



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

July 26, 2011 Government Records Council Meeting

Luisa D. Erich-Carr
Complainant

Complaint No. 2010-168

v.

Plumstead Township School District (Ocean)
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council (“Council”) considered the July 19, 2011 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 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 (January 2010).
2. Pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the records responsive because the Custodian mistakenly informed the Complainant that no records responsive exist to request Item No. 4 due to his insufficient search. *See also* Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).
3. Because the Custodian certified that no records responsive to the Complainant’s OPRA request Items No. 1, No. 2 and No. 3 exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant’s request and failed to adequately search for records responsive to request Item No. 4, the Custodian provided the Complainant with the records responsive to request Item No. 4 when the



Custodian filed his Statement of Information. 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, 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.

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 26th Day of July, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 28, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 26, 2011 Council Meeting**

**Luisa D. Erich-Carr¹
Complainant**

GRC Complaint No. 2010-168

v.

**Plumstead Township School District (Ocean)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Detail profit and loss statement as of June 30, 2010
2. Detail balance sheet as of June 30, 2010
3. Schedule of capital equipment as of June 30, 2010
4. List of all computers, printers, projectors, televisions, DVD players, VHS players, cameras and copiers as of June 30, 2010.

Request Made: July 12, 2010

Response Made: July 28, 2010

Custodian: Sean Gately³

GRC Complaint Filed: July 23, 2010⁴

Background

July 12, 2010

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.

July 12, 2010

Telephone call from the Complainant to Administrative Assistant, Carol Florio ("Ms. Florio"). The Complainant asks Ms. Florio if the Custodian has received her OPRA request. Ms. Florio states that she put the Complainant's OPRA request in the Custodian's inbox.

¹ No legal representation listed on record.

² Represented by Arthur Stein, Esq., of the Law Offices of Stein & Suspie (Forked River, NJ).

³ The original Custodian who handled the Denial of Access Complaint is Mr. Frank Gripp. Mr. Sean Gately became the Custodian in August 2010.

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

July 23, 2010

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching Complainant’s OPRA request dated July 12, 2010.⁵

The Complainant states that she telephoned the Board of Education on July 12, 2010 to confirm whether the instant OPRA request was received. The Complainant states that Carol Florio, the Custodian’s Administrative Assistant, informed her that the OPRA request had been received and placed in the Custodian’s inbox. The Complainant states that the Custodian has not responded to her OPRA request. The Complainant also states that the Custodian’s last day of work is August 5, 2010, because he submitted his resignation in June 2010.

The Complainant does not agree to mediate this complaint.

July 26, 2010

Request for the Statement of Information (“SOI”) sent to the Custodian.

July 27, 2010

Facsimile from Custodian’s Counsel to the GRC. Counsel states that the detail summary on page three (3) of the Complainant’s Denial of Access Complaint is unreadable. Counsel requests the GRC to provide a legible copy of the Complainant’s detail summary.

July 27, 2010

E-mail from the GRC to the Complainant. The GRC states that the detail summary on page three of the Complainant’s Denial of Access Complaint was unreadable on lines two (2), four (4), five (5), six (6) and seven (7). The GRC requests that the Complainant type and e-mail another detail summary within three (3) business days.

July 27, 2010

E-mail from the Complainant to the GRC. The Complainant attaches her typed detail summary with regards to her Denial of Access Complaint.

July 28, 2010

Custodian’s response to the OPRA request. The Custodian verbally responds to the Complainant’s OPRA request via telephone on the twelfth (12th) business day following receipt of such request and after the Denial of Access Complaint was filed with the GRC. The Custodian states that the Board of Education does not have any records responsive to request Items No. 1 and No. 2.

July 28, 2010

Two telephone calls from the Custodian to the Complainant. The Custodian states that the Board of Education does not have any records responsive to request Item No. 1, No. 2 and No. 4. The Custodian also states that he has some records responsive to request Item No. 3. The Custodian further states that there is a report in response to

⁵ The Complainant attached additional materials not relevant to the adjudication of this complaint.
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request Item No. 3 but the Complainant would have to pay the Custodian to put this report together.

