



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 28, 2015 Government Records Council Meeting

Denyce Carroll
Complainant

Complaint No. 2014-69

v.

Trenton Public School District (Mercer)
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 Supplemental 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 complied with the Council’s June 30, 2015, Interim Order because he responded within the prescribed time frame by certifying both to his search to locate A.A.’s school record and that the District was unable to locate same. Moreover, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond timely to the Complainant’s OPRA request resulted in a “deemed” denial of said request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Moreover, the Custodian’s failure to provide a date certain on which he would respond resulted in an insufficient response. N.J.S.A. 47:1A-5(i). However, the Custodian timely complied with the Council’s June 30, 2015, Interim Order and certified that he was unable to locate A.A.’s school record. For this reason, he did not unlawfully deny access to same. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). 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 28th Day of July, 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: July 30, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 28, 2015 Council Meeting**

**Denyce Carroll¹
Complainant**

GRC Complaint No. 2014-69

v.

**Trenton Public School District (Mercer)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of A.A.'s (the Complainant's daughter) school record, filed in May 2013.

Custodian of Record: Wilfredo Ortiz

Request Received by Custodian: October 21, 2013

Response Made by Custodian: N/A

GRC Complaint Received: February 6, 2014

Background

June 30, 2015 Council Meeting:

At its June 30, 2015, public meeting, the Council considered the April 21, 2015, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he 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. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007). The Custodian's failure to provide a date certain on which he would respond also results in an insufficient response. N.J.S.A. 47:1A-5(i); Hardwick v. NJ Dep't of Transportation, GRC Complaint No. 2007-164 (February 2008); Blay v. Lake Bd. of Educ. (Ocean), GRC Complaint No. 2013-150 (Interim Order dated June 24, 2014).

¹ No legal representation listed on record.

² Represented by Lester Taylor, III, Esq. (Trenton, NJ). Previously represented by Kathleen Smallwood-Johnson, Esq. (Trenton, NJ).

2. The Custodian may have unlawfully denied access to responsive records. N.J.S.A. 47:1A-6. In order to reach a definitive determination as to the lawfulness of the Custodian's denial, he must provide a detailed account of his search beyond the submission of the Statement of Information. Additionally, the Custodian must definitively state whether he was able to locate A.A.'s school records.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On July 1, 2015, the Council distributed its Interim Order to all parties. On July 15, 2015, the Custodian responded to the Council's Interim Order. The Custodian affirmed that his office began relocating on July 1, 2015, and that he was away until July 6, 2015. Thus, the Custodian certified that he did not receive the Council's Order until July 8, 2015.

The Custodian certified that, after receiving the Complainant's OPRA request, he and staff conducted a diligent search for A.A.'s records to include test scores, registration material, a birth certificate, and student grades. The Custodian certified that he personally conducted a search of the central office registration room but was unable to locate records. Further, the Custodian certified that he reached out to Washington and Grant Schools but was unable to obtain records. The Custodian affirmed that the Trenton Public School District ("District") did produce two (2) years of grade reports and historical data. However, the Custodian certified that, after a diligent search, the District was unable to locate A.A.'s records from kindergarten to the second grade, when she was at Trenton Community Charter School.

Analysis

Compliance

At its June 30, 2015, meeting, the Council ordered the Custodian to provide the Council with a detailed account of his search after submitting a Statement of Information with the GRC. Additionally, the Council ordered the Custodian to certify to whether he located A.A.'s records.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 1, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 9, 2015. However, the Custodian subsequently certified that he did not receive the Order until July 8, 2015; therefore, the new deadline to respond was July 15, 2015.

On July 15, 2015, the fifth (5th) day after receipt of the Order, the Custodian responded to the Council's Order. Therein, the Custodian certified to his attempts to locate responsive records. Further, the Custodian affirmed that the District could not locate A.A.'s school record. Additionally, the Custodian simultaneously submitted his certified confirmation of compliance to the Executive Director.

Accordingly, the Custodian complied with the Council's June 30, 2015, Interim Order because he responded within the prescribed time frame, certifying to his search to locate A.A.'s school record and that the District was unable to locate same. Moreover, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

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)).

