



State of New Jersey
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Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 28, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2015-16

v.

NJ Department of Education
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 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’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).
2. 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, as extended, 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).
3. Notwithstanding the Custodian’s “deemed” denial, the Custodian did not unlawfully deny access to the record relevant to this complaint: to wit, his 2014 schedule, because the Custodian certified that such a record does not exist and 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 did not respond sufficiently or in a timely manner to the Complainant’s OPRA request for the record relevant to this complaint, on January 21, 2015, he did notify the Complainant that the record he was seeking does not exist. Moreover, 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 28th Day of July, 2015

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 30, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2015 Council Meeting**

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

GRC Complaint No. 2015-16

v.

**New Jersey Department of Education²
Custodial Agency**

Record Relevant to Complaint: The 2014 schedule for Department of Education employee Dominic Rota.³

Custodian of Record: Dominic Rota

Request Received by Custodian: December 22, 2014

Response Made by Custodian: January 2, 2015

GRC Complaint Received: January 22, 2015

Background⁴

Request and Response:

On December 22, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.⁵ On January 2, 2015, the seventh (7th) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that he would need an extension of time until January 16, 2015, to respond to the request. On January 15, 2015, the Custodian fulfilled part of the Complainant’s request by disclosing records responsive to part two of the request; however, the Custodian did not respond to the part of the request seeking the record relevant to this complaint.

Denial of Access Complaint:

On January 22, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on December 22, 2014, he

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Christopher Huber.

³ There were other records requested that are not relevant to this complaint.

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.

⁵ The Complainant failed to attach a copy of the OPRA request filed with the agency as required per paragraph 5 of the Denial of Access Complaint. However, the Complainant attached the Custodian’s Government Records Request Receipt, which contains a transcription of the request.

submitted a request seeking "...the 2014 schedule of [the Custodian]. Please also provide all requests for vacation, sick or personal days for [the Custodian]."

The Complainant states that on January 2, 2015, the Custodian responded by informing the Complainant that he would need an extension of time. The Complainant states that on January 15, 2015, the Custodian responded to the second part of his request by disclosing the requested records but that the Custodian failed to grant or deny access to the record relevant to the complaint.

The Complainant states that the Custodian's request for an extension of time "appears to be without merit" because he contends that he has knowledge that the Custodian was absent from work during three of the seven days he had to fulfill the request. The Complainant emphasizes that "[a] custodian's vacation or sick leave does not absolve the public agency from its responsibility to fulfill OPRA requests in a timely manner."

The Complainant demands: (1) that the Custodian be found in violation of OPRA for failing to provide the requested record within the statutory time frame, and (2) an Order for disclosure of said record.

Statement of Information:

On February 13, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's OPRA request on December 22, 2014, and that he responded on January 2, 2015, by requesting an extension of time until January 16, 2015.⁶ The Custodian certifies that on January 15, 2015, he addressed the second part of the request by disclosing all responsive records. The Custodian further certifies that he inadvertently forgot to respond to part one of the request, which sought the records relevant to this complaint. The Custodian certifies that after he received the complaint, he responded to part one of the request on January 21, 2015, by informing the Complainant that no responsive records exist.

Analysis

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).

⁶ Neither the Complainant in the complaint, nor the Custodian in the SOI, attached a copy of the Custodian's January 2, 2015, response, which sought an extension of time. However, the Custodian's Government Records Request Receipt describes the content of the response as follows: "1/2/2015: Additional time needed to gather, review and process potentially responsive records. Due date extended to 01/16/2015. Requestor advised by email on this date."

Here, the Custodian responded to the Complainant's December 22, 2014, request in a timely manner by requesting an extension of time; however, the evidence of record indicates that the Custodian did not respond to or list each request item contained in the request individually. Rather, the Custodian merely stated that he would respond by January 16, 2015, because "...[a]dditional time [is] needed to gather, review and process potentially responsive records." Especially in this complaint, listing each request item individually would have served to remind the Custodian later that there was more than one request item which needed to be addressed.

Accordingly, 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.

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).⁷ 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).

The evidence of record reveals that the Custodian responded in writing to the request on the seventh (7th) business day following receipt, informing the Complainant that he would need an extension of time until January 16, 2015, to address the request. Although the Custodian did respond on January 15, 2015, he only addressed part of the request at that time. The Custodian did not address the records relevant to this complaint until January 21, 2015.

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, as extended, 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.

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

⁷ 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.

“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 Werner v. NJ Civil Serv. Comm’n, GRC Complaint No. 2011-151 (December 2012), the Council addressed whether the custodian lawfully sought an extension of time to respond to the complainant’s OPRA request. The Council 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).

Here, the Custodian sought a ten (10) day extension of time to comply with the request. The Complainant stated that the Custodian’s request for an extension of time “appears to be without merit.” Nevertheless, the Complainant acknowledged that the Custodian was only available three of the initial seven days he had to fulfill the Complainant’s request. The Custodian also knew, or should have known, that staffing levels during the holidays may not be as high as they are during non-holiday periods. For those reasons, one ten (10) day extension of time to comply with the request is not unreasonable.

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 record relevant to this complaint, the Custodian’s 2014 schedule, does not exist. Moreover, there is nothing in the evidence of record to indicate that the Complainant refuted the Custodian’s certification.

As such, notwithstanding the Custodian’s “deemed” denial, the Custodian did not unlawfully deny access to the record relevant to this complaint: to wit, his 2014 schedule, because the Custodian certified that such a record does not exist and 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 did not respond sufficiently or in a timely manner to the Complainant’s OPRA request for the record relevant to this complaint, on January 21, 2015 he did notify the Complainant that the record he was seeking does not exist. Moreover, 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 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).
2. 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, as extended, 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).

3. Notwithstanding the Custodian’s “deemed” denial, the Custodian did not unlawfully deny access to the record relevant to this complaint: to wit, his 2014 schedule, because the Custodian certified that such a record does not exist and 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 did not respond sufficiently or in a timely manner to the Complainant’s OPRA request for the record relevant to this complaint, on January 21, 2015, he did notify the Complainant that the record he was seeking does not exist. Moreover, 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

Reviewed By: Joseph D. Glover
Executive Director

July 21, 2015