



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 29, 2014 Government Records Council Meeting

Edgardo Collazo
Complainant

Complaint No. 2013-310

v.

Passaic County Superintendent of Elections
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 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 her burden of proof that she provided a timely and sufficient response to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. The Custodian’s failure to respond to each of the Complainant’s request items individually, and to seek a specific extension of time to respond, results in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008); Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005)
2. The Complainant failed to allege either which documents were wrongfully withheld by the Custodian or why the records that the Custodian did provide amounted to an unlawful denial of access. Further, he did not advance any arguments or cite to any legal precedents in support of his complaint, nor did he raise any objections to the SOI. Additionally, many of the requests made by the Complainant are not for identifiable government records but, instead, impermissibly seek various pieces of information. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). Thus, in light of the Custodian’s submissions to the GRC, her provision of responsive documents to the Complainant, and the overly broad nature of much of the Complainant’s request, the Custodian has borne her burden of proving that she did not unlawfully deny access to the responsive records. See N.J.S.A. 47:1A-6; MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546, 549 (App. Div. 2005).



3. Although the Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i) by providing an untimely and insufficient response to the Complainant's request, the Custodian certified the Complainant was provided with all records maintained at the PCSE office. 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 an 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 July, 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: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Edgardo Collazo¹
Complainant**

GRC Complaint No. 2013-310

v.

**Passaic County Superintendent of Elections²
Custodial Agency**

Records Relevant to Complaint:

1. The names of persons responsible for maintenance and repairs of the Sequoia Voting Machines (“Voting Machines”) at the 495 River Street warehouse in Paterson, New Jersey (“Warehouse”).
2. The names of the technician with the dates of each certification of the Voting Machines for the May 14, 2013 Paterson mayoral election (“mayoral election”), and a copy of those certifications.
3. The procedure used by the Passaic County Superintendent of Elections (“PCSE”) for the code certifications of the Voting Machines for each election, and the employees that did the certifications for the mayoral election.
4. The serial numbers to all Voting Machines that were certified and prepared for the mayoral election.
5. A copy of the certificate by the technician that prepared the Voting Machines for the mayoral election.
6. The serial numbers of all of the results cartridges that were loaded into the Voting Machines for the mayoral election, including the names of the technicians who did so and the dates the task was performed.
7. The names of the technicians that installed the results cartridges into the Voting Machines, a copy of the processes used to ensure that the prior election data has been removed, and the names of the employees from PCSE who oversee this process.
8. The person responsible for the safety and security of the Voting Machines at the Warehouse, and the names of the PCSE employees that work there.
9. A copy of the contract that PCSE has with Election Graphics, Inc. for the period of February 1, 2013 through January 31, 2014, Resolution R-06-97 dated February 14, 2009, and a copy of the stockholders disclosure certificate.
10. The name, address, and phone number of the company awarded the PCSE contract to print sample ballots, a copy of the stockholders disclosure certificate, a copy of the “Non-Collusion Affidavit,” and a copy of the political contribution disclosure form.

¹ No legal representation listed on record.

² No legal representation listed on record.

11. The names of all technicians that were working on the mayoral election; a copy of the paperwork showing the Voting Machines they serviced, the problems the technicians resolved and how they resolved them; the districts in which voting machines were replaced and who authorized the replacements; what time the Voting Machines were replaced; what truck number from McCollister's Transportation Co. delivered the Voting Machines; and the names of the contractually mandated three (3) people who replaced the Voting Machines.
12. A list of the technicians from Election Graphics, Inc. that have State Police clearance and Homeland Security clearance that work on the Voting Machines and have access to the Warehouse, and a copy of the paperwork showing the date they were cleared to work in Passaic County.
13. A copy of the contract that the Passaic County Board of Elections has with the company that prints the mail-in ballots for the county and a copy of the stockholders disclosure certificate for that company.
14. The list of personnel that work at the Board of Elections Room #130 T 401 Grand Street Paterson, New Jersey, including the name, job title, job description, years of work for the Board, and salary.
15. The list of all personnel that work at PCSE, including name, title, job description, salary, and years of work at PCSE; and the list of all PCSE employees that have been cleared by the State Police and Homeland Security to work in the PCSE offices at 317 Pennsylvania Avenue, Paterson, New Jersey, including the dates of such clearances.
16. The special circumstances in which Election Graphics, Inc. was awarded the contract Resolution R-06-97, why the contract was not put out for competitive bidding, the nature of the services provided, why the Board of Freeholders made an exemption under the pay to play law; a copy of the stockholders disclosure certificate; a copy of the "Non-Collusion Affidavit"; and a copy of the "Political Contributions Disclosure Form" that should have been provided to Passaic County Procurement to get on the vendors list for the county.
17. The number of McCollister's Transportation Group/United Van Line, Inc. trucks that transported Voting Machines for the mayoral election; the number of trucks used to transport machines to the City of Passaic voting district; these trucks' numbers; the names of these trucks' drivers and their assistants; the number of days the company transported Voting Machines; the number of trucks used to pick up Voting Machines; the number of days it took to pick up and drop off Voting Machines at the Warehouse; and whether the people who work at McCollister Transportation have State Police clearance, including the date they were cleared to work transporting the Voting Machines.
18. Who is responsible for the Voting Machines in the polling district in the City of Paterson for the mayoral election from the date of the Voting Machines' arrival until the date the Voting Machines are returned to the Warehouse, including the names of the employees responsible for receiving and inspecting the Voting Machines after each election.
19. A copy of all memorandum from the manufacturer of the Voting Machines that have to do with the Voting Machines that have been sent to PCSE for the past eight (8) years.
20. The number of Voting Machines that PCSE has, the number assigned per municipality, and the serial numbers of those Voting Machines.
21. The number of warehouses that PCSE has to store the voting machines that the county owns or leases, and the names of the employees responsible for the operation of such warehouses.
22. The Voting Machine results cartridges used in the mayoral election's service log history for the past four (4) years.
23. A copy of the service, repair, and maintenance logs of the Voting Machines used in the mayoral election for the past five (5) years.

