



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

December 21, 2010 Government Records Council Meeting

Thomas Healy
Complainant

Complaint No. 2008-108

v.

New Jersey Department of Labor & Workforce Development
Custodian of Record

At the December 21, 2010 public meeting, the Government Records Council (“Council”) considered the December 14, 2010 Supplemental 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 timely complied with the Council’s October 26, 2010 Interim Order by providing access to the requested records with the redactions specified in the Council’s Order to the Complainant and providing certified confirmation to the GRC within the five (5) business day time frame to comply.
2. Although the Custodian unlawfully denied access to the requested records because the Custodian did not disclose personnel information contained within the requested personnel records, which information is specifically designated under N.J.S.A. 47:1A-10 as a government record subject to public access, the Custodian complied with the Council’s April 29, 2009 and October 26, 2010 Interim Orders and the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 21st Day of December, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

James W. Requa, Secretary
Government Records Council

Decision Distribution Date: January 4, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 21, 2010 Council Meeting**

**Thomas Healy¹
Complainant**

GRC Complaint No. 2008-108

v.

**New Jersey Department of Labor
& Workforce Development²
Custodian of Records**

Records Relevant to Complaint:

1. Salary adjustment request form 77 (“DPF-77”) log completed since January, 2006, including actual request forms.
2. Request to appoint confidential, Senior Executive Services (“SES”) or unclassified employee form (“DPF-10”) log completed since January, 2006, including actual request forms.³

Request Made: May 14, 2008

Response Made: May 15, 2008

Custodian: David Fish

GRC Complaint Filed: May 29, 2008⁴

Background

October 26, 2010

Government Records Council’s (“Council”) Interim Order. At its October 26, 2010 public meeting, the Council considered the September 13, 2010 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, found that:

1. The Custodian has met the required burden for reconsideration under Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); he has established that this complaint should not be referred to the Office of Administrative Law for a fact finding hearing as ordered in the Council’s January 26, 2010 Interim Order to settle the disputed facts. Specifically, the Custodian provided all of the records at issue to the GRC for a supplemental *in camera* review, thus settling the record as to the material facts of this complaint.

¹ Represented by Frank M. Crivelli, Esq., of Pellettieri, Rabstein and Altman (Hamilton, NJ).

² Represented by DAG Brady Montalbano Connaughton, on behalf of the NJ Attorney General.

³ The Complainant’s request for appointments consists of three (3) titles: confidential, SES and unclassified employee appointments.

⁴ The GRC received the Denial of Access Complaint on said date.

2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
3. The GRC has determined that the Custodian should disclose the following information contained within each of the records:
 - a. **Log sheets for the Forms DPF-77: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.**
 - b. **On each of the thirty-six (36) Forms DPF-77: Disclose only the “individual’s name” (form box 4), current title (form box 6), approved salary (form box 10.c.), specific experiential, educational or medical qualifications (form box 13) and the “approved salary” box in the lower left hand corner pursuant to N.J.S.A. 47:1A-10.**
 - c. **Log sheets for the Forms DPF-10: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.**
 - d. **On each of the fifty-five (55) Forms DPF-10: Disclose only the “individual’s name” (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

October 28, 2010

Council’s Interim Order distributed to the parties.

November 5, 2010

Custodian’s response to the Council’s Interim Order. The Custodian certifies that the records ordered to be disclosed in the Council’s October 26, 2010 Interim Order are being forwarded to the Complainant with redactions as directed in the above-mentioned Interim Order.

Analysis

Whether the Custodian complied with the Council's October 26, 2010 Interim Order?

At its October 26, 2010 public meeting, the Council ordered that “the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the below table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule, 1969 R. 1:4-4 (2005) to the Executive Director:

- a. Log sheets for the Forms DPF-77: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.
- b. On each of the thirty-six (36) Forms DPF-77: Disclose only the “individual’s name” (form box 4), current title (form box 6), approved salary (form box 10.c.), specific experiential, educational or medical qualifications (form box 13) and the “approved salary” box in the lower left hand corner pursuant to N.J.S.A. 47:1A-10.
- c. Log sheets for the Forms DPF-10: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.
- d. On each of the fifty-five (55) Forms DPF-10: Disclose only the “individual’s name” (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.”

Such compliance was to be received by the GRC within five (5) business days from receipt of the Council’s Interim Order, or on November 5, 2010.⁵ The Custodian provided the Complainant and the GRC with a legal certification and copies of the requested records containing the redactions specified in the Council’s Interim Order on November 5, 2010.

Therefore, the Custodian timely complied with the Council’s October 26, 2010 Interim Order by providing access to the requested records with the redactions specified in the Council’s Order to the Complainant and providing certified confirmation to the GRC within the five (5) business day time frame to comply.

Whether the Custodian’s unlawful denial of 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

⁵ The GRC notes that all New Jersey State offices were closed on November 2, 2010 for Election Day. Thomas Healy v. New Jersey Department of Labor & Workforce Development, 2008-108 – Supplemental Findings and Recommendations of the Executive Director

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.

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, 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, 107 (App. Div. 1996).

In this complaint, the GRC conducted an *in camera* review of the records at issue to determine the validity of the Custodian’s assertion that disclosure of the requested records would reveal personnel information otherwise exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Council found that the Custodian unlawfully denied access to the requested records and ordered disclosure of same with several redactions. Following compliance with the Council’s November 4, 2009 Interim Order, the Complainant argued that the Custodian failed to provide all of the requested Forms DPF-77 and DPF-10.

The Complainant subsequently filed a request for reconsideration asserting that it appeared as though the Custodian only provided those Forms DPF-77 and DPF-10 that were approved. Based on the disputed facts presented by the parties at that time, the Council ordered that the complaint be referred to the Office of Administrative Law (“OAL”) for a hearing to resolve the facts, as well as for a determination of whether the Custodian unlawfully denied access and, if so, whether such denial was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

After receipt of the Council’s January 26, 2010 Interim Order, the Custodian requested reconsideration stating that newly discovered information negated the need for a fact finding hearing. Specifically, the Custodian stated that because Ms. Barbara Matthews (“Ms. Matthews”), Secretarial Assistant, maintained the requested logs, DPF-

77 and DPF-10 files and was under the Complainant's supervision, the New Jersey Department of Labor ("DOL") had initially determined that it was appropriate to conduct the search for the requested records without consulting either Ms. Matthews or the Complainant. The Custodian averred that following receipt of the Complainant's request for reconsideration, the DOL conducted a second search that located additional files.

The GRC ordered that the Custodian provide the newly located documents for an *in camera* review. The Custodian provided the records to the GRC on March 26, 2009. The Custodian further certified that the Complainant's Counsel ultimately forwarded the three (3) additional forms to the Custodian's Counsel and advised that Ms. Matthews had maintained these specific documents in her desk drawer under the direction of Mr. Joseph Doherty ("Mr. Doherty"), former Director of Human Resources and Labor Relations. In its October 26, 2010 Interim Order, the Council ordered disclosure of all records provided for both the initial and supplemental *in camera* review with appropriate redactions (including omitting the redaction of the "approved salary" box on the Forms DPF-77). The Custodian provided certified confirmation on compliance on November 5, 2010.

Based on the evidence of record, it appears that the Complainant's position within the Human Resources ("HR") Department at the DOL influenced the Custodian's search and subsequently caused confusion regarding whether all records responsive were provided for the initial *in camera* review. Exemplifying this confusion is the DOL's decision not to include Ms. Matthews in the search for records responsive when three (3) of the records at issue were maintained by Ms. Matthews in her desk drawer and not in the files where the other records were maintained. Ultimately, however, the evidence in this matter does not rise to a level sufficient to establish that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances.

