



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

January 25, 2011 Government Records Council Meeting

Tom Roarty
Complainant

Complaint No. 2009-221

v.

Secaucus Board of Education (Hudson)
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 2011 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. Although the Custodian responded in writing to the Complainant’s January 2, 2008 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., he ultimately failed to provide a specific lawful basis for said denial. Therefore, although the Custodian responded in writing in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because he failed to provide a specific lawful basis for denying access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009). Moreover, because the Custodian failed to immediately grant or deny access to the requested salary information, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian failed to bear his burden of proving a lawful denial of access to the requested accumulated sick time because said information is considered to be part of a payroll record which is subject to disclosure under N.J.S.A. 47:1A-10. See Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004). However, the GRC declines to order disclosure of the requested accumulated sick time because the Custodian acknowledged disclosing said information to the Complainant on June 5, 2008.
3. Although the Custodian performed an inadequate search pursuant to Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220



- (April 2008), because the Custodian advised the Complainant on June 4, 2009 that the resume responsive to the Complainant's January 5, 2009 OPRA request did not exist and subsequently certified in the Statement of Information that no resume responsive to the request exists, and because the Complainant has not provided any credible, competent evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to current superintendent resume responsive to the Complainant's January 5, 2009 OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), because he failed to specifically state that no records responsive to the Complainant's May 27, 2009 OPRA request seeking "Mr. Greg Lentini's salary and new position" existed at the time of his response.
 5. Because the Custodian failed to immediately grant or deny access to the requested salary information for Mr. Greg Lentini, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
 6. Because the Custodian certified on January 11, 2011 that no records responsive to the Complainant's May 27, 2009 OPRA request exist, and because the Complainant has provided no competent, credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
 7. The Custodian failed to provide a specific lawful basis for denying access to the accumulated sick time responsive to the Complainant's January 2, 2008 OPRA request resulted in a violation of N.J.S.A. 47:1A-5.g., failed to respond immediately to the Complainant's January 2, 2008 request for salary information resulted in a violation of N.J.S.A. 47:1A-5.e., failed to bear his burden of proving a lawful denial of access to same pursuant to N.J.S.A. 47:1A-6, performed an inadequate search for the resume responsive to the Complainant's January 5, 2009 OPRA request, gave an insufficient response to the Complainant's May 27, 2009 OPRA request because he failed to specifically state that no records responsive exist, and failed to immediately respond to the Complainant's May 27, 2009 OPRA request for Mr. Greg Lentini's salary resulted in another violation of N.J.S.A. 47:1A-5.e. However, the Custodian provided access to the requested accumulated sick time on June 5, 2008 and the Custodian did not unlawfully deny access to the Complainant's January 5, 2009 and May 27, 2009 OPRA requests because no records responsive exist. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Additionally, 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 25th Day of January, 2011

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: February 7, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2011 Council Meeting**

**Tom Roarty¹
Complainant**

GRC Complaint No. 2009-221

v.

**Secaucus Board of Education (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

January 2, 2008 OPRA request:

Salary, vacation and accumulated sick time for the Secaucus Board of Education's ("BOE") previous superintendent, secretary and attorney.³

January 5, 2009 OPRA request:

Copy of the current superintendent's resume.

May 27, 2009 OPRA request:

Mr. Greg Lentini's ("Mr. Lentini"), Supervisor of Buildings and Grounds, salary and new position.⁴

Request Made: January 2, 2008, January 5, 2009 and May 27, 2009

Response Made: January 11, 2008, January 9, 2009 and June 4, 2009

Custodian: Edward J. Walkiewicz

GRC Complaint Filed: July 20, 2009⁵

Background

January 2, 2008

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

January 11, 2008

Custodian's response to the first (1st) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested accumulated

¹ No legal representation listed on record.

² Represented by Ryan Ottavio, Esq., of Fogarty & Hara (Fair Lawn, NJ).

³ The Complainant alleges that he submitted an OPRA request to the BOE on January 8, 2008; however, the evidence of record indicates that the Complainant filed a request with the BOE on January 2, 2008.

