



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

March 28, 2007 Government Records Council Meeting

Charles Bonanno
Complainant

Complaint No. 2006-62

v.

Garfield Board of Education
Custodian of Record

At the March 28, 2007 public meeting, the Government Records Council ("Council") considered the March 21, 2007 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 with an amendment. The Council, therefore, finds that:

1. While seeking legal advice is reasonable and encouraged by the GRC, the Custodian should have sought permission from the Complainant to respond to the request some time beyond the statutory seven (7) business day time period prescribed under OPRA. Therefore, the Custodian is in violation of N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. for failing to provide a written response to the Complainant's request granting or denying access, or requesting an extension of time within the statutorily mandated seven (7) business days and such failure results in a "deemed" denial.
2. As teachers and administrators must meet specific requirements for employment in a New Jersey school district, the documents requested by the Complainant, i.e. an employee's field of study, date certificates were issued, names of higher educational institutions, copies of certificates, diplomas, and transcripts, are considered government records pursuant to N.J.S.A. 47:1A-10 (information which disclose conformity with specific experiential, educational, or medical qualifications required for government employment) and therefore should be releasable to the public with appropriate redactions, if any.
3. Pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 537 (March 2005), the Custodian is not required to create documents in response to records requests.
4. As the Complainant has made it abundantly clear that he is requesting actual copies of these documents, the Custodian should provide such



access pursuant to N.J.S.A. 47:1A-5.d. Thus, the Custodian's calculation of \$546.28 as a special service charge for compiling information is invalid, as he is not required to create documents, but instead need simply copy the requested records and redact information as required by law. As such, the Custodian violated N.J.S.A. 47:1A-5.d. by not providing the requested records in the medium requested.

5. The Custodian should release the requested certificates, diplomas, and transcripts, with appropriate redactions, if any, to the Complainant.
6. **The Custodian shall comply with #5 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4, to the Executive Director.***
7. As the Complainant never agreed to the cost of \$546.28 for the compiling of records prior to said cost being incurred, the Custodian violated N.J.S.A. 47:1A-5.c. As such, the Complainant is not required to reimburse the Board of Education for the incurred cost of \$546.28.
8. Based on the fact that the Complainant has made it clear that he is specifically requesting actual copies of certificates, transcripts and diplomas, and that the Custodian has yet to provide such records, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 28th Day of March, 2007

Vincent P. Maltese, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Government Records Council

Decision Distribution Date: April 2, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2007 Council Meeting**

**Dr. Charles Bonanno¹
Complainant**

GRC Complaint No. 2006-62

v.

**Garfield Board of Education, Business Department²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of certified personnel including administrators and teachers holding a master's degree and/or a master's degree plus thirty (30) credits or higher education.
2. These same administrators' and teachers' field of study, name/subject of degree, date of issuance and higher educational institution in which the master's degree was received.
3. Copies of these same degree holders' supervisor, principal, business administration and/or superintendent certification and dates of issuance.

Request Made: June 21, 2005

Response Made: August 22, 2005³ and September 9, 2005

Custodian: Dennis Frohnepfel

GRC Complaint filed: March 20, 2006

Background

June 21, 2005

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above.

September 6, 2005

Letter from the Complainant to the Custodian. The Complainant states that he has not yet received a response in reference to his June 21, 2005 OPRA request. The Complainant asks the Custodian to inform him if prepayment is required for the requested records and states that he expects to receive said records by September 13, 2005 or he will file a Denial of Access Complaint.

September 9, 2006

¹ No legal representation listed on record.

² Represented by Toni Belford Damiano, Esq. (Little Falls, NJ).

³ Response was verbal.

Custodian's response to the OPRA request. The Custodian responded to the Complainant's OPRA request on the fifty sixth (56th) business day following receipt of such request. The Custodian claims that he and the Complainant spoke during the week of August 22, 2005. The Custodian asserts that he informed the Complainant that there were two (2) reports responsive to his request: the Employee Salary Report and the Employee Certification Report. The Custodian states that the Complainant had indicated that he would pick up said records.

The Custodian states that the Employee Salary Report provides the name, guide, step degree, and salary of every employee in the district. The Custodian states that the report is thirteen (13) pages. The Custodian also states that the Employee Certification Report provides the name and the certificate(s) held by each certified employee. The Custodian states that this report is one hundred and forty eight (148) pages. The Custodian states that both reports total one hundred and sixty one (161) pages and will cost \$47.75. The Custodian states that the Complainant is welcome to pick up these documents at his earliest convenience.

