



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

December 18, 2012 Government Records Council Meeting

David Herron
Complainant

Complaint No. 2011-351

v.

River Vale Board of Education
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 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. Because the Custodian certified that she never received a copy of the Complainant’s OPRA requests, the Custodian has met her burden of proving that the failure to respond to the Complainant’s request did not constitute an unlawful denial of access under OPRA. N.J.S.A. 47:1A-6.
2. Despite having not received the Complainant’s OPRA requests until the receipt of the Denial of Access Complaint, the Custodian certified in the Statement of Information and provided competent evidence that records responsive to Item Nos. 1, 2, 3, and 6 of the Complainant’s request were provided to the Complainant upon receipt of said requests. Furthermore, the Custodian certified that records responsive to Item Nos. 4 and 5 of the Complainant’s OPRA requests do not exist. Accordingly, the Custodian has met her statutory burden of providing that her actions were lawful and that there has been no unlawful denial of access in the instant matter. N.J.S.A. 47:1A-6.

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 18th Day of December, 2012

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: December 20, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**David Herron¹
Complainant**

GRC Complaint No. 2011-351

v.

**River Vale Board of Education²
Custodian of Records**

Records Relevant to Complaint:

As it pertains to Frank Alvarez:

1. A copy of his contract for each year of employment
2. A copy of his resume
3. A copy of all certificates held
4. Copies of all of Mr. Alvarez's college transcripts
5. A copy of Mr. Alvarez's application for employment
6. A copy of the February 23, 2003 minutes from the River Vale Board of Education meeting

Request Made: October 23, 2011

Response Made: November 18, 2011

Custodian: Kelly Ippolito

GRC Complaint Filed: November 9, 2011³

Background

October 23, 2011

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 via e-mail.

November 8, 2011

E-mail from the Complainant to the Custodian. The Complainant resends his October 23, 2011 OPRA request to the Custodian.

November 9, 2011

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

- Complainant's OPRA request dated October 23, 2011

¹ No legal representation listed on record.

² Represented by Stephen Fogarty, Esq., of Fogarty & Hara (Fair Lawn, NJ).

³ The GRC received the Denial of Access Complaint on November 10, 2011.

- Letter from the Complainant to the Custodian dated November 8, 2011

The Complainant asserts that he was denied access to the requested records and did not receive a response to his request. The Complainant does not agree to mediate this complaint.

November 16, 2011

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

November 18, 2011

Letter from the Custodian to the Complainant with the following attachments:

- A copy of the employment contract of Frank Alvarez
- A copy of Frank Alvarez’s resume
- A copy of Frank Alvarez’s education certificate

The Custodian responds in writing via letter to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request.⁴ The Custodian states that Item Nos. 1-3 of the Complainant’s request are attached. The Custodian further states that the Board of Education does not have any records responsive to Item Nos. 4 and 5 of the Complainant’s request.

November 18, 2011

Letter from the Custodian to the Complainant with an attached copy of the February 23, 2003 minutes from the River Vale Board of Education meeting. The Custodian states that attached to this letter is a copy of Item No. 6 of the Complainant’s request.

November 18, 2011⁵

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated October 23, 2011
- Letter from the Complainant to the Custodian dated November 8, 2011
- Letter from the Custodian to the Complainant dated November 18, 2011 with attachments
- Letter from the Custodian to the Complainant dated November 18, 2011 with attachment

The Custodian certifies that the Complainant’s request was not received until November 9, 2011 and that the Board does not recommend that OPRA requests are sent via e-mail because of spam filters that could prevent the receipt of the requests. The Custodian certifies that she provided the Complainant with all of the responsive records

⁴ The Custodian certifies in the SOI that she received the Complainant’s OPRA request on November 9, 2011.

⁵ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

on November 18, 2011. The Custodian certifies that Item Nos. 4 and 5 of the Complainant's request do not exist.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA 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.

Further, OPRA 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 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.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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

⁶ 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.

In the instant matter, the Complainant filed an OPRA request on October 23, 2011. Not receiving a response, the Complainant resent his request on November 8, 2011. On November 9, 2011, the Complainant filed this Denial of Access Complaint. On November 18, 2011, the Custodian responded to the GRC's request for a Statement of Information and certified that the River Vale Board of Education was not in receipt of the Complainant's OPRA request until receiving a copy of same with the Denial of Access Complaint. Accordingly, the Custodian was never served with a copy of the OPRA requests until she received a copy of said requests with the Complainant's Denial of Access Complaint.

Therefore, because the Custodian certified that she never received a copy of the Complainant's OPRA requests, the Custodian has met her burden of proving that the failure to respond to the Complainant's request did not constitute an unlawful denial of access under OPRA. N.J.S.A. 47:1A-6.

Whether the Custodian unlawfully denied the Complainant access to the requested records?

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.

In addition, 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.

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.

In the instant matter, the Custodian did not receive a copy of the Complainant's October 23, 2011 and November 8, 2011 OPRA requests until she received copies of said

requests within the Complainant's Denial of Access Complaint; supplied to the Custodian as part of the GRC's November 16, 2011 request for a Statement of Information.

In the Statement of Information, the Custodian provided two letters dated November 18, 2011 that demonstrate that the Complainant was provided with records responsive to Item Nos. 1, 2, 3, and 6 of his request. In certifying that these records were provided, the Custodian certified that there are no records responsive to Item Nos. 4 and 5 of the Complainant's request. Accordingly, the Custodian has provided the Complainant access to the existing responsive records.

The Council has consistently held that no denial of access occurs when a custodian has demonstrated that no records responsive to a complainant's request exist. 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 and the complainant submitted no evidence to refute said certification. The GRC held the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Despite having not received the Complainant's OPRA requests until the receipt of the Denial of Access Complaint, the Custodian certified in the Statement of Information and provided competent evidence that records responsive to Item Nos. 1, 2, 3, and 6 of the Complainant's request were provided to the Complainant upon receipt of said requests. Furthermore, the Custodian certified that records responsive to Item Nos. 4 and 5 of the Complainant's OPRA requests do not exist. Accordingly, the Custodian has met her statutory burden of providing that her actions were lawful and that there has been no unlawful denial of access in the instant matter. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that she never received a copy of the Complainant's OPRA requests, the Custodian has met her burden of proving that the failure to respond to the Complainant's request did not constitute an unlawful denial of access under OPRA. N.J.S.A. 47:1A-6.
2. Despite having not received the Complainant's OPRA requests until the receipt of the Denial of Access Complaint, the Custodian certified in the Statement of Information and provided competent evidence that records responsive to Item Nos. 1, 2, 3, and 6 of the Complainant's request were provided to the Complainant upon receipt of said requests. Furthermore, the Custodian certified that records responsive to Item Nos. 4 and 5 of the Complainant's OPRA requests do not exist. Accordingly, the Custodian has met her statutory burden of providing

that her actions were lawful and that there has been no unlawful denial of access in the instant matter. N.J.S.A. 47:1A-6.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012⁷

⁷ This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.
David Herron v. River Vale Board of Education, 2011-351 – Findings and Recommendations of the Executive Director