



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

May 29, 2012 Government Records Council Meeting

Sabino Valdes
Complainant

Complaint No. 2011-47

v.

Union City Board of Education (Hudson)
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 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. The Custodian’s failure to grant access, deny access, seek clarification, or request an extension of time to produce the requested records 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).
2. Because the Custodian herein certified that no records exist which are responsive to the Complainant’s request and because the Complainant submitted no evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny the Complainant access to the requested records. N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). *See also* Kaithern v. West Cape May Borough (Cape May), GRC Complaint No. 2003-135 (April 2004), Rivera v. Union Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and Paff v. Township of Blairstown (Warren), GRC Complaint No. 2009-53 (February 2010).
3. Although the Custodian failed to provide a written response to the Complainant’s OPRA request that granted access, denied access, sought clarification, or requested an extension of time to produce the requested records within the statutorily mandated seven (7) business days, resulting in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny the Complainant access to the requested records because the Custodian certified in the Statement of Information that the requested records do not exist within the Union City of Board of Education and the Complainant did



not submit any evidence to refute the Custodian's certification. Accordingly, 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 29th Day of May, 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: June 1, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Sabino Valdes¹
Complainant**

GRC Complaint No. 2011-47

v.

**Union City Board of Education (Hudson)²
Custodian of Records**

Records Relevant to Complaint: A “certified”³ copy of:

1. Minutes from the executive and regular sessions of a special meeting held by the Union City Board of Education on June 13, 2000.
2. Minutes from the executive and regular sessions of a special meeting held by the Union City Board of Education on September 13, 2000.
3. Minutes from the executive and regular sessions of a special meeting held by the Union City Board of Education on March 29, 2001.
4. Minutes from the executive and regular sessions of a special meeting held by the Union City Board of Education on October 30, 2003.

Request Made: January 24, 2011 and January 25, 2011

Response Made: January 31, 2011

Custodian: Anthony N. Dragona

GRC Complaint Filed: February 17, 2011⁴

Background

January 24, 2011

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests Item Nos. 1, 2, and 3 of the records relevant to this Complaint listed above on separate official OPRA request forms.

January 25, 2011

Complainant’s second (2nd) Open Public Records Act (“OPRA”) request. The Complainant requests Item No. 4 of the records relevant to this Complaint listed above on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by Susanne Lavelle, Esq. (Union City, NJ).

³ The Complainant specifies that “certified” means that the records have an original signature and seal.

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

January 25, 2011

E-mail from the Complainant to the Custodian. The Complainant states that on January 24, 2011, the Custodian provided him with copies of the executive and regular session minutes from the October 30, 2003 meeting.⁵

January 31, 2011

Custodian's response to the Complainant's January 24, 2011 and January 25, 2011 OPRA requests. The Custodian responds in writing via letter to the Complainant's OPRA request on the second (2nd) and third (3rd) business days⁶ following receipt of the respective requests. The Custodian states that he is in receipt of the Complainant's January 24, 2011 and January 25, 2011 OPRA requests. The Custodian asserts that because the school district was closed due to snow on January 27, 2011, the Custodian's response to the Complainant's January 24, 2011 request is due by February 3, 2011. The Custodian further states that the response to the January 25, 2011 request is due by February 4, 2011. The Custodian states that some of the minutes the Complainant requests predate his tenure with the Union City Board of Education ("Board").

The Custodian asserts that he disagrees with the Complainant's position that the Board is obligated to certify, and therefore provide a seal on, the requested minutes. The Custodian requests that the Complainant provide some statutory authority or case law mandating that the Board certify the minutes. The Custodian further asserts that he will consult with Counsel.

February 3, 2011

Letter from the Custodian to the Complainant. The Custodian maintains that OPRA has no directive that demands that a custodian must certify that a public record is the actual record within their possession. The Custodian argues that OPRA only provides that the record be made available to be inspected, examined, and copied.

February 17, 2011

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

- Complainant's first (1st) OPRA request dated January 24, 2011
- Complainant's second (2nd) OPRA request dated January 25, 2011
- Letter from the Custodian to the Complainant dated January 31, 2011
- Letter from the Custodian to the Complainant dated February 3, 2011⁷

The Complainant asks the Council to order the Custodian to disclose to him signed and sealed copies of the requested minutes. The Complainant contends that the Council's failure to provide certified minutes with a seal is proof that the minutes are fraudulent and alleges the Custodian is acting in bad faith.

⁵ The Complainant also asserted that he was provided with additional minutes not relevant to the adjudication of this complaint.

⁶ This calculation of business days takes into account the Custodian's assertion concerning a January 27, 2011 close of business due to snow.

⁷ The Complainant attached additional documentation not relevant to the OPRA request at issue in the instant complaint.

The Complainant does not agree to mediate this complaint.

