



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

January 30, 2008 Government Records Council Meeting

Tyler L. Van Pelt
Complainant

Complaint No. 2007-179

v.

Edison Township Board of Education (Middlesex)
Custodian of Record

At the January 30, 2008 public meeting, the Government Records Council (“Council”) considered the January 23, 2008 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’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the Complainant’s OPRA request. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Even though the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not responding to the Complainant’s OPRA request in writing within the statutorily mandated seven (7) business days, the Custodian has certified that the Complainant received all records responsive to his OPRA request on May 9, 2007. The Custodian also certified that the remaining requested records were not provided because such records do not exist. Therefore, the Custodian did not unlawfully deny access to the sealed plans for rooms 121, 127, and 129 or the Form 124 for rooms 120, 123, 125, 128, and 132 because he has certified that such records do not exist. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council’s powers and duties, the GRC does not have the authority to regulate the manner in which a



Township maintains its files or which records a Township must maintain. See Chaka Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Christine Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); Jay Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate); Louis Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian).

4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, the Complainant was provided with all of the records responsive to the request with the exception of those records which the Custodian legally certified do not exist. Therefore, it is concluded that the 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: February 1, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2008 Council Meeting**

**Tyler L. Van Pelt¹
Complainant**

GRC Complaint No. 2007-179

v.

**Edison Township Board of Education²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of the New Jersey Department of Community Affairs approved layout plans for Edison High School: specifically, redo (reconstruction) work in rooms 120, 121, 123, 125, 127, 128, 129 and 132. The work was done from approximately 2000 to 2006. These plans should have stamped seals and possible other notations from the state.
2. A copy of "Form 124" from Facilities Planning (Department of Education and/or Department of Community Affairs) showing district disposition with regard to this form.³

Request Made: April 18, 2007⁴

Response Made: April 25, 2007⁵

Custodian: Daniel Michaud

GRC Complaint Filed: July 21, 2007

Background

April 18, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

April 25, 2007

The Custodian verbally invites the Complainant to meet with Mr. Paul Jenney, the District's Supervisor of Facilities, to review the plans and to receive copies of such, if desired.

May 11, 2007

¹ No legal representation listed on record.

² Represented by Joseph J. Jankowski, Esq. of Wilentz, Goldman & Spitzer (Woodbridge, NJ).

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

⁴ The Complainant indicates on his Denial of Access Complaint that his requests were submitted on May 11, 2007 and May 23, 2007. However, the OPRA request form that he provided with his Denial of Access Complaint is dated April 18, 2007.

⁵ There is no evidence of a written response.

E-mail from the Complainant to the Supervisor of Facilities, Paul Jenney. The Complainant states that while looking through the original plans gathered, he did not see the plans for rooms 121, 127 and 129. The Complainant asks if the Supervisor of Facilities has the original plans for those projects. The Complainant states that if the Supervisor has them that the Complainant would like to view and obtain copies of them.

May 11, 2007

E-mail from the Supervisor of Facilities, Paul Jenney to the Complainant. The Supervisor of Facilities informs the Complainant that he found copies of the plans, but his copies are not signed, sealed, and approved. The Supervisor of Facilities states that the Business Administrator/Board Secretary, Daniel Michaud, may have sealed copies; but they are probably in the warehouse archives. The Supervisor of Facilities asks if the Complainant would like a copy of the plans that he has.

May 23, 2007

E-mail from the Complainant to the Supervisor of Facilities, Paul Jenney. The Complainant states that he would like to see approved plans with raised seals for rooms 121, 127 and 129.

July 21, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated April 18, 2007
- E-mail from the Complainant to the Supervisor of Facilities, Paul Jenney dated May 11, 2007
- E-mail from the Supervisor of Facilities, Paul Jenney to the Complainant dated May 11, 2007
- E-mail from the Complainant to the Supervisor of Facilities, Paul Jenney dated May 23, 2007

The Complainant asserts that he received five (5) of the eight (8) requested floor plans; therefore, he is still missing floor plans for rooms 121, 127 and 129. The Complainant also asserts that he only received one (1) “Form 124” and there should have been four (4) forms.

