



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

April 30, 2013 Government Records Council Meeting

Sabino Valdes
Complainant

Complaint No. 2012-19

v.

New Jersey Department of Education
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013¹ 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 the evidence of record supports that the Custodian never received the OPRA requests, and the Complainant has not provided any credible evidence to contradict the Custodian’s Statement of Information certification. Thus, the Custodian did not unlawfully deny access to the Complainant’s December 9, 2011 OPRA request No. 2.

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 April, 2013

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, 2013

¹ This complaint was prepared for adjudication at the Council’s January 29, February 26, and March 22, 2013 meetings; however, the complaint could not be adjudicated due to lack of quorum.



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

**Sabino Valdes¹
Complainant**

GRC Complaint No. 2012-19

v.

**New Jersey Department of Education²
Custodian of Records**

Records Relevant to Complaint:

November 2, 2011 OPRA request: Copy of the Notice of Motion (“Notice”) filed by Mr. David H. Ben Asher (“Mr. Asher”) on May 1, 2001 on behalf of the Complainant in New Jersey Department of Education (“DOE”) Docket No. 328-9/00 for dismissal of tenure charges pending against respondent inclusive of the proper agency date stamp.³

December 9, 2011 OPRA request:⁴

1. On-site inspection of Check No. 554 dated June 27, 2011 from the Complainant in the amount of \$5.38 for request No. 58867
2. Copy of 74 page tenure charge record without bate-stamps entered into evidence by the Union City Board of Education in Office of Administrative Law (“OAL”) Docket No. EDU-3620-01.

Request Made: November 2, 2011; December 9, 2011

Response Made: November 29, 2011; None

GRC Complaint Filed: January 19, 2012⁵

Background

Request and Response:

Complainant’s November 2, 2011 OPRA request

On November 2, 2011, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian. On November 22, 2011, the Custodian responded noting

¹ No legal representation listed on record.

² Maria Casale, Custodian of Record. Represented by DAG Caroline Jones, on behalf of the NJ Attorney General.

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ Although these request items were sent to the Custodian on two (2) separate OPRA request forms, the GRC has consolidated same for ease of adjudication.

⁵ The GRC received the Denial of Access Complaint on said date.

that an extension of time until November 29, 2011 to respond was necessary; however, the Custodian did not address the Notice. On November 28, 2011, the Complainant responded to the Custodian advising that she failed to provide a response for the Notice.

Complainant's December 9, 2011 OPRA request

The Complainant submitted a second (2nd) OPRA request to the Custodian on December 9, 2011. The Complainant states that DOE received the requests on December 12, 2011. The Complainant states that after receiving no response, the Complainant hand delivered a letter to DOE on January 9, 2012 advising the Custodian that she failed to respond. The Complainant states that his letter further advising that the Custodian that he would file a complaint if DOE continued to ignore his OPRA requests.

Denial of Access Complaint:

On January 19, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC") contending that the Custodian violated OPRA by failing to respond in writing to the OPRA requests at issue herein. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Complainant requests that the GRC order the Custodian to respond to his OPRA requests.

Statement of Information:

Complainant's November 2, 2011 OPRA request

On February 17, 2012, the Custodian filed a Statement of Information ("SOI") certifying that she received requests for the record relevant to the Complainant's November 2, 2011 OPRA request on November 29, 2011, as No. C63245 and again on December 14, 2011 as No. C63446. The Custodian certifies that she responded on December 8, 2011, noting that the responsive record was ready for pickup and to retrieve same by December 29, 2011. The Custodian certifies that No. C63245 is still in pending status because the Complainant has not retrieved the Notice. The Custodian certifies that No. C63446 was closed as a duplicate.

Complainant's December 9, 2011 OPRA request No. 1

The Custodian certifies that the Complainant previously requested this check in a request received on November 10, 2011. The Custodian certifies that she sought an extension on November 22, 2011 and responded on November 29, 2011 advising that same was available for disclosure. The Custodian certifies that this request is still in pending status.⁶

Complainant's December 9, 2011 OPRA request No. 2

The Custodian certifies that she has no record of receiving this OPRA request. The Custodian certifies that the Complainant has requested this record without date stamps repeatedly over the past several years and has been told on each occasion that no record exists. The

⁶ The Custodian makes no reference to any request dated December 9, 2011 seeking the relevant check.

