



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 30, 2021 Government Records Council Meeting

Yusuf Abdullah Muhammad
Complainant

Complaint No. 2020-32

v.

Bordentown Regional High School District
(Burlington)
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 2021 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 her burden of proof that she 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). Notwithstanding, the GRC declines to order disclosure here because Bordentown Regional High School District did so on July 24, 2020.
2. Although the Custodian’s failure to timely respond resulted in a “deemed” denial of access, Counsel ultimately disclosed the responsive records to the Complainant on July 24, 2020. 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 30th Day of March 2021

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: April 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 30, 2021 Council Meeting**

**Yusuf Abdullah Muhammad¹
Complainant**

GRC Complaint No. 2020-32

v.

**Bordentown Regional High School District (Burlington)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of “[the Complainant’s] school records under [his] previous name Brian Keith Bragg . . . between 1974 – 1986.”

Custodian of Record: Chifonda Henry

Request Received by Custodian: January 3, 2020

Response Made by Custodian: July 24, 2020

GRC Complaint Received: February 10, 2020

Background³

Request and Response:

On December 18, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 7, 2020, Secretary Kamilla Milewski e-mailed the Bucks County Correctional Facility (“BCCF”) advising that she received the subject OPRA request a “[f]ew days ago.” Ms. Milewski stated that Bordentown Regional High School District (“District”) was unable to locate a responsive record. Ms. Milewski suggested that BCCF obtain clarification from the Complainant to aid in the search. On January 15, 2020, Ms. Milewski e-mailed BCCF following up on her prior e-mail. On January 17, 2020, BCCF employee Donna Maloney responded via e-mail apologizing for the delay and stating that she would obtain and provide the Complainant’s clarification later in the afternoon.

Denial of Access Complaint:

On February 10, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted the Custodian failed to respond to his OPRA request.

¹ No legal representation listed on record.

² Represented by Cameron R. Morgan, Esq., of Capehart Scatchard, P.A. (Mt. Laurel, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Yusuf Abdullah Muhammad v. Bordentown Regional High School District (Burlington), 2020-32 – Findings and Recommendations of the Executive Director

Statement of Information:⁴

On June 11, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 3, 2020. The Custodian certified that because the Complainant was incarcerated, Ms. Milewski sent e-mails to the BCCF on January 7, and January 15, 2020 to obtain clarification, but ultimately did not receive a response. The Custodian affirmed that after receiving the Denial of Access Complaint, Custodian’s Counsel contacted the Complainant via telephone. The Custodian averred that during that call, the Complainant noted that he attempted to obtain records several years earlier and the District had difficulty locating them. The Custodian certified that on February 28, 2020, responsive records were located on Microfilm. The Custodian noted that because the District could not print them, personnel had to go to the Hamilton Library on March 2, 2020 to make copies. The Custodian certified that those records were then forwarded to Custodian’s Counsel for review.

The Custodian argued that Ms. Milewski’s e-mail supports that the District timely responded to the Complainant’s OPRA request. The Custodian noted that said response was within the seven (7) business day time frame and sought clarification, which tolled the response time frame thereafter. The Custodian noted that the District did not receive clarification until after the filing of this complaint.

The Custodian additionally stated that student records are exempt from disclosure under State and Federal statutes and regulations, with exceptions. N.J.S.A. 47:1A-9(a); Family Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232(g); New Jersey Pupil Records Act (“NJPRA”), N.J.S.A. 18A:36-19; N.J.A.C. 6A:32-7.5. The Custodian argued that public schools have an obligation to deny access to an OPRA request for student records unless the requestor can establish that they fall within one of the excepted categories. L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). The Custodian argued that here, she lawfully denied access to the responsive student records because the Complainant did not provide verification that he was Brian Keith Bragg. The Custodian argued that it was not only reasonable, but incumbent on the District to attempt to verify whether the Complainant was previously Brian Keith Bragg. The Custodian noted that should the Complainant be able to verify this fact, the District would disclose the requested records to him.⁵

Additional Submissions:

On July 24, 2020, Custodian’s Counsel sent a letter to the Complainant confirming receipt of an Order of Final Judgement granting the Complainant’s name change application from Brian Keith Bragg to his present name. Counsel stated that based on this, the District was disclosing the requested student records to him. Counsel noted that minor redactions were made for other student

⁴ On February 28, 2020, this complaint was referred to mediation. On May 8, 2020, this complaint was referred back for adjudication.

⁵ The Custodian included a description of discussions and actual communication with the mediator while this complaint was in mediation. The GRC notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 *et seq.*, communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

Yusuf Abdullah Muhammad v. Bordentown Regional High School District (Burlington), 2020-32 – Findings and Recommendations of the Executive Director

information, dates of birth, a microfilm identification numbers whereon same is included. Counsel requested that the Complainant confirm that this response amicably resolved the instant complaint and that same could be withdrawn.

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 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).

In the matter before the Council, the Custodian certified in the SOI that the District received the subject OPRA request on January 3, 2020 after returning from holiday break. The Custodian further certified that on January 7, 2020, Ms. Milewski contacted BCCF seeking clarification from the Complainant, which tolled the response time frame. The Custodian thus argued that the District timely responded to the subject OPRA request. Notwithstanding, Custodian's Counsel provided access to the responsive student records on July 24, 2020 after receiving confirmation that the Complainant was previously Brian Keith Bragg.

Upon review of the evidence submitted herein, a "deemed" denial of access occurred. Specifically, N.J.S.A. 47:1A-5(g) requires a custodian to respond in writing "to the requestor." Further, OPRA does not contain any exceptions to the response process where requestors are incarcerated. Thus, OPRA required the Custodian to send a letter directly to the Complainant seeking clarification. This did not occur and Ms. Milewski's e-mail to BCCF does not constitute a valid response under OPRA. Instead, the first evidence of a valid written response directly to the Complainant came from Custodian's Counsel on July 24, 2020.

Therefore, the Custodian did not bear her burden of proof that she 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. Notwithstanding, the GRC declines to order disclosure here because the District did so on July 24, 2020.

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.

Yusuf Abdullah Muhammad v. Bordentown Regional High School District (Burlington), 2020-32 – Findings and Recommendations of the Executive Director

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)).

In the instant matter, although the Custodian’s failure to timely respond resulted in a “deemed” denial of access, Counsel ultimately disclosed the responsive records to the Complainant on July 24, 2020. 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 Custodian did not bear her burden of proof that she 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). Notwithstanding, the GRC declines to order disclosure here because Bordentown Regional High School District did so on July 24, 2020.

2. Although the Custodian's failure to timely respond resulted in a "deemed" denial of access, Counsel ultimately disclosed the responsive records to the Complainant on July 24, 2020. 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

March 23, 2021