mail. He certified that no documents responsive to the request were received from the Board members.

The Custodian averred that the search for records also included his assistant reviewing the office's files for hard copies of any responsive records and that no such documents were located. He further certified that he requested the office's technology director to run a search of the e-mail system using the search terms in the request.

The Custodian certified that on April 11, 2016, he requested a second extension of time to respond, until April 18, 2016, in order to continue the search for any existing e-mails, text messages, and phone calls. He notified the Complainant in that e-mail that he had not located any other correspondence related to the request.

The Custodian averred that his office thereafter provided two (2) responsive records to the Complainant via e-mail on April 18, 2016, consisting of: (1) an e-mail dated January 5, 2016, and (2) an e-mail chain dated January 6, 2016. He certified that the e-mails were redacted due to concerns about the e-mail recipient's reasonable expectation of privacy, pursuant to N.J.S.A. 47:1A-1.

Additional Party Submissions

On December 1, 2016, the GRC sent a request for additional information to the Custodian's Counsel, seeking a response to the factors of the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995), in order for the GRC to determine whether the privacy interests of the individuals named in government records (here, the redacted e-mail addresses in the two (2) disclosed e-mails) were outweighed by any factors in favor of disclosure.

On December 16, 2016, the Custodian's Counsel wrote to the GRC, advising that they instead were providing the previously disclosed e-mails to the Complainant in un-redacted form. On that date, the Custodian's Counsel disclosed one (1) page of the previously disclosed e-mail, without redactions, and advised that the district staff was in the process of locating the remaining additional e-mail. On December 19, 2016, the Custodian's Counsel wrote to the GRC and the Complainant, advising that the District's staff had located the remaining e-mail and that a complete set of unredacted documents was now being disclosed.

On December 27, 2016, the Complainant wrote to the GRC, asserting her belief that the South Plainfield Board of Education and the Custodian's Counsel had not provided "all documentation" responsive to her OPRA request.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant matter, the Custodian averred that, upon receipt of the Complainant's OPRA request on March 4, 2016, he asked for a clarification of her request that same day. The Complainant replied with that clarification on March 8, 2016, and sent a follow-up e-mail on March 16, 2016. The Custodian certified that he did "not notice" the March 8, 2016 e-mail nor respond to it until March 23, 2016, eleven (11) business days after the Complainant submitted the clarification. On that date, he sought an extension of time to respond until April 11, 2016. Because the Custodian did not respond to the Complainant's clarification of her request within the seven (7) days mandated by OPRA, his March 23, 2016 response is untimely.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

Copies of E-mails, Phone Bills, Text Messages/Documentation

⁵ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Phone Bills/Text Messages/Documentation

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's certification, no unlawful denial of access occurred. See Pusterhofer v. NJ Dep't. of Educ., GRC 2005-49 (July 2005). Here, the Custodian certified that after conducting a search for the requested items, it was found that no phone bills, text messages, or other such documentation relating to the specific subject matter and time period of the request existed. Additionally, the Complainant provided no evidence to refute the Custodian's certification.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested phone bills, text messages or other documentation described in the Complainant's March 4, 2016 OPRA request. He certified that no responsive records exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

E-mails

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).

N.J.S.A. 47:1A-5(g) requires that a custodian provide the specific lawful basis for redactions. In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008), the custodian responded in a timely manner by providing redacted records to the complainant; however, the custodian failed to provide a specific legal basis for said redactions. The Council, relying on prior decisions in Paff v. Township of Plainsboro, GRC Complaint No. 2005-29, (July 2005)(ordering the custodian to provide redacted executive session minutes with a detailed and lawful basis for each redacted part) and Schwarz v. NJ Department of Human Services, GRC Complaint No. 2004-60, (February, 2005)(setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial), held that:

“[t]he Custodian's response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction ... Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A- 5.g. and has not borne his burden of proving the denial of access to the redacted portions was authorized by law pursuant to N.J.S.A. 47:1A-6.”

In the instant matter, the Custodian disclosed two (2) responsive e-mails on April 18, 2016, with redactions to the e-mail addresses of recipients. He stated that no other responsive e-mails were found after an extensive search, which he certified included contacting all Board of Education members, his assistant reviewing the office's file for hard copies, and requesting the office's technology director to run a search of the e-mail system using the search terms in the

request. In his response disclosing the redacted e-mails to the Complainant, the Custodian did not cite a specific basis for redacting the records.

While the Custodian's initial response did not contain a specific basis for the redacted e-mail addresses, he later certified in the SOI that the e-mails were redacted due to concerns about the e-mail recipient's reasonable expectation of privacy, pursuant to N.J.S.A. 47:1A-1. Later, in response to the GRC's subsequent request for the Doe v. Poritz balancing test, the Custodian's Counsel advised the GRC that the District would instead disclose the e-mails to the Complainant, completely unredacted.

While the Custodian's initial response, disclosing the two redacted e-mails, was insufficient due to his failure to cite a specific basis for the redactions, the GRC need not order disclosure because the Complainant now possesses the unredacted e-mails. Additionally, the Custodian has certified that all e-mails responsive to the request were located, and the Complainant has not provided competent, credible evidence to refute the Custodian's certification. Therefore, the GRC declines to order disclosure, as the Complainant now possesses the two (2) responsive e-mails, without redactions.

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 Custodian unlawfully denied access to the requested records by failing to respond to the Complainant's clarification e-mail in the seven business days mandated by OPRA,

thereby resulting in a deemed denial, he ultimately responded to the Complainant's March 4, 2016 OPRA request by conducting a search and ultimately disclosing the two (2) responsive records located. Additionally, the Custodian certified that no other existing records were located, and the Complainant did not provide evidence to the contrary. Although he initially did not sufficiently respond by failing to provide the lawful basis for redactions he made, the Custodian's Counsel later disclosed the records to the Complainant without redactions. 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 and 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 did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has borne his burden of proof that he lawfully denied access to the requested phone bills, text messages, or other documentation described in the Complainant's March 4, 2016 OPRA request. He certified that no responsive records exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't. of Educ., GRC 2005-49 (July 2005).
3. While the Custodian's initial response, disclosing the two redacted e-mails, was insufficient due to his failure to cite a specific basis for the redactions, the GRC need not order disclosure because the Complainant now possesses the unredacted e-mails. Additionally, the Custodian has certified that all e-mails responsive to the request were located, and the Complainant has not provided competent, credible evidence to refute the Custodian's certification. Therefore, the GRC declines to order disclosure, as the Complainant now possesses the two (2) responsive e-mails, without redactions.
4. Although the Custodian unlawfully denied access to the requested records by failing to respond to the Complainant's clarification e-mail in the seven business days mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant's March 4, 2016 OPRA request by conducting a search and ultimately disclosing the two (2) responsive records located. Additionally, the Custodian certified that no other existing records were located, and the Complainant

did not provide evidence to the contrary. Although he initially did not sufficiently respond by failing to provide the lawful basis for redactions he made, the Custodian's Counsel later disclosed the records to the Complainant without redactions. 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 and 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: Husna Kazmir
Staff Attorney

January 24, 2017