Therefore, although the Custodian unlawfully denied access to the requested records because the Custodian did not disclose personnel information contained within the requested personnel records, which information is specifically designated under N.J.S.A. 47:1A-10 as a government record subject to public access, the Custodian complied with the Council's April 29, 2009 and October 26, 2010 Interim Orders and the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level 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 the Council find that:

1. The Custodian timely complied with the Council's October 26, 2010 Interim Order by providing access to the requested records with the redactions specified in the Council's Order to the Complainant and providing certified

confirmation to the GRC within the five (5) business day time frame to comply.

2. Although the Custodian unlawfully denied access to the requested records because the Custodian did not disclose personnel information contained within the requested personnel records, which information is specifically designated under N.J.S.A. 47:1A-10 as a government record subject to public access, the Custodian complied with the Council's April 29, 2009 and October 26, 2010 Interim Orders and the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 14, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

October 26, 2010 Government Records Council Meeting

Thomas Healy
Complainant

Complaint No. 2008-108

v.

New Jersey Department of Labor & Workforce Development
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the September 13, 2010 Supplemental 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 has met the required burden for reconsideration under Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); he has established that this complaint should not be referred to the Office of Administrative Law for a fact finding hearing as ordered in the Council’s January 26, 2010 Interim Order to settle the disputed facts. Specifically, the Custodian provided all of the records at issue to the GRC for a supplemental *in camera* review, thus settling the record as to the material facts of this complaint.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
3. The GRC has determined that the Custodian should disclose the following information contained within each of the records:
 - a. **Log sheets for the Forms DPF-77: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.**
 - b. **On each of the thirty-six (36) Forms DPF-77: Disclose only the “individual’s name” (form box 4), current title (form box 6), approved salary (form box 10.c.), specific experiential, educational or medical qualifications (form box 13) and the**



“approved salary” box in the lower left hand corner pursuant to N.J.S.A. 47:1A-10.

c. Log sheets for the Forms DPF-10: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.

d. On each of the fifty-five (55) Forms DPF-10: Disclose only the “individual’s name” (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of October, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: October 28, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Thomas Healy¹
Complainant**

GRC Complaint No. 2008-108

v.

**New Jersey Department of Labor
& Workforce Development²
Custodian of Records**

Records Relevant to Complaint:

1. Salary adjustment request form 77 (“DPF-77”) log completed since January, 2006, including actual request forms.
2. Request to appoint confidential, Senior Executive Services (“SES”) or unclassified employee form (“DPF-10”) log completed since January, 2006, including actual request forms.³

Request Made: May 14, 2008

Response Made: May 15, 2008

Custodian: David Fish

GRC Complaint Filed: May 29, 2008⁴

Background

January 26, 2010

Government Records Council’s (“Council”) Interim Order. At its January 26, 2010 public meeting, the Council considered the January 19, 2010 Supplemental 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, found that because there are disputed issues of material fact, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, as well as for a determination of whether the Custodian unlawfully denied access and, if so, whether such denial was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

¹ Represented by Frank M. Crivelli, Esq., of Pellettieri, Rabstein and Altman (Hamilton, NJ).

² Represented by DAG Brady Montalbano Connaughton, on behalf of the NJ Attorney General.

³ The Complainant’s request for appointments consists of three (3) titles: confidential, SES and unclassified employee appointments.

⁴ The GRC received the Denial of Access Complaint on said date.

January 28, 2010

Council's Interim Order distributed to the parties.

February 4, 2010

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension of time within which to file a motion for reconsideration of the GRC's January 26, 2010 Interim Order.

February 4, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC provides the Custodian's Counsel with information regarding the reconsideration process, including that the granting of an extension is at the sole discretion of the Executive Director pursuant to the GRC's regulations. *N.J.A.C. 105:5-2.10*

February 9, 2010

Letter from the Custodian to the GRC. The Custodian requests an extension of time to submit a request for reconsideration of the GRC's January 26, 2010 Interim Order.

February 17, 2010

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time to submit a request for reconsideration until February 26, 2010.

February 24, 2010

Custodian's Motion for Reconsideration. The Custodian requests that the GRC reconsider its January 26, 2010 Interim Order based on new information. Specifically, the Custodian avers that based on this newly discovered information, there are no issues of disputed material fact necessitating review by the Office of Administrative Law ("OAL"); thus, the GRC should reverse its decision and find that the New Jersey Department of Labor ("DOL") complied with OPRA.

The Custodian states that in an effort to provide the records requested by the GRC in its April 29, 2009 Interim Order, the DOL assigned Ms. Susan Rivera ("Ms. Rivera"), Executive Assistant, to search, locate and retrieve any records responsive. The Custodian avers that because Ms. Barbara Matthews ("Ms. Matthews"), Secretarial Assistant, maintains the requested logs, DPF-77 and DPF-10 files under the Complainant's supervision, the DOL determined that it was appropriate to conduct the search for the requested records without consulting either Ms. Matthews or the Complainant. The Custodian argues that, in good faith, Ms. Rivera searched the files chronologically in order to locate the DPF-77s and DPF-10s responsive, retrieving what she believed to be all forms responsive for the time period identified in the Complainant's OPRA request. The Custodian states that these records were provided to the GRC for an *in camera* review. The Custodian states pursuant to the Council's November 4, 2009 Interim Order, the DOL provided access to the records responsive with certain redactions on November 16, 2009. The Custodian states that the Complainant filed a motion for reconsideration on December 16, 2009.

The Custodian states that subsequent to the Complainant's filing of the motion for reconsideration, Ms. Rivera and Ms. Ellen Spurlock ("Ms. Spurlock"), Acting Director of Human Resources and Labor Relations, performed a second search of the files in Human Resources ("HR"). The Custodian avers that this search yielded a second file containing all of the DPF-77 and DPF-10 forms in question with the exception of a DPF-77 for the Complainant and DPF-10s for Mr. John Batties ("Mr. Batties") and Mr. Joseph Doherty ("Mr. Doherty"), former Director of Human Resources and Labor Relations.⁵ The Custodian states that although these forms cannot be located, the DOL remains committed to working with the Complainant to locate them.

The Custodian requests that in light of the fact that the DOL is now in possession of all of the DPF-77 and DPF-10 forms responsive, the GRC should reconsider its January 26, 2010 Interim Order and permit the DOL to submit the recently discovered records for a supplemental *in camera* review. The Custodian notes that the DOL will also produce the three (3) missing records for an *in camera* review upon discovery of same. Finally, the Custodian reiterates that since the production of the discovered records for an *in camera* review and subsequent disclosure of redacted copies of same to the Complainant, there is no issues necessitating OAL review. Therefore, the Custodian requests that the GRC reconsider its January 26, 2010 Interim Order and reverse its determination that this complaint should be referred to the OAL for disputed issues of material fact.

February 25, 2010

Letter from the Complainant's Counsel to the Custodian's Counsel. The Complainant's Counsel states that this letter serves as notice that he has been retained to represent the Complainant in this matter. The Complainant's Counsel requests that the Custodian's Counsel contact him in order to discuss a resolution to this matter.

February 28, 2010

E-mail from the Complainant to the GRC. The Complainant states that he submitted an OPRA request to the DOL on May 14, 2008. The Complainant states that the DOL initially denied access to the requested records. The Complainant states that subsequent to a filing of this complaint, the GRC requested the records responsive for an *in camera* review, for which the DOL provided only those records reflecting the approval of salary raises. The Complainant argues that the DOL's production of records misled the Council into believing that the DPF-77 form box 10C contained a notation of the approved salary.

The Complainant avers that his request for reconsideration clearly pointed out that the DOL intentionally suppressed additional existing DPF-77s. The Complainant reiterates that the approval status on each of the forms is reflected elsewhere (not in box 10C on the DPF-77 or box 11 on the DPF-10).

