



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

February 23, 2016 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-123

v.

NJ Department of Education
Custodian of Record

At the February 23, 2016 public meeting, the Government Records Council (“Council”) considered the January 19, 2016 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 because the original Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided a specific deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Werner v. NJ Civil Serv. Comm’n, GRC Complaint No. 2011-151 (December 2012). Further, because the Custodian responded prior to the expiration of the first (1st) extended time frame and provided a new date on which he would respond, the second (2nd) extension was proper. See Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order April 29, 2014). Finally, because the Complainant verified the instant complaint before the second (2nd) extended time period for the Custodian to respond had expired, the complaint is materially defective and must be dismissed. See Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013). See also Sallie v. NJ Dep’t of Banking and Ins., GRC Complaint No. 2007-226 (April 2009).

Interim Order Rendered by the
Government Records Council
On The 23rd Day of February, 2016

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 24, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2016 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-123

v.

**NJ Department of Education²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all records released in response to sixteen (16) specific OPRA requests to include the e-mail in which said documents were sent, where applicable.

Custodian of Record: Dominic Rota³
Request Received by Custodian: February 24, 2014
Response Made by Custodian: March 5, 2014
GRC Complaint Received: March 18, 2014

Background⁴

Request and Response:

On February 24, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 5, 2014, the Custodian responded in writing, requesting additional time until March 17, 2014, due to the voluminous nature of both the request and the responsive records. On March 17, 2014, the Custodian responded in writing, advising that a second (2nd) extension of time until March 31, 2014, was necessary.

Denial of Access Complaint:

On March 18, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant noted that he was conducting a personal audit of New Jersey Department of Education’s (“DOE”) OPRA responses and intended to submit his findings to his State elected officials seeking mandatory training for custodians and

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Christopher Huber.

³ The original custodian of record was Kimberly A. Gatti.

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.

sanctions where applicable. To this end, the Complainant stated that he submitted an OPRA request to DOE for all OPRA requests and responses in 2013. The Complainant stated that, after a prior DOE custodian sought two (2) extensions and attempted to charge a special charge, the Complainant filed Scheeler, Jr. v. NJ Dep't of Educ., GRC Complaint No. 2013-190. The Complainant stated that on January 29, 2014, the Council sent its Interim Order to all parties (to include the original custodian), finding that the prior custodian violated OPRA and ordering disclosure of the responsive records. The Complainant asserted that, in the process of conducting a review of the records disclosed as part of the original Custodian's compliance with the Council's Order, he identified several alleged violations of OPRA. The Complainant stated that, based on this review, he submitted the subject OPRA request to perform a deeper audit of DOE's responses.

The Complainant asserted that the Custodian violated OPRA by failing to provide responsive records within the extended time frame. *See* Scheeler, GRC 2013-190 (Interim Order dated January 28, 2014); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2007-124 (Interim Order dated October 31, 2007). The Complainant contended that he is unsure of whether the original or current Custodian is at fault here; the Complainant finds it "unconscionable" that DOE committed the same OPRA violation as it did in Scheeler, GRC 2013-190, even though it received the Council's decision just two (2) months ago.

Supplemental Response:

On March 31, 2014, the Custodian responded in writing, denying access to the Complainant's OPRA request. The Custodian stated that the responsive records were exempt based on the Court's holding in Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005).

Statement of Information:

On May 12, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on February 24, 2014. The Custodian certified that the original Custodian initially responded in writing on March 5, 2014 seeking an extension of time until March 17, 2014. The Custodian certified that he sought a second extension on March 17, 2014, until March 31, 2014, due to an illness. The Custodian certified that he finally responded on March 31, 2014, denying access to the Complainant's OPRA request.

The Custodian asserts that the Complainant only contended in the Denial of Access Complaint that DOE failed to respond to his OPRA request. The Custodian notes that DOE responded on three (3) occasions and ultimately denied access to the Complainant's OPRA request. The Custodian thus asserted that the complaint is moot and should be dismissed.

However, the Custodian asserted that, should the GRC consider the merits of DOE's denial of access, he properly denied access to the responsive records under N.J.S.A. 47:1A-9(b) and Gannett, 379 N.J. Super. at 212. The Custodian asserted that the Gannett court posited that a third party submitting an OPRA request may have an interest in confidentiality and provided an

example of a news agency's proprietary investigation being compromised through disclosure of an OPRA request. The Custodian noted that OPRA exempts access to "information which, if disclosed, would give an advantage to competitors . . ." N.J.S.A. 47:1A-1.1. The Custodian contended that whether the Complainant is a news organization is immaterial, because OPRA requests, once disclosed, could be accessible to anyone seeking a competitive advantage. The Custodian notes that the Complainant admitted to performing a personal audit and intended to release his findings to the public.

Additional Submissions:

On June 17, 2014, the Complainant e-mailed the Custodian's Counsel, advising that he was engaged in litigation with DOE in Superior Court over the disclosure of OPRA request forms. Scheeler, Jr. v. Office of the Governor, et al, Docket No. MER-L-992-14. The Complainant stated that, in an attempt to ease the GRC's workload, he would be willing to withdraw this complaint should DOE disclose the responsive records if he prevailed in Scheeler.

