



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

VINCENT P. MALTESE, Chair
COMMISSIONER SUSAN BASS LEVIN
ACTING COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

March 28, 2007 Government Records Council Meeting

Larry S. Loigman
Complainant

Complaint No. 2006-56

v.

Township of Ocean
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. The Council, therefore, finds that:

1. 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 access, denying access, requesting an extension of the statutory response time, or asking for clarification of the request within the statutorily mandated seven (7) business days and such failure results in a “deemed” denial.
2. Pursuant to N.J.S.A. 47:1A-9.a. and E.O. 26 the Custodian has lawfully denied access to the requested test scores of all individuals who were promoted or are still being considered for promotion to the positions of Lieutenant and Sergeant from January 1, 2005 to present.
3. Because the Custodian has certified that no records exist which are responsive to the request for rankings of all individuals who were promoted or are still being considered for promotion to the positions of Lieutenant and Sergeant from January 1, 2005 to present, the Custodian has not unlawfully denied access to such records.
4. Because a review of the Custodian’s redactions of requested billing discloses that they are narrowly tailored and appear to protect the names of litigants in pending matters, the redactions are an appropriate method of protecting privileged or confidential information in an otherwise public document. Therefore, the Custodian has lawfully denied access to certain



information in the requested bills concerning legal representation of the Township in grievances with the Police Benevolent Association pursuant to N.J.S.A. 47:1A-1.1.

5. Because there is no evidence that the Custodian knowingly or willfully violated OPRA, the Custodian's actions appear to be merely negligent and do not meet the legal standard of a knowing and willful violation of OPRA and unreasonable denial of access pursuant to N.J.S.A. 47:1A-11.a.

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 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**

**Larry S. Loigman, Esq.¹
Complainant**

GRC Complaint No. 2006-59

v.

**Township of Ocean²
Custodian of Records**

Records Relevant to Complaint:

Names, test scores, and rankings of all individuals who were promoted or are still being considered for promotion to the positions of Lieutenant and Sergeant from January 1, 2005 to the present.

Request Made: February 9, 2006

Response Made: February 13, 2006

Custodian: Deborah Smith, Clerk

GRC Complaint Filed: March 9, 2006

Background

February 9, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests copies of the documents listed above.³

February 13, 2006

Custodian's response to the OPRA request made three (3) business days after the request. The Custodian states that she is collating the requested records and will advise the Complainant as soon as that process is complete. The Custodian states that all of the requested records are disclosable with the exception of invoices regarding pending grievances and documents pertaining to pending grievances, which are privileged and protected from public access. The Custodian also states that she has been called for jury duty starting February 14, 2006 and anticipates being unavailable for that week to attend to the Complainant's request. The Custodian further states that she will inform the Complainant if any of the requested records become available by February 13, 2006.

February 23, 2006

Custodian's letter to the Complainant. The Custodian notifies the Complainant that the following records are available:

- Standard operating procedure 92-002C, entitled "Promotional Criteria,"

¹ The Complainant is a private practice attorney (Red Bank, NJ).

² The Custodian is represented by Littie Rau of Ruderman and Glickman (Springfield, NJ).

³ Other documents that were requested were provided to the Complainant in response to this OPRA request.
Larry Loigman v. Township of Ocean, 2006-59 – Findings and Recommendations of the Executive Director

- Documents related to the first promotional process for sergeants and lieutenants,
- Documents related to the second promotional process for sergeants and lieutenants,
- Form letter to candidates for sergeant and lieutenant positions regarding the promotional process phases and scoring,
- Unfair Labor Practice Charge (PBA and Officer Friend),
- Unfair Labor Practice Charge (PBA midnight shift issue), and
- Unfair Labor Practice Charge (PBA and Officer Bruther).

The Custodian states that the copying charge for these documents is \$17.25.

The Custodian asserts that the actual candidate scoring sheets are confidential personnel records exempted from disclosure under N.J.S.A. 47:1A-10. The Custodian also asserts that the test scoring keys and examination data for public employees are not considered government records pursuant to paragraph 4(c) of Executive Order 26 (McGreevey, August 13, 2002)(“E.O. 26”).

March 1, 2006

Facsimile from the Complainant to the Custodian. The Complainant contends that the Custodian has denied the Complainant access to resumes, cover letters from interested applicants, correspondence and test results. The Complainant asks that the Custodian provide a list of documents that have been withheld with a specific indication as to why these records will not be released. The Complainant further asserts that, in civil service municipalities, N.J.A.C. 4A:4-2.16 specifically states that the list of eligible candidates, a description of the examination, rating system and minimum score required are disclosable. The Complainant contends that although Ocean is not a civil service municipality, it would be anomalous for Ocean County to declare that the same types of records are not disclosable.