July 29, 2010

E-mail from the Complainant to the GRC. The Complainant states that she received two (2) telephone calls from the Custodian on July 28, 2010. The Complainant also states that the Custodian does not have any records responsive to request Items No. 1, No. 2 and No. 3. The Complainant further states that the Custodian stated he could give the Complainant a report in response to the request for Item No. 3, but said report only shows totals by account numbers showing revenues and expenditures year-to-date and budget columns. The Complainant states that she wants a detail list showing every entry to each account. The Complainant also states that the Custodian stated that he could give the Complainant an account summary report, but this report does not show cash accounts. The Complainant states that the Custodian stated that he would have to compile the report, and that the Complainant would have to pay for the Custodian to put together the report responsive to request Item No. 4. The Complainant states that she told the Custodian to search in the accounting software for the records responsive to Item No. 1 and No. 2.

August 3, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 12, 2010
- Technology plan for July 1, 2010 through June 30, 2010

The Custodian certifies that he reviewed the Complainant's OPRA request and searched the district's financial software for the requested reports. The Custodian certifies that no records responsive to request Items No. 1 and No. 2 exist. The Custodian also certifies that there are no records responsive to request Item No. 1 because it is currently being created as part of the audit process. The Custodian further certifies that there are no records responsive to request Item No. 3.

The Custodian certifies that he discussed with the Director of Technology regarding the records responsive to request Item No. 4. The Custodian also certifies that there is no exact list responsive to Item No. 4. The Custodian certifies that as part of the District's Technology Plan, required to be filed with the New Jersey Department of Education (NJDOE), a single sheet containing the following information is provided to NJDOE: Available technology includes: twenty (20) smart boards, fifteen (15) tablet PC's, 122 notebook computers, 591 desktop computers, six (6) audio/video carts, twenty-one (21) digital cameras, eight (8) camcorders, five (5) flip video cameras. The Custodian also certifies that the number of working computers for each school is: New Egypt Primary School – 97; New Egypt Elementary School – 175; New Egypt Middle School – 210; and New Egypt High School – 231. The Custodian further certifies that copies of these pages have been provided to the Complainant on this date along with the SOI. The Custodian further certifies that providing this information in response to request Item No. 4 is not an admission or acknowledgement by the Board of Education that the records responsive to request Item No. 4 exist because the records provided are not lists as the Complainant requested.

Custodian's Counsel argues that he had until July 22, 2010 to provide the complainant with copies of the records responsive or to deny her OPRA request.⁶ Counsel also argues that because there was no information to provide the Complainant, no response was given or necessary. Counsel further argues that this was a proper denial of Complainant's request pursuant to N.J.S.A. 47:1A-5.i. Counsel states that the Complainant was verbally told by the Custodian that the records responsive to her OPRA request do not exist. Counsel also states that Complainant appears not to believe the Custodian or the Board of Education. Counsel asserts that there have never been any records responsive to the Complainant's request.

Counsel argues that in the event that the GRC finds that the Custodian violated OPRA, any and all technical violations have been cured as the Board of Education has simultaneously sent the Complainant a written denial upon filing the SOI. Counsel also states that the Custodian has submitted his resignation and will be shortly leaving his position. Counsel further states that the Custodian was in significant transition and at times was on vacation. Counsel states that in an energy saving effort during the summer, the Business Office has begun to utilize a four (4) day work week.

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 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.

⁶ The Custodian argues that because the Business Office was on a four (4) day work week, the Custodian's deadline to respond to the Complainant's OPRA request was July 22, 2010.
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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 Council first addresses the issue of whether the Custodian’s response on July 28, 2010 was timely.

The Custodian certified in the SOI that he received the Complainant’s OPRA request on July 12, 2010. The Custodian also certified that he verbally responded to the Complainant’s OPRA request on July 28, 2010. The evidence of record indicates that the Custodian responded verbally to the Complainant’s OPRA request twelve (12) business days after receipt of the Complainant’s request.

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.⁷ 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 (January 2010).

