



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

February 24, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-77

v.

Woodbine Board of Education (Cape May)
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council (“Council”) considered the February 17, 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 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 dated October 31, 2007). However, it is unnecessary for the Council to order production of responsive records to Item No. 5, as the evidence demonstrates that the Custodian disclosed the records on February 11, 2014.
2. Notwithstanding the Custodian’s “deemed denial,” he has borne his burden of proof that he did not unlawfully deny access to Item No. 1 of the Complainant’s January 28, 2014 OPRA request seeking Request For Proposals for the years 2011, 2013, and 2014 because he certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Notwithstanding the Custodian’s “deemed denial” and subsequent response, Item Nos. 2 and 6 of the Complainant’s January 28, 2014 OPRA request seeking minutes “in which the school board voted to approve Board funds,” and minutes which there was discussion of litigation between the Complainant and Woodbine Elementary School are invalid requests under OPRA. Both requests fail to identify the specific dates of the minutes sought and would require the Custodian to conduct research in



order to locate the responsive records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

4. Notwithstanding the Custodian's "deemed denial" and subsequent response, Item Nos. 3 and 4 of the Complainant's January 28, 2014 OPRA request seeking the e-mail addresses of Woodbine Board of Education members and staff are requests for information and are therefore invalid under MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). *See also* LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), and Harris v. New Jersey Dep't of Corr., GRC Complaint No. 2011-66 (August 2012).
5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian provided the Complainant with all responsive records, even when such disclosure was not required as some of the requested items were requests for information or required the Custodian to conduct research. 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 an 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 24th Day of February, 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 26, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 24, 2015 Council Meeting**

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

GRC Complaint No. 2014-77

v.

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

Records Relevant to Complaint: PDF formatted copies of:³

1. [Request For Proposal] for Board Solicitor for years 2011, 2012, 2013, and (2014 if applicable).
2. Meeting minutes whether open [or] closed session in which the school board voted to approve Board funds to defend Mrs. Towns against criminal complaint filed by Board Member Donald Jenkins.
3. All email addresses used by the Board Members of 2013 and 2014 to conduct BOE Business.
4. I also request private email addresses used by Linda Anderson-Towns, Alan Parmelee and Anthony Devico which were used to conduct school business.
5. Copy of past three Ford Scott Audits.
6. Any and all [Woodbine Board of Education] closed session meeting minutes which Harry Scheeler OBO S.S. Vs. Woodbine Elementary School was discussed. Please also make sure the roll call of all in attendance is included, including anyone who may have recused themselves.

Custodian of Record: Alan Parmelee

Request Received by Custodian: January 28, 2014

Response Made by Custodian: February 11, 2014

GRC Complaint Received: February 12, 2014

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

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

³ The Complainant requested additional records within his OPRA request, but they are not at issue in this matter.

Background⁴

Request and Response:

On January 28, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 11, 2014, ten (10) business days later, the Custodian responded in writing, via e-mail, to each item as follows:

1. *[Request for Proposal] for Board Solicitor for years 2011, 2012, 2013, and (2014 if applicable).*

Already provided. Additional copy is attached.

2. *All Meeting minutes whether open [or] closed session in which the school board voted to approve Board funds to defend Mrs. Towns against criminal complaint filed by Board Member Donald Jenkins.*

Minutes

3. *All email addresses used by the Board Members of 2013 and 2014 to conduct BOE Business.*

[E-mail addresses omitted]

4. *I also request private email addresses used by Linda Anderson-Towns, Alan Parmelee and Anthony Devico which were used to conduct school business.*

None of the above staff members have private e-mail addresses where school business is conducted.

5. *Copy of past three Ford Scott Audits.*

This request was already transmitted. Attached are additional copies.

6. *Any and all [Woodbine Board of Education] closed session meeting minutes which Harry Scheeler OBO S.S. Vs. Woodbine Elementary School was discussed. Please also make sure the roll call of all in attendance is included, including anyone who may have recused themselves.*

All Board minutes including executive session minutes for 2012-2013 were already transmitted. Attached are additional copies.

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.

That same day, the Complainant e-mailed the Custodian with questions regarding several of the Custodian's responses.

Denial of Access Complaint:

On February 12, 2014,⁵ the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian failed to respond within the statutorily mandated time period, despite responding to other OPRA requests the Complainant submitted simultaneously.