Analysis

Unripe Cause of Action

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.

OPRA also provides that a custodian may request an extension of time to respond to the complainant's OPRA request but that a specific date on which the custodian will further respond must be provided. N.J.S.A. 47:1A-5(i). OPRA also provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th) business day, seeking an extension of time to respond to the request and providing an anticipated deadline date when the requested records would be made available. The complainant did not agree to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven

(7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).”

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant’s OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian’s request for an extension of time [to a specific date] to respond to the Complainant’s OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

In Werner v. NJ Civil Serv. Comm’n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant’s OPRA request. It concluded that because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days, and provided an anticipated deadline date when the requested records would be made available, the Custodian properly requested the extension pursuant to OPRA. In rendering the decision, the Council cited as legal authority Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); and Starkey v. NJ Dep’t of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009). Moreover, the Council has found additional extensions of time to be timely when sought inside a prior extended time frame. *See e.g. Delbury v. Greystone Park Psychiatric Hosp. (Morris)*, GRC Complaint No. 2013-240 (Interim Order April 29, 2014)(holding that a second extension of time was found to be timely because “. . . [the custodian] . . . sought a second extension and responded prior to the expiration of same . . .”).

Further, in instances where a complainant filed a complaint prior to the expiration of an extended response time frame, the Council has determined that the complaint was unripe for adjudication. *See Inzelbuch v. Lakewood Bd. of Educ. (Ocean)*, GRC Complaint No. 2012-323 (February 2013).

This is not to say that the Council will unquestioningly find valid every request for an extension of time containing a date certain deadline. *See Ciccarone v. NJ Dep’t of Treasury*, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014)(holding that notwithstanding the fact that extensions are rooted in well-settled case law, the custodian cannot exploit same to deny access continuously by repeatedly rolling over an extension once it is obtained. In reaching their conclusion, the Council looked to what is “reasonably necessary”).

In the instant complaint, the Complainant's only Denial of Access Complaint claim is that the Custodian failed to provide responsive records within the initial extended time frame. The Complainant thus asserted that this failure resulted in a "deemed" denial of access. The Complainant cited to Scheeler, GRC 2013-190, and Kohn, GRC 2007-124, in support of why he did not acknowledge the second (2nd) extension of time as valid.

The original Custodian extended the initial time frame to respond by eight (8) business days. The evidence of record suggests that, at some point during the pendency of the OPRA request, the Custodian assumed custodial duties for DOE. Thereafter, the Custodian sought an additional ten (10) business days to respond. The apparent change in custodians, as well as the potential number of records and subsequent legal review, likely contributed to the need for two (2) extensions. Moreover, in this particular matter, the Custodian certified in the SOI that one of either himself or the original custodian was out sick during response period. Those factors influence the aspect of *reasonableness* in granting an extension of time. Given the facts of the complaint, an eighteen (18) business day extension of time for the Custodian to comply with the request was not unreasonable.

Further, a review of both Scheeler, GRC 2103-190, and Kohn, GRC 2007-124, shows that the Council's "deemed" denial holding is not applicable here. Specifically, the custodians in both sought multiple extensions, but ultimately failed to respond within the final extended deadline. Thus, the Council determined that, although the custodians properly requested extensions of time to a date certain, they violated N.J.S.A. 47:1A-5(i) by failing to respond within the final extended time frame.

However, the facts of this complaint are similar to those in Inzelbuch, GRC 2012-323. Specifically, as is the case here, the complainant there filed a complaint prior to the expiration of the extended time frame. Thus, the GRC is satisfied that the instant complaint is similarly unripe for adjudication.

Accordingly, because the original Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided a specific deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See Rivera, GRC 2009-317; Criscione, GRC 2010-68; Werner, GRC 2011-151. Further, because the Custodian responded prior to the expiration of the first (1st) extended time frame and provided a new date on which he would respond, the second (2nd) extension was proper. See Delbury, GRC 2013-240. Finally, because the Complainant verified the instant complaint before the second (2nd) extended time period for the Custodian to respond had expired, the complaint is materially defective and must be dismissed. See Inzelbuch, GRC 2012-323. See also Sallie v. NJ Dep't of Banking and Ins., GRC Complaint No. 2007-226 (April 2009).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the original Custodian requested an extension of time in writing within the statutorily mandated

seven (7) business days and provided a specific deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). *See* Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Werner v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012). Further, because the Custodian responded prior to the expiration of the first (1st) extended time frame and provided a new date on which he would respond, the second (2nd) extension was proper. *See* Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order April 29, 2014). Finally, because the Complainant verified the instant complaint before the second (2nd) extended time period for the Custodian to respond had expired, the complaint is materially defective and must be dismissed. *See* Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013). *See also* Sallie v. NJ Dep't of Banking and Ins., GRC Complaint No. 2007-226 (April 2009).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

January 19, 2016⁵

⁵ This complaint was prepared for adjudication at the Council's January 26, 2016 meeting, but could not be adjudicated due to lack of quorum.