The Complainant asserts that he has remained cooperative throughout this entire process. The Complainant argues that he was willing to make accommodations to help

⁵ The Custodian notes that all three individuals are employed in the HR department at the DOL, but there is no indication of whether Mr. Batties and Mr. Doherty are still employed in the HR Department. Thomas Healy v. NJ Department of Labor & Workforce Development, 2008-108 – Supplemental Findings and Recommendations of the Executive Director

the DOL save time and money in providing records; however, the DOL has avoided any discussions with the Complainant until the Custodian filed his motion for reconsideration, in which the Custodian's Counsel indicates that the DOL is willing to work with the Complainant to locate the missing forms. The Complainant asserts that he believes the DOL has failed to comply with the Council's April 29, 2009 Interim Order, thereby misleading the Council in its determination of which redactions were appropriate on the DPF-77 and DPF-10 forms.

March 4, 2010

E-mail from the GRC to the Custodian's Counsel, attaching the GRC's reconsideration request form. The GRC states that it is in receipt of the legal brief supporting the DOL's motion for reconsideration dated February 24, 2010. The GRC requests that the Custodian's Counsel complete the attached form and return it to the GRC.

March 4, 2010

E-mail from the Custodian's Counsel to the GRC, attaching a completed copy of the GRC's reconsideration request form. The Custodian indicates that the reasons for reconsideration of the instant complaint are mistake and change in circumstances.

March 11, 2010

E-mail from the Complainant's Counsel to the GRC. The Complainant's Counsel requests that the GRC hold a conference call regarding this matter during the week of March 22, 2010. The Complainant's Counsel expresses his interest in holding this conference prior to the Council rendering a decision.

March 15, 2010

E-mail from the GRC to the Complainant's Counsel and Custodian's Counsel. The GRC states that a conference call has been scheduled for March 22, 2010 between 2:30 pm and 3:30 pm. The GRC requests that both parties advise as to their availability.

March 18, 2010

E-mail from the GRC to the Complainant's Counsel and Custodian's Counsel. The GRC confirms that a conference call will be held on March 22, 2010 at 2:30 pm.

March 26, 2010

E-mail from the Custodian's Counsel to the GRC with the following attachments:

- Custodian's legal certification.
- Seven (7) DPF-77 forms.
- Thirteen (13) DPF-10 forms.

The Custodian's Counsel states that attached is the supplemental submission as discussed during the telephone conference. The Custodian's Counsel states that the attached newly discovered records responsive to Complainant's OPRA request are being provided for an *in camera* review pursuant to the Council's April 29, 2009 Interim Order.

The Custodian certifies that the attached documents are being submitted in response to a conference call held with the parties and the GRC. The Custodian certifies that subsequent to the Complainant's filing of a motion for reconsideration on December 16, 2009, Ms. Rivera and Ms. Spurlock conducted a second search of the files in HR. The Custodian certifies that as a result of this search, a separate file was discovered containing the existing DPF forms as well as three (3) additional forms. The Custodian certifies that the Complainant's Counsel ultimately forwarded the three (3) additional forms to the Custodian's Counsel and advised that Ms. Matthews had maintained these specific documents in her desk drawer under the direction of Mr. Doherty.

The Custodian certifies that the attached records are those requested by the Council in order to complete the *in camera* inspection in the instant matter.

April 9, 2010

E-mail from the Complainant's Counsel to the GRC. The Complainant's Counsel states that he believes the GRC is now in receipt of the supplemental submission containing the newly discovered DPF-77 and DPF-10 forms. The Complainant's Counsel states that this e-mail will memorialize his position with respect to which part of the records should not be redacted.

The Complainant's Counsel states that he was advised by the GRC during the conference call on March 22, 2010 that the reason the "approved salary" box was redacted was because it was the same number as in the "requested salary" box (10C) and the "requested salary" box was typed and thus easier to read. The Complainant's Counsel states that while the foregoing may have been true in the initial *in camera* review, the newly discovered records should make it clear that this is no longer the case. The Complainant's Counsel notes that the Complainant's "requested" and "approved" boxes are not the same which makes it necessary to reveal all of the "approved salary" boxes. The Complainant's Counsel argues that based on the new evidence, the "approved salary" box should not be redacted.

August 6, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC states that it is in receipt of the DOL's supplemental *in camera* submission and has additional questions. The GRC requests that the Custodian legally certify to the following:

1. Whether the records provided to the GRC for an *in camera* review (both submissions) represents all records responsive to the Complainant's OPRA request?
2. Whether the Form DPF-77 log entries and Form DPF-10 log entries are reflected interchangeably, as the GRC has noticed that similar names (and matching titles) appear in both logs?

The GRC requests that the Custodian's Counsel submit the requested legal certification by close of business on August 10, 2010.

August 11, 2010

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension until August 17, 2010 to submit the requested legal certification.

August 12, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension until August 17, 2010 to submit the requested legal certification.

August 17, 2010

Custodian's legal certification. The Custodian certifies that he has relied heavily on Ms. Spurlock and staff from HR. The Custodian certifies that after deliberating with Ms. Spurlock and staff, it is his understanding that the records provided to the GRC for an *in camera* review represent all records responsive to the Complainant's OPRA request. Moreover, the Custodian certifies that the attached document, prepared by Ms. Spurlock and staff at HR, explains the nature of the Form DPF-77 and Form DPF-10 logs and provides reasons for names which appear either on both logs or multiple times on a single log.

Listed incorrectly:

- Caruso, Robert – action was a DPF-77; incorrectly listed on DPF-10 log (pg. 1).
- Reweta, Wande – action was a DPF-10; incorrectly listed on DPF-77 log (pg. 3).
- Yarborough, Gerald – action was a DPF-77; incorrectly listed on DPF-10 log (pg. 3). Listed correctly on DPF-77 log (pg. 2).
- Richardson, Michelle – action was a DPF-77; incorrectly listed on DPF-10 log (pg. 3). Listed correctly on DPF-77 log (pg. 3).

Resubmissions:

- Dunn, Cecil – original request submitted in November 2005 (not approved)(DPF-77 log, pg. 1); resubmitted February 6, 2007 (DPF-77 log, pg. 2).
- Latoof, Joseph – original request submitted in November 2005 (not approved)(DPF-77 log, pg. 1); resubmitted December 5, 2007 (DPF-77 log, pg. 2).
- Meyer, Franklin – original request submitted in December 2005 (not approved)(DPF-77 log, pg. 1); resubmitted December 5, 2007 (DPF-77 log, pg. 3).
- Biglin, David – original request submitted in December 2005 (not approved)(DPF-77 log – pg. 1); resubmitted October 9, 2007 (DPF-77 log, pg. 2).

Multiple Listing:

- Caruso, Robert
 - DPF-10 – appointment to unclassified position.
 - DPF-10 – request for salary increase, posted on incorrect log.
- Montero, Ana
 - DPF-10 – appointment to unclassified position.

