



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 25, 2009 Government Records Council Meeting

Leonard P. Lucente
Complainant

Complaint No. 2008-30

v.

City of Union City (Hudson)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 18, 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. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Custodian has borne his burden that the denial of access to the redacted information in the record responsive was authorized by law pursuant to N.J.S.A. 47:1A-10 and Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004). *See also* Mitzak v. Manalapan-Englishtown Regional Schools, GRC Complaint No. 2005-205 (July 2006)(holding that there was no unlawful denial of access to the requested record because the record was not clearly defined as a payroll record pursuant to Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), nor clearly defined as a personnel record pursuant to N.J.S.A. 47:1A-10).
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian bore his burden of proving a lawful denial of access to the redacted information in the record responsive to the Complainant’s December 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-10 and Jackson v. Kean University, GRC



Complaint No. 2002-98 (February 2004), 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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 25th Day of February, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: March 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

**Leonard P. Lucente¹
Complainant**

GRC Complaint No. 2008-30

v.

**City of Union City²
Custodian of Records**

Records Relevant to Complaint: A copy of D.C.'s terminal leave paper work submitted to payroll.³

Request Made: December 11, 2007

Response Made: January 7, 2008

Custodian: William Senande

GRC Complaint Filed: February 7, 2008.⁴

Background

December 11, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form.

January 7, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventeenth (17th) business day following receipt of such request. The Custodian states that he is confirming the Complainant's agreement to an extension of time to respond to this request. The Custodian states that the Complainant clarified his request on December 26, 2007 and that the Custodian is providing access to the record responsive with redactions pursuant to N.J.S.A. 47:1A-10 and D.C.'s reasonable expectation of privacy as afforded under N.J.S.A. 47:1A-1. The Custodian states that the information disclosed to the Complainant is within the personnel record exemptions found in N.J.S.A. 47:1A-10.⁵

¹ No legal representation listed on record.

² Represented by Jacquelin Gioioso, Esq., of Scarinci Hollenbeck (Lyndhurst, NJ).

³ The Complainant's December 11, 2007 OPRA request also includes a request for timesheets for the year 2007 and appears not to be at issue in this complaint. The name of the employee whose records are being sought is initialed to protect said person's identity.

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

⁵ The Custodian includes a numerical list of exemptions corresponding with each redacted line in the record responsive.

January 7, 2008

Letter from the Complainant to the Custodian. The Complainant states that he received the Custodian's response and does not agree with the Custodian's redactions and legal explanations for said redactions. The Complainant states that as President of the Union City Employees Association ("UCEA"), he has every right to view the redacted portions of the record to ensure that the data complies with the employee's contract. The Complainant states that he has filed a complaint with the Government Records Council.

February 7, 2008

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

- Complainant's OPRA request dated December 11, 2007.
- Letter from the Custodian to the Complainant dated January 7, 2008, attaching a redacted copy of the requested record.

The Complainant states that he submitted a records request to the Custodian on December 11, 2007. The Complainant states that he received a heavily redacted record on January 7, 2008.

The Complainant contends that the redacted information is not exempt from disclosure under OPRA. The Complainant asserts that as President of the UCEA, he must review all of these records to make sure that the retired employees are receiving fair compensation from Union City in accordance with their contract. The Complainant also asserts that this record may be needed in a federal court case.

The Complainant agreed to mediate this complaint.

February 25, 2008

Offer of Mediation sent to the Custodian.

February 28, 2008

The Custodian agrees to mediate this complaint.

March 7, 2008

Complaint referred to mediation.

August 13, 2008

Complaint referred back from mediation.

August 19, 2008

Letter from the GRC to the Complainant. The GRC informs the Complainant's Counsel that he has the opportunity to amend this Denial of Access Complaint prior to the GRC's request for the Statement of Information from the Custodian. The GRC states that the Complainant's response is due by close of business on August 27, 2008.

August 25, 2008

E-mail from the Complainant to the GRC. The Complainant requests an extension of time to submit a response to the GRC's request for an amended Denial of Access Complaint.

August 25, 2008

E-mail from the GRC to the Complainant. The GRC grants the Complainant's request for an extension and states that a response to the GRC's request for an amended Denial of Access Complaint is due on September 5, 2008.

