



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

TAHESHA L. WAY  
Lieutenant Governor

JACQUELYN A. SUÁREZ  
Acting Commissioner

### FINAL DECISION

#### April 30, 2024 Government Records Council Meeting

Robert Walden  
Complainant

Complaint No. 2022-294

v.

North Bergen Board of Education (Hudson)  
Custodian of Record

At the April 30, 2024 public meeting, the Government Records Council (“Council”) considered the April 23, 2024 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 immediately to the applicable portion of the Complainant’s OPRA request and within the statutorily required time frame to the remainder either granting access, denying access, seeking clarification or requesting an extension of time resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access to those invoices, cancelled checks, and lease agreements related to use of TCUs by North Bergen Board of Education for the identified time frame of 2001 through the date of the subject OPRA request. N.J.S.A. 47:1A-6. Specifically, disclosed “Vendor Analysis” report identifies numerous responsive records specifically sought by the Complainant that the Custodian failed to disclose. Further, the presence of at least one lease agreement indicates that other leases exist. Thus, the Custodian shall locate the responsive invoices, cancelled checks, and leases and disclose them to the Complainant. Should the Custodian determine that any of the responsive records do not exist, he must provide the Complainant a certification identifying those records no longer in existence.
3. **The Custodian shall comply with conclusion No. 2 above within twenty (20) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council’s Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

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 30<sup>th</sup> Day of April 2024

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: May 2, 2024**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 30, 2024 Council Meeting**

**Robert Walden<sup>1</sup>  
Complainant**

**GRC Complaint No. 2022-294**

v.

**North Bergen Board of Education (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of “[i]nvoices, agreements, *etc.*, for the physical rental of the TCUs, and other TCU operational related charges, from Scotsman or wherever they are leased from,” that reflect current TCU monthly and/or yearly operating expenses from North Bergen Board of Education (“NBBOE”) including receipts and cancelled checks.<sup>3</sup>

**Custodian of Record:** Hugo D. Cabrera

**Request Received by Custodian:** October 28, 2021

**Response Made by Custodian:** December 6, 2021

**GRC Complaint Received:** June 28, 2022

**Background<sup>4</sup>**

**Request and Response:**

On October 28, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 10, 2021, the Complainant purportedly<sup>5</sup> e-mailed the Custodian seeking a status update. On November 15, 2021, the Complainant again purportedly e-mailed the Custodian seeking a status update. On November 26, 2021, the NBBOE purportedly responded stating that it was reviewing all past OPRA requests submitted by the Complainant and comparing them to the subject OPRA request.

On December 1, 2021, the Complainant purportedly e-mailed the Custodian seeking another status update and asking that responsive records be disclosed by December 3, 2021. On the same day, the NBBOE purportedly responded stating that the request would again be reviewed,

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

<sup>2</sup> Represented by Jack Gillman, Esq., of Ryglicki & Gillman, P.C. (North Bergen, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</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>5</sup> The Complainant included in his complaint a description of the correspondence that occurred between October 28, 2021 and the Custodian’s ultimate response on December 6, 2021. However, neither he nor the Custodian submitted copies of any “purported[.]” correspondence as part of their filings.

and it would “get back to” the Complainant. On December 3, 2021, the NBBOE purportedly responded stating that it was still working on the Complainant’s OPRA request. On December 6, 2021, the twenty-fifth (25<sup>th</sup>) business day after receipt of the OPRA request, Custodian’s Counsel responded in writing on behalf of the Custodian disclosing a “Vendor Analysis” report to the Complainant.

On May 23, 2022, the Complainant e-mailed Custodian’s Counsel asserting that the record disclosed on December 6, 2021 did not completely fulfill his OPRA request. The Complainant stated that he wanted to know “how much [NBBOE] has paid to lease the TCUs in Braddock Park, from inception, to [present].” The Complainant requested that NBBOE disclose invoices, receipts, cancelled checks, and lease agreements related thereto. On the same day, Custodian’s Counsel responded advising that NBBOE would investigate the Complainant’s assertions and respond accordingly. On June 7, 2022, the Complainant again e-mailed Custodian’s Counsel advising that he had yet to receive any additional responses, or the records sought months earlier. The Complainant stated that if he did not receive responsive records by June 9, 2022, he would be forced to involve his attorney. On June 8, 2022, Custodian’s Counsel responded stating that he would confer with NBBOE and respond accordingly.