⁴ The Complainant requested additional records that are not at issue in this complaint.

⁵ The GRC received the Denial of Access Complaint on said date.

sick time is denied because said information is not a government record subject to disclosure.

January 5, 2009

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

January 9, 2009

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that access to the requested resume is denied because personal information contained within the resume is exempt from disclosure under OPRA.

May 27, 2009

Complainant's third (3rd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

June 4, 2009

Custodian's response to the third (3rd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that Mr. Lentini resigned in August of last year and his position no longer exists. The Custodian also advised the Complainant that a report containing sick, personal and vacation days for BOE employees is available for review, which is likely the record responsive to the Complainant's first (1st) OPRA request.

July 20, 2009

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

- Letter from the Custodian to the Complainant dated January 11, 2008.
- Complainant's second (2nd) OPRA request dated January 5, 2009.
- Complainant's third (3rd) OPRA request dated May 27, 2009.
- Letter from the Custodian to the Complainant dated June 4, 2009.⁶

The Complainant states that he submitted his first (1st) OPRA request to the BOE on January 2, 2008. The Complainant states that the Custodian responded in writing on January 11, 2008 denying access to the superintendent's accrued sick time because said unused time is not a government record.

⁶ The Complainant attached three (3) additional documents to the Denial of Access Complaint. The first two (2) are an OPRA request dated May 28, 2008 and an attendance summary dated June 5, 2008, which appears to have been provided in response to the Complainant's OPRA request. The third (3rd) document is an OPRA request dated June 10, 2009. Although the Complainant initially noted this request as one of those in dispute, he verbally confirmed on November 23, 2010 that this request is not at issue in the instant complaint.

The Complainant states that he submitted a second (2nd) OPRA request to the BOE on January 5, 2009. The Complainant states that the Custodian responded on January 9, 2009 denying access to the resume because personal information contained therein is exempt from disclosure under OPRA.

The Complainant states that he submitted his third (3rd) OPRA request to the BOE on May 27, 2009. The Complainant states that the Custodian responded on June 4, 2009 stating that Mr. Lentini had resigned and his job title no longer existed.

The Complainant states that he believes he was unlawfully denied access to government records on all three (3) occasions. The Complainant states that he was initially denied access to the superintendent's accumulated sick time; however, the Custodian later granted access to same in response to a separate OPRA request not at issue in this complaint. The Complainant argues that the Custodian could not provide a specific basis for initially denying access to the sick time, simply stating that decisions⁷ had changed since the Custodian denied access to the same information on January 11, 2008. The Complainant argues that he was later unlawfully denied access to the new superintendent's resume.

The Complainant does not agree to mediate this complaint.

July 31, 2009

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

August 5, 2009

Letter from the Custodian's Counsel to the GRC. Counsel requests an extension of time until August 14, 2009 to submit the requested SOI.

August 6, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension of time until August 13, 2009 (one (1) business day less than requested by the Custodian's Counsel) to submit the requested SOI.

August 11, 2009

Custodian's SOI with the following attachments:

- Complainant's first (1st) OPRA request dated January 2, 2008.
- Letter from the Custodian to the Complainant dated January 11, 2008.
- Complainant's second (2nd) OPRA request dated January 5, 2009.
- Letter from the Custodian to the Complainant dated January 9, 2009.
- Complainant's third (3rd) OPRA request dated May 27, 2009.
- Letter from the Custodian to the Complainant dated June 4, 2009.⁸

⁷ The Complainant did not specify whether these decisions were from the GRC or the courts.

⁸ The Custodian also attached the Complainant's May 29, 2008 OPRA request and attendance summary dated June 5, 2008.

The Custodian certifies that his search for the requested records included reviewing the Complainant's OPRA requests and gathering all responsive records maintained by the BOE.

The Custodian also certifies that the issue of whether records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") is not applicable in this complaint.

Complainant's OPRA request dated January 2, 2008:

The Custodian certifies that he received the Complainant's first (1st) OPRA request seeking accumulated sick time for the previous superintendent, secretary and BOE attorney on January 2, 2008. The Custodian certifies that he responded in writing on January 11, 2008 denying access to the requested accumulated sick time because said information is not a government record.

