



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

October 29, 2013 Government Records Council Meeting

George F. Burdick, Jr.
Complainant

Complaint No. 2013-45

v.

New Jersey Department of Education
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 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 his burden of proof that he timely responded to the Complainant’s OPRA request. *See 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. Twp. of Rockaway*, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Although the Custodian was not responsive to the Complainant’s request under *N.J.S.A. 47:1A-5(g)* and *N.J.S.A. 47:1A-5(i)*, the Complainant’s request is invalid under OPRA because it fails to specify an identifiable government record sought. *See Bart v. Passaic Cnty. Pub. Hous. Agency*, 406 *N.J. Super.* 445, 451 (App. Div. 2009); *Bent v. Stafford Twp. Police Dept.*, 381 *N.J. Super.* 30, 37-39 (App. Div. 2005); *See MAG Entm’t, L.L.C. v. Div. of Alcoholic Beverage Control*, 375 *N.J. Super.* 534, 546-49 (App. Div. 2005).
3. Under the totality of the circumstances, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA or an unreasonable denial of access. *See N.J.S.A. 47:1A-11(a).*

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 October, 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: November 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**George F. Burdick, Jr.¹
Complainant**

GRC Complaint No. 2013-45

v.

**New Jersey Department of Education²
Custodial Agency**

Records Relevant to Complaint: Copies of the following records, including, but not limited to, communications relating to business services agreements, shared services agreements, share, shared, or sharing a business administrator, share, share or sharing an administrator, the Uniform Shared Service and Consolidation Act, N.J.S.A. 40A:65-1 et seq., N.J.S.A. 18A:17-14.1, Pohatcong, Bloomsbury, Alpha, N.J.A.C. 6A:23A-3.1(E), Title 40, and Title 18A:

1. All communications, both written and electronic, between Dr. Gerald Verontica, Hunterdon County Executive Superintendent, and the Pohatcong (Warren County) Board of Education between January 1, 2010 and December 31, 2010;
2. All communications, both written and electronic, between Dr. Gerald Verontica, Hunterdon County Executive Superintendent, and the Bloomsbury (Hunterdon County) Board of Education between the dates of January 1, 2010 and December 31, 2010;
3. All communications, both written and electronic, between Mr. Jeffrey Scott, Interim Hunterdon County Executive Superintendent, and the Pohatcong (Warren County) Board of Education between the dates of January 1, 2011 and December 31, 2012;
4. All communications, both written and electronic, between Mr. Jeffrey Scott, Interim County Executive Superintendent, and the Bloomsbury (Hunterdon County) Board of Education between the dates of January 1, 2011 and December 31, 2012.

Custodian of Record: Maria Casale³

Request Received by Custodian: January 3, 2013

Response Made by Custodian: January 8, 2013, January 16, 2013, and February 5, 2013

GRC Complaint Received: February 8, 2013

¹ No legal representation listed on record.

² No legal representation listed on record.

³ Paul Crupi became Custodian of Record for the New Jersey Department of Education as of April 1, 2013.

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Background⁴

Request and Response:

On January 3, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian for the above-referenced documents. On January 8, 2013, three (3) business days later, the Custodian attempted to respond, in writing via e-mail, by asking the Complainant to clarify the parties to, and the specific topics covered by, the requested e-mails. On January 15, 2013, the Complainant sent an e-mail to the Custodian advising that he had received no response to his January 3, 2013 request. On January 16, 2013, the Custodian realized that she had mistyped the Complainant’s e-mail address when sending her January 8, 2013 reply. As a result, the Complainant did not receive the Custodian’s January 8, 2013 request for clarification until January 16, 2013. On January 16, 2013, the Complainant replied, through e-mail, to the Custodian’s request for clarification with a reworded OPRA request.

On February 4, 2013, the Complainant e-mailed the Custodian stating that he had not received a response to his January 16, 2013 e-mail. On the morning of February 5, 2013, the Complainant sent an additional e-mail to the Custodian advising that he was considering filing a denial of access complaint with the Government Records Council (“GRC”). On the afternoon of February 5, 2013, thirteen (13) business days after receipt of the Complainant’s reworded OPRA request, the Custodian denied the Complainant’s request and sought additional clarification. The Custodian, however, sent this e-mail to the same address she had used on January 8, 2013, so the Complainant did not receive the communication.

Denial of Access Complaint:

On February 8, 2013, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserts that, following the Custodian’s January 16, 2013 request for clarification, he has received no response from the Custodian despite providing said clarification and inquiring twice into the status of his request.

Statement of Information:

On February 26, 2013, following the grant of an extension of time by the GRC, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on January 3, 2013. The Custodian further certifies that she requested clarification, in writing via e-mail, from the Complainant on January 8, 2013, but that this e-mail did not reach the Complainant until January 16, 2013, due to the Custodian’s error in addressing the message. The Custodian additionally certifies that she did not become aware of the error until the Complainant inquired about the status of his request on January 16, 2013, at which point the Custodian resent her request for clarification. The Custodian certifies that she received the Complainant’s response to this request for clarification on January 16, 2013, and

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.

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that, after consulting with internal staff and the Office of the Attorney General (“OAG”), she again sought clarification on February 5, 2013.

The Custodian certifies that no records could be produced because the Complainant’s January 16, 2013 e-mail in response to her request for clarification did not sufficiently narrow the scope of the Complainant’s request. The Custodian further states that the Complainant’s request for all communications between the Boards of Education of the two (2) school districts and the two (2) named individuals over a period of two (2) years is impermissibly broad and would require the Custodian to perform research in order to fulfill the Complainant’s request. The Custodian additionally states that the list of thirteen (13) enumerated subjects provided by the Complainant in his January 16, 2013 response did not serve to clarify which e-mails the Complainant sought, but instead further broadened his request. The Custodian provides that she sought additional clarification on February 5, 2013. The Custodian certifies that she did not receive a response to her February 5, 2012 request for clarification.