Additionally, the Custodian asserts that the Complainant has requested some information that is contained in the individual personnel folders of employees and that these documents contain information that may be protected under N.J.S.A. 47:1A-10. The Custodian states that the potentially protected information includes employees' field of study, the date certificates were issued, and the names of the institutions of higher learning issuing said degree. The Custodian states that he has submitted the Complainant's request to the Board Attorney to determine if such information can be released and if so, it will require the Custodian's office an indeterminate amount of work hours to compile the information for which the Complainant will be charged. The Custodian asserts that he will advise the Complainant of the Board Attorney's opinion as soon as he receives it.

September 12, 2005

Letter from Complainant to Custodian. The Complainant states that while the copies of the two (2) reports he received are helpful, they are not responsive to his request. The Complainant states that the information requested is not considered personal identifying information such as a social security number, driver's license, credit card number, and/or unlisted phone number. The Complainant asserts that the employees' field of study, the date certificates were issued and the names of the institutions of higher learning issuing said degree all relate to the employees' qualifications required for government employment or for receipt of a public pension, which makes them a government record pursuant to N.J.S.A. 47:1A-10. The Complainant requests that the Custodian provide the requested information as soon as possible.

The Complainant states that the information need not include employees with a BA degree or a BA + 30 credits. Regarding fees, the Complainant states that if reproduction of the requested copies involves an extraordinary expenditure of time and effort to accommodate the request, he asks that the appropriate special service charge be applied. The Complainant requests that the Custodian allow him the opportunity to review the charges prior to the charges being incurred and copies made. Additionally, the

Complainant requests that if special service charges have been established in advance by resolution, the Custodian provide a copy of said resolution.

March 20, 2006

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated June 21, 2005
- Letter from the Complainant to the Custodian dated September 6, 2005
- Custodian’s response to the Complainant’s OPRA request dated September 9, 2005
- Letter from the Complainant to the Custodian dated September 12, 2005

The Complainant states that he filed an OPRA request on June 21, 2005 and claims that he did not hear back from the Custodian until August 22, 2005, forty-three (43) business days following the date of such request when he was verbally advised that there were two (2) reports available for pick up. The Complainant states that on September 6, 2005, he wrote a letter to the Custodian inquiring about copies of these reports, which the Complainant picked up on September 11, 2005. The Complainant states that he wrote another letter to the Custodian, dated September 12, 2005, indicating that the information provided in response to his request, although helpful, is still not responsive to his request and does not contain the requested information. The Complainant states that on September 18, 2005, he made a payment of \$47.75 for records not responsive to his request. The Complainant also states that the Custodian indicated that all the requested records were not provided because the request asked for information of a personal nature and would have to be reviewed by the Board Attorney. The Complainant contends that he did not hear from the Custodian regarding this matter again.

March 21, 2006

Offer of Mediation sent to both parties.

March 21, 2006

The Complainant declines mediation of this complaint. The Custodian also did not agree to mediate this complaint.

March 22, 2006

Request for Statement of Information sent to the Custodian.

May 2, 2006

Letter from GRC to the Custodian. GRC states that on March 22, 2006, the GRC requested that the Custodian complete a Statement of Information in order for the Custodian to present the Board of Education’s (“BOE”) positions in response to the Denial of Access complaint filed with the GRC. GRC states that if the GRC is not in receipt of a response to the Statement of Information within three (3) business days of receipt of this letter, this complaint will proceed to adjudication before the Council with the documents that are currently on file.

May 3, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Custodian's response to the Complainant's OPRA request dated September 9, 2005
- Letter from the Complainant to the Custodian dated September 12, 2005

The Custodian certifies that he forwarded the Complainant's OPRA request to the Board Attorney because there were concerns regarding the scope of information requested. The Custodian certifies that records were provided to the Complainant on September 11, 2005.

The Custodian certifies that the information the Complainant requested is not readily available in the BOE's database. The Custodian certifies that he can only provide two (2) reports; (1) a one hundred and fifty (150) page Employee Certificate Report that contains the names of all certified staff (administrators and teachers), and specifies each employee's certificate, and (2) a sixteen (16) page Staff Summary which contains the names of all certified staff and specifies each employee's degree. The Custodian also certifies that these reports contain social security numbers and the database does not allow the Custodian to redact social security numbers. Therefore, Custodian contends that he has to assign a staff member to print these reports and redact all social security numbers.