The Custodian asserts that the Complainant was not provided with the requested accumulated sick days because the information was not included in the contracts provided to the Complainant (which are not at issue in this complaint). Moreover, the Custodian believed that the requested accumulated sick time was exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10.

The Custodian notes that the Complainant submitted a separate OPRA request, which is not at issue herein, (*See* Complainant's May 29, 2008 OPRA request attached to the SOI) for the accumulated sick time of the previous superintendent. The Custodian certifies that Counsel advised that the information should be provided to the Complainant and that a printout of the "Attendance Summary Report" would contain the amount of accrued sick time. The Custodian certifies that because he was advised that the requested sick time is not exempt from disclosure pursuant to N.J.S.A. 47:1A-10, the Custodian provided the Complainant with the "Attendance Summary Report" on June 5, 2008.

Complainant's OPRA request dated January 5, 2009:

The Custodian certifies that he received the Complainant's second (2nd) OPRA request seeking the current superintendent's resume on January 5, 2009. The Custodian certifies that he responded in writing to the Complainant on January 9, 2009 denying access to the requested resume because said record contained personal information exempt from disclosure pursuant to OPRA.

The Custodian certifies that he denied access to the requested resume without even searching for the record because he believed same was exempt from disclosure. The Custodian certifies that on June 4, 2009, in a written response to the Complainant's third (3rd) OPRA request, he advised the Complainant that no resume for the current superintendent existed because she was hired through a search process conducted by the New Jersey School Boards Association ("NJSBA").

Complainant's OPRA request dated May 27, 2009:

The Custodian certifies that he received the Complainant's third (3rd) OPRA request seeking Mr. Lentini's salary and new position on May 27, 2009. The Custodian certifies that he responded on June 4, 2009 stating that Mr. Lentini had resigned the previous August and that his position no longer exists.

The Custodian asserts that the Complainant is only alleging that the BOE failed to provide the current superintendent's resume. The Custodian certifies that an in-depth review of the BOE's files revealed that no resume responsive to the request exists. The Custodian certifies that the BOE never received the current superintendent's resume because the NJSBA, not the BOE, conducted the search to fill the job vacancy. The Custodian states that the Complainant was provided with all other records requested. The Custodian contends that because no resume responsive exists, the Custodian has lawfully denied access to the Complainant's OPRA request for same.

January 7, 2011

E-mail from the GRC to the Custodian. The GRC states that it has reviewed the evidence of record in the above mentioned complaint and needs additional information. The GRC states that the Complainant's May 27, 2009 OPRA request sought Mr. Lentini's salary and new position. The GRC states that the Custodian responded in writing on June 4, 2009 indicating that "Mr. Lentini resigned in August of last year and his position no longer exists." The GRC states that based on the Custodian's response, it is unclear whether any records responsive to the Complainant's OPRA request for Mr. Lentini's salary and new position exist. The GRC requests that the Custodian certify to the following:

1. Whether any records responsive to the Complainant's OPRA request seeking Mr. Lentini's salary and new position exists?

The GRC requests that the Custodian provide the requested legal certification by close of business on January 10, 2011.

January 10, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until January 11, 2011 to provide the Custodian's legal certification.

January 10, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension of time until January 11, 2011 to provide the Custodian's legal certification.

January 11, 2011

Custodian's legal certification. The Custodian certifies that no records responsive to the Complainant's May 27, 2009 OPRA request for Mr. Lentini's salary and new position exist.

The Custodian certifies that Mr. Lentini was previously employed as the Buildings and Grounds Supervisor. The Custodian certifies that prior to his retirement

Mr. Lentini had a three (3) year contract that expired on June 30, 2008, or nearly a year prior to the Complainant's OPRA request. The Custodian certifies that Mr. Lentini did not receive a new contract; thus, there was no "new salary" or "new position." The Custodian certifies that Mr. Lentini's old salary information was available through the BOE's website.

