



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

January 30, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-204

v.

Woodbine Board of Education (Cape May)
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the December 9, 2014 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’s failure to respond immediately to the Complainant’s OPRA request for invoices and a purchase order results in a violation of OPRA’s immediate access provision at N.J.S.A. 47:1A-5(e). See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013). However, the GRC declines to order disclosure of the responsive records because the Custodian provided same to the Complainant on May 6, 2014.
2. The Custodian has not borne the burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, this 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 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). The GRC similarly declines to order disclosure of the responsive expenditure list because the Custodian provided same to the Complainant on May 6, 2014.
3. The Custodian’s failure to respond immediately to the Complainant’s OPRA request item No. 1 resulted in a violation of N.J.S.A. 47:1A-5(e). Additionally, the Custodian’s failure to timely respond to the Complainant’s OPRA request item No. 2 resulted in a violation of N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Custodian later disclosed all responsive records to the Complainant on May 6, 2014. 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 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 30th Day of January, 2015

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: February 4, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-204

v.

**Woodbine Board of Education (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. February 2014 legal bills for the Custodian's Counsel and any other law firm that submitted a bill.
2. List of all expenditures for February 2014.

Custodian of Record: Allen Parmelee

Request Received by Custodian: March 4, 2014

Response Made by Custodian: May 6, 2014

GRC Complaint Received: May 22, 2014

Background³

Request and Response:

On March 3, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On March 7, 2014, the Complainant noted that his request sought immediate access records. On May 6, 2014, the Complainant advised the Custodian that he never received a response to the subject OPRA request seeking immediate access records.

On May 6, 2014, the Custodian responded in writing (attaching a letter dated March 5, 2014) providing access to the responsive records in their entirety. On May 7, 2014, the Complainant asked the Custodian to provide a copy of the March 5, 2014 e-mail that transmitted the Custodian's response.

¹ Represented by Michelle Douglass, Esq. (Northfield, NJ).

² Represented by Susan Hodges, Esq., of Archer & Greiner, P.C. (Haddonfield, NJ).

³ 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.

Denial of Access Complaint:

On May 22, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that, although he sought immediate access records, the Custodian failed to respond to his request until May 6, 2014. The Complainant noted that the Custodian’s response included a letter dated March 5, 2014. The Complainant stated that he attempted to obtain the corresponding e-mail to which the March 5, 2014 letter would have been attached, but that the Custodian failed to provide same.

Statement of Information:

On July 2, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 4, 2014. The Custodian certified that, at that time, the responsive records were compiled and converted to electronic format. The Custodian affirmed that he prepared a response on March 5, 2014, but failed to send same to the Complainant. The Custodian affirmed that this was partially due to other e-mails with multiple attachments sent to the Complainant on the same day. The Custodian averred that it was not until the Complainant followed up on May 6, 2014 that he actually sent his response.

Analysis

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).⁴ 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).

OPRA further provides that “[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiation agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5(e).

In Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that “immediate access language of OPRA (N.J.S.A. 47:1A-5(e)) suggests that the Custodian was still obligated to immediately notify the Complainant. . .” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately,

⁴ 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.

granting or denying access, requesting additional time to respond or requesting clarification of the request. Additionally, if immediate access items are contained within a larger OPRA request containing a combination of records requiring a response within seven (7) business days and immediate access records requiring an immediate response, a custodian still has an obligation to respond to immediate access items immediately. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

Further, in Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013), the Council held that “. . . *the Complainant’s request . . . sought invoices, which are bills*, another type of immediate access record. N.J.S.A. 47:1A-5(e).” Id. (emphasis added). Based on the foregoing, the Council determined that the custodian violated N.J.S.A. 47:1A-5(e).

First, the GRC notes that the Complainant’s characterization of his request indicated that he believed that both responsive records were considered immediate access items under OPRA. However, a review of N.J.S.A. 47:1A-5(e) reveals that “expenditure lists” requested as OPRA request item No. 2 are not specifically identified as “immediate access” records. Thus, the GRC will handle each request item separately.

Regarding OPRA request item No. 1, the Complainant sought February 2014 legal bills. Based on the Council’s holding in Kohn, GRC 2012-03, the Custodian was required to respond to same immediately. Although the Custodian intended to respond immediately, he failed to do so until May 6, 2014.

Therefore, the Custodian’s failure to respond immediately to the Complainant’s OPRA request for invoices and a purchase order results in a violation of OPRA’s immediate access provision at N.J.S.A. 47:1A-5(e). See Herron, GRC 2006-178 (February 2007); Kohn, GRC 2012-03. However, the GRC declines to order disclosure of the responsive bills because the Custodian provided same to the Complainant on May 6, 2014.

Regarding item No. 2, the Complainant sought expenditure bills. The Custodian was required to respond providing same within seven (7) business days and failed to do so.

Thus, the Custodian has not borne the burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, this 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 request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. The GRC similarly declines to order disclosure of the responsive expenditure list because the Custodian provided same to the Complainant on May 6, 2014.

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 "... [i]f 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)); 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 this matter, the Custodian's failure to respond immediately to the Complainant's OPRA request item No. 1 resulted in a violation of N.J.S.A. 47:1A-5(e). Additionally, the Custodian's failure to timely respond to the Complainant's OPRA request item No. 2 resulted in a violation of N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Custodian later disclosed all responsive records to the Complainant on May 6, 2014. 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 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 that:

1. The Custodian's failure to respond immediately to the Complainant's OPRA request for invoices and a purchase order results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5(e). *See* Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013). However, the GRC declines to order disclosure of the responsive records because the Custodian provided same to the Complainant on May 6, 2014.
2. The Custodian has not borne the burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, this 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 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). The GRC similarly declines to order disclosure of the responsive expenditure list because the Custodian provided same to the Complainant on May 6, 2014.

3. The Custodian’s failure to respond immediately to the Complainant’s OPRA request item No. 1 resulted in a violation of N.J.S.A. 47:1A-5(e). Additionally, the Custodian’s failure to timely respond to the Complainant’s OPRA request item No. 2 resulted in a violation of N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Custodian later disclosed all responsive records to the Complainant on May 6, 2014. 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 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: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

December 9, 2014⁵

⁵ This complaint was prepared for adjudication at the Council’s December 16, 2014 meeting, but could not be adjudicated due to lack of quorum.