



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

March 25, 2009 Government Records Council Meeting

Eric Taylor
Complainant

Complaint No. 2008-240

v.

Trenton Board of Education (Mercer)
Custodian of Record

At the March 25, 2009 public meeting, the Government Records Council (“Council”) considered the March 18, 2009 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 for meeting minutes 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian failed to immediately respond in writing to the Complainant stating that no receipts, invoices and contracts exist or request additional time to respond to the Complainant’s request, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. Although the Custodian failed to respond in writing to the Complainant’s OPRA request within the statutorily mandated time frame, the Custodian did respond to the Complainant on October 31, 2008, stating that no records responsive had been located, and subsequently certified in the Statement of Information that no records exist which are responsive to the request relevant to this complaint. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request for meeting minutes within the statutorily mandated



seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian’s failure to respond immediately to the Complainant’s request for receipts, invoices and contracts violates N.J.S.A. 47:1A-5.e., because the Custodian responded in writing stating that no records responsive exist approximately twenty-one (21) business days following the date of the Complainant’s request, and subsequently certified in the Statement of Information that no records responsive exist, 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.

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 March, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: March 30, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 25, 2009 Council Meeting**

**Eric Taylor¹
Complainant**

GRC Complaint No. 2008-240

v.

**Trenton Board of Education (Mercer)²
Custodian of Records**

Records Relevant to Complaint:

1. All receipts regarding any purchases of “Organic Law” books by the Trenton Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from January 11, 1968 to the present.
2. All receipts regarding any purchases of “Organic Law” books by the Trenton Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from 1925 to January 10, 1968.
3. All Board of Education meeting minutes regarding any purchases of “Organic Law” books by the Trenton Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from January 11, 1968 to the present.
4. All Board of Education meeting minutes regarding any purchases of “Organic Law” books by the Trenton Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from 1925 to January 10, 1968.
5. All invoices regarding any purchases of “Organic Law” books by the Trenton Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from January 11, 1968 to the present.
6. All invoices regarding any purchases of “Organic Law” books by the Trenton Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from 1925 to January 10, 1968.
7. All contracts regarding any purchases of “Organic Law” books by the Trenton Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from January 11, 1968 to the present.
8. All contracts regarding any purchases of “Organic Law” books by the Trenton Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from 1925 to January 10, 1968.³

¹ Represented by Kevin Mitchell, Esq., of Taylor & Mitchell, LLC (Audubon, NJ).

² Represented by Sharon D. Larmore, Esq. (Trenton, NJ).

³ N.J.S.A. 18A:36-18 provides that: “[t]he board of education of every school district shall have printed and suitably bound in book form, copies of the Declaration of Independence, the constitution of the United States and the amendments thereto, and the constitution of the state of New Jersey and the amendments thereto, and a copy of such book shall be presented to each pupil upon his graduation from any elementary school.”

Request Made: September 30, 2008
Response Made: October 31, 2008
Custodian: Jayne Howard
GRC Complaint Filed: October 22, 2008⁴

Background

September 30, 2008

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.

October 22, 2008

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

- Complainant's OPRA request dated September 30, 2008.
- Return receipt of mailing dated October 1, 2008.⁵

The Complainant states that he sent his September 30, 2008 OPRA request to the Custodian via certified mail. The Complainant states that the Trenton Board of Education ("TBOE") signed for receipt of the request on October 1, 2008. The Complainant states that he has not received a response to this date.

The Complainant did not agree to mediate this complaint.

October 29, 2008

Request for the Statement of Information sent to the Custodian.

October 31, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the twenty-first (21st) business day following receipt of such request. The Custodian states that the TBOE acknowledges receipt of the Complainant's September 30, 2008 OPRA request and subsequent Denial of Access Complaint.

The Custodian states that she is still searching for the requested records, which includes receipts regarding purchases, contracts and invoices for "Organic Law" books. The Custodian states that she has been unable to locate any records responsive but is continuing the search. The Custodian states that once the search for the records responsive is complete, the Complainant will be notified accordingly.

November 12, 2008

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on October 29, 2008 and to date has not received a response. Further, the

⁴The GRC received the Denial of Access Complaint on said date.

⁵Michelle Blaine, Communications Supply Clerk, signed the return receipt.

GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

November 17, 2008

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel states that in response to the GRC's November 12, 2008 correspondence, the Custodian has been unable to locate any records responsive to the Complainant's OPRA request. The Custodian's Counsel states that the Custodian is continuing her search and any records responsive that are located will be provided to the Complainant.