The Custodian certifies that if the Complainant was seeking historical information, it could have been provided, but no records responsive to the Complainant's May 27, 2009 OPRA request for Mr. Lentini's salary and new position existed for the reasons stated above.

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.

Further OPRA provides that:

"[i]mmediate access *ordinarily shall be granted to* budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and *public employee salary and overtime information.*" N.J.S.A. 47:1A-5.e.

OPRA also provides that:

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

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

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

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.

Complainant’s OPRA request dated January 2, 2008:

The GRC first addresses whether the Custodian’s initial response was sufficient under OPRA.

The Complainant submitted an OPRA request seeking “salary ... and accumulated sick time for ... the previous superintendent, secretary and attorney ...” to the BOE on January 2, 2008.⁹ The Custodian initially responded to the Complainant’s OPRA request on the seventh (7th) business day from receipt thereof denying access to the accumulated sick time, stating only that sick time is not a government record.

OPRA provides that if a “...custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor* ... on the request form and promptly return it to the requestor” (Emphasis added.) N.J.S.A. 47:1A-5.g. In DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued in the Denial of Access Complaint that although the custodian responded in writing in a timely manner, the custodian failed to provide some of the records responsive and further failed to provide a specific lawful basis for denying access to the missing records. The GRC held that:

“... the Council’s decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records. *See* Seabrook v. Cherry Hill Police Department, GRC Complaint No. 2004-40 (April 2004), Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005) and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (October 2005). The Council also held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian’s denial is authorized by OPRA. *See* Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008).

Here, while the Custodian’s response to the Complainant’s request was within the time allowed by N.J.S.A. 47:1A-5.i, his response was not in compliance with OPRA because it failed to provide a specific basis for

⁹ The GRC notes that the Custodian only denied access to the requested accumulated sick time; however, the GRC has included salary information in its analysis because the Custodian failed to immediately grant access to same. Access to vacation time was not denied; therefore, vacation time is not at issue in this complaint.

denying the Complainant access to certain records pursuant to N.J.S.A. 47:1A-5.g. and the Council's decisions in Seabrook, supra, Rosenblum, supra, Paff, supra and Morris, supra." *Id.* at pg. 7.

In this complaint, the Custodian responded in writing to the Complainant's OPRA request on the seventh (7th) business day stating that the requested accumulated sick time is not a government record subject to disclosure. Although the Custodian responded within the statutorily mandated seven (7) business days in accordance with N.J.S.A. 47:1A-5.i., he ultimately failed to provide a specific lawful basis for denying access to the requested sick time.

Additionally, the requested salary information for the previous superintendent, secretary and attorney is specifically classified as an "immediate access" record pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the "immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant..." Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

The GRC notes that although the Complainant does not dispute the Custodian's response to the OPRA request, it appears from the evidence of record that the Custodian did not conform with his statutory obligation under OPRA to provide the requested salary immediately. Rather, the Custodian responded on the seventh (7th) business day providing access to salary information and denying access to the accumulated sick time at issue here.

Therefore, although the Custodian responded in writing to the Complainant's January 2, 2008 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because he failed to provide a specific lawful basis for denying access to the requested accumulated sick time pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, supra. Moreover, because the Custodian failed to immediately grant or deny access to the requested salary information, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron, supra.

The GRC next addresses whether the Custodian's denial of access to the requested accumulated sick time was lawful.

OPRA provides 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.

Moreover, in Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), the Council undertook to define the term “payroll record” as follows:

“Neither OPRA nor Executive Order #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 State of New Jersey, as well as its constituent agencies, is an employing unit. (See N.J.S.A. 43:21-19, a statute entitled ‘Definitions’ in Article 1 of the Unemployment Compensation Law, which defines ‘employing unit’ to mean the State or any of its instrumentalities or any political subdivisions.) Therefore, the State is required to keep payroll records in accordance with N.J.A.C. 12:16-2. By the same token, Kean University, as an instrumentality of the State, is an employing unit. See N.J.S.A. 18A:62-1 and 18A:64-21-1 (Governor continues as public employer for purposes of negotiation by state colleges.)

