



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 30, 2014 Government Records Council Meeting

Michael Inzelbuch, Esq.
Complainant

Complaint No. 2014-79

v.

Lakewood Board of Education (Ocean)
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 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 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 October 31, 2007). However, the GRC declines to order disclosure of records because the Custodian (via Ms. Piasentini) responded to the Complainant on February 14, 2014 providing a responsive e-mail and verifying that no other records exist.
2. Although, the Custodian failed to timely respond to the Complainant’s OPRA request, he did so (via Ms. Piasentini) on February 14, 2014 providing access to a responsive e-mail and advising that no other e-mails existed. 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 September, 2014

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: October 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Michael I. Inzelbuch, Esq.¹
Complainant**

GRC Complaint No. 2014-79

v.

**Lakewood Board of Education (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via pickup of:

1. Any and all e-mails authored by Helen Tobia or Elchanan Freund to Child Study Team (“CST”) members and staff regarding utilizing e-mail about classified students from June 2013, to September 2013.
2. Any and all responses to the e-mails and any and all “documents as to same.”

Custodian of Record: Thomas A. D’Ambola

Request Received by Custodian: January 21, 2014

Response Made by Custodian: February 14, 2014

GRC Complaint Received: February 14, 2014

Background³

Request:

On January 19, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On February 14, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant alleged that during Court proceedings, CST members testified that they were instructed to deny him (as well as others) access to student records. The Complainant asserted that Ms. Tobia and Mr. Freund supposedly authored e-mails on this subject. Thus, the Complainant submitted an OPRA request for those e-mails on January 19, 2014. The Complainant stated that the Custodian failed to respond to his request.

¹ legal representation listed on record.

² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, 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.

Response:

On February 14, 2014, the eighteenth (18th) business day after receipt of the request, Ms. Diane Piasentini responded in writing on behalf of the Custodian providing access to one (1) e-mail. Ms. Piasentini apologized for the delay noting that she wanted to verify that only one (1) e-mail existed.

Statement of Information:

On April 4, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 21, 2014. The Custodian certified that upon receipt of the request, he forwarded same to the Supervisor of the Lakewood Board of Education (“Board”) Department of Pupil, Personnel Services and the Supervisor of the CST. The Custodian certified that his assistant responded on his behalf on February 14, 2014, providing one (1) responsive e-mail and advising that the Board’s response was delayed in order to verify whether any other records existed.

The Custodian certified that it took longer than anticipated to verify that no other responsive e-mails existed because same were not titled or categorized in a manner conducive to an efficient search. Further, the Custodian asserted that because of the search difficulties and multiple OPRA requests filed by the Complainant, the Board needed additional time to respond. However, the Custodian noted that the Board inadvertently failed to notify the Complainant of the need for an extension of time to verify that no further records existed.

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).

In this matter, the Custodian certified in the SOI that he received the Complainant’s OPRA request on January 21, 2014 and responded (via Ms. Piasentini) on February 14, 2014, the eighteenth (18th) business day after receipt of the request. Further, the Custodian noted that additional time was needed to verify the nonexistence of additional records, but that the

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.

Custodian inadvertently failed to notify the Complainant of this fact. Thus, the evidence supports that the Custodian failed to timely respond to the Complainant's OPRA 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 2007-11. However, the GRC declines to order disclosure of records because the Custodian (via Ms. Piasentini) responded to the Complainant on February 14, 2014 providing a responsive e-mail and verifying that no other records exist.

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 failed to timely respond to the Complainant's OPRA request, he did so (via Ms. Piasentini) on February 14, 2014 providing access to a responsive e-mail and advising that no other e-mails existed. 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 does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear 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 October 31, 2007). However, the GRC declines to order disclosure of records because the Custodian (via Ms. Piasentini) responded to the Complainant on February 14, 2014 providing a responsive e-mail and verifying that no other records exist.

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

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

September 23, 2014