



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 29, 2014 Government Records Council Meeting

Alex Bidnik, Jr.
Complainant

Complaint No. 2013-254

v.

Clifton Board of Education (Passaic)
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council (“Council”) considered the April 22, 2014 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 she timely responded to the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests 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 same 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). However, because the Custodian provided the Complainant with the records responsive to both requests, the GRC should decline to order disclosure of same.
2. In the absence of any evidence indicating that the Complainant submitted OPRA requests seeking the four (4) items identified in the Denial of Access Complaint, the GRC has no authority to adjudicate said items because the Complainant’s contention is without a reasonable factual basis. N.J.S.A. 47:1A-6; Gartner v. Middlesex Borough (Middlesex), GRC Complaint No. 2013-184 (July 2013).
3. The Custodian’s failure to respond to the Complainant’s two (2) OPRA requests resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). 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 29th Day of April, 2014

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, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2014 Council Meeting**

**Alex Bidnik, Jr.¹
Complainant**

GRC Complaint No. 2013-254

v.

**Clifton Board of Education (Passaic)²
Custodial Agency**

Records Relevant to Complaint:

September 10, 2012 OPRA request: Copies of all custodians and maintenance records, plus their bosses, salaries, overtime and bonuses from July 1, 2011 to June 3, 2012.

June 14, 2013 OPRA request: Copies of name and salaries plus overtime pay for every employee of Clifton Board of Education (“BOE”) in a non-teaching capacity to include cafeteria, stadium, maintenance, warehouse, janitors, etc.

Custodian of Record: Karen L. Perkins

Request Received by Custodian: September 10, 2012 and June 14, 2013

Response Made by Custodian: September 21, 2012 and N/A

GRC Complaint Received: August 29, 2013

Background³

Request and Response:

On September 8, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 21, 2012, the ninth (9th) business day after receipt of the request, the Custodian responded in writing providing the following:

- Salary reports for 2011-2012 for Supervision of Custodians and Facilities Manager.
- Custodian/Maintenance salary report 2011-2012.
- Custodian/Maintenance overtime report 2011-2012.

¹ No legal representation listed on record.

² Represented by Paula D. Clark, Esq., of Machado Law Group, LLC (Clark, NJ).

³ 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.

On June 14, 2013, the Complainant submitted a second (2nd) OPRA request to the Custodian seeking the above-mentioned records. The Custodian responded on an unknown date providing the following:

- Cafeteria salary and overtime reports 2012-2013.
- Secretary salary and overtime report 2012-2013.
- Bus Driver salary and overtime reports 2012-2013.
- Bus Aid salary and overtime reports 2012-2013.
- Custodian salary and overtime reports 2012-2013.

Denial of Access Complaint:

On August 29, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted multiple OPRA requests over the course of 2012 and 2013 and never received any response from the Custodian. The Complainant contended that the Custodian failed to provide him with records in order to hide mismanagement of BOE funds. The Complainant asserted that since October 2012, the Custodian has failed to provide him with the following:

1. Salaries plus overtime for all teaching and administrative personnel, as well as present assignments.
2. Stipends given to all teaching and administrative personnel, as well as salaries.
3. Assignments, locations of all administrators, *i.e.* principals, coaches.
4. The amount paid for an ad in “Football Guide” and amount of money received from the private firm who publically promised reimbursement for BOE participation.

Statement of Information:⁴

On March 5, 2014, the Custodian filed a Statement of Information (“SOI”).⁵ The Custodian certifies that she received the Complainant’s first (1st) OPRA request on September 10, 2012. The Custodian certified that technology personnel ran reports from the BOE’s payroll system for 2011-2012 salaries and overtime. The Custodian certified that she responded on September 21, 2012 providing those reports.

The Custodian certified that she received the Complainant’s second (2nd) request on June 14, 2013. The Custodian affirmed that she had reports run by name and employment category for 2012-2013 for cafeteria works, secretaries, bus drivers, bus aides and custodians. The Custodian certified that she responded providing said reports but did not record a response date.