Custodian notes that the March 2009 letter from the previous DOE that the Complainant appears to have attached to the request states exactly that.

Additional Submissions

On February 17, 2012, the Complainant submitted an amended Denial of Access Complaint. The Complainant states that the record at issue is the December 9, 2011 request No. 2. The Complainant states that on December 9, 2011, he mailed via certified mail an OPRA request seeking the relevant tenure charges record without Bates stamps. The Complainant states that according to the certified mail receipt, DOE received the request on December 12, 2011. The Complainant states that he never received a response.

The Complainant states that on January 9, 2012, he submitted a second request for the tenure charges. The Complainant notes that in his cover letter, he advised DOE that if it failed to reply, he would file a complaint. The Complainant states that DOE did not respond and this complaint resulted.

The Complainant disputes the Custodian's SOI statement that she never received the request at issue herein. The Complainant contends that the certified mail receipt shows that DOE received the request and subsequent request for the same record. The Complainant further notes that the Custodian erroneously asserted that his request sought the record without date stamps (his request actually sought the record without Bates stamps).⁷

The Complainant states that pursuant to the Council's regulations, a custodian may respond to an amended Denial of Access within five (5) business days. *N.J.A.C. 5:105-2.4(i)*. The Complainant contends that if the Custodian is actually acting in good faith, she will amend the SOI to correct erroneous statements, provide a retention schedule for the relevant record and a document index.

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*

⁷ The Complainant notes that on this date, he submitted another OPRA request for the same record.

been received in the course of his or its official business ...” (Emphasis added.)
N.J.S.A. 47:1A-1.1.

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.

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.

Here, the Complainant’s initial complaint identified three (3) records; however, the Complainant submitted an amended Denial of Access Complaint on February 27, 2012 arguing that the record at issue was responsive to his December 9, 2011 OPRA request No. 2 seeking a tenure charges record with no Bates stamps. Thus, the GRC will only address this request.

In the SOI, the Custodian certified that she never received the Complainant’s December 9, 2011 OPRA request seeking the tenure charges. Conversely, the Complainant argued in his amended Denial of Access Complaint that the certified mail receipt showed that DOE received his OPRA on December 12, 2011. Thus, there is a question of whether the certified mail receipt rises to the level of competent, credible evidence that the Custodian actually received the OPRA request.

A review of the certified mail receipt shows that the parcel containing the OPRA request was received on December 12, 2011; however, there is no signature. There is a stamp on the receipt that reads “State of NJ – Capital Post Office.” Thus, the Custodian did not sign the receipt and there is no indication that DOE received the request, only that the State received it on December 12, 2011. Thus, it is entirely possible that the Custodian never received the OPRA request.

Additionally, the Complainant appears to have sent the two (2) OPRA requests comprising the Complainant’s December 9, 2011 OPRA request No. 2 in separate envelopes because two (2) receipts are attached to the initial Denial of Access Complaint. Furthermore, the Custodian never speaks to receiving the Complainant’s December 9, 2011 OPRA request No. 1: she certifies that the Complainant previously requested same and she granted access to the responsive check on November 29, 2011. Thus, the evidence supports that the Custodian never received either request.

Therefore, the evidence of record supports that the Custodian never received the subject OPRA request and the Complainant has not provided any credible evidence to contradict the Custodian’s SOI certification. Thus, the Custodian did not unlawfully deny access to the Complainant’s December 9, 2011 OPRA request No. 2.

The GRC reiterates that it declines to address any other issues because the Complainant submitted an amended Denial of Access Complaint on February 27, 2012, solely disputing the Custodian's failure to respond to his request for tenure charges.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the evidence of record supports that the Custodian never received the OPRA requests, and the Complainant has not provided any credible evidence to contradict the Custodian's Statement of Information certification. Thus, the Custodian did not unlawfully deny access to the Complainant's December 9, 2011 OPRA request No. 2.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

January 22, 2013⁸

⁸ This complaint was prepared for adjudication at the Council's January 29, February 26, and March 22, 2013 meetings; however, the complaint could not be adjudicated due to lack of quorum.