



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

April 26, 2016 Government Records Council Meeting

Michael I. Inzelbuch
Complainant

v.

NJ State Police
Custodian of Record

Complaint No. 2016-35

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt 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 for the immediate access records. 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 immediately, results in a “deemed” denial of the Complainant’s OPRA request for the contracts described in request item number 4, pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012) and Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. With respect to the records responsive to request items numbered 1 through 3 and 5 through 21, because the Complainant verified the complaint before the statutory time period for the Custodian to respond had expired, the Custodian had not at that time denied the Complainant access to a government record. Therefore the complaint, as pertaining to said request items, is materially defective and must be dismissed. N.J.S.A. 47:1A-5(i). See also Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007- 226 (April 2009).
3. Although the Custodian failed to respond to the Complainant’s request for immediate access records immediately, which resulted in a “deemed” denial of request item number 4, he certified that he did disclose said records to the Complainant on February 1, 2016. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 26th Day of April, 2016

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: May 2, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Michael I. Inzelbuch¹
Complainant**

GRC Complaint No. 2016-35

v.

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

Records Relevant to Complaint: Copies via mail of the items set forth in Exhibit A.

Custodian of Record: Thaddeus Thompson
Request Received by Custodian: January 19, 2016
Response Made by Custodian: January 28, 2016
GRC Complaint Received: January 28, 2016

Background³

Request and Response:

On January 15, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 28, 2016, the seventh (7^h) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that due to the holiday on January 18, 2016, and “two weather related days” on January 25 and 26, 2016, the requested information should be e-mailed to the Complainant on February 1, 2016.

Denial of Access Complaint:

On January 28, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”).⁴ The Complainant asserts that he sent an OPRA request for the information contained in Exhibit A to the Custodian on January 15, 2016, via fax and e-mail, and thereafter sent a reminder to the Custodian on January 27, 2016. The Complainant states that he received no response from the Custodian.

¹ No 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.

⁴ The Complainant verified the complaint on January 27, 2016.

Statement of Information:

On February 25, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 19, 2016, and that he responded in writing on January 28, 2016. The Custodian certifies that he disclosed the records responsive to request item number 4, consisting of contracts, on February 1, 2016. The Custodian further certifies that he responded to the remaining request items on several dates ranging from February 1, 2016, to February 18, 2016.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).

Likewise, barring extenuating circumstances, a custodian’s failure to respond immediately in writing to a complainant’s OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁶ See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records.

Here, the Complainant’s request item number 4 was for contracts. Contracts are immediate access records pursuant to N.J.S.A. 47:1A-5(e). As such, the Custodian was required to respond immediately in writing to the Complainant’s request for the contracts, either granting access, denying access, seeking clarification, or requesting an extension of time; however, the Custodian failed to do so until the seventh (7^h) business day following receipt of the request. Further, the Custodian failed to provide an explanation that would reasonably justify a delay in immediate access to the requested records.

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.

⁶ OPRA lists immediate access records as “budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request for the immediate access records. 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 immediately, results in a "deemed" denial of the Complainant's OPRA request for the contracts described in request item number 4 pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98. See also Harris, GRC 2011-65 and Herron, GRC 2006-178.

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. "Unless a shorter time period is otherwise provided . . . a custodian [shall grant or deny access to requested records] as soon as possible, but not later than seven business days after receiving the request . . ." N.J.S.A. 47:1A-5(i). 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.

As one means of challenging a denial of access to a government record, OPRA provides for the filing of a complaint with the GRC. N.J.S.A. 47:1A-6. In order for such a complaint to be ripe, a complainant must have been denied access to a government record.

In Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007- 226 (April 2009), the complainant forwarded a complaint to the GRC, asserting that he had not received a response from the custodian and that seven (7) business days would have passed by the time the GRC received the Denial of Access Complaint. The custodian argued that the complainant filed the complaint prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5(i). The Council held that:

Because the Complainant's cause of action was not ripe at the time he verified his Denial of Access Complaint; to wit, the Custodian had not at that time denied the Complainant access to a government record, the complaint is materially defective and therefore should be dismissed. Id.

