



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

March 29, 2011 Government Records Council Meeting

Anthony P. Lopez
Complainant

Complaint No. 2009-267

v.

County of Hudson
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 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. Because Custodian’s Counsel failed to promptly forward the Complainant’s September 14, 2009 OPRA request to the Custodian, having forwarded such request to the Custodian four (4) business days after receipt thereof, Custodian’s Counsel has violated OPRA. N.J.S.A. 47:1A-5.h. See, e.g., Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006); Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Morgano v. NJ Office of the Public Defender, Essex County, GRC Complaint No. 2008-79 (July 2008).
2. Because the Custodian failed to grant immediate access to the records responsive to the Complainant’s request for “a current list of all Hudson County employees in alphabetical order by last name, including ...annual salary [and] overtime hours earned in 2008 and 2009[.]” the Custodian has violated N.J.S.A. 47:1A-5.e.
3. Because the Custodian’s September 29, 2009 response to the OPRA request failed to address the Complainant’s request for compensatory time for all Hudson County employees, the Custodian’s response was insufficient under OPRA. N.J.S.A. 47:1A-5.g.; Roarty v. Secaucus Board of Education (Hudson), GRC Complaint No. 2009-221 (January 2011); Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009).
4. The Custodian’s provision of illegible records to the Complainant in response to the OPRA request when legible records existed constitutes a limitation on the right of access accorded by OPRA pursuant to N.J.S.A. 47:1A-1 and a violation of OPRA.
5. Because the Custodian failed to forward the Complainant’s request for compensatory hours earned for all Hudson County employees in 2008 and 2009 to the custodians of each department and division within Hudson County so that responsive records could



be located and provided or direct the Complainant to said custodians, the Custodian has violated OPRA. N.J.S.A. 47:1A-5.h; N.J.S.A. 47:1A-5.h. *See, e.g., Mourning v. Department of Corrections*, GRC Complaint No. 2006-75 (August 2006); *Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety*, GRC Complaint No. 2007-63 (May 2007); *Morgano v. NJ Office of the Public Defender, Essex County*, GRC Complaint No. 2008-79 (July 2008).

6. Although the Custodian violated N.J.S.A. 47:1A-5.e. by failing to grant immediate access to the requested salary and overtime records, violated N.J.S.A. 47:1A-5.g. by failing to address the Complainant's request for overtime records in the response to the OPRA request, violated N.J.S.A. 47:1A-5.h. by failing to forward the OPRA request to the appropriate custodians of records to obtain the requested compensatory time records, and provided illegible records when legible ones existed, creating a limitation on access pursuant to N.J.S.A. 47:1A-1, the Custodian provided to the Complainant all of the records responsive that existed at the Hudson County Personnel and Finance Departments. 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 29th Day of March, 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: April 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2011 Council Meeting**

**Anthony P. Lopez¹
Complainant**

GRC Complaint No. 2009-267

v.

**County of Hudson²
Custodian of Records**

Records Relevant to Complaint: Copy of a current list of all Hudson County employees in alphabetical order by last name, including the following information for each:

1. Hire date
2. Status (active, disability, etc.)
3. Job title
4. Division
5. Annual Salary
6. Overtime hours earned in 2008 and 2009
7. Compensatory time hours earned in 2008 and 2009
8. Union affiliation
9. Permanent or provisional status

Request Made: September 14, 2009

Response Made: September 29, 2009

Custodian: Rita C. Holleran

GRC Complaint Filed: September 28, 2009³

Background

September 14, 2009

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

¹ No legal representation listed on record.

² Represented by Neil J. Carroll, Jr., Esq., Office of Hudson County Counsel (Jersey City, NJ).

³ The GRC received the Denial of Access Complaint on said date.

September 28, 2009

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

- Complainant’s OPRA request dated September 14, 2009
- Fax Log dated September 14, 2009

The Complainant asserts that he called the Hudson County Personnel Department on September 14, 2009 and asked how he could obtain copies of records under OPRA. The Complainant further asserts that he was told to put all of the information requested on a County of Hudson Government Records Request form and fax such form to the Custodian. The Complainant states that he already had a blank Hudson County OPRA request form in his possession and that he confirmed that such was the appropriate form.

The Complainant states that he asked the cost of the records requested and further states that he was informed that the Custodian would notify the Complainant of the cost of the requested copies. The Complainant states that he completed the request form and faxed it about forty (40) minutes later; the Complainant asserts that his fax log shows that the fax went through at 9:50 a.m. on September 14, 2009. The Complainant states that he had no further communication with anyone from Hudson County.

The Complainant does not agree to mediate this complaint.

September 29, 2009

Custodian’s response to the OPRA request. The Custodian states that he received the Complainant’s OPRA request on September 18, 2009. The Custodian responds in writing to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request. The Custodian causes copies of records responsive to the Complainant’s OPRA request to be hand delivered to the Complainant’s designee, Mr. Louis D’Amico.

