



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

October 31, 2017 Government Records Council Meeting

Judy DeHaven
Complainant

Complaint No. 2017-81

v.

Red Bank Charter School (Monmouth)
Custodian of Record

At the October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 24, 2017 Supplemental 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 failed to comply fully with the Council’s September’s 28, 2017 Interim Order. The Custodian provided responsive reports to the Complainant on August 3, and 9, 2017 respectively. Further, the Custodian certified that no record from 2007-2008 existed and that he provided certified confirmation of compliance to the Executive Director. However, the Custodian did not respond to the Order until the seventh (7th) business day after receipt of it.
2. The Custodian did not timely respond to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to those responsive records that existed. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with the Council’s September 28, 2017 Interim Order because he did not respond until the seventh (7th) business day. Finally, it should be noted that the Custodian violated the GRC’s regulations by failing to submit a Statement of Information, although he was given two (2) opportunities to do so. N.J.A.C. 5:105-2.4(a). However, the Custodian ultimately provided all records that existed on August 3, and August 9, 2017 respectively. Further, the Custodian did not unlawfully deny access to a 2007-2008 record because none 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. However, the Custodian’s actions appear negligent and heedless because he is vested with the legal responsibility of granting and denying access in accordance with the law.



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 31st Day of October, 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: November 2, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 31, 2017 Council Meeting**

**Judy DeHaven¹
Complainant**

GRC Complaint No. 2017-81

v.

**Red Bank Charter School (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of all annual submissions made by Red Bank Charter School (“RBCS”) to the Red Bank Public Schools (“RBS”) superintendent, as required by Section 2 of a Consent Order signed on March 20, 2007.

Custodian of Record: David Block

Request Received by Custodian: March 9, 2017

Response Made by Custodian: March 24, 2017

GRC Complaint Received: April 17, 2017

Background

September 26, 2017 Council Meeting:

At its September 26, 2017 public meeting, the Council considered the September 19, 2017 Supplemental 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, found that:

1. The Custodian has failed to establish in his request for reconsideration of the Council’s July 25, 2017 Interim Order that either: 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian failed to establish that the complaint should be reconsidered based on mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. . Specifically, the Custodian’s failure to respond to the OPRA request or any of the GRC’s communications does not constitute a mistake made by the Council. Thus, the Custodian’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue

¹ No legal representation listed on record.

² Represented by Thomas O. Johnston, Esq. of Johnston Law Firm, LLC (Montclair, NJ).

To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. The Council's July 27, 2017 Interim Order requiring disclosure remains active. However, the Custodian (through Counsel) disclosed several years of responsive records during the pendency of request for reconsideration. For that reason, the GRC will defer the compliance analysis, pending the Custodian's complete disclosure of the responsive 2007-2008 school year annual submission or his legal certification that no responsive records exist.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On September 28, 2017, the Council distributed its Interim Order to all parties.

On October 10, 2017, the Custodian responded to the Council's Interim Order. Through Counsel, the Custodian certified that he provided to the Complainant responsive records from the 2008-2009 through 2014-2015 school years (with redactions) on August 3, and August 9, 2017. The Custodian further affirmed that, following a diligent search, he was unable to locate a record for the 2007-2008 school year; to wit, no records exist.

Analysis

Compliance

At its July 25, 2017 meeting, the Council ordered the Custodian to disclose the responsive records to the Complainant and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 27, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 3, 2017.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On August 3, 2017, the Custodian submitted a request for reconsideration, thus effectively staying the compliance time frame until the Council could address the request. The Custodian also stated that he would disclose responsive reports to the Complainant prior to August 10, 2017. Through Counsel, the Custodian provided the Complainant responsive reports from the 2008-2009 through 2014-2015 school years (with redactions) on August 3, and August 9, 2017. However, the Custodian did not provide certified confirmation of compliance regarding the disclosure or existence of a 2007-2008 school year record.

Thus, at its September 28, 2017 meeting, the Council deferred its compliance analysis and ordered the Custodian either to disclose a responsive 2007-2008 record or certify that none existed. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On September 28, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on October 5, 2017.

On October 10, 2017, the seventh (7th) business day after receipt of the Council's Order, the Custodian responded to the Order by certifying that he disclosed all responsive reports that existed on August 3, and 9, 2017. Further, the Custodian affirmed that no 2007-2008 school report existed. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director. While the Custodian began to comply during the pendency of his request for reconsideration, he ultimately failed to comply fully with the Council's Order. Specifically, although the request for reconsideration stayed the compliance time frame, the Custodian still failed to adhere to the five (5) business day time frame set by the September 28, 2017 Order.