- DPF-10 – appointment to unclassified position.
 - DPF-77 – salary increase.
- Krause, George
 - DPF-10 – appointment to SES position.
 - DPF-10 – appointment to unclassified position.
- Booker, Sheila
 - DPF-10 – appointment to SES position.
 - DPF-10 – request for amendment to original DPF-10 (salary).
- Carrano, Priscilla
 - DPF-10 – appointment to unclassified position.
 - DPF-77 – appointment to SES (no documentation).
- Richardson, Michelle
 - DPF-10 – appointment to unclassified position.
 - DPF-77 – salary increase (incorrectly listed on DPF-10 log, pg. 3).
- Fish, David
 - DPF-77 – salary increase (not approved).
 - DPF-77 – salary increase.
 - DPF-10 – appointment to unclassified position.
 - DPF-77 – appointment to classified position.
 - DPF-77 salary increase.
- Jennings, Joseph
 - DPF-10 – appointment to unclassified position.
 - DPF-10 – appointment to unclassified position.
 - DPF-10 – appointment to unclassified position.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council’s January 26, 2010 Interim Order?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, on February 9, 2010, the Custodian’s Counsel requested an extension of time to file a motion for reconsideration. On February 17, 2010, the GRC granted an extension until February 26, 2010 for submission of the motion of reconsideration. The Custodian’s Counsel submitted the DOL’s motion for reconsideration on February 24, 2010, two (2) business days within the extended time frame to submit same.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, supra, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of its motion for reconsideration, the Custodian avers that based on newly discovered information, there are no issues of disputed material fact necessitating review by the OAL; thus, the GRC should reverse its decision and find that the DOL complied with OPRA. Specifically, the Custodian states that subsequent to the Complainant’s filing a motion for reconsideration of the Council’s November 4, 2009 Interim Order, Ms. Rivera and Ms. Spurlock performed a second search of the files in HR and found a second file containing all of the DPF-77 and DPF-10 forms in question (with the exception of a DPF-77 for the Complainant and DPF-10s for Mr. Batties and Mr. Doherty). The Custodian subsequently certified that the Complainant’s Counsel ultimately forwarded the three (3) remaining forms to the Custodian’s Counsel and advised that Ms. Matthews had maintained these specific documents in her desk drawer under the direction of Mr. Doherty.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. Although the GRC initially relied on the evidence of the record in determining that this complaint should be sent to OAL for a fact finding hearing, the new evidence submitted by the DOL has settled the record. Specifically, the Custodian stated in the motion for reconsideration that following the Complainant’s motion for reconsideration, Ms. Rivera and Ms. Spurlock conducted a second search that yielded the disputed records (with the exception of a DPF-77 for the Complainant and DPF-10s for a Mr. Batties and Mr. Doherty). Moreover, the Custodian certified that the remaining three (3) records were provided to the DOL by the Complainant’s Counsel and has provided all of the newly discovered records to the GRC for a supplemental *in camera* review.

Therefore, the Custodian has met the required burden for reconsideration under Cummings; he has established that this complaint should not be referred to OAL for a fact finding hearing as ordered in the Council’s January 26, 2010 Interim Order to settle

the disputed facts. Specifically, the Custodian provided all of the records at issue to the GRC for a supplemental *in camera* review, thus settling the record as to the material facts of this complaint and obviating the need for any fact-finding hearing at OAL.

Whether the Custodian unlawfully denied the Complainant access to the requested records?

The GRC previously conducted an *in camera* examination on the first set of responsive records submitted pursuant to the Council's April 29, 2009 Interim Order. The GRC reviewed twenty-nine (29) Forms DPF-77 and forty-two (42) Forms DPF-10 and determined that the Custodian must disclose the following information contained in each of the records:

- a. Log sheets for the Forms DPF-77: Disclose only the "individual's name" and "title" columns pursuant to N.J.S.A. 47:1A-10.
- b. On each of the twenty-nine (29) Forms DPF-77: Disclose only the "individual's name" (form box 4), current title (form box 6), approved salary (form box 10.c.), and specific experiential, educational or medical qualifications (form box 13) pursuant to N.J.S.A. 47:1A-10.
- c. Log sheets for the Forms DPF-10: Disclose only the "individual's name" and "title" columns pursuant to N.J.S.A. 47:1A-10.
- d. On each of the forty-two (42) Forms DPF-10: Disclose only the "individual's name" (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.

On March 26, 2010, the Custodian provided the newly discovered records to the GRC for a supplemental *in camera* review. These records consist of seven (7) Forms DPF-77 and thirteen (13) Forms DPF-10.⁶ The Complainant's Counsel subsequently requested that, based on the newly discovered records submitted, the GRC reconsider its recommendation to redact the approved salary section in the bottom left hand corner of the DPF-77s.⁷

A second inspection of the universe of records provided by the Custodian for *in camera* review shows that the figures contained in the approved box at the bottom left hand portion of the DPF-77 forms is identical in those forms where the salaries were approved. Moreover, the DPF-77 forms submitted for the supplemental *in camera* review contain no written annotations in the "approved" box. Because OPRA allows for the disclosure of an employee's salary (*See* N.J.S.A. 47:1A-10) and because the figures in the approved box,

⁶ The Custodian certified that all of the records provided for the initial and subsequent *in camera* inspections represent all records responsive to the Complainant's OPRA request.

⁷ The GRC notes that this issue was one of the issues raised by the Complainant in his motion for reconsideration of the Council's November 4, 2009 Interim Order. The evidence of the record shows that the DOL never raised any objections to this specific issue in its subsequent motion for reconsideration of the Council's February 9, 2010 Interim Order.

either match the numbers in box 10(c) or contain no information, there would be no adverse effects from releasing both. Therefore, the GRC has now subsequently determined that the Custodian should disclose the following information contained within each of the records provided:

- a. Log sheets for the Forms DPF-77: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.
- b. On each of the thirty-six (36) Forms DPF-77: Disclose only the “individual’s name” (form box 4), current title (form box 6), approved salary (form box 10.c.), specific experiential, educational or medical qualifications (form box 13) and the “approved salary” box in the lower left hand corner pursuant to N.J.S.A. 47:1A-10.
- c. Log sheets for the Forms DPF-10: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.
- d. On each of the fifty-five (55) Forms DPF-10: Disclose only the “individual’s name” (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.

Whether the Custodian’s unlawful denial of 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?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has met the required burden for reconsideration under Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); he has established that this complaint should not be referred to the Office of Administrative Law for a fact finding hearing as ordered in the Council’s January 26, 2010 Interim Order to settle the disputed facts. Specifically, the Custodian provided all of the records at issue to the GRC for a supplemental *in camera* review, thus settling the record as to the material facts of this complaint.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

3. The GRC has determined that the Custodian should disclose the following information contained within each of the records:
 - a. **Log sheets for the Forms DPF-77: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.**
 - b. **On each of the thirty-six (36) Forms DPF-77: Disclose only the “individual’s name” (form box 4), current title (form box 6), approved salary (form box 10.c.), specific experiential, educational or medical qualifications (form box 13) and the “approved salary” box in the lower left hand corner pursuant to N.J.S.A. 47:1A-10.**
 - c. **Log sheets for the Forms DPF-10: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.**
 - d. **On each of the fifty-five (55) Forms DPF-10: Disclose only the “individual’s name” (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 13, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

INTERIM ORDER

January 26, 2010 Government Records Council Meeting

Thomas Healy
Complainant

Complaint No. 2008-108

v.

New Jersey Department of Labor & Workforce Development
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 19, 2010 Supplemental 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 because there are disputed issues of material fact, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, as well as for a determination of whether the Custodian unlawfully denied access and, if so, whether such denial was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 26th Day of January, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: January 28, 2010



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 26, 2010 Council Meeting**

**Thomas Healy¹
Complainant**

GRC Complaint No. 2008-108

v.

**New Jersey Department of Labor
& Workforce Development²
Custodian of Records**

Records Relevant to Complaint:

1. Salary adjustment request form 77 (“DPF-77”) log completed since January, 2006, including actual request forms.
2. Request to appoint confidential, Senior Executive Services (“SES”) or unclassified employee form (“DPF-10”) log completed since January, 2006, including actual request forms.³

Request Made: May 14, 2008

Response Made: May 15, 2008

Custodian: David Fish

GRC Complaint Filed: May 29, 2008⁴

Background

November 4, 2009

Government Records Council’s (“Council”) Interim Order. At its November 4, 2009 public meeting, the Council considered the October 21, 2009 *In Camera* 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, found that:

1. The Custodian has complied with the Council’s April 29, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order, as well as a legal certification within the extended time to comply with said Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination**

¹ No legal representation listed on record.

² Represented by DAG Brady Montalbano Connaughton, on behalf of the NJ Attorney General.

³ The Complainant’s request for appointments consists of three (3) titles: confidential, SES and unclassified employee appointments.

⁴ The GRC received the Denial of Access Complaint on said date.

set forth below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.

