



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

July 29, 2014 Government Records Council Meeting

Michael I. Inzelbuch  
Complainant

Complaint No. 2013-320

v.

Lakewood Board of Education (Ocean)  
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, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he 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 within seven (7) business days, or immediately, 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(e); 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); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007); 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 his burden of proving that he 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 that he has provided, or is providing, all records responsive to the Complainant's request, less those responsive to October 4 Items No. 5, 6, and 10. 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 29<sup>th</sup> 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**

**Michael I. Inzelbuch**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2013-320**

v.

**Lakewood Board of Education (Ocean)**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:**

**October 3, 2013 Request**

Item No. 1: Any and all board approvals as to “On Track Resources, Inc.” since April 2013.

Item No. 2: Any and all contracts as to “On Track Resources, Inc.” since April 2013.

Item No. 3: Any and all board vouchers, purchase orders, etc. as to “On Track Resources.”

Item No. 4: Any and all billing statements, requests for payment, etc. forwarded to the Lakewood Board of Education (“Board”) since April 2013.

Item No. 5: Amount of cafeteria fund surplus as of June 2012 and June 2013.

Item No. 6: Current status of cafeteria fund surplus.

Item No. 7: Cafeteria fund ledger for 2011-2012, 2012-2013, and 2013-2014 school years.

Item No. 8: Any and all transfers to and from cafeteria fund since April 2012 to current.

Item No. 9: Any and all notifications to or approvals from the New Jersey Department of Education (“DOE”) as to utilization of surplus and/or cafeteria funds.

Item No. 10: A listing of any and all raises or board approvals of same since April 2012.

Item No. 11: Any and all employee rosters since April 2012 to current.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by James Eric Andrews, Esq. (Florham Park, N.J.).

### **October 4, 2013 Request**

Regarding the transportation department:

Item No. 1: Any and all purchase orders for the 2012-2013 school year.

Item No. 2: Any and all revised purchase orders for the 2012-2013 school year after previous purchase orders were voided.

Item No. 3: A copy of the contracts and job descriptions for any and all staff assigned to transportation since April 2012 to current including, but not limited to, Gus, Carol, Tara, Sonia, Janice, Lordes, including training provided.

Item No. 4: Any and all resignation letters submitted by staff since April 2012.

Item No. 5: A copy of any and all files maintained by the district and/or Ruth Molnar as to Patty Bunnell as to any and all claims as to harassment, hostile workplace, etc.

Item No. 6: Any and all emails forwarded by Gus to vendors or the press or others as to bids, quotes, etc. that contain any and all individuals that may be “blind copied.”

Item No. 7: Monthly balances of Systems 3000 as to transportation since April 2012 to current.

Item No. 8: Any and all lawsuits or indications that lawsuits may be filed by vendors or agencies not paid, such as MOESO since April 2012.

Item No. 9: Any and all District Report for Transported Resident Students (“DRTRS”) reports filed with the State since April 2012 to current as well as any emails as to same since September 2012 to current.

Item No. 10: Any and all demands for additional monies by vendors per “Increase/Decrease” agreements with vendors since 2010 to current, any payments as to same with accompanying Board approvals.

**Custodian of Record:** Thomas A. D’Ambola

**Request Received by Custodian:** October 3, 2013; October 4, 2013

**Response Made by Custodian:** October 21, 2013

**GRC Complaint Received:** October 28, 2013

## Background<sup>3</sup>

### Request and Response:

On October 3, 2013, the Complainant submitted an initial Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 4, 2013, the Complainant submitted the additional above OPRA request. On October 18, 2013, the Complainant contacted the Custodian to ask if he could pick up the requested documents. On October 21, 2013, eleven (11) days after the initial request, and ten (10) business days after the second request, Counsel for the Custodian (“Counsel”) responded in writing to both requests by seeking an extension of time of “a couple weeks” because the school district was moving offices. Counsel also sought clarification as to whether the Complainant wanted copies of the requested documents, and as to the desired time period for the emails requested in the October 4 Item No. 6. On October 22, 2013, the Complainant responded by stating that he would wait until October 25, 2013 before filing a complaint, and by asking that he receive copies of all responsive documents.

### Denial of Access Complaint:

On October 28, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that no documents were provided to him in response to his October 3, 2013 and October 4, 2013 requests.

The Complainant did not provide to the GRC any additional arguments in response to the Custodian’s October 30, 2013 reply, Statement of Information, or June 25, 2014 certification.

### Additional Party Submissions

On October 30, 2013, after the filing of the instant complaint, the Custodian provided additional responses to each item of the Complainant’s requests. Regarding the October 3 requests, the Custodian provided documents responsive to Items No. 1, 2, 3, 4 and 11. The Custodian also provided information responsive to Items No. 5, 6, 8 and 10. Additionally, the Custodian stated that no documents responsive to Item No. 9 exist. In response to Item No. 7, the Custodian provided one (1) of the responsive fund ledgers but stated that another would be supplied the following week once it was unpacked, and that the most recent document was “still with auditors.”