Therefore, the Custodian failed to comply fully with the Council's September's 28, 2017 Interim Order. The Custodian provided responsive reports to the Complainant on August 3, and 9, 2017 respectively. Further, the Custodian certified that no record from 2007-2008 existed and that he provided certified confirmation of compliance to the Executive Director. However, the Custodian did not respond to the Order until the seventh (7th) business day after receipt of it.

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 did not timely respond to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to those responsive records that existed. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with the Council’s September 28, 2017 Interim Order because he did not respond until the seventh (7th) business day. Finally, it should be noted that the Custodian violated the GRC’s regulations by failing to submit a Statement of Information, although he was given two (2) opportunities to do so. N.J.A.C. 5:105-2.4(a). However, the Custodian ultimately provided all records that existed on August 3, and August 9, 2017 respectively. Further, the Custodian did not unlawfully deny access to a 2007-2008 record because none 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. However, the Custodian’s actions appear negligent and heedless because he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply fully with the Council’s September’s 28, 2017 Interim Order. The Custodian provided responsive reports to the Complainant on August 3, and 9, 2017 respectively. Further, the Custodian certified that no record from 2007-2008 existed and that he provided certified confirmation of compliance to the Executive Director. However, the Custodian did not respond to the Order until the seventh (7th) business day after receipt of it.
2. The Custodian did not timely respond to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to those responsive records that existed. N.J.S.A. 47:1A-6. Also, the Custodian failed to comply with the Council’s September 28, 2017 Interim Order because he did not respond until the seventh (7th) business day. Finally, it should be noted that the Custodian violated the GRC’s regulations by failing to submit a Statement of Information, although he was given

two (2) opportunities to do so. N.J.A.C. 5:105-2.4(a). However, the Custodian ultimately provided all records that existed on August 3, and August 9, 2017 respectively. Further, the Custodian did not unlawfully deny access to a 2007-2008 record because none 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. However, the Custodian's actions appear negligent and heedless because he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

October 24, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
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CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

September 26, 2017 Government Records Council Meeting

Judy DeHaven
Complainant

Complaint No. 2017-81

v.

Red Bajk Charter School (Monmouth)
Custodian of Record

At the September 26, 2017 public meeting, the Government Records Council (“Council”) considered the September 19, 2017 Supplemental 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 has failed to establish in his request for reconsideration of the Council’s July 25, 2017 Interim Order that either: 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian failed to establish that the complaint should be reconsidered based on mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. . Specifically, the Custodian’s failure to respond to the OPRA request or any of the GRC’s communications does not constitute a mistake made by the Council. Thus, the Custodian’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council’s July 27, 2017 Interim Order requiring disclosure remains active. However, the Custodian (through Counsel) disclosed several years of responsive records during the pendency of request for reconsideration. For that reason, the GRC will defer the compliance analysis, pending the Custodian’s complete disclosure of the responsive 2007-2008 school year annual submission or his legal certification that no responsive records exist.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of September, 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: September 28, 2017

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
September 26, 2017 Council Meeting

Judy DeHaven¹
Complainant

GRC Complaint No. 2017-81

v.

Red Bank Charter School (Monmouth)²
Custodial Agency

Records Relevant to Complaint: Electronic copies of all annual submissions made by Red Bank Charter School (“RBCS”) to the Red Bank Public Schools (“RBS”) superintendent, as required by Section 2 of a Consent Order signed on March 20, 2007.

Custodian of Record: David Block
Request Received by Custodian: March 9, 2017
Response Made by Custodian: March 24, 2017
GRC Complaint Received: April 17, 2017

Background

July 25, 2017 Council Meeting:

At its July 25, 2017 public meeting, the Council considered the July 18, 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, found 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).
2. The GRC attempted to obtain a completed Statement of Information from the Custodian. Moreover, the GRC reset the time frame after being made aware of a

¹ No legal representation listed on record.

² Represented by Thomas O. Johnston, Esq. of Johnston Law Firm, LLC (Montclair, NJ).

purported change in the Custodian's e-mail address. Even thereafter, the Custodian had more than sufficient time to address the most recent SOI request but failed to do so. Thus, the Custodian's failure to provide a completed SOI to the GRC results in a violation of N.J.A.C. 5:105-2.4(a).

3. The Custodian unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive submissions. Should the responsive records for certain, or all, years not exist, the Custodian must certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On July 27, 2017, the Council distributed its Interim Order to all parties.

