



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**

**December 16, 2014 Government Records Council Meeting**

Sean Patrick Vandy  
Complainant

Complaint No. 2014-331

v.

Newfield Borough Board of Education (Gloucester)  
Custodian of Record

At the December 16, 2014 public meeting, the Government Records Council (“Council”) considered the December 9, 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 he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).
2. The Custodian’s response was insufficient because he failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. The Custodian failed to bear his burden of proving that the denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the Custodian certified that he informed the Complainant that the records responsive to his request were available for pick up on October 15, 2014, and the Complainant confirmed that he took possession of the records shortly thereafter.
4. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request and when he did respond, the response was insufficient because the Custodian failed to respond in writing to each request item. Moreover,



the Custodian failed to bear his burden of proving that the denial of access to the requested records was lawful. However, once the Custodian realized his mistake by not responding to the request, he did make the requested records available to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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 16<sup>th</sup> Day of December, 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: December 17, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 16, 2014 Council Meeting**

**Sean Patrick Vandy<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-331**

v.

**Newfield Borough Board of Education<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “A copy of the contract between Newfield & Edgerton Christian Academy names of person (sic) involved with this contract, and any new contract or contracts that are being worked on.”

**Custodian of Record:** Henry Bermann  
**Request Received by Custodian:** April 28, 2014  
**GRC Complaint Received:** September 30, 2014  
**Response Made by Custodian:** October 15, 2014

**Background<sup>3</sup>**

**Request and Response:**

On April 28, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.<sup>4</sup> On October 15, 2014, the one hundred eighteenth (118<sup>th</sup>) business day following receipt of said request, the Custodian responded by contacting the Complainant via telephone to inform him the requested records were available for pick up.

**Denial of Access Complaint:**

On September 30, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on February 28, 2014, he personally delivered the OPRA request to John Paladino, President of the Newfield Borough

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

<sup>2</sup> Represented by Jane B. Capasso, Esq. (Vineland, NJ).

<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.

<sup>4</sup> The Complainant failed to specify the preferred delivery method.

Board of Education (“BOE”).<sup>5</sup> The Complainant states that the Custodian did not respond to the request.

Statement of Information:

On October 15, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s request on April 28, 2014. The Custodian certifies that the records responsive to the request consist of initial and extended lease agreements between the BOE and Edgerton Academy. The Custodian further certifies that he did not respond to the request because it was submitted on the Borough of Newfield’s request form rather than the BOE’s official form.

The Custodian certifies that he subsequently learned that he erred by not responding to the request because the court’s decision in Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009) held that a custodian shall not withhold requested records if the request, although not presented on the agency’s official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form. The Custodian certifies that after he was made aware of the court’s holding in Renna, his office telephoned the Complainant on October 15, 2014, and informed him the records responsive to his request were available for pick up.

Additional Submissions:

On December 1, 2014, the GRC telephoned the Complainant and learned that the requested records were picked up by the Complainant at the BOE shortly after he was informed they were made available.

**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).<sup>6</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).

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<sup>5</sup> Although the Complainant stated that the OPRA request was delivered to Mr. Paladino on February 28, 2014, the evidence of record reveals that the request is dated April 28, 2014, and was delivered to Mr. Paladino on that same date.

<sup>6</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.

Here, the records requested by the Complainant were immediate access records pursuant to N.J.S.A. 47:1A-5(e), and as such the Custodian should have responded to the request immediately following receipt of the request on April 28, 2014. However, the Custodian failed to respond to the request until October 15, 2014, which was one hundred eighteen (118) business days following receipt of the request. Moreover, when the Custodian did respond to the request he failed to do so in writing.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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, GRC 2007-11.

### **Sufficiency of Response**

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "...[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)."

Here, when the Custodian responded to the Complainant's request on October 15, 2014, he directed his office staff to place a telephone call to the Complainant. Further, there is nothing in the evidence of record to indicate that the Custodian confirmed the telephone conversation in writing or responded to each item individually. As such, the Custodian failed to respond to each request item in writing, as required under OPRA.

The Custodian's response was insufficient because he failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

### **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 Custodian failed to bear his burden of proving that the denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the Custodian certified that he informed the Complainant that the records responsive to his request were available for pick up on October 15, 2014, and the Complainant confirmed that he took possession of the records shortly thereafter.

## **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 (Berg); 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request and when he did respond, the response was insufficient because the Custodian failed to respond in writing to each request item. Moreover, the Custodian failed to bear his burden of proving that the denial of access to the requested records was lawful. However, once the Custodian realized his mistake by not responding to the request, he did make the requested records available to the Complainant. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).

2. The Custodian's response was insufficient because he failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. The Custodian failed to bear his burden of proving that the denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the Custodian certified that he informed the Complainant that the records responsive to his request were available for pick up on October 15, 2014, and the Complainant confirmed that he took possession of the records shortly thereafter.
4. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request and when he did respond, the response was insufficient because the Custodian failed to respond in writing to each request item. Moreover, the Custodian failed to bear his burden of proving that the denial of access to the requested records was lawful. However, once the Custodian realized his mistake by not responding to the request, he did make the requested records available to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: John E. Stewart, Esq.

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

December 9, 2014