On June 17, 2022, the NBBOE purportedly responded disclosing a 2015 lease agreement. On the same day, the Complainant purportedly responded confirming receipt of same and arguing that this single lease agreement for the rental of a single TCU in one year did not fulfill subject OPRA request, which sought all leases for all TCUs from 2001 to present. The Complainant noted that because he was still attempting to calculate the total cost of TCU rental for the identified time period, he needed access to all records sought.

#### Denial of Access Complaint:

On June 28, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted while he was not explicitly denied access to the records sought, NBBOE “strung [him] along.” The Complainant asserted that the only record he received showed unknown charges, mostly listed as “Early Childhood”, or containing only dates. The Complainant contended that none of these charges were decipherable. The Complainant also argued that although the charges included invoice numbers, no corresponding records were disclosed.

#### Statement of Information:<sup>6</sup>

On November 15, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 28, 2021. The Custodian certified that his search included “gathering accurate data from the necessary departments” during the COVID-19 public health emergency. The Custodian affirmed that he received responsive invoices and lease agreements<sup>7</sup> from the Business Office. The Custodian

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<sup>6</sup> On July 7, 2022, this complaint was referred to mediation. On November 3, 2022, this complaint was referred back to the GRC for adjudication.

<sup>7</sup> The Complainant asserted in the Denial of Access Complaint that the disclosed lease was from April 2015. However, the lease attached to the SOI was from November 2012.

certified that NBBOE responded in writing on December 6, 2021 and August 1, 2022 disclosing all records that existed.

The Custodian argued that this complaint should be dismissed because the Complainant “admits” that no denial of access occurred. The Custodian noted that the Complainant instead argued that “[t]he proper info was not sent.” The Custodian thus argued that this complaint is defective on its face.

### **Analysis**

As a threshold issue, the Custodian has contended that this complaint should be dismissed because the Complainant “admits” that he was not denied access to any responsive records. This argument, however, is a misrepresentation of the Complainant’s Denial of Access Complaint claims. In fact, the Complainant stated in a May 23, 2022 e-mail to Council that the report “does not fulfill [his] OPRA request.” The Complainant reiterated that his OPRA request sought invoices, receipts, and cancelled checks that he did not receive. Further, while the Complainant confirmed in the Denial of Access Complaint that he received the “Vendor Analysis” report, he argued that “the proper info was not sent”. Thus, it is clear that the Complainant was challenging both the timeliness issue *and* his assertion that NBBOE did not disclose many of the records he actually sought. Based on the forgoing, the GRC will address these issues accordingly.

### **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).<sup>8</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Likewise, barring extenuating circumstances, a custodian’s failure to respond immediately in writing to a complainant’s OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).<sup>9</sup> See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding that the custodian

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<sup>8</sup> A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

<sup>9</sup> OPRA lists immediate access records as “budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

was obligated to notify the complainant immediately as to the status of “immediate access” records).

In the instant matter, the Custodian certified that he received the subject OPRA request, which sought “immediate access” records in part, on October 28, 2021. Custodian’s Counsel responded in writing on the Custodian’s behalf on December 6, 2021, the twenty-fifth (25<sup>th</sup>) business day after receipt of the OPRA request, disclosing to the Complainant a “Vendor Analysis” report. The Complainant subsequently e-mailed Counsel multiple times asserting that the record disclosed did not fulfill his OPRA request. This complaint followed, wherein the Complainant argued that the Custodian “strung [him] along” and did not provide the records he sought. In the SOI, the Custodian certified that he received the OPRA request on October 28, 2021 and did not respond to it in writing until December 6, 2021, noting that it was impacted by the District conducted its search during the COVID-19 pandemic.

