



State of New Jersey

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JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

July 30, 2024 Government Records Council Meeting

Kris Pawelko
Complainant

Complaint No. 2022-42

v.

Ramapo Indian Hills Regional High
School District (Bergen)
Custodian of Record

At the July 30, 2024 public meeting, the Government Records Council (“Council”) considered the July 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’s failure to respond in writing to the Complainant’s January 31, 2022 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time with a date certain 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); Hardwick v. N.J. Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008). See Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 2007).
2. The oaths of office sought in request item number 1 are expressly exempt from access under OPRA. N.J.S.A. 47:1A-1.1. Further, the Custodian was not required to siphon non-confidential information from the oaths or to locate and disclose a different record containing that information. Thus, the Custodian lawfully denied access to this request item. N.J.S.A. 47:1A-6. See Kaufmann, Jr. v. N.J. Office of the Attorney General, GRC Complaint No. 2022-178 (May 2023).
3. The Custodian has borne his burden of proof that he lawfully denied access to copies of anti-bribery statements and indemnity, surety, good faith, faithful performance bonds, which are request items numbered 2 and 3, respectively. Specifically, the Custodian certified in the Statement of Information that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 July 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: August 1, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Kris Pawelko¹
Complainant**

GRC Complaint No. 2022-42

v.

**Ramapo Indian Hills Regional High School District (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Via e-mail “Please send me a copy of the:

1. Oath of office
2. Anti-bribery statement
3. Indemnity, surety, good faith, faithful performance bond

for the Ramapo Indian Hills superintendent, board administrator, board attorney, school nurses and each board of Education members (sic).”

Custodian of Record: Thomas Lambe

Request Received by Custodian: January 31, 2022

Responses Made by Custodian: February 8, 2022 and February 14, 2022

GRC Complaint Received: March 1, 2022

Background³

Request and Responses:

On January 31, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 8, 2022, the sixth (6th) business day following receipt of the request, the Custodian responded in writing, informing the Complainant that he received her OPRA request on January 31, 2022, and due to an influx of OPRA requests he was requesting more time to attend to her request. The Custodian informed the Complainant that he would address her request “as soon as possible.” On February 10, 2022, the Complainant e-mailed the Custodian informing him she understood that he had seven (7) days to respond, but she would be “happy to give [him] until the end of business on Friday, March 11th.”

¹ No legal representation listed on record.

² Represented by Stephen R. Fogarty, Esq., of Fogarty & Hara (Fair Lawn, 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.

On February 14, 2022, the Custodian responded to the Complainant's request, denying request item number 1 because any existing records would be exempt under OPRA. The Custodian informed the Complainant that no records exist responsive to request items number 2 and 3. On February 19, 2022, the Complainant e-mailed the Custodian and asked him to let her know "the exact reason you denied me copies of the 'oath to office' (sic) in my Opra (sic) request." The Complainant asked the Custodian to inform her where on the OPRA website it states that an oath of office is exempt from access. The Complainant further asked the Custodian what he was hiding.

Denial of Access Complaint:

On March 1, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that she submitted her OPRA request to the Custodian on January 31, 2022, and that the Custodian responded on the seventh (7th) business day following receipt of the request asking for an extension of time to respond to the request. The Complainant stated that she informed the Custodian that he had until February 11, 2022, to respond to the request.⁴ The Complainant stated that the Custodian responded on February 14, 2022, denying her three (3) request items.

The Complainant stated that on February 19, 2022, she e-mailed the Custodian, asking why request item number 1 was denied. The Complainant further stated that she informed the Custodian that she could not find an exemption for an oath of office on the New Jersey OPRA exemption website. The Complainant referenced <https://www.nj.gov/dep/opra/exemptions.html>.⁵ The Complainant also stated that there is no reference to an "oath" in Title 47, for which the Complainant referenced <https://law.justia.com/codes/new-jersey/2020/title-47/>.⁶ The Complainant stated that the Custodian did not reply to her e-mail.

Statement of Information:

On March 10, 2022, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on January 31, 2022. The Custodian further certified that on February 8, 2022, he requested additional time to respond to the request because he had received many OPRA requests. The Custodian certified that the Complainant replied that she would allow the Custodian until March 11, 2022, to respond to the request.

⁴ The evidence of record reveals that the Complainant, in her February 10, 2022 e-mail, allowed the Custodian until March 11, 2022 to respond.

⁵ The GRC notes that this URL referenced by the Complainant is for the Department of Environmental Protection website, which lists various exemptions from access for government records. An oath of office is not listed on the DEP list of exemptions; however, the web page contains a link to the GRC's list of OPRA exemptions which references an oath of office under exemption number 18.

⁶ This URL is for "JUSTIA US Law 2020 New Jersey Revised Statutes Title 47 – Public Records." The page contains an index of statute sections N.J.S.A. 47:1-1 through N.J.S.A. 47:4-6. Although this is an unofficial source, and contains a disclaimer to that effect, it contains a link to §47:1A-1.1, and within that section is a provision exempting oaths of office.

The Custodian certified that he responded to the request on February 14, 2022. The Custodian certified that he denied the first part of the request because any existing records were exempt under OPRA. The Custodian certified that there were no records that existed for request items numbered 2 and 3, so he denied access to those request items.