On August 3, 2017, the Custodian filed a request for reconsideration of the Council's July 25, 2017 Interim Order based on a mistake. The Custodian requested that the Council reconsider its decision because the RBCS inadvertently failed to comply timely with the Complainant's OPRA request and Government Records Council ("GRC") communications due to agency size and staffing. Specifically, the Custodian asserted that RBCS is a small school with a part time Business Administrator/Custodian of Records. The Custodian argued that the subject OPRA request sought records containing student information not disclosable to the public under the Family Educational Rights and Privacy Act ("FERPA") and State regulations (N.J.A.C. 6A:32-7.1(b)). The Custodian averred that RBCS had to coordinate a response with Custodian's Counsel to ensure appropriate redactions to voluminous records, which remained incomplete through the pendency of this complaint. The Custodian further argued that a change in RBCS e-mail addresses and staffing in June and July 2017 ultimately resulted in RBCS failing to submit a Statement of Information ("SOF").

The Custodian averred that the RBCS will begin complying with the Complainant's OPRA request and hopes to complete its compliance by August 10, 2017 (within the ten (10)

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

business day deadline to submit a request for reconsideration). The Custodian thus requested that the Council reconsider its decision and dismiss the complaint. The Custodian noted that the GRC previously determined that schools complying with an interim order did not unlawfully deny access to records. *See* Watson v. Washington Twp. Pub. Sch. (Gloucester), GRC Complaint No. 2012-33 (March 2013); Carroll v. Trenton Pub. Sch. Dist. (Mercer), GRC Complaint No. 2014-69 (July 2015). Finally, the Custodian asserted that his mistakes here did not rise to the level of a knowing and willful violation of OPRA.

The Custodian also attached a letter from Custodian's Counsel, as well as multiple records. Therein, Counsel stated that he was attaching responsive records for the 2015-2016 and 2016-2017 school years including redactions of student names and addresses. Counsel stated that RBCS would provide all other records by August 10, 2017, and that no records for 2007-2008 exist.

On August 7, 2017, Custodian's Counsel disclosed records for the 2013-2014 and 2014-2015 school years with redactions for various student information.⁵

On August 9, 2017, the Complainant submitted objections to the request for reconsideration. Therein, the Complainant argued that this complaint should not be dismissed because the Custodian's alleged "mistake" did not equate to the Council making a mistake necessary to reconsider its Interim Order.

First, the Complainant noted that the Custodian never addressed why it failed to satisfy her OPRA request. The Complainant disputed that a change in e-mail addresses could have hindered the process because she sent her OPRA request to both the old and new addresses. The Complainant asserted that the Custodian responded after eleven (11) business days by seeking an extension of time but never responded again. The Complainant argued that she found it hard to believe that the Custodian did not understand his response obligations under OPRA, especially given that she filed several OPRA requests, mostly without incident,⁶ in the past. The Complainant further contended that the Custodian's change of e-mail argument is faulty. The Complainant noted that the GRC reached out to the Custodian, obtained the apparent new e-mail address, and restarted the adjudication process in July 2017. The Complainant argued that, notwithstanding the GRC's actions, the Custodian still failed to respond to the GRC's offer of mediation and further failed to submit an SOI. The Complainant contended that those failures were neither inadvertent nor a mistake.

The Complainant also disputed that staffing or availability resulted in the Custodian's failure to comply with her OPRA request or the GRC's process. The Complainant asserted that RBCS is open during the summer and has regular Board of Trustee meetings. The Complainant

⁵ On August 8, 2017, the Complainant contacted the GRC via telephone, advising that she did not receive any response from the Custodian. This is notwithstanding that she was copied on all e-mails. The GRC forwarded those e-mails to a new e-mail address (provided by the Complainant) after determining that the attachment sizes may have hindered delivery.

⁶ The Complainant did note that she previously filed a complaint because the Custodian had failed to respond, but the GRC dismissed the complaint administratively because the parties had settled the matter in mediation. *See* DeHaven v. Red Bank Charter Sch. (Monmouth), GRC Complaint No. 2016-92 (September 2016).

also contended that the Custodian is familiar enough with OPRA to know that ignoring the GRC's requests for mediation and SOI responses was wrongful.

The Complainant also took issue with the amount of time it was taking the Custodian to provide responsive records. The Complainant asserted that the Custodian "flagrantly" disregarded the five (5) business day requirement and imposed its own ten (10) business day time frame. The Complainant noted that she did not contest the redaction of identifiable student information.

