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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**June 28, 2016 Government Records Council Meeting**

Harry Louis Hersh  
Complainant

Complaint No. 2014-357

v.

Lakewood Board of Education (Ocean)  
Custodian of Record

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 2016 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:

1. The Custodian’s failure to respond in writing to part of 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 as extended, results in a “deemed” denial of the 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). *See also* Huegel v. City of Newark (Essex), GRC Complaint No. 2014-412 (December 2015).
2. The Custodian did not unlawfully deny access to the requested records that were filed with the New Jersey Department of Education in 2012 because the Custodian certified that he disclosed said records to the Complainant in a timely manner. N.J.S.A. 47:1A-1.
3. Notwithstanding the Custodian’s “deemed” denial, the Custodian did not unlawfully deny access to the requested records that were filed with the New Jersey Department of Education in 2011 and 2013 because the Custodian certified that such records do not presently exist at the Lakewood Board of Education. Moreover, the Custodian did not unlawfully deny access to the requested records that were filed with the New Jersey Department of Education in 2014 because the Custodian certified that such records are not yet in existence. The Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See* Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian failed to respond timely in writing to part of the Complainant’s OPRA request, which resulted in a “deemed” denial, he did disclose to the Complainant the requested records that were filed in 2012 and did not unlawfully deny access to the requested records that were filed in 2011, 2013, and 2014 because



such records did not exist. 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 28<sup>th</sup> Day of June, 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: June 30, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 28, 2016 Council Meeting**

**Harry Louis Hersh<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-357**

v.

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

**Records Relevant to Complaint:** Copies of the following two (2) reports filed with the New Jersey Department of Education during the calendar years 2011, 2012, 2013, and 2014:

1. Report of Nonpublic Auxiliary and Handicapped Services, including all amendments, attachments and exhibits.
2. Nonpublic Student Services Project Completion Report for the Chapter 192 Services and the Chapter 193 Services, including all amendments, attachments and exhibits.

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

**Request Received by Custodian:** September 18, 2014

**Responses Made by Custodian:** September 30, 2014 and October 1, 2014

**GRC Complaint Received:** October 23, 2014

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

**Request and Responses:**

On September 18, 2014, the Complainant personally delivered an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On September 30, 2014, the sixth (6<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that the requested records for 2012-2013 were attached to the response and that the requested records for 2013-2014 have not yet been completed by the Lakewood Board of Education ("BOE").

On October 1, 2014, the Complainant e-mailed the Custodian, inquiring as to whether there were "preliminary copies" of the 2013-2014 records available. The Complainant also stated that he did not receive the requested records for 2011-2012 and asked the Custodian to forward

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

<sup>2</sup> Represented by Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, 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.

them. On October 1, 2014, the seventh (7<sup>th</sup>) business day following receipt of the OPRA request, the Custodian e-mailed the Complainant to inform him that the records requested for 2011-2012 are in the warehouse and that an attempt to locate them would be conducted on October 2, 2014. The Custodian informed the Complainant that there is no preliminary 2013-2014 report because it would not be completed until November 9, 2014.

#### Denial of Access Complaint:

On October 23, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the Custodian failed to respond to his September 18, 2014 OPRA request within the statutorily-mandated seven (7) business day period, which resulted in a denial of his request.

The Complainant contends that he was denied access to the records he requested because he only received a summary of the records responsive to request items numbered 1 and 2 for the 2013-2014 year. The Complainant states that he was denied the requested records for years 2010-2011, 2011-2012, 2012-2013 and 2014-2015. The Complainant further states that “[n]o \$’s allocated, \$’s used or \$’s still available in response.”

The Complainant further states that subsequent to the Custodian’s denial of his request, he filed an OPRA request with the New Jersey Department of Education (“DOE”) and that their response to his request proved that the records he requested from the Custodian were readily available because the BOE had previously submitted the requested records to the DOE.

#### Statement of Information:

On November 14, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on September 18, 2014, and responded in writing on September 30, 2014 and October 1, 2014. The Custodian certifies that the BOE was closed for Rosh-Hashanah on September 25, 2014 and September 26, 2014; therefore, his response was transmitted in a timely manner.