3. Based on the *in camera* review of the records and examination of the law, the GRC has determined that the Custodian must disclose the following information contained in each of the records:
 - a. **Log sheets for the Forms DPF-77:** Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.
 - b. **On each of the twenty-nine (29) Forms DPF-77:** Disclose only the “individual’s name” (form box 4), current title (form box 6), approved salary (form box 10.c.), and specific experiential, educational or medical qualifications (form box 13) pursuant to N.J.S.A. 47:1A-10.
 - c. **Log sheets for the Forms DPF-10:** Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.
 - d. **On each of the forty-two (42) Forms DPF-10:** Disclose only the “individual’s name” (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.
4. The Custodian unlawfully denied access to the requested records because the Custodian did not disclose personnel information contained within the requested personnel records that is specifically required under N.J.S.A. 47:1A-10 to be government records open to the public. The Council finds the Custodian’s argument unconvincing that disclosure of the personnel information which OPRA specifically designates as a government record open to the public would disclose otherwise exempt personnel records.
5. Since the redactions required are extensive given the number of records involved, a special service charge may be warranted. If the Custodian spends an extraordinary expenditure of time or effort making the redactions directed by the GRC, the Custodian may charge the hourly rate of the lowest level employee who is capable and available to make these redactions within the Custodian’s office pursuant to N.J.S.A. 47:1A-5.c. **If the Complainant determines that he does not want to pay such special service charge, the Custodian need only provide certified confirmation pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director within five (5) business days from receipt of this Order indicating same and this matter will be concluded accordingly.**

November 6, 2009

Council's Interim Order distributed to the parties.

November 16, 2009

Custodian's response to the Council's Interim Order attaching copies of the requested records with redactions.⁵ The Custodian certifies that the attached records are submitted in compliance with the Council's November 4, 2009 Interim Order. The Custodian certifies that the records include log sheets for the Forms DPF-77, twenty-nine (29) Forms DPF-77 attachments, logs sheets for the Forms DPF-10 and forty-two (42) Forms DPF-10 attachments. The Custodian certifies that said forms have been redacted in accordance with the Council's Order.

November 17, 2009

E-mail from the Complainant to the GRC. The Complainant states that he is in possession of the records ordered to be disclosed in the Council's Interim Order. The Complainant states that he appreciates not having to pay a special service charge; however, the Complainant requests that the Council clarify three (3) issues:

1. The Complainant asserts that if the Council's order requires the "approved salary" to be released, then doesn't the "approved" column on the log sheets need to be disclosed.
2. The Complainant asserts that the Council's Interim Order incorrectly identifies the "approved salary" on the DPF-77 form as box 10-c, which is in fact the requested salary. The Complainant asserts that, being intimately familiar with the form, he knows the approved salary is in the lower left hand corner of the form along with the approval status. The Complainant asserts that although this information has been redacted, the Complainant does not believe it is the New Jersey Department of Labor & Workforce Development's ("DOL") possession that every DPF-77 was approved as requested.
3. The Complainant asserts that the order is silent as to the approved salary on the DPF-10 forms. The Complainant asserts that it is his position that the information is public and should be disclosed.

December 11, 2009

E-mail from the GRC to the Complainant. The GRC states that it is in receipt of the Complainant's e-mail dated November 17, 2009 in which the Complainant raises three (3) issues regarding the Council's November 4, 2009 Interim Order. The GRC states the following is in response to the Complainant's raised concerns:

1. The GRC states that the Complainant asserts that the "approved column" on the log sheets be disclosed because the approved salary was ordered disclosed. The GRC contends that although N.J.S.A. 47:1A-10 requires the disclosure of a public employee's salary, it does not require disclosure of the date on which a salary was approved; therefore, the "approved" column on the log sheets are not subject to disclosure under OPRA.

⁵ The Custodian provided his certification with the attached records to the Complainant via hand delivery. Thomas Healy v. NJ Department of Labor & Workforce Development, 2008-108 – Supplemental Findings and Recommendations of the Executive Director

2. The GRC states that the Complainant asserts that box 10-c on the DPF-77 form is not the approved salary; the approved salary is located at the lower left corner of the form and should be disclosed. The GRC contends that since all twenty-nine (29) DPF-77 forms submitted to the GRC for an *in camera* review were approved, the salary contained in box 10-c the approved salary. Additionally, the GRC notes that the amount in box 10-c is typed, making it easier to read, as opposed to the sometimes illegible handwritten amount in the lower left hand approval box.
3. The GRC states that the Complainant asserts that the Interim Order is silent with respect to the approved salary on the DPF-10 forms. The GRC contends that conclusion No. 3.d. on page 2 of the Council's Interim Order specifically directs the Custodian to disclose "the ... approved salary (form box 11) ... pursuant to N.J.S.A. 47:1A-10." The GRC states that because all DPF-10 forms submitted to the GRC were approved, the requested salary in box 11 is the approved salary.⁶

Finally, the GRC states that further review of the DPF-10 forms subsequent to the Complainant's asserted errors in the Interim Order, the GRC has determined that the Custodian included records beyond the scope of the Complainant's May 14, 2008 OPRA request. The GRC states that the scope of the Complainant's request was from January, 2006 to the date of the request; however, the Custodian included several records that are dated after the submission of the Complainant's request to the Custodian.

December 14, 2009

E-mail from the Complainant to the GRC. The Complainant avers that he made his OPRA request on May 14, 2008 and that the DOL wrongfully denied access to the requested records on May 15, 2008. The Complainant further states that this Denial of Access Complaint was filed on May 21, 2008.⁷

The Complainant argues that he has reviewed the records provided by the Custodian and believes that the requested and approved salaries are different in at least one (1) instance. Further, the Complainant asserts that at least one (1) DPF-77 form was not included in the records provided to the Complainant because said form is the Complainant's DPF-77, which was first submitted on November 18, 2005, resubmitted on April 13, 2006 and disapproved by the New Jersey Department of Personnel ("DOP") on April 24, 2008.

The Complainant asserts that he questions the DOL's compliance with the Council's Interim Order and believes that for the foregoing reasons, the approval status is crucial to verifying the DOL's compliance. The Complainant requests that he be given the opportunity to verify that not all DPF-77's were approved as requested.

⁶ The GRC notes that based upon additional documentation included with the *in camera* documentation, the GRC has determined that the requested salary for one employee previously thought to be unapproved was, in fact, approved.

⁷ The GRC received the instant complaint on May 29, 2008.

December 14, 2009

E-mail from the GRC to the Complainant. The GRC states that the Custodian provided those DPF-77 and DPF-10 forms which corresponded to the entries highlighted in the corresponding logs provided to the GRC for the *in camera* inspection. The GRC states that the *in camera* was thorough and complete as it relates to the records the Custodian certified were those required for inspection. The GRC requests that if the Complainant is searching for something specific, he must identify it clearly to the GRC, because the GRC is certain the investigation of the records responsive was carried out in a complete and legally sufficient manner.

December 14, 2009

E-mail from the Complainant to the GRC. The Complainant asserts that he is in possession of a DPF-77 for the Custodian which was submitted on October 29, 2007. The Complainant avers that the requested salary and approved salary do not match. The Complainant asks whether the instant record was sent to the GRC, because he has not received such as part of the DOL's compliance.⁸ The Complainant also notes that the DPF-77 submitted for the Complainant was not contained in the DOL's compliance.

December 14, 2009

E-mail from the GRC to the Complainant. The GRC reiterates that the Custodian only provided those records for individuals highlighted on the DPF-77 and DPF-10 log sheets. The GRC states that if the Complainant is contesting that the records submitted for *in camera* inspection were incomplete, then the Complainant must request an reconsideration of this Interim Order pursuant to the GRC's regulations. The GRC states that it will extend the deadline to request reconsideration to December 16, 2009.⁹ The GRC states that if the Complainant's request for reconsideration is not received by December 16, 2009, this complaint will proceed to final adjudication, at which time the Complainant will have forty-five (45) days from the date the decision is issued to file an appeal with the Appellate Division.

December 16, 2009

Complainant's request for reconsideration of the Council's November 4, 2009 Findings and Recommendations attaching the Complainant's disapproved DPF-77 form.

The Complainant asserts that the reasons supporting the Council's reconsideration of this matter include new evidence, a mistake and extraordinary circumstances.

