



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

July 23, 2013 Government Records Council Meeting

Sabino Valdes
Complainant

Complaint No. 2012-190

v.

New Jersey Department of Education
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, 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 (Interim Order October 31, 2007).
2. The Complainant’s request is invalid because it failed to provide ample identifiers necessary for the Custodian to locate the responsive check. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹ New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. The Custodian’s failure to respond in writing within seven (7) business days resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Complainant’s request is invalid because it failed to identify with reasonable clarity the check sought. 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, the Custodian’s “deemed” denial did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).



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 23rd Day of July, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Sabino Valdes¹
Complainant**

GRC Complaint No. 2012-190

v.

**New Jersey Department of Education²
Custodian of Records**

Records Relevant to Complaint: On-site inspection of the Complainant's check in the amount of \$5.05 for copy fees paid relevant to Request No. C66396 seeking a copy of the complete set of tenure charges with the original markings made by the Honorable Stephen G. Weiss, Administrative Law Judge.³

Request Made: June 1, 2012

Response Made: None

GRC Complaint Filed: June 20, 2012⁴

Background⁵

Request and Response:

On June 1, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above-listed records. The evidence of record indicates that the Custodian failed to respond to the Complainant's OPRA request.

Denial of Access Complaint:

On June 20, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contends that the Custodian violated OPRA by failing to respond to his OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). The Complainant contends that the Council should hold that the Custodian knowingly and willfully violated OPRA by failing to respond to his OPRA request.

¹ No legal representation listed on record.

² Maria Casale, Custodian of Records. No legal representation listed on record.

³ According to the Complainant's letter attached to the OPRA request, the Complainant submitted the responsive check to the New Jersey Department of Education at some point between April 5, 2012 and May 8, 2012.

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

⁵ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Statement of Information:

On July 27, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she is unable to determine the date the OPRA request was received because she was out of the office for a substantial amount of time over the past few months. The Custodian certifies that no response was provided to the Complainant.

The Custodian certifies that the OPRA request at issue here was attached to a letter submitting another check for records and the employees did not realize that the OPRA request was attached; thus, no search was conducted. The Custodian certifies that she has since conducted a search based on the Complainant’s description in the OPRA request and is unable to identify the exact responsive record. The Custodian certifies that attached is a deposit list with several checks prepared on June 1, 2012; however, the Custodian is unsure if the check for \$5.05 on the list is the record sought, as this information is not consistent with the language of the request.

The Custodian certifies that the lack of a check number or date makes it impossible to track the responsive check. The Custodian further certifies that she is unable to verify whether the Complainant’s check was deposited or even exists. The Custodian certifies that the Complainant has submitted multiple OPRA requests for the same item and multiple unsolicited payments for the same records, which has created substantial paperwork and confusion as to what check the Complainant is seeking.

Analysis⁶

Timeliness

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. *Id.* 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 (Interim Order October 31, 2007).

Here, the Custodian certified in the SOI that no response was ever provided to the Complainant. The Custodian further certifies that she was out of the office for a substantial amount of time over the months between the submission of the OPRA request and the complaint.

⁶ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

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.

However, the Custodian or a designated substitute is required to respond to the Complainant's OPRA request and failed to do so.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, 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, supra.

Unlawful Denial of Access

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 New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court reasoned that:

"[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." [Emphasis added]. *Id.* at 549.

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records not otherwise exempt ...* In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* See also Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁸ New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

Here, the Custodian certified in the SOI that the lack of a check number or date made it impossible to track and locate the responsive check. The Custodian submitted with the SOI a June 1, 2012 memorandum with four (4) of the Complainant's checks attached. One (1) check in the amount of \$5.05 was attached; however, the memo line identifies that the check was submitted for Request No. C66043 and not Request No. C66396, as requested.

The GRC is satisfied that the Complainant's OPRA request lacked sufficient information allowing the Custodian to identify and provide the responsive check for inspection. Bent supra (holding that "... a proper request under OPRA must identify *with reasonable clarity* those documents that are desired ..." *Id.*) The Complainant's request went into extensive detail about the records the Complainant submitted his check for, but lacked necessary identifiers to locate a specific check, such as a specific check number and/or date. A check is comprised of few elements by which to identify it and a check number and date are among them. These elements are crucial to the identification process when seeking a specific check; however, the Complainant failed to identify same. The Custodian's SOI arguments are further substantiated by the memorandum attached to the SOI indicating that the Complainant submitted multiple checks to DOE, including one for the same amount that was not responsive to the request.

Additionally, the OPRA request was attached to a letter that included a check for another OPRA request. The inclusion of statements regarding a separate matter in the letter understandably added to the confusion of responding to the subject request.

Therefore, the Complainant's request is invalid because it failed to provide ample identifiers necessary for the Custodian to locate the responsive check. MAG, supra; Bent, supra; NJ Builders, supra; Schuler, supra.

Knowing & Willful

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)).

The Custodian’s failure to respond in writing within seven (7) business days resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Complainant’s request is invalid because it failed to identify with reasonable clarity the check sought. 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, the Custodian’s “deemed” denial did 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, 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 (Interim Order October 31, 2007).
2. The Complainant’s request is invalid because it failed to provide ample identifiers necessary for the Custodian to locate the responsive check. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁹ New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
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⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

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: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013¹⁰

¹⁰ This complaint was prepared and scheduled for adjudication at the Council's June 25, 2013 meeting; however, this complaint was not adjudicated due to lack of quorum.