October 20, 2009

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

October 25, 2009

Facsimile transmission from the Complainant to the Custodian. The Complainant states that upon reviewing the records provided by the Custodian in response to the OPRA request, the Complainant notices that the date of hire is not legible on any page, there are no compensatory hours listed for 2008 or 2009, several retired employees are still listed on the payroll, including the Director of Parks, Engineering and Planning. The Complainant states that he asked for detailed, up-to-date information and states that it appears that the records he received do not comply with the OPRA request.

October 25, 2009

E-mail from the Complainant to the GRC. The Complainant states that he has notified the County of Hudson about the unreadable and incorrect records provided to him. The Complainant states that as soon as the corrections are made, he will notify the GRC as to the resolution of the problem.

October 27, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 14, 2009
- Statement of Anthony J. Ward and Bart Dellabella, undated

The Custodian certifies that she received the Complainant's OPRA request on September 18, 2009 and that she responded in writing to same on September 29, 2009. The Custodian further certifies that she formatted and created the employee roster. The Custodian also certifies that the Payroll Department created the overtime reports and provided same to the Custodian. The Custodian certifies that neither the Personnel nor the Payroll Department maintains records responsive to the request for compensatory time hours.

The Custodian certifies that the records retention schedule promulgated by the New Jersey Department of Archives and Records Management ("NJDARM") requires that the employee roster be maintained permanently and further requires that the overtime reports be maintained for six (6) years.

Custodian's Counsel states that he has been advised that neither the Personnel nor the Payroll Departments maintain records pertaining to compensatory hours. Counsel further states that the Complainant's issue regarding the presence of certain individuals on the payroll is not an issue that can be addressed through OPRA; the records provided are correct. Counsel also states that the SOI was prepared by the Custodian, who is employed as the Office Services Manager for the Division of Personnel. Counsel further states that the Custodian provided Counsel with a copy of the requested record which contains legible hire dates; Counsel asserts that he will forward such record to the Complainant.

Anthony J. Ward and Bart Dellabella jointly state that on September 29, 2009, they hand delivered the Custodian's response to the Complainant's OPRA request to Mr. Lou D'Amico in the Hudson County Engineering Office; this was done pursuant to the Complainant's instructions. Mr. Ward and Mr. Dellabella state that Mr. D'Amico took possession of the records responsive to the request.

July 5, 2010

E-mail from the Complainant to the GRC. The Complainant states that he wishes to submit an addition to his complaint. The Complainant states that when the Custodian provided the responsive records, two (2) request items were omitted. The Complainant states that request Item No. 1 of the OPRA request sought the hire date of each employee; however, this information is not on the printout provided to him. The Complainant further states that request Item No. 2 of the OPRA request sought compensatory time hours for each employee for 2008 and 2009; the Complainant states that compensatory time hours are given to employees who work overtime but receive the equivalent of time off with pay instead of overtime pay. The Complainant states that in other words, an employee could work overtime every day but this would not show on any overtime record.

The Complainant states that he is an employee of Hudson County and has earned compensatory time hours in past years; the Complainant further states that he has records of such compensatory time earned.

July 6, 2010

E-mail from the GRC to the Complainant. The GRC asks that the Complainant submit copies of any records provided to the Complainant in response to the OPRA request which the Complainant alleges contain inaccurate information.

July 6, 2010

E-mail from the Complainant to the GRC. The Complainant states that Hudson County hand-delivered to him a payroll list containing information pertaining to several thousand employees from 2008 and 2009 on legal-size paper weighing several pounds. The Complainant states that this is too much to fax or scan and e-mail and asks if he may send the GRC a sample of pages that will fit into a flat rate postal envelope, as all of the pages contain the same basic information.

July 7, 2010

E-mail from the GRC to the Complainant. The GRC states that it will accept the Complainant's submission as long as the same information is missing on all pages. The GRC requests that the Complainant also submit a legal certification stating that the same information is missing from all pages provided to the Complainant.

July 8, 2010

E-mail from the Complainant to the GRC, attaching a legal certification.⁴ The Complainant states that although he sent to the GRC copies of records which he believed were not responsive to the request, upon further review of the records sent to him by the Custodian the Complainant found a group of payroll records which show the hire dates of each employee. The Complainant states that his request for Item No. 1 of the OPRA request has therefore been fulfilled.

The Complainant states that upon further review, he also found a letter from Custodian's Counsel which states that a corrected copy of responsive records would be sent to the Complainant; such letter also states that there are no records of compensatory time. The Complainant disputes this statement and asserts that he has received compensatory time in the past and the department in which he worked kept records of compensatory time for each employee.

The Complainant contends that neither set of responsive records contains any notation of compensatory time hours. The Complainant states that he is sending copies of such records to the GRC, as well as a copy of Custodian's Counsel's letter.

