



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**September 24, 2019 Government Records Council Meeting**

Scott Madlinger  
Complainant

Complaint No. 2017-243

v.

Berkeley Township Board of Education (Ocean)  
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 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 Complainant’s e-mail represented a valid non-form OPRA request. Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009). Further, the Custodian improperly required the Complainant to complete the BOE’s official OPRA request form. See Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013). Thus, the Complainant’s OPRA request was appropriately filed and the Custodian should have responded to it as such. However, the GRC declines to order disclosure because the Custodian provided all records that existed to the Complainant via e-mail on January 15, 2018.
2. The Custodian improperly required the Complainant to complete the Berkeley Township Board of Education’s official OPRA request form. Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009); Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013). However, the Custodian ultimately provided all responsive records to the Complainant on January 15, 2018. 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 24<sup>th</sup> Day of September 2019

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: September 27, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 24, 2019 Council Meeting**

**Scott Madlinger<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-243**

**v.**

**Berkeley Township Board of Education (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. Copy of complaint in Kirk v. Berkeley Twp. Bd. of Educ., Docket No. OCN-L-568-17.
2. Any interrogatories or depositions conducted in Kirk.
3. Legal bills from Stephen Gertler, Esq. for his representation of the Berkeley Township Board of Education (“BOE”).

**Custodian of Record:** Laura Gingerelli

**Request Received by Custodian:** November 13, 2017

**Response Made by Custodian:** November 21, 2017

**GRC Complaint Received:** December 22, 2017

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

**Request and Response:**

On December 12, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.<sup>4</sup> On December 13, 2017, the Custodian responded asking the Complainant to complete and return the BOE’s official OPRA request form.

**Denial of Access Complaint:**

On December 22, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian required

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

<sup>2</sup> Represented by Patrick F. Carrigg, Esq., of Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, LLC. (Lawrenceville, 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.

<sup>4</sup> The Complainant originally submitted his OPRA request to the Township of Berkeley and was advised that they maintained no records. The Township subsequently directed the Complainant to file an OPRA request with the BOE.

him to complete the BOE's official OPRA request form, which was contrary to Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009). The Complainant asserted that he received no additional responses thereafter.

Supplemental Response:

On December 22, 2017, the Custodian e-mailed the GRC and Complainant noting that had the Complainant filled out the official OPRA request form, she would have provided the responsive records to him.

On January 15, 2018, the Custodian responded in writing to the Complainant stating that attached were records responsive to the subject OPRA request. The Custodian noted that no billings from Mr. Gertler's office existed.

Statement of Information:

On January 24, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on December 12, 2017. The Custodian certified that she responded in writing on December 13, 2017 requiring the Complainant to submit his request on the BOE's official OPRA request form. The Custodian certified that she subsequently disclosed copies of the original complaint (4 pages with minor redactions for personal information), a deposition (16 pages), and an interrogatory (18 pages) to the Complainant via e-mail on January 15, 2018.

The Custodian contended that she acted appropriately here because the Complainant failed to meet OPRA's pre-requisites in his non-form submission. N.J.S.A. 47:1A-5(f); Renna, 407 N.J. Super. 230. The Custodian argued that while OPRA does not generally require use of an agency's official form, a custodian may require one when the non-form request submitted was insufficient. Id. at 245-246. The Custodian argued that here, the Complainant did not include the medium requested, nor did he provide an address, fax number, or telephone number. The Custodian argued that the Complainant's use of the term "copy" suggested that he sought records in physical form, which would have to be mailed or faxed. The Custodian contended that she could not comply with the request due to a lack of the forgoing information. The Custodian noted that had the Complainant completed the official form, she would have promptly responded providing access to the requested records, which she ultimately did on January 15, 2018. The Custodian thus argued that her actions were appropriate and this complaint should be dismissed with prejudice.

The Custodian additionally argued that she responded on the tenth (10<sup>th</sup>) business day that she "was at work." The Custodian noted that the BOE had a half day on December 22, 2017. The Custodian further affirmed that the BOE was closed through January 7, 2018 due to an extended holiday break and weather emergency. The Custodian affirmed that she was on vacation from January 8, through 14, 2018 and received the instant complaint upon her return. The Custodian noted that she responded to the Complainant on January 15, 2018, which was a non-business day,<sup>5</sup> disclosing records in the only medium she could: electronically as .pdf files.

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<sup>5</sup> The BOE was closed on January 15, 2018 in observation of Martin Luther King, Jr. Day.

The Custodian further argued that to if she violated OPRA, same was not knowing and willful in nature. The Custodian contended that she required the Complainant to complete the BOE's form on good faith to obtain necessary contact information and the Complainant's desired medium. The Custodian further argued that not only did the Complainant not complete the form, but that a series of closings and vacations affected her response time. The Custodian further noted that she immediately disclosed the responsive records upon notification of the instant complaint. The Custodian thus argued that her actions did not rise to the level of a knowing and willful violation.

### Analysis

#### Valid OPRA Request

OPRA provides that:

The custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- 1) specific directions and procedures for requesting a record;
- 2) a statement as to whether prepayment of fees or a deposit is required;
- 3) the time period within which the public agency is required by [OPRA] to make the record available;
- 4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- 5) space for the custodian to list reasons if a request is denied in whole or in part;
- 6) space for the requestor to sign and date the form;
- 7) space for the custodian to sign and date the form if the request is fulfilled or denied.