The Complainant specifically declines mediation in his Denial of Access Complaint.

August 8, 2007

Request for the Statement of Information sent to the Custodian.

August 17, 2007

Custodian’s Statement of Information (“SOI”).

The Custodian certifies that he received the Complainant’s OPRA request on April 18, 2007 and responded by April 25, 2007.

November 2, 2007

Letter from the GRC to the Custodian. The GRC acknowledges sending the Custodian a request for the Statement of Information dated August 8, 2007 and receiving a response on August 17, 2007 that did not include a complete document index format in “Item 9” as is required. The GRC provides the Custodian with the document index format again and requests that the Custodian complete such and return it to the GRC along with a legal certification.

November 14, 2007 & November 15, 2007

Letter from the Custodian to the GRC. The Custodian certifies that the Edison Board of Education received the OPRA request for eight (8) sets of plans for the upgrades of science rooms on April 18, 2007. The Custodian also certifies that by April 25, 2007, the Complainant was invited to meet with Mr. Paul Jenney, the District’s Supervisor of Facilities, to review the plans and to receive copies of such, if desired. The Custodian further certifies that the District’s Supervisor of Facilities had the eight (8) requested plans available, and the Complainant took five (5) of the eight (8) sets of plans.

The Custodian contends that the five (5) sets of plans that the Complainant took were sealed copies from the New Jersey Department of Education, and the other three (3) sets were not sealed; therefore, the Complainant did not want them. The Custodian also contends that the District’s Supervisor of Facilities and the staff from the business department searched for a sealed set of plans for the three (3) rooms but were not able to locate them. The Custodian further contends that he is unsure whether or not a sealed set was ever received for these rooms, but he still has the three (3) unsealed sets of plans in his office.

The Custodian asserts that a Form 124 is a section of the project application that is sent to the Department of Education (“DOE”) for approval to have the local code official provide the inspection of the projects. The Custodian also asserts that the DOE forwards the forms to the Department of Community Affairs (“DCA”) for approval to allow the local code officials to provide the inspections. The Custodian further asserts that once approved by the DCA, the DCA forwards the forms to the municipality with their approval, and usually his office receives a courtesy copy of the approved forms, but could not locate several of them.

The Custodian certifies that his office has always been fully compliant with any OPRA requests and thoroughly understands the obligation to provide public records. The Custodian also certifies that the Complainant cannot accept that the remainder of the requested records cannot be provided because the Custodian does not have them. The Custodian further certifies that the Complainant requested a Form 124 for each of the projects and was provided with one (1) of the forms, but the Custodian could not locate the other three (3) forms.

November 28, 2007

Letter from the Complainant to the GRC. The Complainant states that there are several inconsistencies with the Custodian's submissions dated November 14 & 15, 2007. The Complainant also states that the Custodian does not provide an adequate response because sealed plans for renovated rooms should absolutely be on file. The Complainant further states that a Form 124 for each classroom would demonstrate that the district fulfilled their responsibility to have the rooms inspected and approved by the local construction official; therefore, the absence of the forms is dubious and sanctionable by the State.

November 28, 2007

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide a legal certification indicating which of the forms were provided and which forms were not provided.

November 29, 2007

Letter from the Custodian with an attached Form 124 to the GRC. The Custodian certifies that he has a copy of the Form 124 for Edison High School Science rooms 121, 127 and 129. The Custodian also certifies that his office has never received copies of the forms for rooms 120, 123, 125, 128 and 132 from the township code official.

December 13, 2007

E-mail from the GRC to the Custodian. The GRC requests that the Complainant provide a legal certification including the exact date that the Complainant was provided with all of the records that he received.

December 19, 2007

Letter from the Custodian to the GRC. The Custodian certifies that to his knowledge, the Complainant picked up the documentation on May 9, 2007.