August 29, 2008

Letter from the Complainant to the GRC attaching a sample of the record responsive to the Complainant's request. The Complainant states that the attached sample is submitted to the Payroll Department so that an individual who has retired can be paid for their length of service with Union City. The Complainant states that in his capacity as union President, the Complainant assists employees in completing and filing paper work to Union City while the employees are retired. The Complainant states that because the Payroll Department receives only the requested record, which takes the place of time sheets, the requested record is a payroll record and should be disclosed to the Complainant without redactions.

September 30, 2008

Request for the Statement of Information sent to the Custodian.

October 9, 2008

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

- Complainant's OPRA request dated December 11, 2007.
- Letter from the Custodian to the Complainant dated January 7, 2008, attaching a redacted copy of the requested record.
- Letter from the Complainant to the Custodian dated January 7, 2008.
- Redacted printout of D.C.'s pay period dated June 6, 2008 to June 16, 2008.

The Custodian certifies that upon receipt of the Complainant's OPRA request on December 11, 2007, he contacted the Mayor's office and the Payroll Department, at which time it was determined that there was no form for employees to complete to request terminal leave payment. The Custodian certifies that he obtained a copy of a letter from D.C. to the Mayor and her Department head notifying them of her intention to retire.

The Custodian avers that because the Complainant erroneously described the D.C. letter as a payroll record, he confirmed with the Payroll Department and the City Treasurer that the Payroll Department receives an Excel spreadsheet that lists the employees to be paid and the number of days for which the employees get paid from each Union City department before each pay period.

The Custodian avers that the Complainant verbally clarified his request on December 27, 2007, seeking the record that an employee fills out when he or she retires.

The Custodian states that he responded on January 7, 2008, indicating that the Complainant had allowed for an extension of time to respond and also clarified the December 11, 2007 OPRA request. The Custodian states that the Complainant was also provided with a redacted copy of the requested record that contained a numerical set of exemptions corresponding with the redacted lines on the record. The Custodian states that the record provided is the only record responsive to the Complainant's original request and subsequent clarification.

The Custodian asserts that the GRC should not order disclosure of the redacted information because of D.C.'s reasonable expectation of privacy and the exemptions to disclosure found in N.J.S.A. 47:1A-10. The Custodian contends that the Legislature explicitly defined that information which is subject to disclosure because of the sensitive nature of personnel records. The Custodian asserts that "payroll records" is the only information subject to disclosure that can be classified as actual records, but in a limited scope.

The Custodian contends that although the Complainant attempts to distinguish the difference between a payroll record and a personnel record, the GRC has already defined the term payroll record in Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), by relying on the definition used by New Jersey Department of Labor's ("DOL") regulations regarding information required to be included in an employee's payroll record. The Custodian states that the GRC held the following in Jackson:

"Neither OPRA nor Executive Order [No.] 11² defines the term "payroll record". Thus, we look to the ordinary meaning of that term, and are informed by other regulatory provisions defining that phrase. "Payroll" is defined as a list of employees to be paid and the amount due to each of them. Black's Law Dictionary (7th Ed., 1999). It is also clear that documents included within the payroll record exception are, in part, records required by law to be maintained or reported in connection with payment of salary to employees and is adjunct to salary information required to be disclosed. In this regard, N.J.A.C. 12: 16-2.1, a Department of Labor regulation entitled "Payroll records," requires the following:

Every employing unit having workers in employment, regardless of whether such unit is or is not an "employer" as defined in the Unemployment Compensation Law, shall keep payroll records that shall show, for each pay period:

1. The beginning and ending dates;
2. The full name of each employee and the day or days in each calendar week on which services for remuneration are performed;
3. The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so

reported, the minimum wage rate prescribed under applicable laws of this State or of the United States or the amount of remuneration actually received by the employee from his employing unit, whichever is the higher; and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;

4. The total amount of all remuneration paid to all employees;
5. The number of weeks worked.”

The Custodian argues that the Complainant’s reliance on the requested record as a payroll record and not a personnel record is wrong. Additionally, the Custodian asserts that if the Complainant’s argument is correct that the redacted information is really a payroll record subject to disclosure, then the Custodian would also be obligated to provide other sensitive information, such as a letter regarding an employee’s reason for medical leave or an employee’s request to take a vacation day.

The Custodian contends that the Complainant’s arguments regarding contractual provisions in the UCEA contracts are irrelevant to whether the record should be fully disclosed under OPRA. The Custodian asserts that N.J.S.A. 47:1A-10 does not contain a specific exception allowing union presidents to access personnel records that are otherwise exempt from disclosure pursuant to OPRA based on a contractual provision. The Custodian avers that even though he committed a technical violation of OPRA by not responding in writing within the statutorily mandated seven (7) business day time frame, the Custodian worked meticulously to provide the record responsive with redactions to protect information exempt from disclosure under OPRA.

