



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 22, 2018 Government Records Council Meeting

Edward J. Sakos, Jr.
Complainant

Complaint No. 2016-99

v.

Atlantic County Board of Education
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 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 her burden of proof that she timely responded to the Complainant’s November 24, 2015 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 dated October 31, 2007).
2. Notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to the Complainant’s August 26, 2015, November 6, 2015, and November 24, 2015 OPRA requests, since the evidence in the record demonstrates that the Complainant had in his possession the records alleged to be missing from the Custodian’s responses prior to filing his requests. N.J.S.A. 47:1A-6. Requiring disclosure of records already in the Complainant’s possession “does not advance the purpose of OPRA . . .” Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008). See also Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg’l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (Interim Order February 2013).
3. The Custodian violated N.J.S.A. 47:1A-5(i) by failing to timely respond to the Complainant’s November 24, 2015 OPRA request. However, the evidence in the record demonstrates that the Complainant already had the records in his possession at the time he filed his request. Moreover, the Custodian included copies of the records at issue as part of her SOI. Additionally, the evidence of record does not indicate that either the original or the current Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Custodian’s



actions do 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 22nd Day of May, 2018

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: May 25, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
May 22, 2018 Council Meeting**

**Edward J. Sakos, Jr.¹
Complainant**

GRC Complaint No. 2016-99

v.

**Atlantic County Board of Taxation²
Custodial Agency**

Records Relevant to Complaint:

August 26, 2015 OPRA Request

Tax Board Appeal

#08-1500370

Block 78/01-Lot 38

“I request two copies of computer disks containing all the matter on the Plaintiff’s Tax Board Appeal.”

November 6, 2015 OPRA Request

“Hard copy of the 2015 Tax Appeal #08-1500370 file.”

November 24, 2015 OPRA Request

“Request for three (3) readable computer discs containing all of my 2015 tax appeal file #08-1500370 with details on the attached instructions”

“Include in the subject file the following correspondence which was not included in the USB Flash Drive download during a previous O.P.R.A. request:

- 1) Bergman’s letter of June 11, 2015
- 2) Schott’s letter of June 16, 2015
- 3) Bergman and Ferguson’s Motion to Quash subpoens [sic] issued by the Plaintiff.
- 4) Memorandum of Judgement.

Additionally pertaining to the subject file, include all notes of the Commissioners and Tax Board Staff; E-mails, letters and other forms of communicationsto [sic] or from the Tax Board. Include all additional communications to the Tax Board after the USB Flash Drive download.”

Custodian of Record: Margaret Schott

Requests Received by Custodian: August 26, 2015; November 6, 2015; November 24, 2015

Response Made by Custodian: August 28, 2015; November 10, 2015; November 24, 2015

GRC Complaint Received: April 13, 2016

¹ No representation listed on record.

² Represented by Jennifer Starr, Assistant County Counsel (Atlantic City, NJ).

Background³

Request and Response:

On August 6, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned record. On August 28, 2016, the Complainant provided the Custodian with USB flash drives, and the responsive record was transferred onto the flash drives.

On November 6, 2015, the Complainant submitted another OPRA request seeking the above-mentioned record. On November 10, 2015, the Custodian provided the responsive record to the Complainant.

On November 24, 2015, the Complainant submitted another OPRA request seeking the above-mentioned records. That same day, the Custodian provided the Custodian with responsive records on three (3) computer discs. Shortly thereafter, the Complainant returned the discs to the Atlantic County Board of Taxation (“ACBT”), claiming that the discs were unreadable.

Denial of Access Complaint:

On , the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that for all three (3) OPRA requests, the Custodian’s responses were missing records that should have been part of his tax appeal file. Those records were identified as Item Nos. 1-4 of his November 24, 2015 OPRA request.