Furthermore, the Custodian’s Counsel asserted that because there was no information to provide the Complainant, no response was given or necessary. In addition, the Custodian asserted that any and all technical violations have been cured as the Board of Education sent the Complainant a written denial of access to the requested records simultaneously upon filing the SOI.

Custodian Counsel’s assertion that no response to the Complainant’s OPRA request was necessary because no records responsive to the request exist is incorrect. OPRA mandates that the Custodian is required to respond *in writing* granting or denying access to the Complainant’s OPRA request within seven (7) business days after receipt of the OPRA request pursuant to N.J.S.A. 47:1A-5.g and -5.i. Custodian Counsel’s assertion that all technical violations were cured because a written denial of access to the requested records was sent to the Complainant with the SOI is also incorrect. Again, the Custodian is required by OPRA to respond in writing within seven (7) business days of

⁷ It is the GRC’s position that 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.

receipt of the OPRA request, not after the Complainant files a Denial of Access Complaint.

Therefore, 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. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

The Council next addresses whether the Custodian properly searched for the records responsive to request Item No. 4.

The evidence of record indicates that the Custodian responded to the Complainant's request for records responsive to Item No. 4 stating that that no records responsive exist. The evidence of record also indicates that the Custodian later certified in the SOI that some records responsive to request Item No. 4 exist and that the Custodian provided such records to the Complainant with the SOI. The Custodian certified that he provided the Complainant pages from an inventory required to be submitted to NJDOE.

In Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the complainant's OPRA request by stating that no records responsive existed. The complainant, however, submitted e-mails which were responsive to her request with the Denial of Access Complaint. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and this time located records responsive to this request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied the Complainant access to the requested records.

Like the custodian in Schneble, *supra*, the Custodian in the instant matter mistakenly informed the Complainant that there were no records responsive to request Item No. 4. However, the Custodian certified in the SOI that some records responsive to request Item No. 4 existed and provided such records along with the SOI. Therefore, the Custodian's search for records responsive to request Item No. 4 was insufficient.

Therefore, pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the records responsive because the Custodian mistakenly informed the Complainant that no records responsive exist to request Item No. 4 due to his insufficient search. *See also* Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).

The Council next addresses the issue of whether the Board of Education has any records responsive to request Item No. 1, No. 2 and No. 3.

The evidence of record indicates that the Custodian certified in the SOI that no records exist which are responsive to request Items No. 1, No. 2 and No. 3. The evidence of record further indicates that the Complainant failed to submit any credible evidence to refute the Custodian's certification in this regard.

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 Complainant failed to submit any evidence to refute the Custodian's certification. The GRC held that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian has certified that no records responsive to the Complainant's OPRA request Items No. 1, No. 2 and No. 3 exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Whether the Custodian's deemed denial, insufficient response, insufficient search and delay in access 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 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.

In the instant complaint, the Custodian verbally responded to the Complainant's OPRA request on the twelfth (12th) business day following receipt of such request and after the filing of the Denial of Access Complaint. In addition, the Custodian responded to request Items No. 1 and No. 2 and did not address Items No. 3 and No. 4. However,

the Custodian certified in the SOI that there are no records responsive to request Items No. 1, No. 2 and No. 3. In addition, the Custodian provided records responsive to request Item No. 4 to the Complainant with the Custodian's SOI.

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 violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant's request and failed to adequately search for records responsive to request Item No. 4, the Custodian provided the Complainant with the records responsive to request Item No. 4 when the Custodian filed his SOI. 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, 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.

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 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 (January 2010).
2. Pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the records responsive because the Custodian mistakenly informed the Complainant that no records responsive exist to request Item No. 4 due to his insufficient search. *See also* Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).

3. Because the Custodian certified that no records responsive to the Complainant's OPRA request Items No. 1, No. 2 and No. 3 exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
4. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant's request and failed to adequately search for records responsive to request Item No. 4, the Custodian provided the Complainant with the records responsive to request Item No. 4 when the Custodian filed his Statement of Information. 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, 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.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 19, 2011