Regarding the October 4 requests, the Custodian provided documents responsive to Items No. 1, 2, 3, 4, 7 and 9. Further, the Custodian stated that no documents responsive to Item No. 8 exist, and that records responsive to Item No. 10 can be found on the school district’s website. Lastly, the Custodian denied access to Item No. 5 as exempt from disclosure and to Item No. 6 for being an overly broad request.

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<sup>3</sup> 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.

Statement of Information:

On November 18, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the requests on October 3, 2013 and October 4, 2013, and that on October 30, 2013 he made documents available for pick up.

Further, the Custodian certifies that the following documents were provided to the Complainant: Board approvals, contract vouchers, purchase orders, and invoices for On Track Resources since April 2013; the PCR listing; 2012-2013 transportation purchase orders and revised purchase orders; the contract of Gus Kakavas and job descriptions of other transportation employees; resignation letters; System 3000 expense report with balances from April 2012 to current; and DRTRS reports. The Custodian states that these documents total 2,217 pages, and that the Board’s transportation, accounting, and personnel departments had been instructed to supply any responsive information.

Additionally, the Custodian argues that the Board’s Administrative Offices were in the midst of moving to a new location at the time of this request, and that this made some files initially inaccessible and delayed his response. Regarding specifically withheld documents, the Custodian contends that the records responsive to the October 4 Item No. 5 are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, while the October 4 Item No. 6 constitutes an overly broad request due to its failure to specify a time frame.

GRC Request for Additional Information:

On June 23, 2014, the GRC requested additional information from the Custodian in the form of responses to the following questions:

1. To which items of the Complainant’s October 3, 2013 and October 4, 2013 requests is the provided “PCR listing” responsive, and what is the nature of that document?
2. Has the Custodian provided all documents responsive to the Complainant’s October 3, 2013 and October 4, 2013 requests, with the exception of those listed as withheld in columns (E) and (F) of Item No. 9 of the SOI?
3. If not, do responsive documents exist for the request items not specifically addressed in Item No. 9 of the SOI?

On June 26, 2014, the Custodian provided the following certification, dated June 25, 2014:

- “PCR listing” refers to Position Control Roster and is the document responsive to Complainant’s [October] 3, 2013 request #11 (“any and all rosters since April 2012 to current”). The Position Control Roster provides a listing of personnel and related data.

- I have not provided copies of the cafeteria fund ledgers for 2011-2012 and 2013-2014. The 2011-2012 cafeteria fund ledger was not retrievable at the time of the request because it was packed in boxes in connection with the move of the Board's offices to a new address. The 2013-2014 cafeteria fund ledger was not available at the time of the request because it had not yet been released by the auditors. A search of our files will be conducted to locate the above-referenced documents, which will be sent on to Complainant.
- With regards to the documents referenced in Complainant's October 4, 2013 request #10, I was not able to discern what is meant by "any and all demands" but all changes in transportation contract costs are approved by the Board and records of same are available on the District's website. Complainant was advised of the availability of these documents on the website.
- With the exception of the above referenced documents, the documents referenced in columns E and F of [the SOI] and those available on the District's website, I have provided all documents responsive to the Complainant's [October 3, 2013 and October 4, 2013] OPRA requests . . . .

### 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).<sup>4</sup> 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).

OPRA also states that "[i]mmediate access ordinarily shall be granted to budgets, . . . contracts, . . . and public employee salary . . . information." N.J.S.A. 47:1A-5(e). When immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond, or requesting clarification of the request. See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).

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

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<sup>4</sup> 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.

on the seventh (7<sup>th</sup>) 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 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 Counsel responded to the Complainant's requests more than seven (7) business days after receiving them. Counsel sought an open-ended extension of time of "a couple weeks" to respond, and he did not respond to each request item individually. There is no evidence in the record that the Custodian otherwise responded to the Complainant's requests, including those for immediate access records, until he provided an item-specific reply to the Complainant on October 30, 2013.

Therefore, the Custodian did not bear his burden of proof that he 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 within seven (7) business days, or immediately, 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(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272; Herron, GRC 2006-178; 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 his burden of proving that he 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 (Felder 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 that he has provided, or is providing, all records responsive to the Complainant's request, less those responsive to October 4 Items No. 5, 6, and 10. 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 his burden of proof that he 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 within seven (7) business days, or immediately, 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(e); 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); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007); 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 his burden of proving that he 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 that he has provided, or is providing, all records responsive to the Complainant's request, less those responsive to October 4 Items No. 5, 6, and 10. 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