Finally, the Custodian certifies that the District employs four hundred and three (403) teachers, as well as thirty (30) administrators. The Custodian asserts that he will have to assign a staff member to physically pull four hundred and thirty-three (433) personnel files, go through those files to obtain the specific educational institution each employee attended, review their respective certificates and record the information on the Employee Certificate Report. The Custodian certifies that the paper copies will be \$49.00 plus the cost of assigning a full-time staff member to extract and record the information from the personnel files. The Custodian estimates thirty (30) hours of work at \$39.73 per hour, equaling \$1,192.06 for an estimated total production cost of \$1,241.06. The Custodian states that the district would require a fifty (50) percent deposit from the Complainant prior to beginning the work.

May 7, 2006

Complainant's Memo to the GRC titled: "Addendum (Complaint # 2006-62)." The Complainant states that the information requested is located either on a computer or in the central office of the Garfield Board of Education. The Complainant claims that an employee's field of study, certification dates, and the names of the institutions of higher learning issuing said degree are summarized in personnel files and available on college transcripts which are held in the Business Department. The Complainant states that he is only interested in information relating to the one hundred and eighty six (186) teachers that have master's degrees or a master's degree +30 credits of higher education and 30 administrators, which the Complainant believes should not encompass as many documents as the Custodian claims.

The Complainant asserts that the Custodian's special service charge of \$1,192.06 for assigning a staff member to extract and record the information for the four hundred

and thirty-three (433) records the Custodian claims are responsive is excessive. The Complainant reiterates that his request is for information relating to only two hundred and sixteen (216) individuals and so this cost should be adjusted to reflect this reduction in documents. Additionally, the Complainant contends that he finds the special service charge excessive regardless of the reduction in documents because the documents are for active teachers and are readily accessible on a summary sheet or official transcript in the Business Department. The Complainant claims that the Custodian is implementing policy in an unreasonable manner.

May 9, 2006

Letter from Custodian to GRC. The Custodian asserts that he has not knowingly and willfully denied the Complainant access to the requested records and states that he is ready to provide the requested records, provided that the Complainant pay for the time and effort required to produce the requested documents. The Custodian states that the requested information is not readily available because the District's data system contains information on all certified employees, regardless of their degree level and does not let the Custodian sort by degree to respond to the request. The Custodian states that both the Employee Certificate Report and the Staff Summary Report had to be redacted for social security numbers before being provided to the Complainant.

The Custodian goes on to state that there are two hundred and twelve (212) employees with an MA or MA+30 credits for which the Custodian must assign a staff member to physically pull the personnel files, go through the files to obtain the requested information, review the respective certificates and record the information. The Custodian states that he will keep an account of the hours spent completing the assignment and will charge the Complainant accordingly.

May 10, 2006

Letter from Complainant to GRC. The Complainant claims that the following is readily available on file with the Garfield School District for all certified personnel:

1. Supervisors' Certificates
2. Principals' Certificates
3. Administrators' Certificates
4. Official Transcripts

The Complainant contends that documents # 1-3 above contain the requested information and are required to be on file for all certified employees. Additionally the Complainant asserts that # 4 above is readily available and can be easily transferred to a summary document. The Complainant has provided copies of his own Supervisor Certificate, Principal Certificate, and Official Transcript as an example of the documents held by the agency (as he is an employee) and asserts that these documents can be easily copied by the Custodian and provided in response to this OPRA request. The Complainant states that these are files of active employees and are maintained in the Superintendent's office. Therefore, the Complainant contends that it would require low to mid-level clerical staff to locate, copy and return the approximately 200 files to their original location.

May 14, 2006

Letter from Complainant to GRC. The Complainant claims that the Custodian is knowingly and willfully delaying access to the requested records as the Custodian has exceeded the statutorily mandated seven (7) business days required to respond to OPRA requests. Additionally, the Complainant asserts that he is unaware of the proper fees being applied to his request. The Complainant also claims that the documents he is requesting are readily available on file with the BOE. The Complainant asserts the following in regards to his request for records:

- Supervisor's certificate – Custodian can copy certificate and redact social security number and State reference number
- Principal's certificate - Custodian can copy certificate and redact social security number and State reference number
- Administrator's certificate - Custodian can copy certificate and redact social security number and State reference number
- Diploma – Custodian can copy master's degree and/or doctorate degree diploma with no redactions necessary
- Official Transcripts – Custodian can transfer the field of study to a summary sheet or copy it onto one of the above certificates.

May 16, 2006

Letter from Custodian to Complainant. The Custodian states that two (2) clerical staff members have been assigned to redact information from the requested records. The Custodian requests that the Complainant stop by the Custodian's office to review the information regarding format.