Additionally, because certain types of sick leave payments are treated as wages within the meaning of the Unemployment Compensation and Temporary Disability Benefits laws for both tax and benefit entitlement purposes, the payroll record should include the type of leave so that it may

be treated appropriately for tax and benefit purposes. See N.J.A.C. 12:16-4.2.

Based upon the above, an employee's payroll records should include information that will allow a person to determine whether an employee took a leave of absence, the dates of the leave, whether it was paid, and if so, the amount of salary received for the paid leave of absence. For example, if a payroll record is for a two week period, and the employee is paid \$52,000.00 a year³, and has taken a paid leave of absence of one week for that pay period, the payroll record should show that the employee actually worked one week, took one week of leave and received \$2,000.00. The fact that the employee received her full salary during the pay period, even though she took a week of leave, shows that it was a paid leave of absence. Therefore, the relevant law supports a conclusion that the requested information should be disclosed.⁴ (Emphasis added.)

Based on the Council's interpretation of a payroll record in Jackson, *supra*, sick time is part of a payroll record and is therefore subject to access under OPRA pursuant to N.J.S.A. 47:1A-10. Therefore, pursuant to N.J.S.A. 47:1A-6, the Custodian failed to bear his burden of proving a lawful denial of access to the requested accumulated sick time because said information is considered to be part of a payroll record which is subject to disclosure under N.J.S.A. 47:1A-10. See Jackson, *supra*. However, the GRC declines to order disclosure of the requested accumulated sick time because the Custodian acknowledged disclosing said information to the Complainant on June 5, 2008.

Complainant's OPRA request dated January 5, 2009:

The Complainant submitted an OPRA request for "the current superintendent's resume" to the BOE on January 5, 2009. The Custodian initially responded to the Complainant's OPRA request in a timely manner denying access to the requested resume because personal information contained thereon is not subject to disclosure under OPRA. The Custodian subsequently certified in the SOI that he denied access to the requested record without performing a search for said record because the Custodian believed it was exempt from disclosure.

The GRC first addresses whether the Custodian performed an adequate search to locate the requested resume.

In Paff v. New Jersey Department of Labor, 392 N.J.Super. 334 (App. Div. 2007), the Department of Labor ("DOL") located an additional record responsive to the claimant's June 21, 2003 OPRA request after the GRC requested that DOL conduct one final inspection of its records. The Superior Court subsequently ordered agencies "to which the request is made...to produce sworn statements...setting forth in detail...the search undertaken to satisfy the request..." *Id.* at 341. This holding displays the Court's placement of importance on a custodian's duty to perform an adequate search in order to locate all records responsive to an OPRA request.

Further in Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant's August 30, 2007 OPRA request existed. The custodian stated in the SOI that after receipt of the complainant's Denial of Access Complaint, which contained e-mails responsive to the complainant's request, the custodian conducted a second search and found records responsive to the complainant's request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the records responsive.

In the instant complaint, the Custodian certified in the SOI that he denied access to the Complainant's request for the current superintendent's resume without conducting a search for the requested record. The Custodian certified that he performed a search for the record in response to a secondary OPRA request and found that no resume existed because the NJSBA had conducted the search process. The Complainant has submitted no credible, competent evidence to refute the Custodian's certification herein.

Both Paff and Schneble are not factually similar to this complaint in that the failure of both custodians to perform an adequate search resulted in an unlawful denial of access to records that otherwise would have been discovered had an adequate search been provided. However, the principle of the Court's and Council's holding in Paff and Schneble respectively can be applied here: had the Custodian performed an adequate search, he would have been able to promptly respond to the Complainant stating that no resume responsive exists. Similar to the custodian in Schneble, the Custodian herein denied access to the requested resume without performing any search, which resulted in a secondary search that yielded a different outcome (*i.e.*, access to additional records and discovery that the requested record does not exist). Thus, the Custodian performed an inadequate search because he simply denied access to the requested resume without actually searching for same.

However, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed. The complainant submitted no evidence to refute the custodian's certification. The GRC determined the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed and there was no evidence in the record to refute the custodian's certification.