⁴ On October 1, 2013, this complaint was referred to mediation. On January 23, 2014, the complaint was referred back to the GRC for adjudication.

⁵ The Custodian included additional information regarding correspondence between the parties while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

The Custodian certifies that in the Denial of Access Complaint, the Complainant identified four (4) request items. The Custodian certifies that her responses to same are as follows:

1. Salaries and overtime for all teaching and administrative personnel: No exact OPRA request received; however, the Complainant's two (2) OPRA requests sought similar information.
2. Stipends given to all teaching and administrative personnel and salaries: No OPRA request received seeking these records prior to the filing of this complaint.
3. Assignments and locations of all administrators, *i.e.* principals, coaches: No OPRA request received prior to the filing of this complaint.
4. Amount paid to "Football Guide" and reimbursement for BOE participation: No OPRA request received prior to the filing of this complaint. However, no responsive records exist.

The Custodian contended that she never received OPRA requests for the four (4) items as described above. The Custodian argued that notwithstanding this fact, the items are invalid because they fail to identify government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005).

The Custodian further argued that no denial of access could have occurred because the Complainant received all records previously requested in his September 8, 2012 and June 14, 2013 OPRA requests. The Custodian also contended that she could not have unlawfully denied access to the four (4) items above because she never received any OPRA requests seeking same.

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).⁶ 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).

Regarding the September 8, 2012 OPRA request, the Custodian did not respond to same until nine (9) business days after receipt of the request. Regarding the June 14, 2013 OPRA request, no written response memorializing the actual date of said response exists per the Custodian. Thus, the Custodian's failure to respond timely to the Complainant's September 8,

⁶ 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.

2012 OPRA request and failure to provide evidence that her response to the Complainant's June 14, 2013 OPRA request was timely results in a "deemed" denial of both requests.

Therefore, the Custodian did not bear his burden of proof that she timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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 same pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, because the Custodian provided the Complainant with the records responsive to both requests, the GRC should decline to order disclosure of same.

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.

The Complainant filed this complaint disputing that the Custodian failed to provide him with records contained in the four (4) items that he asserted he had been attempting to obtain through OPRA for over a year. However, the Complainant did not provide any OPRA requests specifically citing to this information. In the SOI, the Custodian attached two (2) OPRA requests that were slightly similar to item No. 1 of the Denial of Access Complaint. The Custodian further certified that she did not receive any requests from the Complainant specifically seeking the records identified as at issue in the Denial of Access Complaint.

In the absence of any evidence indicating that the Complainant submitted OPRA requests seeking the four (4) items identified in the Denial of Access Complaint, the GRC has no authority to adjudicate said items because the Complainant's contention is without a reasonable factual basis. N.J.S.A. 47:1A-6; Gartner v. Middlesex Borough (Middlesex), GRC Complaint No. 2013-184 (July 2013).

Finally, the GRC notes that OPRA provides that "the personnel or pension records . . . shall not be considered a government record . . . except that an individual's name, title, position, salary [and] payroll record . . . shall be a government record . . ." N.J.S.A. 47:1A-10. Thus, OPRA has clearly identified certain types of personnel information that fall under the definition of a government record. Thus, requests identifying this type of information are valid OPRA requests. Danis v. Garfield Bd. Of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010); Valdes v. Marinaccio v. Borough of Fanwood (Union), GRC Complaint No. 2012-23 (May 2013).

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)).

Here, the Custodian’s failure to respond to the Complainant’s two (2) OPRA requests resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). 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 she timely responded to the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests 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 same 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). However, because the Custodian provided the Complainant with the records responsive to both requests, the GRC should decline to order disclosure of same.

2. In the absence of any evidence indicating that the Complainant submitted OPRA requests seeking the four (4) items identified in the Denial of Access Complaint, the GRC has no authority to adjudicate said items because the Complainant's contention is without a reasonable factual basis. N.J.S.A. 47:1A-6; Gartner v. Middlesex Borough (Middlesex), GRC Complaint No. 2013-184 (July 2013).
3. The Custodian's failure to respond to the Complainant's two (2) OPRA requests resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). 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: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

April 22, 2014