October 6, 2006

Letter from GRC to Custodian. GRC requests a legal certification, signed by the Custodian, providing a document index of all the records responsive to the request. GRC requests that the Custodian identify which of the responsive records have and have not been provided to the Complainant, as well as a legal justification for non-disclosure or redaction of any document(s).

October 6, 2006

Letter from GRC to Custodian. As the Custodian asserts that the request at issue warrants an extraordinary effort on the part of the agency, GRC requests that the Custodian provide a legal certification in response to the following special service charge criteria used by the GRC to evaluate whether such a charge is warranted and whether the charge assessed is reasonable in accordance with Courier Post v. Lenape Regional School District, 360 N.J. Super. 191, 821 A.2d 1190, (October 28, 2002):

1. The volume, nature, size, number, of government records involved,
2. The period of time over which the records were received,
3. Whether some or all of the records sought are archived,
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
5. The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination, and,
6. The amount of time required to return documents to their original storage place,
7. The size of the agency,

8. The number of employees available to accommodate documents requests,
9. The availability of information technology and copying capabilities,
10. What was requested,
11. The level(s) of skill necessary to accommodate the request,
12. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill above,
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents, and
14. Who in the agency will perform the work associated with each request?

October 11, 2006

Letter from Custodian to GRC. The Custodian asserts that he has attempted to accommodate each request as submitted by the Complainant and states that he is still prepared to release the requested documents to the Complainant. The Custodian asserts that he left a voice message for the Complainant on May 15, 2006 and did not receive a response. The Custodian also claims that on May 16, 2006, he sent a memo to the Complainant requesting that he stop into the Custodian's office to review the requested information and again received no response from the Complainant. The Custodian contends that the requested records have been available for the Complainant since June 1, 2006 and will be released upon payment. The Custodian states that in order to prepare the requested records, BOE staff had to: (1) produce a fourteen (14) page Staff Summary Report and highlight all employees who have a MA or a MA + 30 credits; and (2) remove the two hundred and seven (207) files for staff who have a MA or a MA + 30 credits and transfer the requested information from each file to the one hundred and fifty (150) page Employee Certificate Report.

The Custodian breaks down the cost for the requested records as follows: two (2) secretaries reviewed the two hundred seven (207) files with the exception of May 18, 2006 when only one secretary reviewed the files. The Custodian asserts that the total time accumulated by the secretaries equals 8.58 and 8.08 hours. The Custodian states that the hourly rates of the secretaries are \$36.59 and \$34.82. The Custodian calculates the total cost as follows: $\$36.59 \times 8.58 \text{ hours} = \313.94 and $\$34.82 \times 8.08 \text{ hours} = \281.34 , which totals \$595.28. As the Complainant has already paid \$49.00, the Custodian states that the final charge equals \$546.28.

October 18, 2006

Letter from Complainant to GRC. The Complainant states that the Custodian is attempting to provide information in the wrong format. The Complainant claims that he should not have to pay for secretaries to enter information into the Employee Certificate Report that should have already been entered into the report as it came into the office from the State's Department of Education ("DOE"). The Complainant states that he is requesting actual certificates issued by the State's DOE. Additionally, the Complainant asserts that he never received any letter from the Custodian dated May 16, 2006. The Complainant also claims that he has never refused to pay for the requested records and states that he already paid \$49.00 for documents which were not really responsive to his request. The Complainant claims that the personnel files the secretaries are pulling do not require a high level of skill to locate, copy, and then return as they are located in the Superintendent's office and are not archived. The Complainant states that he is willing to

pay for the requested information in the right format. However, the Complainant also states that he is not willing to pay to have the secretaries enter information into the school database that should have already existed. The Complainant asserts that when the Custodian fully complies with his request and provides actual copies of the Supervisors' certificates, Principals' certificates, Administrators' certificates, school diplomas, and transcripts, he will pay the required fees.

October 30, 2006

Letter of Representation from Custodian's Counsel with Custodian's Certification dated October 30, 2006 attached. The Custodian asserts that the Complainant requested specific information such as the employees' field of study, the dates their certificates were issued, and the names of the schools attended by the employees, which the Custodian certifies are not available in the District's database. The Custodian certifies that the remainder of the Complainant's requested documentation has not been provided due to the discrepancy in cost of the special service charge. The Custodian also certifies that these documents had not been previously provided to the Complainant as they were not readily available in the database and had to be pulled from each individual file and handwritten onto the Employee Certificate Report.