Therefore, although the Custodian performed an inadequate search pursuant to Schneble, *supra*, because the Custodian advised the Complainant on June 4, 2009 that the resume responsive to the Complainant's January 5, 2009 OPRA request did not exist and subsequently certified in the SOI that no resume responsive to the request exists, and because the Complainant has not provided any credible, competent evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to current superintendent resume responsive to the Complainant's January 5, 2009 OPRA request pursuant to Pusterhofer, *supra*.

Complainant's OPRA request dated May 27, 2009:

The Complainant submitted an OPRA request to the BOE on May 27, 2009 seeking Mr. Lentini's salary and new position. The Custodian certified in the SOI that he responded to said OPRA request in writing on June 4, 2009 stating that Mr. Lentini resigned in August of the prior year and that his position no longer exists. The Custodian subsequently certified on January 11, 2011 that no records responsive to the request exist.

In Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), the Custodian's Counsel responded to the Complainant's OPRA request within the statutorily mandated seven (7) business days denying access to the requested record pursuant to N.J.S.A. 47:1A-9, the Open Public Meetings Act and attorney-client privilege exemption. However, the Counsel later certified in the SOI that the Borough did not receive the requested record until October 16, 2007, after receipt of the Complainant's OPRA request and subsequent Denial of Access complaint. The Council undertook the task of deciding whether Counsel's initial response was appropriate under OPRA:

“[i]n O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the GRC determined that N.J.S.A. 47:1A-5.g. states that if a Custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for the inability to comply. In that complaint, the Council applied N.J.S.A. 47:1A-5.g. to the Custodian's failure to address the Complainant's choice of mode of delivery and held that “the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records.”

The GRC also applied N.J.S.A. 47:1A-5.g. to a Custodian's failure to provide an adequate response when denying access to a request for government records or failure to respond to each request individually. *See* Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)(holding that the Custodian's response was insufficient because she failed to specifically state that the requested executive session minutes were not yet approved by the governing body at the time of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g.) and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008)(holding that the Custodian's response was legally insufficient because he failed to respond to each request item individually).” *Id.* on page 6.

The Council held that based on the foregoing, “Counsel's response was insufficient because he failed to specifically state that the requested record did not exist at the time of the Complainant's September 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).”

In the instant complaint, the Custodian failed to advise the Complainant in his written response on June 4, 2009 that no records responsive to the OPRA request exist.

Although the facts of this complaint differ slightly from those in Shanker, (specifically, Counsel in that complaint denied access to a record that did not exist while the Custodian in the instant complaint simply failed to state that no records responsive existed) the response is similar in that neither Custodian clearly articulated that records responsive to the request did not exist at the time of the written response.

Therefore, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Shanker, supra, because he failed to specifically state that no records responsive to the Complainant's May 27, 2009 OPRA request seeking "Mr. Lentini's salary and new position" existed at the time of his response.

Additionally, as previously discussed, the requested salary information for Mr. Lentini is specifically classified as an "immediate access" record pursuant to N.J.S.A. 47:1A-5.e. Here, the Custodian responded on the sixth (6th) business day after receipt of the Complainant's OPRA request instead of immediately, as required by N.J.S.A. 47:1A-5.e. Thus, the Council's holding in Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007) applies to the Custodian's handling of this OPRA request.

Therefore, because the Custodian failed to immediately grant or deny access to the requested salary information for Mr. Lentini, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron, supra.

However, as previously discussed above, the Council's decision in Pusterhofer applies to this portion of the complaint because the Custodian responded to the Complainant stating that Mr. Lentini resigned the previous August and that his position no longer exists. The Custodian subsequently certified on January 11, 2011 that no records responsive to the request exist. Although the Complainant has disputed the Custodian's argument that Mr. Lentini is no longer employed by the BOE and his position no longer exists, this contention does not rise to the level of competent, credible evidence sufficient to refute the Custodian's certification.

