

**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

⁶ "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."

⁷ 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.