The Custodian certifies that the records responsive to the Complainant’s request, which were disclosed to the Complainant on September 30, 2014, are:

- Chapters 192/193 Report of Nonpublic Auxiliary and Handicapped Services for funding year 2013-2014 filed on November 9, 2012 covering the 2011-2012 school year.
- Nonpublic Student Services Project Completion Report for Chapters 192/193 Services filed on November 9, 2012 covering the 2011-2012 school year.

The Custodian also certifies that the requested records filed with the DOE in November 2011 and 2013 have not been maintained or kept on file by the BOE. The Custodian further certifies that the records requested for 2014 covering school year 2013-2014 were not created as of the date of the request. The Custodian states that the requested reports are sent to the DOE via a computer program that locks down after the documents are sent; therefore, the BOE cannot retrieve documents that are filed with the DOE online and would only possess a hard copy if a

copy were printed at the time of submission. The Custodian states that since records filed with the DOE during years 2011 and 2013 could not be located, it appears that no reports were printed.

The Custodian states that the Complainant alleged that the DOE provided him with all of the requested records, thereby suggesting that the BOE purposely denied access. The Custodian certifies that a review of the DOE-provided records revealed that they are not the same kind of records that the BOE files with the DOE.

### Additional Submissions:

On December 11, 2014, the Complainant filed a rebuttal to the SOI. The Complainant first argues that “[t]he LBOE definitely had the full information requested all along” (Emphasis in original). The Complainant states that the BOE provided information to the DOE, which was used to compile the 2014 state audit reports, and that he then framed his request using the same report names as those mentioned in the audit reports. The Complainant argues that the Custodian therefore cannot claim that he did not have the information to complete his response within the statutorily-mandated time frame because the information would not be available until November 2014. The Complainant further asserts that, given the Custodian’s response in the first column of Item 9 of the SOI, it is apparent that the Custodian did not understand his request for information covering years 2011 through 2014.

The Complainant next asserts that the computer system lock down mentioned by the Custodian in the SOI is only intended to prevent data submitted and finalized from being subsequently altered. The Complainant contends that the information remains available for retrieval and printing.

On May 24, 2016, the GRC e-mailed the Complainant to inform him that his statements contained within the rebuttal to the SOI do not carry as much evidential weight as the Custodian’s certified responses in the SOI. The GRC asked the Complainant to put his rebuttal in the form of a legal certification so that his statements could be accorded sufficient weight in the adjudicatory process.<sup>4</sup>

## Analysis

### Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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>5</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request,

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<sup>4</sup> The Complainant did not reply to the GRC’s request.

<sup>5</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.

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).

Moreover, OPRA provides that:

If the . . . record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

N.J.S.A. 47:1A-5(i).

In Huegel v. City of Newark (Essex), GRC Complaint No. 2014-412 (December 2015), the custodian timely sought two extensions of time in order to search through a voluminous amount of records, disclosing some of the records. Prior to the expiration of the extended time frame, the custodian again sought an additional extension of time, but thereafter the custodian failed to respond within the extended time period.

Here, the Custodian certified that the BOE was closed for Rosh-Hashanah on September 25 and 26, 2014; therefore the Custodian initially responded to the Complainant on September 30, 2014, which was the sixth (6<sup>th</sup>) business day following receipt of the request. The Custodian attached the requested records for 2012-2013 to the response and informed the Complainant that the requested records for 2013-2014 have not yet been completed by the BOE. Subsequently, on October 1, 2014, the seventh (7<sup>th</sup>) business day following receipt of the request, the Custodian again responded to the Complainant. The Custodian informed the Complainant that the records requested for 2011-2012 are in the warehouse and that an attempt to locate them would be conducted on October 2, 2014.

The Custodian’s October 1, 2014 response was tantamount to a request for an extension of time for one (1) day beyond the statutorily-mandated seven (7) business day period to address the requested 2011-2012 records. Therefore with respect to said records, the Custodian had until October 2, 2014 to grant access, deny access, seek clarification, or request an additional extension of time. The evidence of record reveals that the Custodian failed to respond by October 2, 2014.

Therefore, the Custodian’s failure to respond in writing to part of 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 as extended, results in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. *See also* Huegel, GRC 2014-412.

### **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 stated that he was denied access to the records he requested because he only received a summary of the records responsive to his request for the 2013-2014 year, and that he was denied the requested records for years 2010-2011, 2011-2012, 2012-2013 and 2014-2015.