Therefore, because the Custodian certified on January 11, 2011 that no records responsive to the Complainant's May 27, 2009 OPRA request exist, and because the Complainant has provided no competent, credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See Pusterhofer, supra.*

The GRC notes that although Mr. Lentini was no longer an employee of the BOE at the time of the Complainant's OPRA request and therefore has no current salary, the Custodian could have provided to the Complainant Mr. Lentini's salary at the time of Mr. Lentini's resignation.

Whether the Custodian's actions rise 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, 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 Custodian failed to provide a specific lawful basis for denying access to the accumulated sick time responsive to the Complainant’s January 2, 2008 OPRA request resulted in a violation of N.J.S.A. 47:1A-5.g., failed to respond immediately to the Complainant’s January 2, 2008 request for salary information resulted in a violation of N.J.S.A. 47:1A-5.e., failed to bear his burden of proving a lawful denial of access to same pursuant to N.J.S.A. 47:1A-6, performed an inadequate search for the resume responsive to the Complainant’s January 5, 2009 OPRA request, gave an insufficient response to the Complainant’s May 27, 2009 OPRA request because he failed to specifically state that no records responsive exist, and failed to immediately respond to the Complainant’s May 27, 2009 OPRA request for Mr. Lentini’s salary resulted in another violation of N.J.S.A. 47:1A-5.e. However, the Custodian provided access to the requested accumulated sick time on June 5, 2008 and the Custodian did not unlawfully deny access to the Complainant’s January 5, 2009 and May 27, 2009 OPRA requests because no records responsive exist. See Pusterhofer, *supra*. Additionally, 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. Although the Custodian responded in writing to the Complainant's January 2, 2008 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., he ultimately failed to provide a specific lawful basis for said denial. Therefore, although the Custodian responded in writing in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because he failed to provide a specific lawful basis for denying access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009). Moreover, because the Custodian failed to immediately grant or deny access to the requested salary information, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian failed to bear his burden of proving a lawful denial of access to the requested accumulated sick time because said information is considered to be part of a payroll record which is subject to disclosure under N.J.S.A. 47:1A-10. See Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004). However, the GRC declines to order disclosure of the requested accumulated sick time because the Custodian acknowledged disclosing said information to the Complainant on June 5, 2008.
3. Although the Custodian performed an inadequate search pursuant to Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), because the Custodian advised the Complainant on June 4, 2009 that the resume responsive to the Complainant's January 5, 2009 OPRA request did not exist and subsequently certified in the Statement of Information that no resume responsive to the request exists, and because the Complainant has not provided any credible, competent evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to current superintendent resume responsive to the Complainant's January 5, 2009 OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), because he failed to specifically state that no records responsive to the Complainant's May 27, 2009 OPRA request seeking "Mr. Greg Lentini's salary and new position" existed at the time of his response.
5. Because the Custodian failed to immediately grant or deny access to the requested salary information for Mr. Greg Lentini, request additional time to respond or request clarification of the request, the Custodian has violated

N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).

6. Because the Custodian certified on January 11, 2011 that no records responsive to the Complainant's May 27, 2009 OPRA request exist, and because the Complainant has provided no competent, credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

7. The Custodian failed to provide a specific lawful basis for denying access to the accumulated sick time responsive to the Complainant's January 2, 2008 OPRA request resulted in a violation of N.J.S.A. 47:1A-5.g., failed to respond immediately to the Complainant's January 2, 2008 request for salary information resulted in a violation of N.J.S.A. 47:1A-5.e., failed to bear his burden of proving a lawful denial of access to same pursuant to N.J.S.A. 47:1A-6, performed an inadequate search for the resume responsive to the Complainant's January 5, 2009 OPRA request, gave an insufficient response to the Complainant's May 27, 2009 OPRA request because he failed to specifically state that no records responsive exist, and failed to immediately respond to the Complainant's May 27, 2009 OPRA request for Mr. Greg Lentini's salary resulted in another violation of N.J.S.A. 47:1A-5.e. However, the Custodian provided access to the requested accumulated sick time on June 5, 2008 and the Custodian did not unlawfully deny access to the Complainant's January 5, 2009 and May 27, 2009 OPRA requests because no records responsive exist. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Additionally, 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

January 18, 2011