Finally, the Complainant requested that the GRC perform the knowing and willful analysis. The Complainant asserted that the Custodian violated OPRA, unreasonably denied access to the responsive records, and failed to comply with the Council's Order. The Complainant argued that the Custodian's conduct since submission of the OPRA request proves that he knowingly and willfully violated OPRA. The Complainant requested that the GRC find a knowing and willful violation and impose civil penalties on the Custodian.

On August 9, 2017, the Custodian's Council disclosed records for the 2008-2009, 2009-2010, 2010-2011, 2011-2012, and 2012-2013 school years with redactions for various student information.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian filed the request for reconsideration of the Council's July 25, 2017 Order on August 3, 2017, five (5) business days from the issuance of the Council's Order.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable

whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Here, the Custodian sought reconsideration of the Council’s Order, alleging that the Council made a mistake. In support of the allegation, the Custodian argued that the RBCS failed to respond to the subject OPRA request and GRC’s communications due to agency size and staffing. In her objections, the Complainant contended that the Custodian’s asserted “mistakes” did not equate to the Council making a mistake in rendering its Order. The GRC agrees: the Custodian’s failure to respond to the OPRA request and subsequent GRC communications does not constitute a mistake warranting reconsideration. Further, the GRC did its due diligence in contacting the Custodian and restarting the complaint response process.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be reconsidered based on a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria, 242 N.J. Super. at 401. Specifically, the Custodian’s failure to respond to the OPRA request or any of the GRC’s communications does not constitute a mistake made by the Council. Thus, the Custodian’s request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Accordingly, the Council’s July 27, 2017 Interim Order requiring disclosure remains active. However, the Custodian (through Counsel) disclosed several years of responsive records during the pendency of request for reconsideration. For that reason, the GRC will defer the compliance analysis, pending the Custodian’s complete disclosure of the responsive 2007-2008 school year annual submission or his legal certification that no responsive records exist.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has failed to establish in his request for reconsideration of the Council’s July 25, 2017 Interim Order that either: 1) the Council's decision is based

- upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian failed to establish that the complaint should be reconsidered based on mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. . Specifically, the Custodian’s failure to respond to the OPRA request or any of the GRC’s communications does not constitute a mistake made by the Council. Thus, the Custodian’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council’s July 27, 2017 Interim Order requiring disclosure remains active. However, the Custodian (through Counsel) disclosed several years of responsive records during the pendency of request for reconsideration. For that reason, the GRC will defer the compliance analysis, pending the Custodian’s complete disclosure of the responsive 2007-2008 school year annual submission or his legal certification that no responsive records exist.
 3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Executive Director.⁸**
 4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian’s compliance with the Council’s Interim Order

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

September 19, 2017

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 25, 2017 Government Records Council Meeting

Judy DeHaven
Complainant

Complaint No. 2017-81

v.

Red Bank Charter School (Monmouth)
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 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 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).
2. The GRC attempted to obtain a completed Statement of Information from the Custodian. Moreover, the GRC reset the time frame after being made aware of a purported change in the Custodian’s e-mail address. Even thereafter, the Custodian had more than sufficient time to address the most recent SOI request but failed to do so. Thus, the Custodian’s failure to provide a completed SOI to the GRC results in a violation of N.J.A.C. 5:105-2.4(a).
3. The Custodian unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive submissions. Should the responsive records for certain, or all, years not exist, the Custodian must certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of July, 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: July 27, 2017

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Judy DeHaven¹
Complainant**

GRC Complaint No. 2017-81

v.

**Red Bank Charter School (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of all annual submissions made by Red Bank Charter School (“RBCS”) to the Red Bank Public Schools (“RBS”) superintendent, as required by Section 2 of a Consent Order signed on March 20, 2007.

Custodian of Record: David Block

Request Received by Custodian: March 9, 2017

Response Made by Custodian: March 24, 2017

GRC Complaint Received: April 17, 2017

Background³

Request and Response:

On March 9, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 24, 2017, the eleventh (11th) business day after receipt of the OPRA request, the Custodian responded in writing, stating that, to the extent that the Complainant’s OPRA request sought student identifiable information, he was denying access. The Custodian stated that the remaining records would require significant time to compile due to the ten (10) year time period. The Custodian stated that he would need an extension until April 10, 2017, and that RBCS reserves the right to assess a special service charge.

On the same day, the Complainant responded, stating that she only sought the number of students by grade and demographic. The Complainant stated that she did not understand how those numbers constituted identifiable student information. The Complainant noted that the RBCS could start by locating the report sent to RBS in October 2016.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

On April 11, 2017, the Complainant e-mailed the Custodian to seek a status update. The Custodian did not respond.