In support of the motion for reconsideration, the Complainant asserts that the DOL chose to suppress certain documents. The Complainant contends that his attached DPF-77 form (signed April 13, 2006 and submitted on his behalf to the DOP on April 28, 2006) was never provided as part of the Custodian's compliance with the Council's November 4, 2009 Interim Order. The Complainant further argues that there also exists a DPF-77 form submitted on behalf of the Custodian where the requested salary is different

⁸ It is unclear whether the Complainant is speaking about the entire record or the information contained within the Custodian's DPF-77 submitted on October 29, 2007.

⁹ The GRC notes that the deadline provided in *N.J.A.C. 5:105-2.10* is ten (10) business days from receipt of the Council's decisions, or originally November 20, 2009 in the instant matter.

from the approved salary.¹⁰ The Complainant acknowledges that he can understand the missing resubmissions regarding a Mr. John Batties and a Mr. Joseph Doherty. The Complainant asserts that he believes that the DOL only provided approved forms, which was not what was requested.

The Complainant avers that for the foregoing reasons, he questions the DOL's compliance with the Council's Interim Order and reiterates that the "approved salary" is extremely important especially since the DOL attempted to portray that every action was approved as submitted.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's November 4, 2009 Findings and Recommendations?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

"[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." *D'Atria v. D'Atria*, 242 *N.J. Super.* 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, *Cummings v. Bahr*, 295 *N.J. Super.* 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 *N.J. Super.* at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

¹⁰ The Complainant notes that he does not know whether he has the authorization to release the Custodian's DPF-77 form, so it has not been attached.
Thomas Healy v. NJ Department of Labor & Workforce Development, 2008-108 – Supplemental Findings and Recommendations of the Executive Director

The Council's November 4, 2009 Interim Order specifically directed the Custodian to disclose to the Complainant the following information contained in each of the records requested:

- a. Log sheets for the Forms DPF-77: Disclose only the "individual's name" and "title" columns pursuant to N.J.S.A. 47:1A-10.
- b. On each of the twenty-nine (29) Forms DPF-77: Disclose only the "individual's name" (form box 4), current title (form box 6), approved salary (form box 10.c.), and specific experiential, educational or medical qualifications (form box 13) pursuant to N.J.S.A. 47:1A-10.
- c. Log sheets for the Forms DPF-10: Disclose only the "individual's name" and "title" columns pursuant to N.J.S.A. 47:1A-10.
- d. On each of the forty-two (42) Forms DPF-10: Disclose only the "individual's name" (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.

Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

The Custodian provided legal certification of his compliance on November 16, 2009, or the fifth (5th) business day following receipt of the Council's Interim Order, certifying that the attached redacted records are submitted in compliance with the Council's Order.

However, the Complainant e-mailed the GRC on November 17, 2009 taking issue with the compliance. Specifically, the Complainant asked whether the approved salary column should be subject to disclosure and contended that the approved salary on the DPF-77 form is not located in box 10-c, but in the lower left corner of the form. The Complainant also argued that the Council's Interim Order was silent as to the approved salaries contained on the DPF-10 forms.

The GRC e-mailed the Complainant on December 11, 2009 stating that it disagreed with the Complainant's position. Specifically, the GRC stated that the information contained in the approved column on the logs contain dates not subject to disclosure. Additionally, the GRC acknowledged that all twenty-nine (29) DPF-77 forms submitted by the DOL were approved, thus making the requested salary in box 10-c the approved salary. The GRC further averred that all DPF-10 forms submitted were approved, thus the requested salary in box 11 is the approved salary subject to disclosure.

The Complainant responded via e-mail on December 14, 2009 asserting the requested and approved salaries are different in at least one (1) instance. The Complainant also contends that there is at least one (1) DPF-77 form not provided, submitted on behalf of the Complainant, which was ultimately disapproved. In a

subsequent communication, the Complainant averred that he was in possession of a DPF-77 for the Custodian that was not provided to the Complainant as part of the DOL's compliance that contained a difference between the requested salary and the approved salary. The Complainant reiterated that the DPF-77 form submitted on his behalf was not included in the DOL's compliance.

The GRC noted in an e-mail to the Complainant dated December 14, 2009 that the Custodian provided only those records for individuals highlighted on the DPF-77 and DPF-10 form log sheets. The GRC further advised that if the Complainant wished to request reconsideration on the basis that the records provided to the GRC for the *in camera* inspection were incomplete, he submit notice of such by December 16, 2009.

The Complainant filed such request for reconsideration on December 16, 2009. In support of his motion for reconsideration, the Complainant asserts that a mistake, new evidence and extraordinary circumstances require the Council's reconsideration of its November 4, 2009 decision. Specifically, the Complainant contends that the DOL has not provided all of the DPF-77 and DPF-10 forms responsive. The Complainant attached a copy of a DPF-77 form submitted on his behalf that falls within the time period requested, but was not provided for either the *in camera* review or the Custodian's compliance of the Council's Interim Order. Additionally, the Complainant asserts that a DPF-77 form submitted on behalf of the Custodian containing an approved salary differing from the requested salary was not provided.

The GRC has reviewed the evidence submitted by the parties in this matter. Upon further review, it appears that there is a dispute between the parties involving the material facts of this case. Specifically, the Custodian provided DPF-77 and DPF-10 forms for only the names highlighted on each log sheet. It is unclear whether the DOL is possession of the forms corresponding to the names not highlighted, or whether the Custodian has a valid exemption for not providing such as part of records responsive for *in camera* review per the directives of the GRC in the November 4, 2009 Interim Order.

Therefore, because there are disputed issues of material fact, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, as well as for a determination of whether the Custodian unlawfully denied access and, if so, whether such denial was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because there are disputed issues of material fact, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, as well as for a determination of whether the Custodian unlawfully denied access and, if so, whether such denial was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 19, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

November 4, 2009 Government Records Council Meeting

Thomas Healy
Complainant

Complaint No. 2008-108

v.

New Jersey Department of Labor
& Workforce Development
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 2009 *In Camera* 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 has complied with the Council’s April 29, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order, as well as a legal certification within the extended time to comply with said Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
3. Based on the *in camera* review of the records and examination of the law, the GRC has determined that the Custodian must disclose the following information contained in each of the records:
 - a. **Log sheets for the Forms DPF-77: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.**
 - b. **On each of the twenty-nine (29) Forms DPF-77: Disclose only the “individual’s name” (form box 4), current title (form box 6), approved**



salary (form box 10.c.), and specific experiential, educational or medical qualifications (form box 13) pursuant to N.J.S.A. 47:1A-10.

- c. **Log sheets for the Forms DPF-10:** Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.
 - d. **On each of the forty-two (42) Forms DPF-10:** Disclose only the “individual’s name” (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.
4. The Custodian unlawfully denied access to the requested records because the Custodian did not disclose personnel information contained within the requested personnel records that is specifically required under N.J.S.A. 47:1A-10 to be government records open to the public. The Council finds the Custodian’s argument unconvincing that disclosure of the personnel information which OPRA specifically designates as a government record open to the public would disclose otherwise exempt personnel records.
 5. Since the redactions required are extensive given the number of records involved, a special service charge may be warranted. If the Custodian spends an extraordinary expenditure of time or effort making the redactions directed by the GRC, the Custodian may charge the hourly rate of the lowest level employee who is capable and available to make these redactions within the Custodian’s office pursuant to N.J.S.A. 47:1A-5.c. **If the Complainant determines that he does not want to pay such special service charge, the Custodian need only provide certified confirmation pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director within five (5) business days from receipt of this Order indicating same and this matter will be concluded accordingly.**

Interim Order Rendered by the
Government Records Council
On The 4th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Thomas Healy¹
Complainant**

GRC Complaint No. 2008-108

v.