The Custodian certified that the Complainant asserted in the complaint that the Custodian violated OPRA by denying access to the oath forms for Ramapo Indian Hills Regional High School District (“District”) members. The Custodian certified that the Complainant is in error because effective May 11, 2015, N.J.S.A. 47:1A-1.1 was amended to exclude from the definition of a government record “. . . any copy of an oath of allegiance, oath of office or any affirmation taken upon assuming the duties of any public office[.]” The Custodian certified that while the Complainant cited a list of exemptions on the Department of Environmental Protection website, which omits the exemption for copies of an oath of office, it does not mean he violated OPRA by denying access to it. The Custodian further certified that the exemption for an oath of office appears in the GRC’s Handbook for Records Custodians, and the GRC recognized such exemption in Burns v. Cape May Cnty. Sheriff’s Office, GRC Complaint No. 2018-299 (July 2020). The Custodian certified that, as such, he properly denied access to the oaths of office and did not violate OPRA.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).⁷ 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).

OPRA provides that a custodian may request an extension of time to respond to the complainant’s OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Hardwick v. N.J. Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to his request on the seventh (7th) business day following receipt of such request in which the Custodian requested an

⁷ 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.

extension of time to fulfill the request but failed to notify the Complainant of when the requested records would be provided. The Council held that:

[B]ecause the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available . . . the Custodian’s written response to the Complainant . . . and the request for an extension of time . . . are inadequate under OPRA and the Complainant’s request is “deemed” denied[.]

[Id.]

The facts in Hardwick are similar to the facts in the instant complaint because the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days in which the Custodian requested an extension of time but failed to provide an anticipated deadline upon which the requested records would be made available.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s January 31, 2022 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time with a date certain 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); Hardwick, GRC 2007-164. See 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.

Request Item No. 1 - oaths of office

OPRA provides that:

A government record shall not include . . . any copy of an oath of allegiance, oath of office or any affirmation taken upon assuming the duties of any public office, or that oath or affirmation, taken by a current or former officer or employee in any public office or position in this State or in any county or municipality of this State, including members of the Legislative Branch, Executive Branch, Judicial Branch, and all law enforcement entities, except that the full name, title, and oath date of that person contained therein shall not be deemed confidential.

[N.J.S.A. 47:1A-1.1]⁸

In this request item, the Complainant sought oaths of office for several District officials. The Custodian denied access to the request item stating that any existing oaths are exempt from disclosure under OPRA. The Complainant disputed the Custodian's response, arguing that there is no such exemption under OPRA. This complaint followed and, in the SOI, the Custodian maintained his position that oaths of office are specifically exempt from disclosure.

A plain reading of OPRA clearly supports the Custodian's position that actual oaths of office are exempt from disclosure in their entirety and are not disclosable in redacted form. N.J.S.A. 47:1A-1.1. However, the exemption contains an exception for certain specific information; to wit, "the full name, title, and oath date . . . shall not be deemed confidential." Id. This exception may raise the issue of whether a custodian is required to disclose the "non-confidential" information contained within the oath of office in response to an OPRA request for an oath of office. The GRC has determined that a custodian is not required to siphon non-confidential information from the oaths and disclose same or locate and disclose a different record containing that information. Rather, the oath of office exception only applies to disclosure of "the full name, title, and oath date" if such information exists *elsewhere* in a requested record. See Kaufmann, Jr. v. N.J. Office of the Attorney General, GRC Complaint No. 2022-178 (May 2023).

Therefore, the oaths of office sought in request item number 1 are expressly exempt from access under OPRA. N.J.S.A. 47:1A-1.1. Further, the Custodian was not required to siphon non-confidential information from the oaths or to locate and disclose a different record containing that information. Thus, the Custodian lawfully denied access to this request item. N.J.S.A. 47:1A-6. See Kaufmann, GRC 2022-178.

Request Item No. 2 - anti-bribery statements

Request Item No. 3 - indemnity, surety, good faith, faithful performance bonds

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified in the SOI that the records responsive to request items number 2 and 3 do not exist. Upon review, the GRC is persuaded that no unlawful denial of access has occurred. There is nothing in the evidence of record that contradicts the Custodian's certification that no responsive records exist for these request items. Based on the forgoing, a conclusion in line with Pusterhofer is appropriate here.

⁸ OPRA was revised in 2015 to include this provision.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to copies of anti-bribery statements and indemnity, surety, good faith, faithful performance bonds, which are request items numbered 2 and 3, respectively. Specifically, the Custodian certified in the SOI that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's January 31, 2022 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time with a date certain 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); Hardwick v. N.J. Dep't of Transp., GRC Complaint No. 2007-164 (February 2008). See Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 2007).
2. The oaths of office sought in request item number 1 are expressly exempt from access under OPRA. N.J.S.A. 47:1A-1.1. Further, the Custodian was not required to siphon non-confidential information from the oaths or to locate and disclose a different record containing that information. Thus, the Custodian lawfully denied access to this request item. N.J.S.A. 47:1A-6. See Kaufmann, Jr. v. N.J. Office of the Attorney General, GRC Complaint No. 2022-178 (May 2023).
3. The Custodian has borne his burden of proof that he lawfully denied access to copies of anti-bribery statements and indemnity, surety, good faith, faithful performance bonds, which are request items numbered 2 and 3, respectively. Specifically, the Custodian certified in the Statement of Information that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart

July 23, 2024