Initially, the GRC notes that although N.J.S.A. 47:1A-5(i) was amended in March 2020 due to the COVID-19 public health emergency to provide a response exception for public health emergencies, P.L. 2021, c.104 signed into effect on June 4, 2021 provided that agencies were required to adhere to normal OPRA response provisions with a limited exception that does not apply here. Thus, the fact that the pandemic may have been ongoing during the pendency of the subject OPRA request did not absolve the Custodian of his legal obligation to respond within the statutorily mandated time frames set forth in OPRA. Based on this, the evidence of record clearly supports the Custodian’s failure to timely respond immediately to that portion of the OPRA request seeking “immediate access” invoices. Further, the Custodian also failed to timely respond to the remainder of the OPRA request within the statutorily mandated timeframe.

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 immediately to the applicable portion of the Complainant’s OPRA request and within the statutorily required time frame to the remainder either granting access, denying access, seeking clarification or requesting an extension of time resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Herron, GRC 2006-178; Kelley, GRC 2007-11.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the matter before the Council, the Complainant has contended that the NBBOE and its Custodian failed to fulfill his OPRA request by not disclosing invoices, lease agreements, receipts, and cancelled checks related to rented TCUs. Conversely, the Custodian has argued that it disclosed the “Vendor Analysis” report and a 2012 lease agreement. The Custodian does not argue why he did not disclose any invoices, receipts, cancelled checks, or other lease agreements from the time frame identified in the OPRA request (2001 to the date of the OPRA request).

A review of the evidence here provides that an unlawful Denial of Access occurred. Specifically, the disclosed “Vendor Analysis” report, which range from 2006 to 2022, shows invoices by number and checks associates with those invoices. These are exactly the records the Complainant sought in his OPRA request. However, for reasons unknown, the Custodian unilaterally chose to disclose the “Vendor Analysis” report and a single lease agreement without explanation. Additionally, the Custodian failed to argue that any of the requested invoices, cancelled checks, or leases were exempt in part or whole, or did not exist. Also, the presence of a single lease agreement strongly suggests that additional agreements exist and were not disclosed. The potential existence of receipts is unclear; however, payment of the invoices may be reflected through either receipts or cancelled checks appear to be sufficient. Ultimately, the Custodian had an obligation to locate them, review for potential applicable exemptions, and disclose those records that existed: he simply failed to do so.

Accordingly, the Custodian unlawfully denied access to those invoices, receipts, cancelled checks, and lease agreements related to use of TCUs by NBBOE for the identified time frame of 2001 through the date of the subject OPRA request. N.J.S.A. 47:1A-6. Specifically, disclosed “Vendor Analysis” report identifies numerous responsive records specifically sought by the Complainant that the Custodian failed to disclose. Further, the presence of at least one lease agreement indicates that other leases exist. Thus, the Custodian shall locate the responsive invoices, cancelled checks, and leases and disclose them to the Complainant. Should the Custodian determine that any of the responsive records do not exist, he must provide the Complainant a certification identifying those records no longer in existence.

### **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 immediately to the applicable portion of the Complainant’s OPRA request and within the statutorily required time frame to the remainder either granting access, denying access, seeking clarification or requesting an extension of time resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access to those invoices, cancelled checks, and lease agreements related to use of TCUs by North Bergen Board of Education for the identified time frame of 2001 through the date of the subject OPRA request. N.J.S.A. 47:1A-6. Specifically, disclosed “Vendor Analysis” report identifies numerous responsive records specifically sought by the Complainant that the Custodian failed to disclose. Further, the presence of at least one lease agreement indicates that other leases exist. Thus, the Custodian shall locate the responsive invoices, cancelled checks, and leases and disclose them to the Complainant. Should the Custodian determine that any

of the responsive records do not exist, he must provide the Complainant a certification identifying those records no longer in existence.

3. **The Custodian shall comply with conclusion No. 2 above within twenty (20) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

Prepared By: Frank F. Caruso  
Executive Director

April 23, 2024