Here, the Custodian's failure to respond timely to the Complainant's OPRA request resulted in a “deemed” denial of said request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Moreover, the Custodian's failure to provide a date certain on which he would respond resulted in an insufficient response. N.J.S.A. 47:1A-5(i). However, the Custodian timely complied with the Council's June 30, 2015, Interim Order and certified that he was unable to locate A.A.'s school record. For this reason, he did not unlawfully deny access to same. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). 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 complied with the Council's June 30, 2015, Interim Order because he responded within the prescribed time frame by certifying both to his search to locate A.A.'s school record and that the District was unable to locate same. Moreover, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian's failure to respond timely to the Complainant's OPRA request resulted in a "deemed" denial of said request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Moreover, the Custodian's failure to provide a date certain on which he would respond resulted in an insufficient response. N.J.S.A. 47:1A-5(i). However, the Custodian timely complied with the Council's June 30, 2015, Interim Order and certified that he was unable to locate A.A.'s school record. For this reason, he did not unlawfully deny access to same. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). 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

Reviewed By: Joseph D. Glover
Executive Director

July 21, 2015



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
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KIM GUADAGNO
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CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

June 30, 2015 Government Records Council Meeting

Denyce Carroll
Complainant

Complaint No. 2014-69

v.

Trenton Public School District (Mercer)
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 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. 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. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007). The Custodian’s failure to provide a date certain on which he would respond also results in an insufficient response. N.J.S.A. 47:1A-5(i); Hardwick v. NJ Dep’t of Transportation, GRC Complaint No. 2007-164 (February 2008); Blay v. Lake Bd. of Educ. (Ocean), GRC Complaint No. 2013-150 (Interim Order dated June 24, 2014).
2. The Custodian may have unlawfully denied access to responsive records. N.J.S.A. 47:1A-6. In order to reach a definitive determination as to the lawfulness of the Custodian’s denial, he must provide a detailed account of his search beyond the submission of the Statement of Information. Additionally, the Custodian must definitively state whether he was able to locate A.A.’s school records.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of June, 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: July 1, 2015

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Denyce Carroll¹
Complainant**

GRC Complaint No. 2014-69

v.

**Trenton Public School District (Mercer)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of A.A.'s (the Complainant's daughter) school record, filed in May 2013.

Custodian of Record: Wilfredo Ortiz

Request Received by Custodian: October 21, 2013

Response Made by Custodian: N/A

GRC Complaint Received: February 6, 2014

Background³

Request and Response:

On October 21, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. Ms. Mary Bailey, Confidential Secretary to the Trenton Board of Education ("BOE"), forwarded the OPRA request to the Custodian, who then forwarded same to Erica P. Smith at the Transcript Office.

On October 22, 2013, Ms. Smith contacted the Complainant to obtain A.A.'s date of birth in order to locate responsive records. After obtaining A.A.'s date of birth, Ms. Smith advised the Complainant that she only had access to alumni records and that the Complainant should contact Paul Robeson Charter School for the responsive records. The Complainant responded via e-mail, advising that she transferred A.A. out of the Trenton Public School District ("District") in May 2013 and that A.A.'s records could not be located. The Complainant noted that she is specifically seeking A.A.'s District records. Ms. Smith responded via e-mail, advising the Complainant that she should contact either Grant or Washington Schools for A.A.'s records.

¹ No legal representation listed on record.

² Represented by Kathleen Smallwood-Johnson, Esq. (Trenton, 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.

On the same day, the Complainant again responded to Ms. Smith, stating that she already contacted staff at Grant School, who directed her to Washington School. The Complainant stated that Washington School advised her that they never received A.A.'s records from Trenton Community Charter School ("TCCS") when it closed.

Denial of Access Complaint:

On February 6, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that she attempted to obtain A.A.'s records several times starting in May 2013 through the District's "parental concern" process. The Complainant averred that contacts at both Grant and Washington Schools stated that they did not possess A.A.'s school records. The Complainant stated that she subsequently filed an OPRA request for the records and was unable to obtain same.

Statement of Information:

On March 14, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on October 21, 2013. The Custodian certified that he and Complainant engaged in a conversation about the location of A.A.'s records. The Custodian affirmed that his search also included contacting the "Systems, Data Management and Accountability Department," which was only able to provide grade reports for the two (2) years she was enrolled in the District. The Custodian certified that the grade reports were obtained from PowerSchool, to which the Complainant has access. Further, the Custodian certified that Ms. Smith provided the Complainant with student historical data. The Custodian averred that he verbally advised the Complainant that he would continue his search.

The Custodian certified that A.A. previously attended TCCS and was later transferred to a school within the District when TCCS closed. The Custodian noted that evidence shows that A.A.'s records were received at the District's Central Administration Building in the summer of 2011. The Custodian affirmed that the school to which A.A. was assigned closed at the conclusion of the 2011-2012 school year; however, A.A. attended a different District school during that time. The Custodian noted that records were not located at A.A.'s actual attending school. The Custodian asserted that he took all reasonable steps to locate A.A.'s school records and is continuing his search.