The Complainant argued that because the Custodian did not list all of the records responsive to the request in the first column of Item 9 of the SOI, it is apparent that the Custodian did not understand his request for all of the records covering years 2011 through 2014. The Complainant is correct that the Custodian did not properly list all of the records responsive to the request in the first column of Item 9; however, because the Custodian erred in properly completing the document index does not mean he did not understand the Complainant’s request.<sup>6</sup> In fact, the Custodian addressed the remaining records elsewhere in the SOI.

The evidence of record reveals that the records requested are the aforementioned reports that were *filed with the DOE* during the calendar years 2011, 2012, 2013, and 2014. The request did not reference school years.

The Custodian certified that on September 30, 2014, which was the sixth (6<sup>th</sup>) business day following receipt of the request, he disclosed to the Complainant the requested records that were filed with the DOE in 2012. Therefore, the Custodian did not unlawfully deny access to the requested records that were filed with the DOE in 2012 because the Custodian certified that he disclosed said records to the Complainant in a timely manner. N.J.S.A. 47:1A-1.

The Custodian certified that the requested records filed with the DOE in November of 2011 and 2013 have not been maintained or kept on file by the BOE. The Complainant argued that the reports filed with the DOE online remain available for retrieval and printing, implying that the records requested for the years 2011 and 2013 could be retrieved by the Custodian and disclosed to him. However, the Custodian certified that the BOE could not retrieve documents that are filed with the DOE online. Although the Complainant was provided with an opportunity to submit evidence to the GRC in support of his statements refuting the Custodian, he failed to do so. As such, the Complainant’s assertion that the requested records could have been retrieved is not sufficient to outweigh the Custodian’s certified statement that he could not retrieve documents filed with the DOE online.

With respect to the requested records for 2014, the Custodian certified that they had not yet been created as of the date of the request. The Complainant argued that because the Custodian provided information to the DOE that was used to compile the 2014 state audit reports, the Custodian had the information necessary to address his request for the year 2014. Although the Complainant failed to produce evidence to support his assertion, assuming he is

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<sup>6</sup> The Custodian listed only the records provided to the Complainant in the first column of the document index, rather than listing all records responsive to the request as required.

correct, the Custodian was under no obligation to create a report not already in existence to fulfill the Complainant's request.

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the records that were filed with the DOE in November 2011 and November 2013 had not been maintained or kept on file by the BOE and that no records had yet been filed with the DOE for 2014.

Therefore, notwithstanding the Custodian's "deemed" denial, the Custodian did not unlawfully deny access to the requested records that were filed with the DOE in 2011 and 2013 because the Custodian certified that such records do not presently exist at the BOE. Moreover, the Custodian did not unlawfully deny access to the requested records that were filed with the DOE in 2014 because the Custodian certified that such records are not yet in existence. The Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer*, GRC 2005-49.

### **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, although the Custodian failed to respond timely in writing to part of the Complainant's OPRA request, which resulted in a "deemed" denial, he did disclose to the Complainant the requested records that were filed in 2012 and did not unlawfully deny access to the requested records that were filed in 2011, 2013, and 2014 because such records did not exist. 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's failure to respond in writing to part of 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 as extended, results in a "deemed" denial of the 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). *See also* Huegel v. City of Newark (Essex), GRC Complaint No. 2014-412 (December 2015).
2. The Custodian did not unlawfully deny access to the requested records that were filed with the New Jersey Department of Education in 2012 because the Custodian certified that he disclosed said records to the Complainant in a timely manner. N.J.S.A. 47:1A-1.
3. Notwithstanding the Custodian's "deemed" denial, the Custodian did not unlawfully deny access to the requested records that were filed with the New Jersey Department of Education in 2011 and 2013 because the Custodian certified that such records do not presently exist at the Lakewood Board of Education. Moreover, the Custodian did not unlawfully deny access to the requested records that were filed with the New Jersey Department of Education in 2014 because the Custodian certified that such records are not yet in existence. The Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian failed to respond timely in writing to part of the Complainant's OPRA request, which resulted in a "deemed" denial, he did disclose to the Complainant the requested records that were filed in 2012 and did not unlawfully deny access to the requested records that were filed in 2011, 2013, and 2014 because such records did not exist. 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

June 21, 2016