[N.J.S.A. 47:1A-5(f).]

Furthermore, OPRA states that “a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” N.J.S.A. 47:1A-5(g).

In Renna, 407 N.J. Super. 230, the Appellate Division held that although requestors should continue to use public agencies' OPRA request forms when making requests, no custodian shall withhold such records if the written request, not presented on the official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form. Id.

In effect, this permits requestors to write their own correspondence seeking records from a custodian, as long as the request properly invokes OPRA.

The Council has previously adjudicated complaints in which it considered Renna. For instance, in Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013), the Council determined that the custodian improperly required the complainant to submit his requests on the official form. Id. at 5. The Council reasoned that:

The Complainant's April 21, 2012 request contains the following statement, "[p]lease accept this e-mail/fax as my request for government records in accordance with the Open Public Records Act (OPRA). . ." The original Custodian's response dated May 2, 2012, states, "[t]he email appears to be a request, under OPRA, for certain documents of this Fire District." The original Custodian's response makes it clear that he understood the Complainant's e-mail to be an OPRA request for records. The Complainant's May 11, 2012 request also contains the following statement, "[p]lease accept this as my request for government records in accordance with the Open Public Records Act (OPRA). . ." The original Custodian, in his response dated May 16, 2012, confirms receipt of the Complainant's request entitled "OPRA Request." Thus, the original Custodian's response makes it clear that he understood the Complainant's fax to be an OPRA request for records.

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Accordingly, the original Custodian improperly required the Complainant to complete an official OPRA request form pursuant to Renna, [407 N.J. Super. 230], because the Complainant's e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request. However, the Council declines to order disclosure of the requested records because the current Custodian granted access to the existing records and denied access to the remaining records, which do not exist, on June 13, 2012.

[Id. See also Wolosky v. Twp. of East Hanover (Morris), GRC Complaint No. 2010-205 (Interim Order dated October 25, 2011); Wolosky v. Twp. of East Hanover (Morris), GRC Complaint No. 2010-259 (February 2012).]

Here, the threshold issue is whether the Complainant's non-form submission could effectively be considered a valid OPRA request.<sup>6</sup> The Complainant submitted his non-form request via e-mail, stating that same was "made under OPRA . . ." The Complainant also included a statement that he had not been convicted of an indictable offense, which is particular to most official OPRA request forms. The Custodian, clearly identifying the request as one made under OPRA, responded by requiring the Complainant to complete the agency's form. In the SOI, the Custodian argued that she required the form because the Complainant failed to include address information and failed to identify a medium by which she could provide the records.

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<sup>6</sup> The GRC will not reach the timeliness issue due to the dispute over whether the original non-form request was valid under OPRA.

However, the GRC is persuaded that the Custodian improperly required the Complainant to complete the BOE's official OPRA request form. Such a finding is consistent with the court's holding in Renna, 407 N.J. Super. 230, as well as GRC case law stemming from same. Paff, GRC 2012-158. First, and like the OPRA request at issue in Paff, the Complainant's e-mail clearly cited to OPRA. Second, OPRA allows for anonymous requests, thus negating a requestor's obligation to provide any contact information. N.J.S.A. 47:1A-5(i). The Custodian could have been guided accordingly had the Complainant not provided any contact information; however, the OPRA request contained an e-mail address by which she could provide records. Third, the GRC is not persuaded by the Custodian's argument that the lack of a medium necessitated completion of the BOE's form. In fact, the BOE's form only includes the medium option of "Inspection" and "Copy[ies] of Records." Even if the Complainant were required to identify a desired medium under OPRA, which he was not, completing the form would not have cured the issue. Ultimately, the OPRA request plainly required the Custodian to locate and provide responsive records to the Complainant via e-mail, just as she did on January 15, 2018.

Thus, the Complainant's e-mail represented a valid non-form OPRA request. Renna, 407 N.J. Super. 230. Further, the Custodian improperly required the Complainant to complete the BOE's official OPRA request form. See Paff, 2012-158. Thus, the Complainant's OPRA request was appropriately filed and the Custodian should have responded to it as such. However, the GRC declines to order disclosure because the Custodian provided all records that existed to the Complainant via e-mail on January 15, 2018.

### **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, the Custodian improperly required the Complainant to complete the BOE's official OPRA request form. Renna, 407 N.J. Super. 230; Paff, GRC 2012-158. However, the Custodian ultimately provided all responsive records to the Complainant on January 15, 2018. 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Complainant's e-mail represented a valid non-form OPRA request. Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009). Further, the Custodian improperly required the Complainant to complete the BOE's official OPRA request form. See Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013). Thus, the Complainant's OPRA request was appropriately filed and the Custodian should have responded to it as such. However, the GRC declines to order disclosure because the Custodian provided all records that existed to the Complainant via e-mail on January 15, 2018.
2. The Custodian improperly required the Complainant to complete the Berkeley Township Board of Education's official OPRA request form. Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009); Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013). However, the Custodian ultimately provided all responsive records to the Complainant on January 15, 2018. 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.

Prepared By: Frank F. Caruso  
Executive Director

September 17, 2019