24. Information on the salary, benefits, and term of commission of the Board of Elections Commissioners of Passaic County.
25. The number of investigators PCSE has, the number of years they have been working for PCSE, and the number who were assigned to work the mayoral election.

Custodian of Record: Sherine El-Abd

Request Received by Custodian: September 23, 2013

Response Made by Custodian: September 25, 2013; September 27, 2013; October 1, 2013; October 11, 2013; October 17, 2013

GRC Complaint Received: October 21, 2013

Background³

Request and Response:

On September 23, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 25, 2013, two (2) business days later, the Custodian responded by providing a copy of the stockholder disclosure certification “from Main Street Movers, and for Universal Mailing.” The Custodian also stated that she had not yet received the requested stockholder certification from Election Graphics, but that she would forward it to the Complainant as soon as she had it.

On September 27, 2013, the Custodian responded providing the “proposal for Election Graphics in 2009,” which included Election Graphics, Inc.’s stockholder disclosure certification and non-collusion affidavit as requested.

On October 1, 2013, the Custodian provided another partial response to the Complainant’s OPRA request, noting that she would “continue with all of your requests until all have been addressed.” The Custodian responded to the first ten (10) of the Complainant’s twenty-five (25) request items:

1. The Warehouse where the Passaic County voting machines are stored and maintained is located at 501 River Street, Paterson, NJ. The Warehouse operation has been privatized and the operation is being run by Election Graphics of North Bergen, New Jersey.
2. Due to the fact that the Warehouse operation has been privatized, the technicians, etc. for the [mayoral election] has been conducted Election Graphics including the fact that the technicians are not employees of this office but rather employees or independent contractor of Election Graphics.
3. Please refer to the answer to your question 2 above.
4. As per the guidance of the Office of the Attorney General [“OAG”], for security reasons, we are not allowed to provide this information.
5. Please refer to the answer to your question 2 above.
6. As per the guidance of [OAG], for security reasons, we are not allowed to provide this information.

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.

7. Please refer to the answer to your question 2 above.
8. Please refer to the answer to your question 2 above.
9. As soon as the offices of Passaic County Counsel provides us with a copy of Stock Holders' Disclosure certificate, we will forward to you.
10. [PCSE] is not the party that awards or is involved with the process of awarding the contract for printing [] sample ballots. Information on the contract of the company that mails the sample ballots has been given to you on September 19, 2013 via email.

On October 8, 2013, the Complainant contacted the Custodian regarding the status of the remaining requested information. On October 11, 2013, the Custodian responded stating that she had replied within the required seven (7) business days and that there is no specific time frame within which she must address the Complainant's additional requests, but that she promised to do so as soon as possible.

On October 17, 2013, the Custodian responded providing another partial response so that the Complainant could "direct [his] inquiries to the appropriate sources for additional assistance:"

Please be advised that technicians assigned for duty on Election Day are hired by Election Graphics. To the best of my recollection, there was no request or no need for any voting machine to be replaced on the day of the [mayoral race].

[PCSE] is not in charge of printing or hiring a printer for the purpose of printing sample ballots.

For information requested from the Board of Election, you need to contact them directly.

A list of all [PCSE] employees, along with job descriptions, salaries, etc., has already been sent to you.

Any information regarding Resolution R-06-97 adopted by the Freeholder Board should be directed to the Freeholder Board.

Technicians assigned for duty on Election Day are hired by Election Graphics. No [Voting Machines] were replaced that day. The information you requested is not available in this office; Election Graphics is the employer of the [Voting Machines] technicians.

As per the guidance of the office of [OAG], serial numbers (machines or cartridges) will not be given out to the public for security reasons.

