



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**

**February 21, 2017 Government Records Council Meeting**

William A. Goode, Jr.  
Complainant

Complaint No. 2017-20

v.

Little Ferry Board of Education (Bergen)  
Custodian of Record

At the February 21, 2017 public meeting, the Government Records Council (“Council”) considered the February 14, 2017 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 requested 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 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 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).
3. The Custodian did not unlawfully deny access because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian’s response was insufficient and he failed to respond within the statutorily-mandated period, which resulted in a “deemed” denial of the request, 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 21<sup>st</sup> Day of February, 2017

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 23, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 21, 2017 Council Meeting**

**William A. Goode, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-20**

v.

**Little Ferry Board of Education (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies via e-mail of:

1. Any billing by any attorneys representing the Little Ferry Board of Education from 2011 through 2014 regarding or on behalf of Board of Education Trustee Jody Pasqua.
2. Any billing on behalf of Board of Education Trustee Jody Pasqua by an attorney named Jennifer Roselle, Genova, Burns, Giantomasi & Webster LLC, 494 Broad Street, Newark, NJ 07102

**Custodian of Record:** Dennis R. Frohnapfel, Ed.D.

**Request Received by Custodian:** January 11, 2017

**Response Made by Custodian:** January 27, 2017, and January 31, 2017

**GRC Complaint Received:** January 27, 2017

**Background<sup>3</sup>**

**Request and Responses:**

On January 11, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 27, 2017, the eleventh (11<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that a search of the records listed neither Jennifer Roselle nor the firm of Genova, Burns, Giantomasi & Webster as vendors. On January 27, 2017, the Complainant e-mailed the Custodian to inform him that he did not respond to item No. 1 of the request. On January 31, 2017, the Custodian responded via e-mail to the Complainant, informing him that, “regarding billing from attorneys pertaining to Ms. Pasqua’s tenure on the Board. NO SUCH RECORDS EXIST!” (Emphasis in original).

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Marla Taus, Esq., of Winne, Banta, Basralian & Kahn, P.C. (Hackensack, NJ).

<sup>3</sup> 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.

### Denial of Access Complaint:

On January 27, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant alleges that he submitted the OPRA request to the Custodian on January 11, 2017, and that the Custodian did not respond to the request.

### Statement of Information:

On February 2, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 11, 2017, and responded in writing on January 27, 2017, and January 31, 2017. The Custodian certifies that no responsive records exist.<sup>4</sup>

### Additional Submissions:

On February 2, 2017, the GRC e-mailed the Complainant to inform him that the Custodian certified that no responsive records exist. The GRC asked the Complainant to forward any evidence refuting the Custodian’s certification to the GRC within five business days.<sup>5</sup>

### **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 request on January 27, 2017, by stating that a search of the records listed neither Jennifer Roselle nor the firm of Genova, Burns, Giantomasi & Webster as vendors. However, that communication was only responsive to item No. 2 of the request. The Custodian neither listed item no. 1 of the request nor responded to it. Indeed, the Custodian did not respond to request item no. 1 until January 31, 2017, after being prompted to do so by the Complainant.

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

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<sup>4</sup> The Custodian made this statement by attaching to his certification the January 27, 2017 and January 31, 2017 responses to the Complainant’s request and incorporating them by reference as Exhibits #1 and #2, respectively.

<sup>5</sup> The Complainant never replied to the GRC’s correspondence.

## 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).<sup>6</sup> 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).<sup>7</sup> 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 immediately notify the complainant as to the status of immediate access records.

Here, the Custodian certified that he received the Complainant's OPRA request on January 11, 2017. The Custodian further certified that he did not respond to the request until January 27, 2017, which was the eleventh (11<sup>th</sup>) business day following receipt of the request. Per N.J.S.A. 47:1A-5(e), bills are immediate access records; therefore the Custodian had an obligation to respond immediately in writing to the Complainant's OPRA request. The Custodian neither responded immediately to the request nor provided an explanation that would reasonably justify a delay in access to the requested records.

Therefore, 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 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.

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<sup>6</sup> 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.

<sup>7</sup> 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).

## **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.

In Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed, and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the records responsive to the Complainant’s request do not exist. The Complainant was provided with an opportunity to submit evidence to the GRC refuting the Custodian’s certification, but he failed to do so.

As such, the Custodian did not unlawfully deny access because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer*, GRC 2005-49.

## **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, although the Custodian's response was insufficient and he failed to respond within the statutorily-mandated period which resulted in a "deemed" denial of the request, 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 requested 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 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 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).
3. The Custodian did not unlawfully deny access because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian's response was insufficient and he failed to respond within the statutorily-mandated period, which resulted in a "deemed" denial of the request, 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

February 14, 2017