January 4, 2008

E-mail from the Complainant to the GRC. The Complainant states that he can accept that the Custodian cannot provide the records that he does not have. The Complainant also raises concerns about why the township does not have the requested records on file. Further, the Complainant states that the Custodian's submission to the GRC on December 12, 2006 in which he informed the GRC that the Complainant picked up all the requested records on May 9, 2007 is false.⁶

The Complainant requested that the GRC hold the district accountable for its obvious unlawful failure of upholding their legal obligation under OPRA.

Analysis

⁶ The GRC sought clarification from the Complainant regarding his assertions that the Custodian's certification dated December 19, 2007 was false in stating that the Complainant received all the requested records on May 9, 2007. The Complainant confirmed that he did receive the requested records on May 9, 2007 with the exception of those records that the Custodian has certified did not exist.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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. 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

In this complaint, the Custodian verbally responded to the Complainant’s April 18, 2007 OPRA request on the seventh (7th) business day by inviting the Complainant to meet with the District’s Supervisor of Facilities, Paul Jenney, to review the plans and to receive copies of such, if desired. 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. As also prescribed under 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. Further, the Custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i, results in a “deemed” denial of the Complainant’s OPRA request. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

However, the Custodian certified that on May 9, 2007 the Complainant received the plans for rooms 120, 123, 125, 128, and 132, but the Complainant declined the plans for rooms 121, 127, and 129 because they were not sealed. The Custodian also certified that on May 9, 2007 the Complainant received one (1) Form 124 which was for rooms 121, 127, and 129, of the four (4) responsive because his office has never received the other three (3) forms for rooms 120, 123, 125, 128 and 132. In the prior GRC decision, Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), the Council held that because the Custodian certified that the records responsive did not exist, there was no unlawful denial of access.

Even though the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not responding to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days, the Custodian has certified that the Complainant received all records responsive to his OPRA request on May 9, 2007. The Custodian also certified that the remaining requested records were not provided because such records do not exist. Therefore, the Custodian did not unlawfully deny access to the sealed plans for rooms 121, 127, and 129 or the Form 124 for rooms 120, 123, 125, 128, and 132 because he has certified that such records do not exist. See Pusterhofer, supra.

Whether the Township BOE should have maintained the requested records on file?

Pursuant to N.J.S.A. 47:1A-7(b), which delineates the Council's powers and duties, the Council shall:

“receive, hear, review and adjudicate a complaint filed by any person concerning a *denial of access to a government record* by a records custodian; issue advisory opinions; prepare guidelines and an informational pamphlet; prepare lists for use by records custodians; make training opportunities available for records custodians; and operate an informational website and a toll-free helpline....” (Emphasis added) N.J.S.A. 47:1A-7(b).

In the complaint before the Council, the Complainant raised a concern about whether the sealed plans for renovation of the high school classrooms should be kept on file with the Township BOE. The Complainant also states that the Form 124 demonstrates that the school district has fulfilled their responsibility of having the requested rooms inspected and approved by the local construction official. The Complainant contends that the absence of these forms is suspicious and sanctionable by the State.

However, pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council's powers and duties, the GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain. See Chaka Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Christine Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); Jay Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not

within the GRC's authority to adjudicate); Louis Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian).

Whether the Custodian's "deemed" denial to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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 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 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Felder 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 (App. Div. 1996) at 107).

Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, the Complainant was provided with all of the records responsive to the request with the exception of those records for which the Custodian legally certified do not exist. Therefore, it is concluded that the 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the Complainant's OPRA request. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Even though the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not responding to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days, the Custodian has certified that the Complainant received all records responsive to his OPRA request on May 9, 2007. The Custodian also certified that the remaining requested records were not provided because such records do not exist. Therefore, the Custodian did not unlawfully deny access to the sealed plans for rooms 121, 127, and 129 or the Form 124 for rooms 120, 123, 125, 128, and 132 because he has certified that such records do not exist. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council's powers and duties, the GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain. See Chaka Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Christine Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); Jay Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate); Louis Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian).
4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, the Complainant was provided with all of the records responsive to the request with the exception of those records which the Custodian legally certified do not exist. Therefore, it is concluded that the 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

January 23, 2008