



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 25, 2020 Government Records Council Meeting

Jason Allen Jones
Complainant

Complaint No. 2019-80

v.

Roselle Board of Education (Union)
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 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 has borne his burden of proof that he timely responded to the Complainant’s April 1, 2019 OPRA request. N.J.S.A. 47:1A-6. As such, no “deemed” denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s April 1, 2019 OPRA request. Specifically, the Custodian certified that no responsive records existed and there is no competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 25th Day of August 2020

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: August 27, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Jason Allen Jones¹
Complainant**

GRC Complaint No. 2019-80

v.

**Roselle Board of Education (Union)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of OPRA requests and responses from October 2017 through January 2018 from Anthony Esposito and Sharonda Johnson.³

Custodian of Records: Anthony Juskiewicz

Request Received by Custodian: April 1, 2019

Response Made by Custodian: April 2, 2019⁴

GRC Complaint Received: April 15, 2019

Background⁵

Request and Response:

On April 1, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On or around April 2, 2019, the first (1st) business day after receipt, the Custodian responded in writing stating that there were no responsive records within that date range.

Denial of Access Complaint:

On April 15, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the seven (7) business day period elapsed since he submitted his OPRA request and has not received a response or acknowledgment from the Custodian.

¹ No legal representation listed on record.

² Represented by Allan C. Roth, Esq., of Ruderman & Roth, LLC (Springfield, N.J.)

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The Custodian did not provide a copy of this response.

⁵ 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.

Supplemental Response:

On April 18, 2019, the thirteenth (13th) business day after receipt, the Custodian responded in writing stating that he already responded to the Complainant's OPRA request but was providing the same response as stated in the April 2, 2019 correspondence.

Later that same day, the Complainant responded to the Custodian, stating that there should be responsive records as he and other employees responded to those OPRA requests or were copied to same. The Complainant suggested that the Custodian check the e-mail account of an employee and the Human Resources Department's "OPRA File." The Custodian replied by stating that he checked his office's files and did not find responsive records. The Custodian also stated that there were records from Mr. Esposito which did not fall within the requested date range. The Complainant responded to the Custodian stating that he agreed that the Board's Business Administrator's Office would not possess the records requested but suggested that the Custodian should reach out to an employee and the previous custodian to locate records during the identified date range. The Complainant added that he was electronically copied on those records.

Statement of Information:

On May 6, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on April 1, 2019. The Custodian certified that his search included his records, e-mails, and electronically stored files. The Custodian certified that he responded in writing on or around April 2, 2019, but due to IT and other technical issues, there was no record of this response. The Custodian thus certified that once the Board received correspondence from the GRC on April 18, 2019, he immediately responded to the Complainant's OPRA request that same day.

The Custodian asserted that upon conducting his search, conferring with staff, and consulting with the Board's IT director, he determined that the previous custodian destroyed or misplaced documents, and deleted e-mails from the server. The Custodian asserted that upon review with legal counsel, he and the Superintendent of Schools authorized that a notice of the destruction of the documents and e-mails be sent to the Union County Prosecutor's Office and Records Management Services.

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).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA

⁶ 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.

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).

In the instant matter, the Complainant submitted his OPRA request on April 1, 2019. The Custodian certified that he responded on or around April 2, 2019, but due to technical issues he has no record of this response. The Custodian also certified that upon receipt of the GRC’s request for a completed SOI, he provided a response that same day. Additionally, in said response the Custodian asserted that he had already replied to the Complainant’s OPRA request. Based upon the Custodian’s certification, and the Complainant’s lack of refuting evidence, the evidence of record supports a finding that the Custodian did not violate OPRA’s response time provisions.

Therefore, the Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA April 1, 2019 request. N.J.S.A. 47:1A-6. As such, no “deemed” denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

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 GRC has previously found that, in light of a custodian’s certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian’s certification, no unlawful denial of access occurred. In Pusterhofer v. N.J. 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.

In the matter before the Council, the Complainant initially asserted that he did not receive a response to his request. However, upon receipt of the Custodian’s April 18, 2019 response, he contended that there should be responsive records as he was copied on several of them. The Custodian responded and certified in the SOI that no responsive records exist. Additionally, the Custodian certified that while researching the request, it was determined that the previous custodian destroyed or misplaced documents, and deleted e-mails from the Board’s server.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s April 1, 2019 OPRA request. Specifically, the Custodian certified that no responsive records existed and there is no competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he timely responded to the Complainant's April 1, 2019 OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's April 1, 2019 OPRA request. Specifically, the Custodian certified that no responsive records existed and there is no competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado
Staff Attorney

August 18, 2020