**New Jersey Department of Labor
& Workforce Development²
Custodian of Records**

Records Relevant to Complaint:

1. Salary adjustment request form 77 (“DPF 77”) log completed since January, 2006, including actual request forms.
2. Request to appoint confidential, Senior Executive Services (“SES”) or unclassified employee form (“DPF 10”) log completed since January, 2006, including actual request forms.³

Request Made: May 14, 2008

Response Made: May 15, 2008

Custodian: David Fish

GRC Complaint Filed: May 29, 2008⁴

Records Submitted for *In Camera* Examination:

1. Log of the Forms DPF-77 (Salary Adjustment Request)
2. Twenty-nine (29) Forms DPF-77
3. Log of the Forms DPF-10 (Request to Appoint Confidential, SES and/or Unclassified Employee)
4. Forty-two (42) Forms DPF-10

Background

April 29, 2009

Government Records Council’s Interim Order. At the April 29, 2009 public meeting, the Government Records Council (“Council”) considered the April 22, 2009 Executive Director’s Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

¹ No legal representation listed on record.

² Represented by DAG Brady Montalbano Connaughton, on behalf of the NJ Attorney General.

³ The Complainant’s request for appointments consists of three (3) titles: confidential, SES and unclassified employee appointments.

⁴ The GRC received the Denial of Access Complaint on said date.

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of all records responsive to determine the validity of the Custodian's assertion that disclosure of the requested records would reveal personnel information otherwise exempt from disclosure pursuant to N.J.S.A. 47:1A-10.
2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

May 1, 2009

Council's Interim Order ("Order") distributed to the parties.

May 7, 2009⁸

Letter from the Custodian's Counsel to the GRC. Counsel requests an extension of time to comply with the Council's April 29, 2009 Interim Order.

May 14, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian an extension of time to comply with the Council's April 29, 2009 Interim Order until May 21, 2009.

May 20, 2009

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

1. Log of the Forms DPF-77 (Salary Adjustment Request)
2. Twenty-nine (29) Forms DPF-77
3. Log of the Forms DPF-10 (Request to Appoint Confidential, SES and/or Unclassified Employee)
4. Forty-two (42) Forms DPF-10

⁵ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ This request was dated May 5, 2009; however the GRC did not receive this correspondence until May 7, 2009. Thomas Healy v. NJ Department of Labor & Workforce Development, 2008-108 – *In Camera* Findings and Recommendations of the Executive Director 2

The Custodian certifies that he is the Executive Director of Legal and Regulatory Services, as well as the Records Custodian. The Custodian also certifies that the records enclosed are those records requested for an *in camera* review by the Council in its April 29, 2009 Interim Order.

Analysis

Whether the Custodian complied with the Council's April 29, 2009 Interim Order?

At its April 29, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested records were lawfully denied because disclosure of the those records would reveal personnel information that is otherwise exempt pursuant to N.J.S.A. 47:1A-10, the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on May 8, 2009.

On May 7, 2009, Custodian's Counsel requested an extension of time to comply with the Council's April 29, 2009 Interim Order. On May 14, 2009, the GRC granted the Custodian an extension of time to comply with the Interim Order until May 21, 2009. Thereafter, the Custodian provided the GRC with a legal certification and the unredacted records requested for the *in camera* inspection on May 21, 2009 (within the extended time to comply with the Interim Order).

Therefore, the Custodian complied with the Council's April 29, 2009 Interim Order within the extended time to comply with said Order.

Whether the Custodian unlawfully denied the Complainant access to the requested records?

The Custodian asserts that he lawfully denied the Complainant access to the requested records because disclosure of the records would reveal personnel information that is otherwise exempt pursuant to N.J.S.A. 47:1A-10. Conversely, the Complainant asserts that the Custodian's denial was overly broad and that the records requested are public records. Additionally, the Complainant asserts that because N.J.S.A. 47:1A-10 sets forth a certain amount of information that is disclosable under OPRA, the Custodian should have granted access to the requested records with appropriate redactions.

OPRA provides that the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance

filed by or against an individual, 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, date of separation and the reason therefor, and the amount and type of any pension received **shall be a government record**;
- personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
- 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 GRC conducted an *in camera* examination on the submitted records. The GRC reviewed the logs of the personnel forms, as well as each of the twenty-nine (29) Forms DPF-77 (Salary Adjustment Request) and forty-two (42) Forms DPF-10 (Request to Appoint Confidential, SES and/or Unclassified Employee). Based on the *in camera* review of the records and examination of the law, the GRC has determined that the Custodian must disclose the following information contained in each of the records:

- a. Log sheets for the Forms DPF-77: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.
- b. On each of the twenty-nine (29) Forms DPF-77: Disclose only the “individual’s name” (form box 4), current title (form box 6), approved salary (form box 10.c.), and specific experiential, educational or medical qualifications (form box 13) pursuant to N.J.S.A. 47:1A-10.
- c. Log sheets for the Forms DPF-10: Disclose only the “individual’s name” and “title” columns pursuant to N.J.S.A. 47:1A-10.
- d. On each of the forty-two (42) Forms DPF-10: Disclose only the “individual’s name” (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.

Thus, the Custodian unlawfully denied access to the requested records because the Custodian did not disclose personnel information contained within the requested personnel records that is specifically required under N.J.S.A. 47:1A-10 to be government records open to the public. The Council finds the Custodian’s argument that disclosure of the personnel information which OPRA specifically designates as a government record open to the public would disclose otherwise exempt personnel records.

Since the redactions are extensive given the number of records involved, a special service charge may be warranted. If the Custodian spends an extraordinary expenditure of time or effort making the redactions directed by the GRC, the Custodian may charge the hourly rate of the lowest level employee who is capable and available to make these redactions within the Custodian's office pursuant to N.J.S.A. 47:1A-5.c.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an "extraordinary" expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. In this regard, OPRA provides:

"Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*" (Emphasis added.) N.J.S.A. 47:1A-5.c.

The determination of what constitutes an "extraordinary expenditure of time and effort" under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the "extraordinary burden" placed upon the school district in responding to the request. *Id.*

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian's time was reasonable and consistent with N.J.S.A. 47:1A-5.c. *Id.* at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an "extraordinary expenditure of time and effort to accommodate" pursuant to OPRA:

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;⁹ and

⁹ With regard to this factor, the court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

- The amount of time required to return the documents to their original storage place. *Id.* at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. *Id.* at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” *Id.*

Recognizing that many different variables may affect a determination of whether a special service charge is reasonable and warranted, the GRC established an analytical framework for situations which may warrant an assessment of a special service charge. This framework incorporates the factors identified in the Courier Post case, as well as additional relevant factors. For the GRC to determine when and whether a special service charge is reasonable and warranted, a Custodian must provide a response to the following questions:

- 1. What records are requested?**
- 2. Give a general nature description and number of the government records requested.**
- 3. What is the period of time over which the records extend?**
- 4. Are some or all of the records sought archived or in storage?**
- 5. What is the size of the agency (total number of employees)?**
- 6. What is the number of employees available to accommodate the records request?**
- 7. To what extent do the requested records have to be redacted?**
- 8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?**
- 9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?**
- 10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?**
- 11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?**

12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

If the Complainant determines that he does not want to pay such special service charge, the Custodian need only provide certified confirmation pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director within five (5) business days from receipt of this Order indicating same and this matter will be concluded accordingly.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's April 29, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order, as well as a legal certification within the extended time to comply with said Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
3. Based on the *in camera* review of the records and examination of the law, the GRC has determined that the Custodian must disclose the following information contained in each of the records:
 - a. **Log sheets for the Forms DPF-77: Disclose only the "individual's name" and "title" columns pursuant to N.J.S.A. 47:1A-10.**
 - b. **On each of the twenty-nine (29) Forms DPF-77: Disclose only the "individual's name" (form box 4), current title (form box 6), approved salary (form box 10.c.), and specific experiential, educational or medical qualifications (form box 13) pursuant to N.J.S.A. 47:1A-10.**
 - c. **Log sheets for the Forms DPF-10: Disclose only the "individual's name" and "title" columns pursuant to N.J.S.A. 47:1A-10.**
 - d. **On each of the forty-two (42) Forms DPF-10: Disclose only the "individual's name" (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.**

4. The Custodian unlawfully denied access to the requested records because the Custodian did not disclose personnel information contained within the requested personnel records that is specifically required under N.J.S.A. 47:1A-10 to be government records open to the public. The Council finds the Custodian's argument unconvincing that disclosure of the personnel information which OPRA specifically designates as a government record open to the public would disclose otherwise exempt personnel records.