The Custodian certifies that he is not withholding documents from the Complainant. The Custodian certifies that he contacted the Complainant by phone on May 15, 2006 and by letter on May 16, 2006 requesting that the Complainant review the format of the requested information. The Custodian certifies that he received no response from the Complainant on this matter. The Custodian also certifies that obtaining all the requested information for the Complainant cost the District more than \$4,000.00 in time and labor. Additionally, the Custodian certifies that the requested records have been ready for release since June 1, 2006 and states that the District is still awaiting the Complainant's payment of \$546.28.

November 2, 2006

Letter from Complainant to GRC. The Complainant states that he does not take issue with the special service charge. The Complainant states that his issue is with the format of the documents the Custodian is attempting to provide. The Complainant asserts that he is seeking copies of the actual employees' certificates, transcripts, and diplomas.

November 27, 2006

Letter from GRC to Custodian's Counsel. GRC requests a legal certification signed by the Custodian in response to the following:

- A statement as to whether or not the following documents are made, maintained, kept on file, or received by the Garfield Board of Education for the employees subject of the Complainant's request:
 - Supervisors' Certificate
 - Principals' Certificate
 - Administrators' Certificate
 - Official Transcripts
 - College Diplomas

- a. If these documents contain the requested information and are made, maintained, kept on file, or received by the BOE, provide a general nature description of the documents and any asserted exemptions under the law, or
- b. If you feel that these documents are not responsive to the request, you must provide a legally certified statement stating why the Custodian deems that these records are not responsive to the Complainant's OPRA request.

December 8, 2006

Custodian's certification in response to GRC's letter dated November 27, 2006. The Custodian certifies that the Complainant has received all of the requested information regarding the certificates of District employees. The Custodian certifies that this information was included in the Employees Certificate Report. Additionally, the Custodian certifies that District staff had to pull two hundred and seven (207) personnel files and hand copy the type of degree earned and the institution of higher learning onto the Employee Certificate Report, which the Custodian certifies was labor intensive as it took 8.58 hours to complete. The Custodian contends that the District is entitled to reasonable reimbursement, as the Complainant was advised of the cost to be incurred.

Regarding the format of the requested information, the Custodian certifies that he attempted to contact the Complainant by telephone on May 15, 2006 and in writing on May 16, 2006 seeking approval of the compiled records. The Custodian certifies that to date, he has not heard from the Complainant regarding this matter, and as such, instructed his staff to proceed with fulfilling the Complainant's request in the manner outlined above.

The Custodian asserts that it now appears that the BOE is being asked to again pull the two hundred and seven (207) files and copy the certificates of each employee, as well as the official transcripts and diplomas. The Custodian takes issue with releasing official transcripts and diplomas to a third party and asserts that these records cannot be obtained by the employee him/herself and are sent directly to the employer upon an official request. As such, the Custodian does not believe he has the ability to release said records to a third party. The Custodian contends that OPRA directs public agencies to safeguard from public access a citizen's personal information with which it has been entrusted. The Custodian asserts that releasing transcripts would disclose an employee's grades and claims that all that is needed is a certified statement that the employee has met the required qualifications for employment.

Moreover, the Custodian asserts that the Complainant's request is duplicative and labor intensive. The Custodian certifies that the requested records have been available since June 1, 2006 and will be released upon payment of \$546.28. [The Custodian did not specifically address all of the questions the GRC asked of him.]

December 8, 2006

Letter from Complainant to GRC. The Complainant states that despite the Custodian's certification, he has not received all of the information requested. The Complainant asserts that the Employee Certificate Report does not indicate the field of study, the date of issuance and higher educational institution from which degrees were earned. The Complainant states that he never requested a copy of the Employee

Certificate Report and never requested that the Custodian organize the request in such format.

The Complainant asserts that the Custodian's statement that he has not received communication from the Complainant regarding the format of the request is false. The Complainant states that he forwarded a letter dated May 14, 2006 to the Custodian and the Custodian's attorney regarding the matter, including a copy of his original request.

Regarding the release of official transcripts, the Complainant claims that information can be redacted from said documents prior to their release to the public so as not to release the grades of an individual, but simply the degree received and the date of issuance. The Complainant claims that the Custodian is knowingly and willfully denying access to public records.

The Complainant cites N.J.S.A. 47:1A-10 regarding personnel and pension records. Specifically, the Complainant cites that "data contained in information which disclose conformity with specific educational qualifications required for government employment or for receipt of a public pension, shall be a government record."⁴ The Complainant asserts that an employee's field of study, date certificates were issued, names of higher educational institutions issuing the certificates, copies of certificates, diplomas, and transcripts all relate to qualifications required for government employment or for receipt of a public pension, and therefore are government records which should be releasable to members of the public. Additionally, the Complainant contends that actual copies of the requested documents are the only true way to determine if an employee has met the required qualifications for a hired position.