March 8, 2006

Letter from the Custodian to the Complainant. The Custodian states that the following documents will be available upon payment of a \$6.25 copying charge:

- Special report submitted by successful candidates for sergeant promotional positions,
- Resumes and cover letters of successful candidates for lieutenant promotional positions, and
- Standard form letters sent to applicants for both sergeants’ and lieutenants’ positions.

The Custodian states that letters to individual candidates will not be provided. The Custodian contends that test results and individual candidate scoring information are considered confidential pursuant to E.O. 26.

The Custodian further states that the requested description of the promotional process and the rating for each phase of the process was previously provided to the Complainant. The Custodian asserts that no minimum score was required for candidates to qualify for continued participation in the other phases of the promotional process.

March 9, 2006

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

- Complainant’s OPRA request dated February 9, 2006,
- Custodian’s response to the OPRA request dated February 13, 2006,
- Custodian’s letter to the Complainant dated February 23, 2006,
- Complainant’s fax memo to the Custodian dated March 1, 2006, and
- Custodian’s letter to the Complainant dated March 8, 2006.

The Complainant states that most of the requested records have been furnished and the records currently at issue are the names, test scores and rankings for those who were promoted or are still being considered for promotion to lieutenant or sergeant. The Complainant asserts that the issue in this case is whether or not E.O. 26 applies to these records. The Complainant contends that in civil service municipalities, N.J.A.C. 4A:4-2.16 makes these records available to the public and the same should apply to non-civil service municipalities.

March 16, 2006

Offer of Mediation sent to both parties.

March 16, 2006

The Complainant declines mediation.

March 20, 2006

Request for Statement of Information (“SOI”) sent to the Custodian.

March 28, 2006

Custodian’s SOI and amendment with the following attachments:⁴

- Complainant’s OPRA request dated February 9, 2006,
- Custodian’s response to the OPRA request dated February 13, 2006, and
- Complainant’s fax memo to the Custodian dated March 1, 2006.

The Custodian states that the following information was not released to the Complainant in response to this OPRA request:

Title and Date of Each Document	General Nature/Description of Each Document	Claimed Statutory Exemption	Explanation why the Claimed Exemption Applies to Each Document
<u>Lieutenant’s Exam- April 2005</u>	- Resume and cover letter for all candidates - Copies of take-home exams (graded) for nine	<u>N.J.S.A 47:1A-10</u> ; E.O. 26;	Materials are personnel records of respective police officer(s)

⁴ Copies of documents provided to the Complainant that are not at issue in this complaint were provided by the Custodian but not included in this analysis.

	<p>(9) individually named employees</p> <ul style="list-style-type: none"> - Three (3) copies of written exercise (graded) for all candidates, - Three (3) copies of evaluator notes (graded) for eight (8) individually named employees, - Role play materials and score sheets for all candidates, - Oral presentation score sheets for all candidates, - Assessment sheets for all candidates, and - Overall Score Sheets for all candidates. 	<p><u>N.J.S.A 47:1A-9</u></p>	<p>Executive Order does not allow for access to test questions, scoring keys, or other examination data</p> <p>OPRA does not preclude a common law grant of confidentiality otherwise established or recognized by other laws, court rules, judicial case law, etc.</p>
<p><u>Lieutenant's Exam – June 2005</u></p>	<ul style="list-style-type: none"> - Copies of take home exams (graded) for six (6) individually named employees, and - Assessment pages for all candidates. 	<p><u>N.J.S.A 47:1A-10</u></p> <p>E.O. 26;</p> <p><u>N.J.S.A 47:1A-9</u></p>	<p>Materials are personnel records of respective police officer(s)</p> <p>Executive Order does not allow for access to test questions, scoring keys, or other examination data</p> <p>OPRA provision does not preclude a common law grant of confidentiality otherwise established or recognized by other laws, court rules, judicial case law, etc.</p>
<p><u>Sergeant's Exam – April 2005</u></p>	<ul style="list-style-type: none"> - Two (2) copies of oral examination (graded) for thirteen (13) individually named employees, 	<p><u>N.J.S.A 47:1A-10;</u></p> <p>E.O. 26;</p>	<p>Materials are personnel records of respective police officer(s)</p>