Additionally, the Custodian argues that the information is exempt from disclosure because of D.C.’s reasonable expectation of privacy found in N.J.S.A. 47:1A-1. The Custodian contends that while the Complainant asserts that his right as the UCEA President is to view the redacted information, the Complainant made his OPRA request personally and in no other capacity. The Custodian also asserts that D.C. is not a member of the UCEA. The Custodian contends that he cannot release the requested record in an unredacted state without violating D.C.’s reasonable expectation of privacy.

The Custodian finally requests that this complaint be dismissed and that the GRC find that the record in question was properly redacted according to N.J.S.A. 47:1A-10.

Analysis

Whether the Custodian responded to the Complainant’s December 11, 2007 OPRA request in a timely manner?

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 also provides that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian....If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived....” N.J.S.A. 47:1A-5.i.

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 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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A.

47:1A-5.g.⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The Custodian in this matter failed to respond in writing to the Complainant's OPRA request until the seventeenth (17th) business day following receipt thereof. The Custodian memorialized in his January 7, 2008 written response to the Complainant that an agreement had been made to extend the statutorily mandated response time and that the Complainant clarified his initial request, but failed to request the extension or clarification in writing within seven (7) business days of receipt.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Whether the Custodian's denial of access to the redacted information is lawful pursuant to OPRA?

OPRA states that:

a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." (Emphasis added.) N.J.S.A. 47:1A-1.

OPRA further provides that:

"[n]otwithstanding the provisions of [OPRA] or any other law to the contrary, 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.

⁶ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

The Custodian provided a heavily redacted record to the Complainant on January 7, 2008 and included a numerical chart of exemptions to match each redacted line in the record responsive. Although the Complainant contends that the record is a payroll record and is subject to disclosure pursuant to OPRA, the Custodian argues that the redacted information is exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and that the Custodian has the obligation to protect D.C.'s right at afforded in N.J.S.A. 47:1A-1.

The unredacted portions of the record provided to the Complainant contain D.C.'s last day of employment, reason for separation and length of service. According to a sample copy of the record type provided by the Complainant, the redacted information is the amount of terminal leave, vacation time, personal time and comp time that is owed to D.C.

According to the definition of a payroll record in Jackson, supra, a payroll record consists of a general "list of employees to be paid and the amount due to each of them." *Id.* Additionally, terminal leave, vacation, sick and comp time are not included in the information specifically identified as subject to disclosure pursuant to N.J.S.A. 47:1A-10.

Therefore, the Custodian has borne his burden that the denial of access to the redacted information in the record responsive was authorized by law pursuant to N.J.S.A. 47:1A-10 and Jackson, supra. See also Mitzak v. Manalapan-Englishtown Regional Schools, GRC Complaint No. 2005-205 (July 2006)(holding that there was no unlawful denial of access to the requested record because the record was not clearly defined as a payroll record pursuant to Jackson, nor clearly defined as a personnel record pursuant to N.J.S.A. 47:1A-10).

Additionally, OPRA is silent as to the intent or use of a requested record. The fact that the Complainant is the President of the UCEA (as asserted by the Complainant) or that D.C. is not a member of the UCEA (as asserted by the Custodian) has no bearing on whether access to public records should be granted or denied in accordance with OPRA. Therefore, these factors are irrelevant to the adjudication of this complaint.

Whether the Custodian's denial of access to the redacted portions of the record responsive rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances,

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian bore his burden of proving a lawful denial of access to the redacted information in the record responsive to the Complainant’s December 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-10 and Jackson, *supra*, 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. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Custodian has borne his burden that the denial of access to the redacted information in the record responsive was authorized by law pursuant to N.J.S.A. 47:1A-10 and Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004). *See also* Mitzak v. Manalapan-Englishtown Regional Schools, GRC Complaint No. 2005-205 (July 2006)(holding that there was no unlawful denial of access to the requested record because the record was not clearly defined as a payroll record pursuant to Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), nor clearly defined as a personnel record pursuant to N.J.S.A. 47:1A-10).

3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian bore his burden of proving a lawful denial of access to the redacted information in the record responsive to the Complainant's December 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-10 and Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2009