Analysis

Whether the Custodian unlawfully denied access to any of the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1."

⁴ As stated in the Complainant's letter to GRC staff dated December 8, 2006.
Dr. Charles Bonanno v. Garfield Board of Education, Business Department, 2006-62 - Findings and Recommendations of the Executive Director.

OPRA states the following regarding a special service charge:

“[t]he requestor shall have the opportunity to *review and object to the charge prior to it being incurred.*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA states that:

“[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

Additionally, OPRA provides that:

“...[i]f the custodian is *unable to comply with a request* for access, the custodian shall *indicate the specific basis therefore* on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” (Emphasis added.) N.J.S.A. 47:1A-5.g

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

Additionally, OPRA provides that:

“...data contained in information which disclose conformity with specific experiential, *educational* or *medical qualifications required for government employment or for receipt of a public pension*, but not including any detailed medical or psychological information, *shall be a government record.*” (Emphasis added.) N.J.S.A. 47:1A-10.

The Complainant states that he submitted his OPRA request on June 21, 2005 and claims that he did not hear back from the Custodian until August 22, 2005, forty-three (43) business days following the date of such request, when he was verbally advised that there were two (2) reports available for pickup. The Complainant states that he received these records on September 11, 2005 and notified the Custodian via letter dated September 12, 2005 that the records received were not responsive to the request. The Complainant asserts that the Custodian indicated that all the records were not provided because the request asked for information of a personal nature and would have to be reviewed by the Board Attorney.

Additionally, the Complainant contends that the records the Custodian is attempting to provide are in the wrong format. The Complainant contends that he should not have to pay for secretaries to enter information into the Employee Certificate Report that should have already been entered into the report as it came into the office from the State's DOE. The Complainant asserts that when the Custodian fully complies with his request and provides actual copies of the requested Supervisors' certificates, Principals' certificates, Administrators' certificates, school diplomas, and transcripts, he will pay the required fees.

Further, the Complainant cites N.J.S.A. 47:1A-10 regarding personnel and pension records. Specifically, the Complainant cites that "data contained in information which disclose conformity with specific educational qualifications required for government employment or for receipt of a public pension, shall be a government record."⁵ The Complainant asserts that an employee's field of study, date certificates were issued, names of higher educational institutions issuing the certificates, copies of certificates, diplomas, and transcripts all relate to qualifications required for government employment or for receipt of a public pension, and are government records which should be releasable to members of the public. Additionally, the Complainant contends that actual copies of the requested documents are the only true way to determine if an employee has met the required qualifications for a hired position.

The Custodian certifies that on September 11, 2005, he provided the Complainant with the following two (2) documents: (1) a one hundred and fifty (150) page Employee Certificate Report that contains the names of all certified staff (administrators and teachers), and specifies each employee's certificate, and (2) a sixteen (16) page Staff Summary which contains the names of all certified staff and specifies each employee's degree. The Custodian certifies that not all of the requested information is maintained in the BOE's database, specifically the type of degree earned and the institution of higher learning attended, and therefore had to be copied by hand onto the Employee Certificate Report. The Custodian certifies that he attempted to contact the Complainant by telephone on May 15, 2006 and in writing on May 16, 2006 seeking approval of the compiled records. The Custodian also certifies that to date, he has not heard from the Complainant regarding this matter, and as such, instructed his staff to proceed with fulfilling the Complainant's request in the manner outlined above.

⁵ As stated in the Complainant's letter to GRC staff dated December 8, 2006.

The Custodian breaks down the cost for providing the requested records as follows: two (2) secretaries reviewed the two hundred and seven (207) files with the exception of May 18, 2006 when only one secretary reviewed the files. The Custodian asserts that the total time accumulated by the secretaries equals 8.58 and 8.08 hours. He states that the hourly rates of the secretaries are \$36.59 and \$34.82. The Custodian calculates the total cost as follows: $\$36.59 \times 8.58 \text{ hours} = \313.94 and $\$34.82 \times 8.08 \text{ hours} = \281.34 , which totals \$595.28. As the Custodian has already paid \$49.00, the Custodian states that the final charge equals \$546.28.

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. 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.