Statement of Information:

On March 31, 2014, the Custodian filed a Statement of Information ("SOF"). The Custodian certified that he responded to the Complainant's OPRA request on February 11, 2014, by either providing responsive documents or by stating that no responsive records exist for each item.

The Complainant e-mailed the Custodian that day with questions regarding several of the Custodian's responses. For request Item No. 6, the Complainant claimed that the Custodian's responsive records did comply with New Jersey's Open Public Meetings Act and asked which meetings discussed litigation between the Complainant and Woodbine Elementary School.

The Complainant next claimed that the audit reports he received in response to Item No. 5 were not the "Ford Scott Audits" he specifically requested. Additionally, the Complainant stated that the Custodian provided a Request For Proposal ("RFP") only for the year 2012, whereas he also requested RFPs for the years 2011, 2013, and 2014 (Item No. 1). The Complainant sought a response for the remaining years.

Lastly, the Complainant asked whether Woodbine Board of Education ("Woodbine BOE") members used private e-mail addresses to conduct business, in addition to staff specifically mentioned in Item No. 4.

On February 12, 2014, the Custodian responded to the Complainant, via e-mail. There, the Custodian provided the meeting dates wherein the Woodbine BOE discussed the litigation with the Complainant, and answered the Complainant's other inquiries.

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

⁵ To clarify, the Complainant signed his Denial of Access Complaint on February 10, 2014, prior to receiving the Custodian's February 11, 2014 response.

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 dated October 31, 2007).

The evidence of record demonstrates that the Custodian did not respond to the Complainant's request until the tenth (10th) business day after receipt. The evidence of record also fails to show that the Custodian requested an extension of time to respond to the Complainant's request.

Therefore, 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 pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC No. 2007-11. However, it is unnecessary for the Council to order production of responsive records to Item No. 5, as the evidence demonstrates that the Custodian disclosed the records on February 11, 2014.

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.

OPRA Request Item No. 1

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Custodian provided an RFP for the year 2012 in response to Item No. 1 on February 11, 2014.

On February 11, 2014, the Complainant inquired as to whether, in addition to 2012, RFPs for the years 2011, 2013, and 2014 existed. The Custodian responded via e-mail that same day, stating that because Woodbine BOE did not seek any proposals for above-mentioned years, no other RFP's exist. The Complainant did not respond further, and there is no evidence in the record to rebut the Custodian's reply.

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.

Notwithstanding the Custodian's "deemed denial," he has borne his burden of proof that he did not unlawfully deny access to Item No. 1 of the Complainant's January 28, 2014 OPRA request seeking RFPs for the years 2011, 2013, and 2014 because he certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; See Pusterhofer, GRC No. 2005-49.

Invalid Request

OPRA defines a "government record" as:

any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof[.]

N.J.S.A. 47:1A-1.1.

OPRA Request Item Nos. 2 & 6

In Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010), the complainant sought "approved meeting minutes regarding the Complainant's placement on Administrative Leave effective December 17, 2008." The Council determined that the complainant's request for "'personnel meeting minutes' and 'executive meeting minutes' would require the Custodian to search all . . . minutes in order to identify those records which related to 'the Complainant's employment . . . during the 2008-2009 school year which led to the nonrenewal of the Complainant's contract[.]' The Complainant's request for such records is therefore invalid under OPRA." Id. at 8. The Council reasoned that:

the Complainant's request for 'personnel meeting minutes [and] executive meeting minutes regarding the following topics: . . . during the 2008-2009 school year which led to the non-renewal of the Complainant's contract . . . placement on Administrative Leave effective December 17, 2008 . . . [t]he Complainant's reinstatement letter . . . [t]he Rice notice served to the Complainant on January 27, 2009 [and] [t]he Rice notice served to the Complainant on April 6, 2009,' would require the Custodian to manually search through all of the agency's files, analyze such files for records containing the information sought by the Complainant, identify the particular records, determine whether the records contained information that led to the non-renewal of the Complainant's contract and redact any contents of such records that may be exempt from disclosure before providing such record to the Complainant. As the Appellate Division held in MAG, supra, custodians are not required to conduct research in order to respond to a valid OPRA request.

Id. at 9.