December 1, 2008

Facsimile from the GRC to the Custodian's Counsel. The GRC states that it requested a Statement of Information from the Custodian on October 29, 2008 and again on November 12, 2008. The GRC states that the Statement of Information was due on November 17, 2008. The GRC states that the Statement of Information is now due no later than by close of business on December 3, 2008.

December 1, 2008

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated September 30, 2008.
- Letter from the Custodian to the Complainant dated October 31, 2008.

The Custodian certifies that her search for the requested records included contacting the Assistant Superintendent for Curriculum and Instruction and the Business Office regarding this request.

The Custodian states that she received the Complainant's request on October 17, 2008. The Custodian states that she responded on October 31, 2008, stating that no records responsive were located but that the Custodian would continue to search for and provide any records responsive. The Custodian further states that she advised the Complainant that she would notify him when the search had been completed.

January 13, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC states that there is an inconsistency between the return receipt and the date the Custodian identifies in the SOI as the date she received the request. The GRC requests a certification responding to the following:

1. Identify the TBOE employee who signed the Complainant's return receipt.
2. Explain why the Custodian did not receive the Complainant's request until eleven (11) business days after acknowledgement of receipt for the OPRA request?

The GRC requests that the certification be signed by the employee that acknowledged receipt of the Complainant's OPRA request. The GRC states that the Custodian's Counsel must provide the certification no later than January 16, 2009.

January 14, 2009

Michelle Blaine's ("Ms. Blaine") certification to the GRC. Ms. Blaine certifies that she serves as Communications Supply Clerk in the mailroom of the TBOE. Ms. Blaine certifies that she signed for receipt of the Complainant's September 30, 2008 OPRA request on October 1, 2008. Ms. Blaine certifies that after reviewing the SOI and conferring with Mary Bailey, the Confidential Secretary who receives all OPRA requests, the October 17, 2008 date listed as the date the Custodian received the Complainant's request is an error. Ms. Blaine certifies that the Complainant's request was received on October 1, 2008.

Analysis

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 also states that:

"[i]mmediate access ordinarily shall be granted to budgets, *bills*, vouchers, *contracts*, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g.

OPRA further provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access

... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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. 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.

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, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this matter currently before the Council, the Custodian failed to respond in writing to the Complainant’s September 30, 2008 OPRA request until the twenty-first (21st) business day after receipt of the Complainant’s request.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request for meeting minutes 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Further, the receipts, invoices and contracts requested are specifically classified as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. In David Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007), the GRC held that “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when

immediate access records are requested, a custodian should respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

Therefore, because the Custodian failed to immediately respond in writing to the Complainant stating that no receipts, invoices and contracts exist or requesting additional time to respond to the Complainant's request, the Custodian has violated N.J.S.A. 47:1A-5.e.

Additionally, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that although the Custodian failed to respond to the OPRA request in a timely manner, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Similarly in this complaint, although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated time frame, the Custodian did respond to the Complainant on October 31, 2008, stating that no records responsive had been located, and subsequently certified in the SOI that no records exist which are responsive to the request relevant to this complaint. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer, supra.

Whether the Custodian's deemed denial of access 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 and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If 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).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request for meeting minutes within the statutorily mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian’s failure to respond immediately to the Complainant’s request for receipts, invoices and contracts violates N.J.S.A. 47:1A-5.e., because the Custodian responded in writing stating that no records responsive exist approximately twenty-one (21) business days following the date of the Complainant’s request, and subsequently certified in the SOI that no records responsive exist, 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 for meeting minutes 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian failed to immediately respond in writing to the Complainant stating that no receipts, invoices and contracts exist or request additional time to respond to the Complainant’s request, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. Although the Custodian failed to respond in writing to the Complainant’s OPRA request within the statutorily mandated time frame, the Custodian did respond to the Complainant on October 31, 2008, stating that no records responsive had been located, and subsequently certified in the Statement of Information that no records exist which are responsive to the request relevant to this complaint. Therefore, while the Custodian violated N.J.S.A. 47:1A-

5.g. and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request for meeting minutes within the statutorily mandated seven (7) business days results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian's failure to respond immediately to the Complainant's request for receipts, invoices and contracts violates N.J.S.A. 47:1A-5.e., because the Custodian responded in writing stating that no records responsive exist approximately twenty-one (21) business days following the date of the Complainant's request, and subsequently certified in the Statement of Information that no records responsive exist, 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.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 18, 2009