



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

January 30, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-60

v.

Woodbine Board of Education (Cape May)
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the October 21, 2014 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 timely responded to the Complainant’s request, twice seeking extensions of time to a final date of January 27, 2014. However, the Custodian’s failure to respond within the extended deadline of January 27, 2014 results in a “deemed” denial. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). Thus, the Council should decline to order disclosure of the requested records because same were provided on February 3, 2014.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) by failing to respond within the second extended deadline, he provided the responsive minutes on February 3, 2014. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an 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 30th Day of January, 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: February 4, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

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

GRC Complaint No. 2014-60

v.

**Woodbine Board of Education (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via email of all Woodbine Board of Education (“WBOE”) Minutes, for open and executive sessions and all meetings including special meetings.³

Custodian of Record: Alan Parmalee

Request Received by Custodian: January 13, 2014

Response Made by Custodian: February 3, 2014

GRC Complaint Received: January 28, 2014

Background⁴

Request and Response:

On January 10, 2014 the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the relevant documents. On January 16, 2014, the Custodian responded seeking an extension of time to reply. The Custodian was given two extensions of time, the first to January 24, 2014 and the second to January 27, 2014 to respond.

Denial of Access Complaint:

On January 28 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his OPRA request on January 13, 2014. He further asserted that Custodian sought an extension of time until January 24, 2014 and a second extension until January 27, 2014. However, the Complainant stated that the requested records were not provided by the extended deadline. The Complainant argued that the Custodian’s failure to respond by the anticipated deadline resulted

¹ No legal representation listed on record.

² Represented by Susan Hodges, Esq. of Archer & Greiner (Haddonfield, NJ).

³ There were other documents requested in the initial OPRA request which were disclosed but are not the subject matter of this complaint.

⁴The 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.

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in a “deemed” denial, *citing* Hardwick v. NJ Dep’t of Transportation, GRC Complaint No. 2007-164 (February 2008).

Supplemental Submissions:

On February 3, 2014, six (6) business days after the filing of the Denial of Access Complaint and seven (7) business days after the extension of time to respond, the Custodian disclosed the responsive records to Complainant.

Statement of Information:

On March 10, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the Complainant’s OPRA request was received January 13, 2014. The Custodian certified, however, that this request item was not numbered as were the other request items and was located later in an email, which caused an oversight. The Custodian argued that on January 28, 2014, the Complainant sent him another email request for the same relevant records, which request Complainant contended included a revised deadline of February 14, 2014.

Additional Submissions:

At the request of the GRC, the Custodian provided a copy of the January 28, 2014 email from Complainant to Custodian extending the deadline to respond to February 14, 2014. The email contained the Complainant’s independent basis for the requested Board minutes under the Open Public Meetings Act, (OPMA), and gave the Custodian until February 14, 2014 to comply with the requirements of that separate law.⁵

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 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).

⁵ The GRC has no authority over matters pertaining to OPMA. See N.J.S.A. 47:1A-7(b). Further, it furnished no basis for the Custodian to believe the deadline had been extended under 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.

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In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. No records were provided until May 31, 2007. Id. The GRC held that:

The [c]ustodian properly requested an extension of time to provide the requested records to the [c]omplainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the [c]ustodian failed to provide the [c]omplainant access to the requested records by the extension date anticipated by the [c]ustodian, the [c]ustodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

Id.

Here, the Custodian timely responded in writing to the Complainant's January 13, 2014 OPRA request, twice seeking extensions of time to a final date of January 27, 2014. However, the Custodian's failure to respond within the extended deadline of January 27, 2014 results in a “deemed” denial. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124. However, the Council should decline to order disclosure of the requested records because same were provided on February 3, 2014.

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. ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated N.J.S.A. 47:1A-5(i) by failing to respond within the second extended deadline, he provided the responsive minutes on February 3, 2014. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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 timely responded to the Complainant's request, twice seeking extensions of time to a final date of January 27, 2014. However, the Custodian's failure to respond within the extended deadline of January 27, 2014 results in a "deemed" denial. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). Thus, the Council should decline to order disclosure of the requested records because same were provided on February 3, 2014.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) by failing to respond within the second extended deadline, he provided the responsive minutes on February 3, 2014. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Ernest Bongiovanni, Esq.
Staff Attorney

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

October 21, 2014⁷

⁷ This complaint was prepared for adjudication at the Council's October 28, November 18, and December 16, 2014 meetings, but could not be adjudicated due to lack of quorum.

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