	<ul style="list-style-type: none"> - Three (3) copies of department interview (graded) for thirteen (13) individually named employees, and - Total score sheet for all candidates. 	<p><u>N.J.S.A 47:1A-9</u></p>	<p>Executive Order does not allow for access to test questions, scoring keys, or other examination data</p> <p>OPRA does not preclude a common law grant of confidentiality otherwise established or recognized by other laws, court rules, judicial case law, etc.</p>
<p><u>Sergeant's Exam – September 2005</u></p>	<ul style="list-style-type: none"> - Three (3) copies of department interview (graded) for all candidates, - Two (2) copies of oral examination (graded) for all candidates, and -Total score sheet for all candidates. 	<p><u>N.J.S.A 47:1A-10;</u></p> <p>E.O. 26;</p> <p><u>N.J.S.A 47:1A-9</u></p>	<p>Materials are personnel records of respective police officer(s)</p> <p>Executive Order does not allow for access to test questions, scoring keys, or other examination data</p> <p>OPRA does not preclude a common law grant of confidentiality otherwise established or recognized by other laws, court rules, judicial case law, etc.</p>

The Custodian asserts that these records are not disclosable pursuant to N.J.S.A. 47:1A-10 because they are considered part of the personnel file of the respective police officers. The Custodian also asserts that resumes of unsuccessful candidates were not provided pursuant to E.O. 26.

The Custodian also asserts that pursuant to paragraph 4(c) of E.O. 26, “test questions, scoring keys and other examination data pertaining to the administration of an

examination for public employment or licensing” are not considered government records subject to OPRA. The Custodian contends that the Police Department of the Township of Ocean anticipates re-using actual test questions in the future.

Additionally, the Custodian contends that pursuant to N.J.S.A. 47:1A-9, OPRA does not preclude a common law grant of confidentiality otherwise established or recognized by other laws, court rules, judicial case law, etc. The Custodian contends that these records are subject to a common law grant of confidentiality, either as advisory, consultative and deliberative (“ACD”) materials or under another grant of confidentiality.⁵ The Custodian contends that these records are subject to a balancing test based on the Township’s claim that the public’s interest in maintaining the confidentiality of these records outweighs the Complainant’s right of access. The Custodian states that the Township considers these materials and data as confidential and not subject to public access. The Custodian argues that the release of these materials would undermine the Police Department’s ability to efficiently and fairly run the department and address the public welfare and safety. The Custodian also asserts that the release of this material would also undermine the confidence that the Township’s employees have in the confidentiality of their own records, reports, rankings and personal data.

April 5, 2006

Complainant’s response to the Custodian’s SOI. The Complainant states that at issue in this complaint are unredacted billing statements⁶ and the promotional rankings of individuals. The Complainant asserts that he is not seeking actual examinations, interviews, evaluator notes or resumes of unsuccessful candidates. The Complainant states he is seeking the scores and rankings of all candidates. The Complainant contends that it is the public’s right to see where the promoted individuals rank against those who were not promoted.

November 8, 2006

E-mail from the GRC to the Custodian. The GRC requests clarification of information provided in the SOI in which the Custodian provides a list of the documents responsive to the Complainant’s February 9, 2006 OPRA request in its entirety. The GRC states that the Complainant has only raised the issue of a denial to names, test scores and rankings. The GRC requests that the Custodian provide a list of the documents that are specifically responsive to the Complainant’s request for names, test scores and rankings of all individuals who were promoted to or are still being considered for promotion to the positions of Lieutenant and Sergeant from January 1, 2005 to present.

November 9, 2006

E-mail from Custodian to GRC. The Custodian requests an extension of time to December 18, 2006 in order to respond to the GRC’s November 8, 2006, e-mail requesting additional information.

⁵ Pursuant to the statutory grant of its authority at N.J.S.A. 47:1A-7.b., the GRC will not adjudicate the common law right of access, only the statutory right of access under OPRA.

⁶ Not indicated in the Denial of Access Complaint.

The same day, the GRC responded by e-mail denying the Custodian an extension of time to December 18, 2006 and requesting the necessary information by November 22, 2006.

November 21, 2006

Custodian's Certification in response to the GRC's November 8, 2006, request for additional information.