5. Since the redactions required are extensive given the number of records involved, a special service charge may be warranted. If the Custodian spends an extraordinary expenditure of time or effort making the redactions directed by the GRC, the Custodian may charge the hourly rate of the lowest level employee who is capable and available to make these redactions within the Custodian's office pursuant to N.J.S.A. 47:1A-5.c. **If the Complainant determines that he does not want to pay such special service charge, the Custodian need only provide certified confirmation pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director within five (5) business days from receipt of this Order indicating same and this matter will be concluded accordingly.**

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

April 29, 2009 Government Records Council Meeting

Thomas Healy
Complainant

Complaint No.2008-108

v.

NJ Department of Labor & Workforce Development
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council ("Council") considered the April 22, 2009 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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of all records responsive to determine the validity of the Custodian's assertion that disclosure of the requested records would reveal personnel information otherwise exempt from disclosure pursuant to N.J.S.A. 47:1A-10.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: May 1, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**Thomas Healy¹
Complainant**

GRC Complaint No. 2008-108

v.

**New Jersey Department of Labor
& Workforce Development²
Custodian of Records**

Records Relevant to Complaint:

1. Salary adjustment request form 77 (“DPF 77”) log completed since January, 2006, including actual request forms.
2. Request to appoint confidential, Senior Executive Services (“SES”) or unclassified employee form (“DPF 10”) log completed since January, 2006, including actual request forms.³

Request Made: May 14, 2008

Response Made: May 15, 2008

Custodian: David Fish

GRC Complaint Filed: May 29, 2008⁴

Background

May 14, 2008

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint on an official OPRA request form.

May 15, 2008

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested records is denied pursuant to N.J.S.A. 47:1A-10, which states that “personnel...records of any individual in possession of a public agency... shall not be considered a government record and shall not be made available for public access.” The Custodian states that there are several enumerated exceptions provided in N.J.S.A. 47:1A-10, but the specific records being requested do not fall within the scope of any of those exceptions.

¹ No legal representation listed on record.

² Represented by DAG Brady Montalbano Connaughton, on behalf of the NJ Attorney General.

³ The Complainant’s request for appointments consists of three (3) titles: confidential, SES and unclassified employee appointments.

⁴ The GRC received the Denial of Access Complaint on said date.

May 29, 2008

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

- Complainant’s OPRA request dated May 14, 2008.
- Letter from the Custodian to the Complainant dated May 15, 2008.
- Sample copy of a DPF 77 log.
- Sample copy of a DPF 77 request form.
- Sample copy of a DPF 10 log.
- Sample copy of a DPF 10 request form.

The Complainant states that he submitted an OPRA request to the Custodian on May 14, 2008. The Complainant states that the Custodian responded in writing on May 15, 2008, denying access to the requested records pursuant to N.J.S.A. 47:1A-10.

The Complainant contends that the Custodian’s denial was overly broad and that the records being requested are public records. The Complainant argues that because N.J.S.A. 47:1A-10 sets forth a certain amount of information that falls within the public domain, the Custodian should have granted access to the requested records with appropriate redactions.

The Complainant did not agree to mediate this complaint.

June 9, 2008⁵

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated May 14, 2008.
- Letter from the Custodian to the Complainant dated May 15, 2008.

The Custodian states that he received the Complainant’s OPRA request on May 14, 2008 and promptly responded, denying access to the requested records pursuant to N.J.S.A. 47:1A-10.

The Custodian states that the requested records are personnel records which are in the possession of the Department of Labor and Workforce Development (“DOL”). The Custodian asserts that, although the requested records contain certain information subject to disclosure pursuant to N.J.S.A. 47:1A-10, each of the forms and logs requested indicates when a request for a salary adjustment or hiring of a confidential, SES or unclassified employee has been submitted by DOL to the New Jersey Department of Personnel (“DOP”) and tracks the status of each request. The Custodian contends that even the release of names listed on the requested records would reveal to the Complainant that such requests for salary adjustments or hirings have been made by DOL on behalf of certain employees, which is outside the scope of information authorized for disclosure under N.J.S.A. 47:1A-10.

⁵ The Complainant’s Counsel prepared and submitted the SOI prior to the GRC’s request for such documentation.

The Custodian asserts that although DOL would be compelled to disclose the information specified in OPRA, DOL is prohibited from disclosing any personnel information regarding an individual employee, such as whether and when DOL requests a salary adjustment or attempts to make an appointment of an unclassified position and the on-going status of such requests.

The Custodian further asserts that the information contained in the requested records, which is otherwise subject to disclosure pursuant to N.J.S.A. 47:1A-10, should not be disclosed when providing the specific information would reveal personnel information that is exempt from disclosure under N.J.S.A. 47:1A-10.

The Custodian states that the Complainant indicates in his May 14, 2008 OPRA request that the Complainant already has unofficial access to the requested records. The Custodian avers that the Complainant is a manager in DOL's Division of Human Resources ("HR"), has daily access to the requested records and has probably seen all DPF 77's and DPF 10's processed by DOL from the present to well before the requested time period of January 2006. The Custodian finally asserts that the Complainant is considered a confidential employee, which allows the Complainant to access the same confidential records and information being sought in the Complainant's May 14, 2008 OPRA request.

Analysis

Whether the Custodian unlawfully denied access to 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.

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 allows that a requestor who is denied access to a government record may:

“institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...” N.J.S.A. 47:1A-6.

OPRA states that:

“...the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, 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, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;*” (Emphasis added.) N.J.S.A. 47:1A-10.

Executive Order 26 (McGreevey 2002) (“E.O. No. 26”) provides that:

“[n]o public agency shall disclose the resumes, *applications for employment or other information concerning job applicants* while a *recruitment search* is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The *resumes of unsuccessful candidates may be disclosed* after the search has been concluded and the position has been filled, but *only where the unsuccessful candidate has consented to such disclosure.*” (Emphasis added.)

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.

N.J.S.A. 47:1A-10 specifically identifies personnel information subject to disclosure under OPRA. The requested records, while containing information that may be subject to disclosure, pertain to personnel processes that are not identified as government records pursuant to OPRA. Additionally, E.O. No. 26 provides that information regarding job applicants shall not be disclosed during recruitment and may only be provided for unsuccessful candidates after the position has been filled and the unsuccessful candidate has consented to disclosure.

In this complaint, the Complainant asserts that the Custodian’s denial of access to the Complainant’s May 14, 2008 OPRA request is overly broad and that the requested

records are, in fact, government records. Conversely, the Custodian asserts that providing the information specifically identified as subject to disclosure pursuant to N.J.S.A. 47:1A-10 would reveal personnel information that is otherwise exempt under OPRA.

In order to determine the validity of the Custodian's assertion that disclosure of the requested records would reveal personnel information otherwise exempt from disclosure pursuant to N.J.S.A. 47:1A-10, the GRC must conduct an *in camera* review of the records responsive to the Complainant's OPRA request.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁶ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

The court also stated that:

"[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review."

Further, the court stated that:

"[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption."

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of all records responsive to determine the validity of the Custodian's assertion that

⁶ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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disclosure of the requested records would reveal personnel information otherwise exempt from disclosure pursuant to N.J.S.A. 47:1A-10.

Whether the Custodian's unlawful denial of 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?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of all records responsive to determine the validity of the Custodian's assertion that disclosure of the requested records would reveal personnel information otherwise exempt from disclosure pursuant to N.J.S.A. 47:1A-10.
2. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁹, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 22, 2009

⁷ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁸ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."