The Complainant contended that if the missing records were used by the ACTB to render a decision on his appeal, then they should have been included in the file. The Complainant noted that letters identified as Item Nos. 1 & 2 of his November 24, 2015 OPRA request were included via e-mails he received from Keith Szendrey, Esq. (“Mr. Szendrey”), an employee of ACTB who assisted in fulfilling the OPRA requests. The Complainant included in his complaint several letters he sent to the New Jersey Treasury Department, attaching those records to the letter. The Complainant also stated that he received submissions from Mr. Szendrey in response to his November 24, 2015 request in the weeks after he returned the blank discs.

The Complainant also claimed that in a telephone conversation with Counsel for the Custodian, Counsel allegedly stated that she spoke with the Custodian about “putting something together” regarding the Complainant’s outstanding OPRA request. However, the Complainant argued that he had not heard from Counsel since.

Statement of Information:

On May 10, 2016 the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on August 26, 2015, November 6,

³ 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

2015, and November 24, 2015. The Custodian certified that she responded in writing on August 28, 2015 and November 10, 2015. Regarding the November 24, 2015 OPRA request, the Custodian certified that she responded on November 24, 2015, and additional documents were provided at later dates at the Complainant's request.

The Custodian asserted that she assigned Mr. Szendrey to handle the OPRA requests. The Custodian certified that for tax appeals, all documentation is scanned into ACBT's computers, and that the Complainant's hearing on his appeal was on August 12, 2015. The Custodian asserted that after that date, additional documentation was added to the file based upon the Complainant's informal and OPRA-based requests. Notwithstanding, the Custodian noted that the ACBT commissioners made their decision on the appeal based upon the documentation contained in the files as of August 12, 2015.

The Custodian asserted that it is difficult to ascertain what records the Custodian claimed are missing from his tax appeal file. However, the Custodian asserted that the Complainant received responsive records for all three (3) OPRA requests. In regards to the November 24, 2015 OPRA request, the Custodian claimed that Mr. Szendrey informed the Complainant that some of the specified records were unable to be located. However, the Custodian contended that the Complainant has had those records in his possession. The Custodian argued that the Complainant has received his tax appeal file on several occasions and that providing the Complainant with records already in his possession does not advance the spirit of OPRA, citing Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), and Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-235 (August 2009).

Notwithstanding the above, the Custodian included as part of the SOI the four (4) records identified in the Complainant's November 24, 2015 OPRA request. The Custodian also noted that the Item 8 production of the November 24, 2015 request did not include copies contained in the August 25, 2015 or November 6, 2015 requests to avoid redundancy.

Additional Submissions:

On June 2, 2016, the Complainant responded in writing to the Custodian's SOI. The Complainant asserted that the SOI contained several errors and misstatements regarding the responses to his OPRA requests and the records contained therein.

The Complainant argued that the Custodian's production of records is identical to what he has received with certain exceptions. The Complainant stated that records marked on pages 192, 194, and 195 were not included in the flash drive provided to him in response to his requests. Additionally, the Complainant asserted that records numbered 1-4 of his November 24, 2015 OPRA request were not included in the Custodian's production. The Complainant also contended that the production was missing copies of records produced in response to his November 6, 2015 OPRA request. The Complainant also asserted that some of the records produced were missing attachments that were included as part of what he received previously.

Furthermore, the Complainant contended that he has not received responsive records to requests identified in his November 24, 2015 OPRA request.

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).⁴ 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 dated October 31, 2007).

The Custodian asserted that she received the Complainant's third OPRA request on November 24, 2015, and responded that day. However, the Complainant contended that discs alleged to contain the records were virtually blank, and returned them to the Custodian. While the evidence in the record suggested that the Custodian made subsequent attempts to provide the records, those attempts were not within the initial seven (7) business day period. Nor is there evidence that the Custodian sought an extension of time to properly respond to the Complainant's request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's November 24, 2015 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.

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.