The Custodian certifies that she possesses the following documents specifically responsive to the Complainant's request for names, test scores and rankings of all individuals who were promoted to or are still being considered for promotion to the positions of Lieutenant and Sergeant from January 1, 2005 to present:

- Score sheets⁷ for seven (7) candidates in the promotional process for the rank of Sergeant in September, 2005,
- Candidate assessment forms and score sheets for thirteen (13) candidates in the promotional process for the rank of Sergeant in April, 2005,
- Score sheets for eight (8) candidates in the promotional process for the rank of Lieutenant in April, 1005,
- Assessment pages for oral presentations for six (6) candidates in the promotional process for the rank of Lieutenant in June, 2005.

The Custodian certifies that no documents exist listing the comparative ranking based on total scores of the individual officers for the promotional process for the Sergeant's position for either April, 2005 or September, 2005.

The Custodian further certifies that no document exists listing the comparative ranking of the individual candidates based on their total scores for the promotional process for the Lieutenant's position for either the oral presentation assessment in June, 2005, or the evaluative process for April, 2005.

Analysis

Whether the Custodian responded to the Complainant's February 9, 2006, OPRA request within the statutorily required seven (7) business days?

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.

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*

⁷ According to the Custodian, the score sheet consists of scores for written examination, oral examination, department interview, evaluations review for each of the three years, which scores are then averaged, average score, service time and total score.

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 ...” N.J.S.A. 47:1A-5.g.

The Complainant made his OPRA request on February 9, 2006. Pursuant to N.J.S.A. 47:1A-5.i, the Custodian should have granted or denied access to the requested records no later than February 22, 2006. In his February 13, 2006 letter to Complainant, the Custodian fails to specifically grant or deny access to the Complainant and fails to indicate a specific reason why the Custodian could not comply with the Complainant’s request for access.

If the Custodian required additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant’s request, she should have obtained a written agreement from the Complainant in order to do so. In Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Custodian knew he needed additional time in order to respond to the Complainant’s request, but failed to obtain a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA to respond. The Council held that the Custodian’s failure to obtain a written agreement extending the seven (7) business day time period resulted in a “deemed” denial of the request.

The Custodian’s response to Complainant on February 13, 2006 that she was collating the documents and would advise him as soon as the process was complete does not satisfy the access requirements of N.J.S.A. 47:1A-5.i. Because the Custodian failed to specifically grant or deny access to the requested records, failed to indicate a specific reason why she could not comply with Complainant’s request for access, and failed to obtain a written agreement to an extension of time within which to respond to Complainant’s request, the request is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i.

Whether the Custodian unlawfully denied access to the requested documents?

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.

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.

OPRA states that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L. 1963, c. 73 (*C. 47:1A-1 et seq.*); any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order...” (Emphasis added). N.J.S.A. 47:1A-9.a.

OPRA states that:

“[n]otwithstanding the provisions of [OPRA]... the personnel or pension records of any individual in the possession of a public agency... shall not be considered a government record and shall not be made available for public access, except that: an individual's *name, title, position, salary, payroll record, length of service... shall be a government record;... and... data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment... shall be a government record.*” (Emphasis added). N.J.S.A. 47:1A-10.

Paragraph 4(c) of E.O. 26 provides that:

“[t]he following records shall not be considered to be government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented...*test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing.*” (Emphasis added). Executive Order 26 (McGreevey, August 13, 2002).

The Complainant states that he is seeking the test scores and promotional rankings of all candidates for the rank of Sergeant or Lieutenant in Ocean Township from January 1, 2005 to the present. The Custodian states that various testing materials for specific

candidates, including test scores and rankings, are confidential pursuant to N.J.S.A. 47:1A-10, E.O. 26 and N.J.S.A. 47:1A-9.

N.J.S.A. 47:1A-9.a. precludes access to documents made confidential by, among other things, Executive Orders of the Governor. Test questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing are not considered government records under paragraph 4(c) of E.O. 26. Therefore, the test scores and rankings of Ocean Township Police Department candidates for Sergeant and Lieutenant from January 1, 2005 to the present are not government records subject to public access under OPRA. The Custodian has, therefore, met her burden of proof that denial of these records was lawful under OPRA pursuant to E.O. 26 and N.J.S.A. 47:1A-9.a.

The Complainant states that he is also seeking the promotional rankings of all candidates for the rank of Sergeant or Lieutenant in Ocean Township from January 1, 2005, to the present.

The Custodian certifies that no documents exist listing the comparative ranking based on total scores of the individual officers for the promotional process for the Sergeant's position for either April, 2005 or September, 2005. The Custodian further certifies that no document exists listing the comparative ranking of the individual candidates based on their total scores for the promotional process for the Lieutenant's position for either the oral presentation assessment in June, 2005, or the evaluative process for April, 2005.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 27, 2005), the Complainant sought copies of telephone records from the New Jersey Department of Education. The Custodian, however, certified that the requested records did not exist. The GRC determined that because no document responsive to the request existed, there could be no unlawful denial of access.