Denial of Access Complaint:

On April 17, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian extended the time frame to respond until April 10, 2017, but failed to respond.

The Complainant also argued that she was unlawfully denied access to the responsive records. The Complainant stated that each year, RBCS is supposed to submit to RBS “the number of students by grade level, their gender, race/ethnicity, economic status, *i.e.* the percentage of students entitled to free and reduced lunch and the number of students who are limited English proficient” attending its school. The Complainant noted that RBCS is required to submit this report to RBS per a Consent Order. The Complainant also noted that this information is similar to what the New Jersey Department of Education (“DOE”) posts to its own website.

The Complainant contended that there was no need to redact or deny any information and that she is open to another extension if needed. The Complainant noted that she was also willing to accept the most recent 2016 submission as a starting point.

Statement of Information:

On May 12, 2017, the GRC requested a completed Statement of Information (“SOI”) from the Custodian. On June 6, 2017, at which point the GRC had not yet received a response, the Custodian advised that RBCS had changed its e-mail address from the “.org” to the “.com” extension. For that reason, the GRC restarted the submissions process.⁴ Thereafter, the Complainant sent an e-mail to the GRC, noting that she previously sent to and received from the Custodian’s addresses, without issue, using both extensions. The Complainant also noted that RBCS’s website still identified the Custodian’s address as ending in “.org.”

On July 7, 2017, the GRC again requested a completed SOI from the Custodian. To date, the GRC has not received a response from the Custodian.

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

⁴ The GRC initially resent the Custodian the offer of mediation at that time. The Custodian did not respond.

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).

Here, the evidence of record supports that the Custodian did not respond to the Complainant's OPRA request until the eleventh (11th) business day after receipt. Further, the Custodian failed to submit an SOI to refute that he failed to respond within seven (7) business days.

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.

The GRC does reach the issue of the Custodian's failure to respond within the extended time frame because the Complainant's OPRA request was already "deemed" denied at the time when the Custodian sought his first extension.

Failure to Submit an SOI

The GRC's promulgated regulations provide that "[c]ustodians shall submit a completed and signed [SOI] to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]" N.J.A.C. 5:105-2.4(a). The Council's regulations further provide that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five [(5)] business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

N.J.A.C. 5:105-2.4(f).

Finally, the GRC's regulations provide that "[a] custodian's failure to submit a completed and signed SOI . . . may result in the Council's issuing a decision in favor of the complainant." N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian's failure to adhere to N.J.A.C. 5:105-2.4(a).

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.

Here, the GRC attempted to obtain a completed SOI from the Custodian. Moreover, the GRC reset the time frame after being made aware of a purported change in the Custodian's e-mail address. Even thereafter, the Custodian had more than sufficient time to address the most recent SOI request but failed to do so. Thus, the Custodian's failure to provide a completed SOI to the GRC results in a violation of N.J.A.C. 5:105-2.4(a).

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.

The request at issue here sought data from a submission that RBCS was apparently required to submit to RBS per a Consent Order every year since 2007. That data was a breakdown of students by grade, gender, race, *etc.* In his March 24, 2017 response, the Custodian at least insinuated that the RBCS should be able to obtain and disclose the data, albeit with an extension to do so. The Custodian also asserted that certain information was exempt possibly as identifiable student information. In her Denial of Access Complaint, the Complainant argued that the submissions she sought contained generic numbers and not identifiable information. The Complainant noted that the submission would be similar to the school data posted on DOE's website.

Because the Custodian failed to submit an SOI, the GRC will rely on the only submissions on the record. Specifically, the Complainant sought ten (10) years of submissions from RBCS to RBS containing student enrollment data as required per a Consent Order. Although the Custodian denied access to some information because he believed it was exempt, there is no evidence in the record to corroborate that. Without any evidence supporting that generic enrollment information is somehow exempt or that no submissions exist, the GRC finds an unlawful denial of access to the records requested.

Accordingly, the Custodian unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive submissions. Should the responsive records for certain, or all, years not exist, the Custodian must certify to this fact.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

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).
2. The GRC attempted to obtain a completed Statement of Information from the Custodian. Moreover, the GRC reset the time frame after being made aware of a purported change in the Custodian's e-mail address. Even thereafter, the Custodian had more than sufficient time to address the most recent SOI request but failed to do so. Thus, the Custodian's failure to provide a completed SOI to the GRC results in a violation of N.J.A.C. 5:105-2.4(a).
3. The Custodian unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive submissions. Should the responsive records for certain, or all, years not exist, the Custodian must certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

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

July 18, 2017

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