



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

March 22, 2013 Government Records Council Meeting

Rita Watson
Complainant

Complaint No. 2012-33

v.

Washington Township Public Schools (Gloucester)
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 2013 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 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 first (1st) 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. Notwithstanding the Custodian’s failure to timely respond to the Complainant’s OPRA request Item No. 1, the Custodian borne her burden of proving that she provided all responsive records on May 16, 2011. N.J.S.A. 47:1A-6.
3. The Custodian’s failure to timely respond to the Complainant’s first (1st) OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Custodian borne her burden of proving that she provided to the Complainant all records responsive to the first (1st) OPRA request and the Complainant failed to provide any competent, credible evidence of the existence of “hidden” records. 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 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.



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 22nd Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: March 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Rita Watson¹
Complainant**

GRC Complaint No. 2012-33

v.

**Washington Township Public Schools (Gloucester)²
Custodian of Records**

Records Relevant to Complaint:

April 28, 2011 OPRA Request: Copies via U.S. mail of 1) student records; 2) hearing records from a board meeting concerning J.W.; and 3) discipline records.

May 17, 2011 OPRA Request: Inspection of 1) student records; 2) hearing records from a board meeting concerning J.W.; 3) discipline records; and 4) test results.

Request Made: April 28, 2011 and May 17, 2011

Response Made: May 16, 2011 and May 27, 2011

GRC Complaint Filed: February 3, 2012³

Background⁴

The Complainant filed her first (1st) OPRA request with the Washington Township Public Schools Board of Education (“BOE”) on April 28, 2011 seeking the records listed above. The Custodian responded on May 16, 2011, the twelfth (12th) business day after receipt of the OPRA request, having Mr. William Grutzmacher (“Mr. Grutzmacher”) and Mr. Ian McCrane (“Mr. McCrane”) hand-deliver copies of the responsive student records, including disciplinary records, and hearing tapes from March 21, 2011 and April 12, 2011.

The Complainant filed her second (2nd) OPRA request with the BOE on May 17, 2011 seeking the records listed above. The Custodian responded in writing on May 27, 2011, the seventh (7th) business day after receipt of the OPRA request,⁵ stating that all records regarding

¹ No legal representation listed on record.

² Margaret F. Meehan, Custodian of Records. Represented by Taylor Ruilova, Esq., from Comgeno Law Group, P.C. (Moorestown, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ 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.

⁵ The Custodian certifies in the Statement of Information that she received the Complainant’s OPRA request on May 18, 2011.

J.W. were previously provided; however, the Complainant may come in and review the original file.

The Complainant filed her Denial of Access Complaint with the Government Records Council (“GRC”) on February 3, 2012. In said complaint, the Complainant contends that the Custodian did not provide all responsive records. The Complainant requests that the GRC order the Custodian to disclose “hidden” records, which the Complainant contends she received at an October 12, 2011 due process hearing.⁶

The Custodian filed his Statement of Information (“SOI”) on February 23, 2012. In the SOI, the Custodian certifies she received the Complainant’s first (1st) OPRA request on April 28, 2011. The Custodian certifies that she contacted the School principal to obtain the responsive records and had Mr. Grutzmacher and Mr. McCrane hand-deliver the records under signature of receipt to the Complainant on May 16, 2011. The Custodian certifies that she disclosed 85 records ranging from progress reports and grades to disciplinary and medical records.

The Custodian certifies that she subsequently received the second (2nd) OPRA request seeking similar records on May 18, 2011. The Custodian certifies that she responded on May 27, 2011 stating that the Complainant could review the original file, but that all records were provided in response to the Complainant’s first (1st) OPRA request.

Analysis⁷

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). 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).⁸ 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).

Regarding the Custodian’s response to the Complainant’s first (1st) OPRA request, the Custodian failed to respond until May 16, 2011, or twelve (12) business days after receipt of said request. Thus, the Custodian’s untimely response results in a “deemed” denial.

⁶ The Complainant did not list or provide a copy of these alleged records to the GRC.

⁷ 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.

⁸ 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.

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. As such, the Custodian's failure to respond in writing to the Complainant's first (1st) 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.

In the instant complaint, the Complainant contends that the Custodian did not disclose "hidden records" that she received five (5) months after the submission of her two (2) OPRA requests. However, the Custodian certified in the SOI that she provided the Complainant with all responsive records to the first (1st) OPRA request in the BOE's possession on May 16, 2011. Additionally, the Custodian timely responded to the second (2nd) OPRA request offering the Complainant inspection of J.W.'s original file.

Thus, the crux of this complaint is whether the Custodian provided the Complainant with all responsive records in response to her first (1st) OPRA request. Although the Complainant alleges that additional records existed, she neither listed nor provided copies of these records as part of her complaint. Absent any competent, credible evidence as to the existence of these records at the time of either of the Complainant's OPRA requests, the GRC is satisfied that the Custodian met her burden of proving that she provided all responsive records.

Therefore, notwithstanding the Custodian's failure to timely respond to the Complainant's OPRA request Item No. 1, the Custodian borne her burden of proving that she provided all responsive records on May 16, 2011. N.J.S.A. 47:1A-6.

Finally, the GRC declines to address the complaint's second (2nd) OPRA request because it appears that no denial of access took place. Specifically, the Custodian timely responded granting inspection of J.W.'s file and the Complainant makes no arguments about the Custodian's response in the Denial of Access Complaint.

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 timely respond to the Complainant’s first (1st) OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Custodian borne her burden of proving that she provided to the Complainant all records responsive to the first (1st) OPRA request and the Complainant failed to provide any competent, credible evidence of the existence of “hidden” records. 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 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 first (1st) 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. Notwithstanding the Custodian's failure to timely respond to the Complainant's OPRA request Item No. 1, the Custodian borne her burden of proving that she provided all responsive records on May 16, 2011. N.J.S.A. 47:1A-6.
3. The Custodian's failure to timely respond to the Complainant's first (1st) OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Custodian borne her burden of proving that she provided to the Complainant all records responsive to the first (1st) OPRA request and the Complainant failed to provide any competent, credible evidence of the existence of "hidden" records. 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 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013