The Custodian herein has certified that the requested records do not exist. Therefore, the requested records cannot be released and there was no unlawful denial of access.

Finally, the Complainant seeks unredacted billing statements of any expenses incurred by the Township in connection with legal representation in grievances between the Township and the Police Benevolent Association. The Custodian provided to the Complainant a number of billing statements redacted to protect certain litigants' names.

N.J.S.A. 47:1A-1.1 exempts from the definition of a government record any record within the attorney client privilege. However, the statute "shall not be construed as exempting from access attorney or consultant bills or invoice except that such bills or invoice may be redacted to remove any information protected by the attorney-client privilege..." N.J.S.A. 47:1A-1.1.

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and

attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 "expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client." In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matter is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Authority, 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State University, 148 N.J. 36, 54 (1997). Nevertheless, "[e]ven in closed cases. . . attorney work-product and documents containing legal strategies may be entitled to protection from disclosure." *Id.*

Because the Custodian's redactions herein are narrowly tailored and appear to protect the names of litigants in pending matters, the redactions are an appropriate method of protecting privileged or confidential information in an otherwise public document.⁸ The Custodian, therefore, did not unlawfully deny access to the Complainant when she provided redacted copies of bills incurred by the Township in connection with legal representation in grievances between the Township and the Police Benevolent Association. N.J.S.A. 47:1A-1.1.

Whether the Custodian's delay and/or failure to respond to the Complainant's requests 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,

⁸ The Custodian included copies of redacted bills with the SOI submitted to the GRC. A review of these documents discloses that the redactions appear to be limited to the names of litigants involved in pending litigation.

the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

The Complainant asserts submitting his OPRA request on February 9, 2006. He states that the Custodian responded to the Complainant on February 13, 2006, three (3) business days after the request. The Complainant states that the Custodian advised him that she was collating the requested records, that she would notify the Complainant on the completion of this process and that all of the requested records were disclosable. The Complainant asserts that on February 23, 2006 the Custodian notified him that all of the requested records were available with the exception of the test score sheets and examination data, which she said were confidential as personnel records pursuant N.J.S.A. 47:1A-10 and E.O. 26.

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).

The evidence of record indicates that Custodian’s response to Complainant occurred on February 23, one day after the seven (7) business day period for responses under OPRA elapsed. Moreover, the evidence of record indicates that the custodian did not intentionally and deliberately deny Complainant access to the requested records. Instead, the evidence shows that the Custodian believed that her non-disclosure of the requested records was authorized under the law. Because there is no evidence that the Custodian knowingly or willfully violated OPRA, the Custodian’s actions appear to be merely negligent and do not meet the legal standard of a knowing and willful violation of OPRA and unreasonable denial of access pursuant to N.J.S.A. 47:1A-11.a.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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 access, denying access, requesting an extension of the statutory response time, or asking for clarification of the request within the statutorily mandated seven (7) business days and such failure results in a “deemed” denial.

2. Pursuant to N.J.S.A. 47:1A-9.a. and E.O. 26 the Custodian has lawfully denied access to the requested test scores of all individuals who were promoted or are still being considered for promotion to the positions of Lieutenant and Sergeant from January 1, 2005 to present.
3. Because the Custodian has certified that no records exist which are responsive to the request for rankings of all individuals who were promoted or are still being considered for promotion to the positions of Lieutenant and Sergeant from January 1, 2005 to present, the Custodian has not unlawfully denied access to such records.
4. Because a review of the Custodian's redactions of requested billing discloses that they are narrowly tailored and appear to protect the names of litigants in pending matters, the redactions are an appropriate method of protecting privileged or confidential information in an otherwise public document. Therefore, the Custodian has lawfully denied access to certain information in the requested bills concerning legal representation of the Township in grievances with the Police Benevolent Association pursuant to N.J.S.A. 47:1A-1.1.
5. Because there is no evidence that the Custodian knowingly or willfully violated OPRA, the Custodian's actions appear to be merely negligent and do not meet the legal standard of a knowing and willful violation of OPRA and unreasonable denial of access pursuant to N.J.S.A. 47:1A-11.a.

Prepared By:

Karyn Gordon, Esq.
In-House Counsel

Approved By:

Catherine Starghill, Esq.
Executive Director

March 21, 2007