



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

June 28, 2016 Government Records Council Meeting

David Herron
Complainant

Complaint Nos. 2016-76, 2016-77 and 2016-78

v.

Montclair Public Schools (Essex)
Custodian of Record

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 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’s response was insufficient because he failed to respond in writing to each request item individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian’s failure to respond in writing to the Complainant’s OPRA requests, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA requests 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) 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).
3. Notwithstanding the Custodian’s “deemed” denial, the Council declines to order disclosure of the requested records because the Custodian certified to the GRC on April 4, 2016, that the Complainant was provided with all of the records responsive to his requests on March 18, 2016 and March 21, 2016. N.J.S.A. 47:1A-6.
4. Although the Custodian failed to respond to each request item individually and to notify the complainant immediately as to the status of immediate access records, he did disclose the records responsive to the Complainant’s requests. 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 28th Day of June, 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: June 30, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2016, 2016 Council Meeting**

**David Herron¹
Complainant**

**GRC Complaint Nos. 2016-76,
2016-77, and 2016-78²**

v.

**Montclair Public Schools (Essex)³
Custodial Agency**

Records Relevant to Complaint:

Request dated February 19, 2016, which formed the basis of GRC Complaint No. 2016-76

Copies of all bills and vouchers for:

1. Kroll Cyber Security from September 1, 2012, through January 30, 2016.
2. Kroll Advisory Solutions from September 1, 2012, through January 30, 2016.

Request dated February 19, 2016, which formed the basis of GRC Complaint No. 2316-77

Copies of all bills and vouchers for Marinus Partners from September 1, 2012, through June 30, 2015.

Request dated February 19, 2016, which formed the basis of GRC Complaint No. 2016-78

Copies of all bills and/or vouchers for:

1. Mark Tabakin from September 1, 2012, through December 31, 2015.
2. Weiner/Lesniak, LLP from September 1, 2012, through December 31, 2015.
3. Mark Tabakin for the assessment investigation from November 1, 2013, to February 19, 2016.

Custodian of Record: Brian Fleischer

Requests Received by Custodian: February 19, 2016

Response Made by Custodian: February 25, 2016

GRC Complaints Received: March 4, 2014

¹ No legal representation listed on record.

² The GRC has consolidated the complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Isabel Machado, Esq., of Machado Law Group (Clark, NJ).

Background⁴

Requests and Response:

On February 19, 2016, the Complainant submitted three (3) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On February 25, 2016, the fourth (4th) business day following receipt of said requests, the Custodian responded in writing, informing the Complainant that the records relevant to the complaint were in storage and had to be retrieved and reviewed. The Custodian requested an extension of time until March 19, 2016.

Denial of Access Complaints:

On March 4, 2014, the Complainant filed three (3) Denial of Access Complaints with the Government Records Council (“GRC”). In each complaint, the Complainant states that he submitted his request for immediate access records on February 19, 2016. The Complainant asserts that the Custodian denied him immediate access to the records and instead requested an extension of time until March 19, 2016.

Statements of Information:

On April 4, 2016, the Custodian filed one (1) Statement of Information (“SOI”) for each of the three (3) complaints. The Custodian certified that he received the Complainant’s OPRA requests on February 19, 2016, and responded in writing on February 25, 2016, seeking an extension of time until March 19, 2016.⁵

The Custodian argues that although the Complainant believes that his requests should have been answered immediately, to do so would have been impossible due to the voluminous nature of the records responsive to the requests. The Custodian argues that N.J.S.A. 47:1A-5(e) provides that “[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information” (Emphasis added by Custodian). The Custodian, citing O’Shea v. Twp. of West Milford (Passaic), GRC Complaint No. 2008-224 (November 2009), contends that “[t]he use of the word ‘ordinarily’ suggests that the legislature acknowledged that there would be certain circumstances in which budgets (as well as other access records) could not be available immediately.” The Custodian certifies that he notified the Complainant on the fourth day following his requests that the documents were in storage and needed to be reviewed. The Custodian therefore asserts that the extension of time was proper.

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.

⁵ The Custodian also disclosed records responsive to one of the items in the request that formed the basis of GRC Complaint No. 2016-78; however those records are not relevant to the complaint.

The Custodian certifies that he subsequently disclosed all of the records responsive to the requests which formed the basis of the complaints. The Custodian certifies that on March 18, 2016, he disclosed three (3) invoices which were the records responsive to the request which formed the basis of GRC Complaint No. 2016-76. The Custodian also certifies that on March 18, 2016, he disclosed three (3) vouchers, eight (8) purchase orders, and nine (9) invoices, which were the records responsive to the request that formed the basis of GRC Complaint No. 2016-77. The Custodian further certifies that on March 21, 2016, he disclosed ten (10) purchase orders, fifteen (15) vouchers, and three hundred five (305) invoices, which were the records responsive to the request that formed the basis of GRC Complaint No. 2016-78.

Analysis

Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)."

Here, the Custodian responded to the Complainant's three (3) separate requests by forwarding one generic letter which disclosed some records and requested an extension of time for the remainder. The letter neither addressed each request nor each individual request item.

Accordingly, the Custodian's response was insufficient because he failed to respond in writing to each request item individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

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).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 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

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.

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).⁷ 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, all of the Complainant’s requests sought bills and/or vouchers, which are immediate access records under N.J.S.A. 47:1A-5(e). The Custodian therefore had an obligation to notify the complainant immediately as to the status of such immediate access records. The evidence of record reveals, however, that although the Custodian received the requests on February 19, 2016, he did not notify the Complainant until February 25, 2016, that the records were in storage and he needed an extension of time until March 19, 2016.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA requests 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 and Harris, GRC 2011-65. See also 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. 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.

Here, although the Custodian failed to notify the complainant immediately as to the status of immediate access records, which resulted in a “deemed” denial, the evidence of record reveals that the Custodian subsequently disclosed all of the records responsive to the Complainant’s requests. The Custodian certified that on March 18, 2016, he disclosed the records responsive to the requests that formed the basis of GRC Complaint Nos. 2016-76 and 2016-77, and on March 21, 2016, he disclosed the records responsive to the request that formed the basis of GRC Complaint No. 2016-78.

Therefore, notwithstanding the Custodian’s “deemed” denial, the Council declines to order disclosure of the requested records because the Custodian certified to the GRC on April 4, 2016, that the Complainant was provided with all of the records responsive to his requests on March 18, 2016 and March 21, 2016. N.J.S.A. 47:1A-6.

⁷ 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).

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 each request item individually and to notify the complainant immediately as to the status of immediate access records, he did disclose the records responsive to the Complainant’s requests. 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’s response was insufficient because he failed to respond in writing to each request item individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian’s failure to respond in writing to the Complainant’s OPRA requests, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA requests 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) 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).

3. Notwithstanding the Custodian's "deemed" denial, the Council declines to order disclosure of the requested records because the Custodian certified to the GRC on April 4, 2016, that the Complainant was provided with all of the records responsive to his requests on March 18, 2016 and March 21, 2016. N.J.S.A. 47:1A-6.
4. Although the Custodian failed to respond to each request item individually and to notify the complainant immediately as to the status of immediate access records, he did disclose the records responsive to the Complainant's requests. 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

June 21, 2016