OPRA requires a Custodian to grant or deny access to a government record in writing, as soon as possible, but not later than seven (7) business days after receiving the request. In this complaint, the Complainant asserts submitting his OPRA request on June 21, 2005 and states that he did not receive a response from the Complainant until August 22, 2005, forty-three (43) business days following the date of such request, although said response was verbal. The Custodian did not provide the Complainant with a written response until September 9, 2005, fifty-six (56) business days following the date of such request, in which the Custodian indicated that two (2) responsive records were available but that some of the information requested is contained in personnel folders and may be exempt under N.J.S.A. 47:1A-10. As such, the Custodian stated that the Board Attorney needed to review the Complainant's request to determine if the requested information is releasable.

Seeking legal advice does not automatically extend the statutory time frame allotted to respond to a records request pursuant to OPRA. OPRA provides that if a Custodian is unable to comply with a records request, he must notify the Complainant in writing indicating a lawful reason for same pursuant to N.J.S.A. 47:1A-5.g. Here, the Custodian knew that he needed additional time in order to adequately respond to the Complainant's request as he was seeking legal advice from the Board Attorney; however he failed to request an extension of time to seek such legal advice in writing within the statutorily mandated time frame.

In Paff v. Borough of Somerville, GRC Complaint No. 2005-55 (November 2005), the Council held that the Custodian was in violation of N.J.S.A. 47:1A-5.i for failing to respond to the Complainant's OPRA request in a timely manner even though the Custodian asserted the delay was caused by his efforts to obtain legal advice. The same applies in this complaint. While seeking legal advice is reasonable and encouraged by the GRC, the Custodian should have sought permission from the Complainant to respond to the request some time beyond the statutory seven (7) business day time period prescribed under OPRA. Therefore, the Custodian is in violation of N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g for failing to provide a written response to the Complainant's request granting or denying access, or requesting an extension of time within the statutorily mandated seven (7) business days and such failure results in a "deemed" denial.

The Custodian contends that employees' filed of study, the date certificates were issued, and the names of the institutions of higher learning issuing said degree may be exempt from disclosure under N.J.S.A. 47:1A-10 as this information is part of an individual's personnel file. However, OPRA provides that "...data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record." N.J.S.A. 47:1A-10. As teachers and administrators must meet specific requirements for employment in a New Jersey school district, the documents requested by the Complainant, i.e. an employee's field of study, date certificates were issued, names of higher educational institutions, copies of certificates, diplomas, and transcripts, are considered government records pursuant to N.J.S.A. 47:1A-10 and therefore should be releasable to the public with appropriate redactions, if any.

The Custodian has attempted to provide the Complainant with some of the information requested which is listed above; however, the manner in which the Custodian is attempting to provide said information is to hand copy information from personnel files onto the Employee Certificate Report, thus creating a new document. OPRA does not obligate a Custodian to create a document in response to a records request. In Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 537 (March 2005), the court reaffirmed that "the Government Records Council (Council), ...has explained that 'OPRA does not require record custodians to conduct research among its records for a requestor and correlate data from various government records in the custodian's possession.' *Reda v. Township of West Milford*, GRC Case No. 2002-58 (January 17, 2003). There, an individual sought information regarding a municipality's liability settlements but did not request any specific record. *Ibid.* In rejecting the request, the Council noted that OPRA only allows requests for records, not requests for information, and therefore, it is 'incumbent on the requestor to perform any correlations and analysis he may desire.' *Ibid.*"

As the Complainant has clearly identified that he is requesting actual copies of certificates, diplomas, and transcripts, there is no need for the Custodian to copy information onto the Employee Certificate Report. N.J.S.A. 47:1A-5.d. provides that a custodian shall grant access to public records in the medium requested if the agency maintains the record in that medium. Clearly, the BOE maintains copies of employee's certificates, diplomas, and transcripts, as the Custodian indicates that staff copied said information from the actual documents onto the Employee Certificate Report. As the Complainant has made it abundantly clear that he is requesting actual copies of these documents, the Custodian should provide such access pursuant to N.J.S.A. 47:1A-5.d. Thus, the Custodian's calculation of \$546.28 as a special service charge for compiling information is invalid, as he is not required to create documents, but instead need simply copy the requested records and redact information as required by law. As such, the Custodian violated N.J.S.A. 47:1A-5.d. by not providing the requested records in the medium requested.

Additionally, N.J.S.A. 47:1A-5.c. provides that a requestor shall have the opportunity to review and object to a special service charge *prior* to it being incurred. The Custodian certifies that he attempted to contact the Complainant by telephone on

May 15, 2006 and in writing on May 16, 2006 seeking approval of the compiled records. The Custodian also certifies as he had not heard from the Complainant regarding this matter, he instructed his staff to proceed with fulfilling the Complainant's request. As the Complainant never agreed to the cost of \$546.28 for the compiling of records prior to said cost being incurred, the Custodian violated N.J.S.A. 47:1A-5.c. As such, the Complainant is not required to reimburse the BOE for the incurred cost of \$546.28.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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.