[PCSE] has assigned to it by the County of Passaic a warehouse located at 501 River Street, Paterson where the voting machines are stored. No other storage facility exists for the voting machines. Personnel in charge at the Warehouse are Election Graphics personnel and not [PCSE] staff.

Denial of Access Complaint:

On October 21, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he did not receive a response to his request within seven (7) business days. The Complainant did not provide to the GRC any additional arguments.

Statement of Information:

On January 7, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on September 23, 2013 and provided responses on September 25, October 1, October 11, and October 17, 2013. The Custodian states that all of the requested information was not immediately available and that some information needed to be clarified with OAG. The Custodian further certifies that the Complainant was provided with all records that were maintained at PCSE.

The Custodian argues that the questions submitted by the Complainant did not specifically seek records from PCSE, and instead sought information regarding the “Board of Elections,” “Election Graphics,” and “Universal Mailing.” The Custodian states that the Complainant was advised to direct his requests to the Passaic County Board of Elections as it is a separate department from PCSE, and PCSE did not have “the information the Complainant sought regarding the functioning of that office.” The Custodian contends that many of the Complainant’s request items were incorrectly directed to PCSE, and that he was directed to the appropriate sources.

Analysis

Timeliness & Sufficiency of Response

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).⁴ 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).

Further, in Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided a written response to the complainant’s OPRA request on the seventh (7th) business day following receipt of same. The custodian requested an extension of time to respond but failed to notify the complainant of when the requested records would be provided. The Council held that:

[B]ecause the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be

⁴ 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.

Collazo v. Passaic County Superintendent of Elections, GRC Complaint No. 2013-310 – Findings and Recommendations of the Executive Director

made available pursuant to N.J.S.A. 47:1A-5(i), the Custodian’s written response to the Complainant . . . and the request for an extension of time . . . are inadequate under OPRA and the Complainant’s request is “deemed” denied 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 (October 2007).”

Hardwick, GRC 2007-164.

Additionally, in O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005), a custodian did not respond to a complainant’s January 29, 2004 request because he considered the complainant’s January 26, 2004 request, and his response, to be sufficiently similar to satisfy the requirements of OPRA. The Council found that the custodian unlawfully denied access because he failed to provide a specific response to the January 29, 2004 request as required by N.J.S.A. 47:1A-5(i). *Id.* See also Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008) (finding custodian’s response legally insufficient pursuant to N.J.S.A. 47:1A-5(i) and N.J.S.A. 47:1A-5(g) for failing to respond to each request item individually).

Here, the Custodian provided responses to the Complainant on September 25, October 1, October 11, and October 17, 2013. The Custodian initially responded within seven (7) business days. However, the Custodian sought open-ended extensions of time to respond, stating that responsive records would be provided “as soon as possible,” and did not respond to each request item individually. Though the Complainant’s request is both lengthy and somewhat complex, the Custodian was still required to provide a timely, specific response to each request item, or extend the period to provide such a reply to a date certain in the future. See Paff, GRC 2007-272; Hardwick, GRC 2007-164; O’Shea, GRC 2004-17.

Therefore, the Custodian did not bear her burden of proof that she provided a timely and sufficient response to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. The Custodian’s failure to respond to each of the Complainant’s request items individually, and to seek a specific extension of time to respond, results in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272; Hardwick, GRC 2007-164; Kelley, GRC 2007-11; O’Shea, GRC 2004-17.

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.

Here, the Complainant failed to allege either which documents were wrongfully withheld by the Custodian or why the records that the Custodian did provide amounted to an unlawful denial of access. Further, he did not advance any arguments or cite to any legal precedents in support of his complaint, nor did he raise any objections to the SOI. Thus, in light of the Custodian’s submissions to the GRC and provision of responsive documents to the Complainant, the Custodian has borne her burden of proving that she did not unlawfully deny access to the responsive records. See N.J.S.A. 47:1A-6.

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 violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i) by providing an untimely and insufficient response to the Complainant’s request, the Custodian certified the Complainant was provided with all records maintained at the PCSE office. 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 an 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 her burden of proof that she provided a timely and sufficient response to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. The Custodian’s failure to respond to each of the Complainant’s request items individually, and to seek a specific extension of time to respond, results in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008); Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005)

2. The Complainant failed to allege either which documents were wrongfully withheld by the Custodian or why the records that the Custodian did provide amounted to an unlawful denial of access. Further, he did not advance any arguments or cite to any legal precedents in support of his complaint, nor did he raise any objections to the SOI. Thus, in light of the Custodian's submissions to the GRC and provision of responsive documents to the Complainant, the Custodian has borne her burden of proving that she did not unlawfully deny access to the responsive records. *See* N.J.S.A. 47:1A-6.
3. Although the Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i) by providing an untimely and insufficient response to the Complainant's request, the Custodian certified the Complainant was provided with all records maintained at the PCSE office. 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014