New Jersey Courts have provided that "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). In Bart, 403 N.J. Super. at 609, the Appellate Division looked to the Lafayette Yard case in determining whether a custodian knowingly and willfully

⁴ 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.

violated OPRA by not providing to the complainant a record already in his possession. The Court held that a complainant could not have been denied access to a requested record if he already had it in possession at the time he made his request under OPRA. Id. at 617. The Appellate Division reasoned that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Id. at 618 (citing Lafayette Yard, 183 N.J. at 535).

The Appellate Division's decision in Bart, however, turns upon the specific facts of that case. The Council's decision noted that the custodian certified that copies of the requested record were available at the Housing Authority's front desk upon simple verbal request by any member of the public. Moreover, the complainant actually admitted that he was in possession of this record at the time of the OPRA request for the same record.

Additionally, in Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg'l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (Interim Order February 2013), the complainant sought access to student discipline reports. The custodian's counsel responded, indicating that he provided the records in response to a prior OPRA request. The Council held that:

The Custodian did not unlawfully deny access to the records responsive to request item no. 8 because at the time of the Complainant's December 14, 2012 OPRA request, the Complainant had already been provided with full access to the requested records in both hard copy and in electronic format. Thus, requiring the Custodian to duplicate another copy of the requested records and send them to the Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry, pursuant to [Bart, 403 N.J. Super. at 609].

[Id. at 13.]

In the current matter, the Complainant admitted in his Denial of Access Complaint that he had in his possession Item Nos. 1 & 2 of his November 24, 2015 OPRA request prior to filing the request, as he stated that he provided Mr. Szendrey with copies of them when he went back to the ACBT's office. Additionally, the Complainant provided further admission that he had all four (4) missing records in his possession at the time of his request in his December 11, 2015 and January 29, 2016 letters to the Department of Treasury, his February 5, 2016 letter to Mr. Szendrey, and his March 9, 2016 letter to the former Custodian. Moreover, the current Custodian provided evidence that the Complainant had acknowledged receipt of the records at issue in correspondence contained in her SOI's Item No. 8 production, well before filing his November 24, 2015 OPRA request. Furthermore, in the Complainant's June 2, 2016 response, the Complainant asserted that he has copies of the missing records, but contended that is not the issue.

Therefore, notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the Complainant's August 26, 2015, November 6, 2015, and November 24, 2015 OPRA requests, since the evidence in the record demonstrates that the Complainant had in his possession the records alleged to be missing from the Custodian's responses prior to filing his requests. N.J.S.A. 47:1A-6. Requiring disclosure of records already in the Complainant's possession "does

not advance the purpose of OPRA” Bart, 403 N.J. Super. at 618. See also Owoh, GRC 2012-330.

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 (*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 (E.C.E.S. v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian violated N.J.S.A. 47:1A-5(i) by failing to timely respond to the Complainant’s November 24, 2015 OPRA request. However, the evidence in the record demonstrates that the Complainant already had the records in his possession at the time he filed his request. Moreover, the Custodian included copies of the records at issue as part of her SOI. Additionally, the evidence of record does not indicate that either the original or the current Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Custodian’s actions do 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 Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s November 24, 2015 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 dated October 31, 2007).

2. Notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the Complainant's August 26, 2015, November 6, 2015, and November 24, 2015 OPRA requests, since the evidence in the record demonstrates that the Complainant had in his possession the records alleged to be missing from the Custodian's responses prior to filing his requests. N.J.S.A. 47:1A-6. Requiring disclosure of records already in the Complainant's possession "does not advance the purpose of OPRA" Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008). See also Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg'l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (Interim Order February 2013).
3. The Custodian violated N.J.S.A. 47:1A-5(i) by failing to timely respond to the Complainant's November 24, 2015 OPRA request. However, the evidence in the record demonstrates that the Complainant already had the records in his possession at the time he filed his request. Moreover, the Custodian included copies of the records at issue as part of her SOI. Additionally, the evidence of record does not indicate that either the original or the current Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Custodian's actions do 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: Samuel A. Rosado
Staff Attorney

May 15, 2018