The Complainant states that he submitted his OPRA request on June 21, 2005 and claims that he did not hear back from the Custodian until August 22, 2005, forty-three (43) business days following the date of such request when he was verbally advised that there were two (2) reports available for pickup. The Complainant states that he received these records on September 11, 2005 and notified the Custodian via letter dated September 12, 2005 that the records received were not responsive to the request. The Complainant asserts that the Custodian indicated that all the records were not provided because the request asked for information of a personal nature and would have to be reviewed by the Board Attorney.

Additionally, the Complainant states that he is not accepting the Custodian's offer of providing documents for \$546.28 as he insists that the records are not in the format requested. The Complainant asserts that when the Complainant fully complies with his request and provides actual copies of the Supervisors' certificates, Principals' certificates, Administrators' certificates, school diplomas, and transcripts, he will pay the required fees. The Complainant claims that the Custodian is knowingly and willfully denying access to the requested records as the Complainant asserts that the records are maintained by the BOE and can easily be copied and released.

The Custodian certifies that he attempted to contact the Complainant by telephone on May 15, 2006 and in writing on May 16, 2006 seeking approval of the compiled

records. The Custodian certifies that to date, he has not heard from the Complainant regarding this matter, and as such, instructed his staff to proceed with fulfilling the Complainant's request by copying information from the personnel folders to the Employee Certificate Report. The Custodian certifies that all the requested information has been available for release to the Complainant since June 1, 2006 and will be released upon payment of \$546.28. The Custodian contends that he is not denying access to records as his staff has spent numerous hours compiling information to be released to the Complainant.

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 at 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 (Berg); 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 (App. Div. 1996) at 107).

It is clear through the Complainant's numerous submissions to the Custodian and the GRC that the Complainant is specifically requesting actual copies of certificates, transcripts and diplomas, with appropriate redactions, if any. However, the Custodian asserts that he has already fulfilled the Complainant's request by compiling records and preparing reports which incurred a copy cost of \$546.28 that the Complainant never agreed to.

Thus, based on the fact that the Complainant has made it abundantly clear that he is specifically requesting actual copies of certificates, transcripts and diplomas, and that the Custodian has yet to provide such records, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination 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 that the Council find that:

1. While seeking legal advice is reasonable and encouraged by the GRC, the Custodian should have sought permission from the Complainant to respond to the request some time beyond the statutory seven (7) business day time period prescribed under OPRA. Therefore, the

Custodian is in violation of N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. for failing to provide a written response to the Complainant's request granting or denying access, or requesting an extension of time within the statutorily mandated seven (7) business days and such failure results in a "deemed" denial.

2. As teachers and administrators must meet specific requirements for employment in a New Jersey school district, the documents requested by the Complainant, i.e. an employee's field of study, date certificates were issued, names of higher educational institutions, copies of certificates, diplomas, and transcripts, are considered government records pursuant to N.J.S.A. 47:1A-10 (information which disclose conformity with specific experiential, educational, or medical qualifications required for government employment) and therefore should be releasable to the public with appropriate redactions, if any.
3. Pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 537 (March 2005), the Custodian is not required to create documents in response to records requests.
4. As the Complainant has made it abundantly clear that he is requesting actual copies of these documents, the Custodian should provide such access pursuant to N.J.S.A. 47:1A-5.d. Thus, the Custodian's calculation of \$546.28 as a special service charge for compiling information is invalid, as he is not required to create documents, but instead need simply copy the requested records and redact information as required by law. As such, the Custodian violated N.J.S.A. 47:1A-5.d. by not providing the requested records in the medium requested.
5. The Custodian should release the requested certificates, diplomas, and transcripts, with appropriate redactions, if any, to the Complainant.
6. **The Custodian shall comply with #5 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4*, to the Executive Director.**
7. As the Complainant never agreed to the cost of \$546.28 for the compiling of records prior to said cost being incurred, the Custodian violated N.J.S.A. 47:1A-5.c. As such, the Complainant is not required to reimburse the Board of Education for the incurred cost of \$546.28.
8. Based on the fact that the Complainant has made it clear that he is specifically requesting actual copies of certificates, transcripts and diplomas, and that the Custodian has yet to provide such records, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

March 21, 2007