In the current matter, the Complainant requested Woodbine BOE regular and executive session meeting minutes, which is a specific type of government record. However, said records do not specify the date or time frame of the minutes sought. Rather, the requests seek only those minutes at which there was discussion of the litigation between the Complainant and Woodbine Elementary School, and minutes at which the Woodbine BOE voted to approve funds to defend an individual against a criminal complaint filed by a Woodbine BOE member. Similar to the facts in Ray, Item Nos. 4 and 8 sought meeting minutes referring to topics that would require the Custodian to conduct research in order to locate the particular set of minutes that are responsive to the Complainant's request. Thus, these request items are invalid under OPRA.

Notwithstanding the Custodian's "deemed denial" and subsequent response, Item Nos. 2 and 6 of the Complainant's January 28, 2014 OPRA request seeking minutes "in which the school board voted to approve Board funds," and minutes which there was discussion of litigation between the Complainant and Woodbine Elementary School are invalid requests under OPRA. Both requests fail to identify the specific dates of the minutes sought and would require the Custodian to conduct research in order to locate the responsive records. MAG, 375 N.J. Super. 546, Ray, GRC No. 2009-185.

OPRA Request Item Nos. 3 & 4

Additionally, 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 Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). 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. at 549.

In LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant sought, among other items, the number of library cardholders in the township. The Council found that such a request was for information and not for a specifically identifiable government record. Id. See also Harris v. New Jersey Dep't of Corr., GRC Complaint No. 2011-66 (August 2012) (requests for employees' home addresses are invalid requests for information).

In Item Nos. 5 and 6, the Complainant sought e-mail addresses of Woodbine BOE members and staff. Similar to LaMantia, these requests are requests for information and not for specifically identifiable records, and thus are invalid requests.⁷ GRC No. 2008-140.

⁷ Additionally, the Complainant's e-mail to the Custodian dated February 11, 2014, wherein the Complainant asked whether Woodbine BOE members used private e-mail addresses to conduct business, and asking which meeting dates the Woodbine BOE discussed certain litigation, is not a clarification of the OPRA request because said e-mail asks questions and does not request an actual record.

Notwithstanding the Custodian's "deemed denial" and subsequent response, Item Nos. 3 and 4 of the Complainant's January 28, 2014 OPRA request seeking e-mail addresses of Woodbine BOE members and staff are requests for information, and therefore invalid under MAG, 375 N.J. Super. 546. *See also* LaMantia, GRC No, 2008-140, and Harris, GRC No. 2011-66.

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)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian provided the Complainant with all responsive records, even when such disclosure was not required as some of the requested items were requests for information or required the Custodian to conduct research. 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 an 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 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 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 dated October 31, 2007). However, it is unnecessary for the Council to order production of responsive records to Item No. 5, as the evidence demonstrates that the Custodian disclosed the records on February 11, 2014.
2. Notwithstanding the Custodian's "deemed denial," he has borne his burden of proof that he did not unlawfully deny access to Item No. 1 of the Complainant's January 28, 2014 OPRA request seeking Request For Proposals for the years 2011, 2013, and 2014 because he certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
3. Notwithstanding the Custodian's "deemed denial" and subsequent response, Item Nos. 2 and 6 of the Complainant's January 28, 2014 OPRA request seeking minutes "in which the school board voted to approve Board funds," and minutes which there was discussion of litigation between the Complainant and Woodbine Elementary School are invalid requests under OPRA. Both requests fail to identify the specific dates of the minutes sought and would require the Custodian to conduct research in order to locate the responsive records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. Notwithstanding the Custodian's "deemed denial" and subsequent response, Item Nos. 3 and 4 of the Complainant's January 28, 2014 OPRA request seeking the e-mail addresses of Woodbine Board of Education members and staff are requests for information and are therefore invalid under MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). *See also LaMantia v. Jamesburg Public Library (Middlesex)*, GRC Complaint No. 2008-140 (February 2009), and Harris v. New Jersey Dep't of Corr., GRC Complaint No. 2011-66 (August 2012).
5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian provided the Complainant with all responsive records, even when such disclosure was not required as some of the requested items were requests for information or required the Custodian to conduct research. 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado
Staff Attorney

Approved By: Dawn R. SanFilippo
Deputy Executive Director

February 17, 2015