Analysis⁵

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

In complaints where it appears that a “deemed” denial may have occurred, the burden rests on the custodian to prove that she responded in writing in a timely manner. *See* Brown v. Sea Isle City Bd. of Educ. (Cape May), GRC Complaint No. 2011-273 (January 2013); Gonzales v. City of Gloucester (Camden), GRC Complaint No. 2008-255 (November 2009). In Gonzales, the custodian certified in his SOI that he timely responded to the complainant’s OPRA request, but there was no evidence in the record to show that such response was written, as is statutorily required by N.J.S.A. 47:1A-5(g). *See* Gonzales, GRC 2008-255. The GRC held that the custodian failed to bear his burden of proof that he properly responded to the OPRA request under N.J.S.A. 47:1A-6. *See* Gonzales, GRC 2008-255. *But cf.* Tracy L. Wadhams v. Town of Belvidere (Warren), GRC Complaint No. 2010-209 (October 2011) (finding custodian’s burden met through corroborating evidence in record of custodian’s certification that e-mail was timely sent to complainant).

⁵ 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.

⁶ 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.

Here, the Custodian certified that she attempted to respond in writing to the Complainant by seeking clarification three (3) business days after receipt of his OPRA request. However, the Custodian also certified that she mistakenly sent this reply to an e-mail address different from the one that the Complainant had provided on the Department of Education's OPRA request form. As a result, the Complainant did not receive the Custodian's written request for clarification until nine (9) business days after he filed his initial OPRA request, and then only because he contacted the Custodian regarding the expiration of the statutorily mandated seven (7) business day response period. *See* N.J.S.A. 47:1A-5(i).

The Custodian further certified that she received the Complainant's clarification on January 16, 2013, but did not attempt to contact the Complainant again until February 5, 2013, thirteen (13) business days later. The Complainant did not receive the Custodian's second request for clarification because the message was sent to the same incorrect e-mail address as before. The Custodian's response included an explanation of the "specific bas[es]" for denying the request; however, the Complainant only received it when the GRC forwarded him the Custodian's SOI on February 26, 2013. *See* N.J.S.A. 47:1A-5(g). As such, the evidence in the record fails to show that the Custodian responded, in writing, to the Complainant's OPRA request within seven (7) business days.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. *See* 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, GRC 2007-11.

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 Appellate Division has held that:

OPRA thus provides a means for citizens to gain access to government records that are "not otherwise exempted from its reach." *See* MAG Entm't, L.L.C. v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Act does not, however, require custodians of government records to undertake research for a requestor. Id. at 546-47.

The requestor must identify the records sought with specificity. Id. at 549. The request may not be a broad, generic description of documents that requires the custodian to search the agency's files and "analyze, compile and collate" the requested information. Id. at 549. *See also* Bent v. Stafford Twp. Police Dept.,

381 N.J. Super. 30, 37-39 (App. Div. 2005) (noting that OPRA allows requests for specific records, not requests for general information, data or statistics).

Bart v. Passaic Cnty. Pub. Hous. Agency, 406 N.J. Super. 445, 451 (App. Div. 2009) (holding that OPRA does not require custodians to engage in legal research to identify records being requested).

In the instant matter, the Complainant's request does not seek a specifically identifiable record. The Complainant instead seeks "all communications" between two (2) individuals and two (2) Boards of Education over a period of two (2) years. The request would require the Custodian to engage in research on behalf of the Complainant, as it encompasses, but is not limited to, communications regarding thirteen (13) broad and undefined topics, including several statutes. As such, the request fails to identify a particular government record with reasonable specificity and is invalid under OPRA.

Therefore, although the Custodian was not responsive to the Complainant's request under N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Complainant's request is invalid under OPRA because it fails to specify an identifiable government record sought. *See* Bart, 406 N.J. Super. at 451; Bent, 381 N.J. Super. at 37-39; MAG, 375 N.J. Super. at 546-49.

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 (Id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); and 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)).

In the matter before the Council, the Custodian failed to bear her burden of proof that she timely responded to the Complainant's request. However, the Custodian certified, and evidence in the record supports, that she mistakenly sent her first request for clarification to the wrong e-mail address. Likewise, there is no evidence in the record to suggest that the Custodian's second, later use of an incorrect e-mail address was deliberate, although it was certainly careless. Finally, the denial that the Custodian attempted to send to the Complainant correctly determined that the Complainant's request was improper under OPRA for being overbroad.

Therefore, under the totality of the circumstances, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA or an unreasonable denial of access. *See* N.J.S.A. 47:1A-11(a).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. *See* 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Although the Custodian was not responsive to the Complainant's request under N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Complainant's request is invalid under OPRA because it fails to specify an identifiable government record sought. *See* Bart v. Passaic Cnty. Pub. Hous. Agency, 406 N.J. Super. 445, 451 (App. Div. 2009); Bent v. Stafford Twp. Police Dept., 381 N.J. Super. 30, 37-39 (App. Div. 2005); *See* MAG Entm't, L.L.C. v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-49 (App. Div. 2005).
3. Under the totality of the circumstances, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA or an unreasonable denial of access. *See* N.J.S.A. 47:1A-11(a).

Prepared By: Dawn SanFilippo
Senior Counsel
October 22, 2013⁷

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

⁷ This complaint was prepared for adjudication at the Council's September 24, 2013 meeting; however, the complaint could not be adjudicated due to lack of quorum.