March 17, 2011

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

March 23, 2011

Custodian’s SOI with the following attachments:

- Complainant’s first (1st) OPRA request dated January 24, 2011
- Complainant’s second (2nd) OPRA request dated January 25, 2011
- Letter from the Custodian to the Complainant dated January 31, 2011
- Letter from the Custodian to the Complainant dated February 3, 2011⁸

The Custodian certifies that the Board is not in possession of “certified” copies of the requested regular and executive Board minutes dated June 13, 2000, September 13, 2000, March 29, 2001 and October 30, 2003. The Custodian certifies there is no applicable retention schedule because signed and sealed versions of the requested records as described by the Complainant do not exist.

The Custodian contends that the Complainant is attempting to mislead the GRC and is making assumptions and baseless allegations. The Custodian maintains that the Complainant does not understand that the Board does not maintain signed and sealed “certified” versions of the requested minutes. The Custodian argues that there is no basis in the law that requires signing and sealing minutes, and accordingly the Board does not maintain minutes in this manner.

Analysis

Whether the Custodian sufficiently responded to the Complainant’s OPRA requests?

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.

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*

⁸ The Custodian attached additional documentation not relevant to the OPRA request at issue in the instant Complaint.

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 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.⁹ 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).

The Custodian responded to the Complainant’s OPRA requests in writing on the second (2nd) and third (3rd) business days following receipt of the respective requests. However, the Custodian’s response stated that because the school district was closed due to snow on January 27, 2011, the Custodian’s response to the Complainant’s January 24, 2011 request is due by February 3, 2011 and the response to the January 25, 2011 request is due by February 4, 2011. The Custodian’s response additionally stated that he disagrees with the Complainant’s position that the Board is obligated to certify, and therefore provide a seal on, the requested minutes and requested the Complainant provide some statutory authority or case law mandating that the Board certify the minutes. Moreover, the Custodian’s letter to the Complainant on February 3, 2011 did not grant or deny access to the requested records but merely asserted that OPRA has no directive that demands that a custodian must certify that a public record is the actual record within their possession. The Custodian argued that OPRA only provides that the record be made available to be inspected, examined, and copied.

In the instant matter, while the Custodian provided a timely written response to the Complainant’s OPRA requests, the Custodian’s response failed to grant access, deny access, seek clarification, or request an extension of time to produce the requested records in said response as mandated by N.J.S.A. 47:1A-5.g. Accordingly, the Custodian’s response is insufficient and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Therefore, the Custodian’s failure to grant access, deny access, seek clarification, or request an extension of time to produce the requested records 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).

⁹ 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.

Whether the Custodian unlawfully denied the Complainant 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. 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 matter before the Council, the Complainant contends that the Custodian must place a raised seal and signature upon the requested minutes or the minutes will not be responsive to his request for “certified” executive and regular session minutes. Conversely, the Custodian certified in the SOI that the Board of Education does not create or maintain “certified” minutes according to the Complainant’s description. The Custodian further certified in the SOI that the Board is not in possession of signed and sealed copies of the requested regular and executive Board minutes dated June 13, 2000, September 13, 2000, March 29, 2001 and October 30, 2003. The Complainant has submitted no evidence to refute the Custodian’s certification in this regard.

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.

Therefore, because the Custodian herein certified that no records exist which are responsive to the Complainant's request and because the Complainant submitted no evidence to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to the requested records. N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). *See also* Kaithern v. West Cape May Borough (Cape May), GRC Complaint No. 2003-135 (April 2004), Rivera v. Union Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and Paff v. Township of Blairstown (Warren), GRC Complaint No. 2009-53 (February 2010).

Whether the Custodian's actions rise 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 failed to provide a written response to the Complainant's OPRA request that granted access, denied access, sought clarification, or requested an extension of time to produce the requested records within the statutorily mandated seven (7) business days, resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny the Complainant access to the requested records because the Custodian certified in the SOI that the requested records do not exist within the Union City of Board of Education and the Complainant did not submit any evidence to refute the Custodian's certification. Accordingly, 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:

1. The Custodian's failure to grant access, deny access, seek clarification, or request an extension of time to produce the requested records 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).
2. Because the Custodian herein certified that no records exist which are responsive to the Complainant's request and because the Complainant submitted no evidence to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to the requested records. N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). *See also* Kaithern v. West Cape May Borough (Cape May), GRC Complaint No. 2003-135 (April 2004), Rivera v. Union Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and Paff v. Township of Blirstown (Warren), GRC Complaint No. 2009-53 (February 2010).
3. Although the Custodian failed to provide a written response to the Complainant's OPRA request that granted access, denied access, sought clarification, or requested an extension of time to produce the requested records within the statutorily mandated seven (7) business days, resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny the Complainant access to the requested records because the Custodian certified in the Statement of Information that the requested records do not exist within the Union

City of Board of Education and the Complainant did not submit any evidence to refute the Custodian's certification. Accordingly, 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: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012