Additional Submissions:

On November 17, 2014, the GRC e-mailed the Complainant to note that the Denial of Access Complaint's Detail Summary appeared to be incomplete. The GRC thus asked the Complainant to review her copy and provide any missing pages.⁴

On April 1, 2015, the GRC requested additional information from the Complainant. Specifically, the GRC again asked that the Complainant provide any missing pages from the Denial of Access Complaint's Detail Summary. Additionally, the GRC requested that the

⁴ As of April 15, 2015, the Complainant did not respond to this e-mail.

Complainant respond to the following questions about the PowerSchool records attached to the SOI:

1. Please advise whether the “PowerSchool” records attached to the SOI were responsive to your request.
2. Please advise whether you received any additional correspondence from the Custodian following submission of the SOI.

The GRC requested that the Complainant provide her response by April 7, 2015. As of April 15, 2015, the Complainant did not respond.

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).⁵ 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).

Additionally, in DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007), the custodian verbally advised the complainant that she would not be able to provide the requested records within the seven (7) business day time frame. The Council held that:

While the Custodian may have verbally contacted the Complainant within the statutorily mandated seven (7) business day time frame required to respond to OPRA requests, she failed to do so in writing, therefore creating a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i and the Council’s decision in Paff v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006).

Id. at 10.

Moreover, OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further requires that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” Id. In Hardwick v. NJ Dep’t of Transportation, GRC

⁵ 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.

Complaint No. 2007-164 (February 2008), the custodian responded by requesting an extension of time to address the request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian's request for an extension of time was inadequate under OPRA, pursuant to N.J.S.A. 47:1A-5(i). *See also* Blay v. Lake Bd. of Educ. (Ocean), GRC Complaint No. 2013-150 (Interim Order dated June 24, 2014).

The Complainant filed this complaint, asserting that she did not receive the responsive records from the District. The evidence of record herein supports that Ms. Smith had extensive interactions with the Complainant as to the possible whereabouts of A.A.'s records. Further, the Custodian admitted in the SOI that he communicated with the Complainant and verbally advised her on an unidentified date that he would continue his search. However, there is no evidence in the record supporting that the Custodian formally responded in writing to the Complainant.

Ultimately, the evidence of record indicates that the Custodian failed to respond in writing to the Complainant and further failed to provide a date certain on which he would respond. While the GRC acknowledges the Custodian's efforts to locate responsive records, these efforts do not alleviate him of the legal obligation to respond in writing within a defined time frame. The fact that the Custodian has yet to respond formally to the Complainant as to the existence of responsive records (after a year and a half) further stresses the need for custodians to operate within a defined time frame.

Therefore, the Custodian clearly did not bear his burden of proof that he 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. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley, GRC 2007-11; Deluca, GRC 2006-126. The Custodian's failure to provide a date certain on which he would respond also results in an insufficient response. N.J.S.A. 47:1A-5(i); Hardwick, GRC 2007-164; Blay, GRC 2013-150.

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 facts of the matter currently before the GRC present a novel issue. Specifically, the Complainant filed this complaint after not receiving a response from the Custodian as to the existence of responsive records. Further, the evidence of record does not indicate whether A.A.'s school records actually exist. Rather, the Custodian certified in the SOI that he would continue searching for the records; the evidence of record does not support that the Custodian eventually notified the Complainant of the results of his search. Based on the available facts, it is unclear whether any responsive records were ever located and ultimately provided to the Complainant or whether the Custodian eventually responded to advise the Complainant that he was unable to

locate same. In the absence of any additional evidence, the GRC is unable to determine whether the Custodian unlawfully denied access to A.A.'s school records.⁶

Therefore, the Custodian may have unlawfully denied access to responsive records. N.J.S.A. 47:1A-6. In order to reach a definitive determination as to the lawfulness of the Custodian's denial, he must provide a detailed account of his search beyond the submission of the SOI. Additionally, the Custodian must definitively state whether he was able to locate A.A.'s school records.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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. 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. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007). The Custodian's failure to provide a date certain on which he would respond also results in an insufficient response. N.J.S.A. 47:1A-5(i); Hardwick v. NJ Dep't of Transportation, GRC Complaint No. 2007-164 (February 2008); Blay v. Lake Bd. of Educ. (Ocean), GRC Complaint No. 2013-150 (Interim Order dated June 24, 2014).
2. The Custodian may have unlawfully denied access to responsive records. N.J.S.A. 47:1A-6. In order to reach a definitive determination as to the lawfulness of the Custodian's denial, he must provide a detailed account of his search beyond the submission of the Statement of Information. Additionally, the Custodian must definitively state whether he was able to locate A.A.'s school records.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

⁶ The GRC notes that the Custodian has not advanced any exemptions as a reason for his denial of access throughout the pendency of this complaint.

redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Executive Director.⁸

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

April 21, 2015⁹

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁹ This complaint was prepared for adjudication at the Council's April 28, and May 26, 2015 meetings, but could not be adjudicated due to lack of quorum.