The records responsive to request items numbered 1 through 3 and 5 through 21 are not immediate access records. As such, the Custodian had until January 28, 2016, to respond pursuant to N.J.S.A. 47:1A-5(i). The Complainant, however, verified his complaint on January 27, 2016. Therefore, the complainant verified the complaint prior to expiration of the statutorily mandated time provided for the Custodian to grant or deny access.

Accordingly, with respect to the records responsive to request items numbered 1 through 3 and 5 through 21, because the Complainant verified the complaint before the statutory time period for the Custodian to respond had expired, the Custodian had not at that time denied the Complainant access to a government record. Therefore the complaint, as pertaining to said

request items, is materially defective and must be dismissed. N.J.S.A. 47:1A-5(i). *See also Sallie*, GRC 2007- 226.

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 (Berg); 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, although the Custodian failed to respond to the Complainant’s request for immediate access records immediately, which resulted in a “deemed” denial of request item number 4, he certified that he did disclose said records to the Complainant on February 1, 2016. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 for the immediate access records. 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 immediately, results in a “deemed” denial of the Complainant’s OPRA request for the contracts described in request item number 4, pursuant to

N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012) and Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).

2. With respect to the records responsive to request items numbered 1 through 3 and 5 through 21, because the Complainant verified the complaint before the statutory time period for the Custodian to respond had expired, the Custodian had not at that time denied the Complainant access to a government record. Therefore the complaint, as pertaining to said request items, is materially defective and must be dismissed. N.J.S.A. 47:1A-5(i). See also Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007- 226 (April 2009).
3. Although the Custodian failed to respond to the Complainant's request for immediate access records immediately, which resulted in a "deemed" denial of request item number 4, he certified that he did disclose said records to the Complainant on February 1, 2016. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: John E. Stewart

March 22, 2016⁷

⁷ This complaint was prepared for adjudication at the Council's March 29, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum.

EXHIBIT A

1. Any and all DRTRS Reports for the years 2012-13 thru current .
2. Any and all documentation submitted by the Transportation Department and/or any and all consultants to the Superintendent and/or the State Monitor(s) as to the calculation of the number of courtesy bussed students for the years 2012 -13 to current
3. Same as # 2 but as to hazardous routes students
4. Any and all contracts from April 2012 to current between the Board and A. Gus Kakavas / Gus Kakavas Cosulting, LLC ; B. Monitor Michael Azzara ; C. monitor David Shafter ; D. Monitor Sinatra
5. Any and all payments made to the 4 (four) Individuals/ entities since April 2012 to current
6. Any and all emails between Monitor Azzara and A. Moshe Welsberg --and (separately) -- B. Rabbi Balsam since April 2012 to current
7. Any and all emails between Monitor Azzara since April 2012 to current and Gus Kakavas
8. Any and all between State Monitor Shafter and Gus Kakavas since Monitor Shafter began in Lakewood
9. The current Hazardous Route Policy of the District
10. Any and all minutes an notes from April 2012 to current of the Board's Transportation Committee
11. The current members of the Board-Transportation Committee
12. The members of the Board's Transportation Committee since April 2012 to current
13. Any and all documents relied upon in the presentation by Monitor Shafter this week to the public
14. Any and all documents relied upon in the presentation entitled "Lakewood School District --Non -- Mandated Busing -- Special Election --January 26,2016 "
15. Any and all monies received from the State as to courtesy bussing and /or hazardous bussing for the years 2012 -13 to current
16. Same as #15 but the amounts requested (not necessarily received)
17. Any and all correspondences received from or sent to Attorney David J. Butler, Esq by State Monitor Azzara
18. Any and all Transportation Handbooks for the current school year
19. The District's current Policy (ies) as to Hazardous Routes , Courtesy Bussing, Transportation of Students
20. Any and all emails and/or correspondences exchanged between the Superintendent and Township Committee/Mayor as to transportation since January 2015 to current
21. Same as # 20 but as to State Monitor(s) and the Township Committee and /or Mayor