The Complainant certifies that he is employed by Hudson County as a Senior Road Inspector. The Complainant further certifies that he requested payroll information from Hudson County pursuant to OPRA on September 14, 2009. The Complainant also certifies that he did not receive responsive records in a timely fashion and further certifies

⁴ The materials which the Complainant sent to the GRC included an additional copy of the Complainant's certification, as well as other materials not relevant to the adjudication of this complaint.
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that upon review of the records provided to him, two (2) items requested were omitted. The Complainant certifies that he has enclosed representative copies of the records provided to him showing that information requested by him was omitted from such records.

July 13, 2010

E-mail from the Custodian to the GRC. The Custodian responds to the Complainant's e-mail to the GRC dated July 8, 2010. The Custodian states that compensatory time hours are not maintained in the main Personnel Office and that she was therefore unable to produce any type of report with the Complainant's compensatory time information. The Custodian also states that the Complainant's attendance sheet is maintained by the payroll clerk in his division and that such clerk would have a record of the Complainant's compensatory time earnings and usage. The Custodian states that any further information regarding compensatory time must be addressed by the Complainant's department.

The Custodian further states that overtime reports are produced in the Finance Department and that such department did produce an overtime report as requested. The Custodian states that all of the requested records available to her have been provided to the Complainant.

July 25, 2010

E-mail from the Complainant to the GRC. The Complainant states that his OPRA request sought, among other things, compensatory time for all Hudson County employees and further states that he has not received records responsive to such request, although he received records responsive to all other items contained in his OPRA request. The Complainant states that he does not understand why the Personnel Department or the Finance Department does not maintain records of compensatory time and asks if this is a violation of the Fair Labor Standards Act.⁵

July 26, 2010

E-mail from the GRC to the Custodian. The GRC states that additional information is required and asks the Custodian to provide answers to the following:

1. Does each Department/Division have its own Records Custodian?
2. If not, does each Department or Division rely upon the Custodian to act as the records custodian?
3. If each Department/Division does have its own Records Custodian, what is the reporting structure?

August 11, 2010

E-mail from the GRC to the Custodian. The GRC states that on July 26, 2010 the GRC requested additional information necessary to adjudicate this complaint and to date has not received a reply. The GRC requests that the Custodian provide the requested information within three (3) business days.

⁵ The Fair Labor Standards Act (FLSA), 29 U.S.C. ch. 8, establishes minimum wage, overtime pay, recordkeeping and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments.

August 11, 2010

E-mail from Custodian's Counsel to the GRC. Custodian's Counsel states that in response to the GRC's e-mail dated July 26, 2010, Counsel makes the following reply:⁶

1. The County has various Departments and a myriad of Divisions. Someone is typically assigned as custodian of records for each division.
2. No one outside of the Department of Personnel would rely upon the Custodian herein to act as custodian of records.
3. Typically, when an individual is unable to determine the appropriate custodian for the record sought, such individual will be referred to the Custodian's Counsel for assistance. Counsel seeks out the relevant custodian and forwards the request accordingly.

August 12, 2010

E-mail from the Complainant to the GRC. The Complainant states that regarding Counsel's statement that he is the person who would assist the Custodian in determining which custodian would have the information requested, the Complainant noticed that in the Custodian's e-mail to Counsel dated July 13, 2010, the Custodian is in fact informing Counsel that she does not have compensatory time records. The Complainant asks whether Counsel should not therefore have contacted the appropriate divisions and departments to obtain the requested records.

The Complainant asks if the Personnel Department is saying that they do not know how many employees are at work during the working day because the compensatory records are kept at the division or department where the employee works and not in the personnel files. The Complainant also asks whether the divisions and/or departments omit compensatory time from their employees' payroll reports. The Complainant states if such information is not omitted from payroll reports, then the payroll department should have all of the compensatory time records which the Complainant requested.

The Complainant states that the requested compensatory time information has not been provided to him to date.

November 12, 2010

E-mail from the GRC to the Custodian. The GRC states that additional information is necessary to adjudicate this complaint. The GRC requests that the Custodian provide a legal certification answering what was the reason that the Custodian did not receive the Complainant's September 14, 2009 OPRA request until September 18, 2009?

November 17, 2010

Custodian's legal certification to the GRC. The Custodian certifies that the Complainant's OPRA request was submitted to the Office of the County Adjustor rather than to the Division of Personnel where the Custodian is employed in the capacity of

⁶ The evidence of record indicates that Counsel's representations in his e-mail to the GRC dated August 11, 2010 are not certified.

Office Services Manager. The Custodian certifies that she did not receive the request until it was forwarded to her by the Office of the County Adjustor on September 18, 2009.

December 13, 2010

E-mail from the GRC to Custodian's Counsel. The GRC asks that Counsel⁷ certify when the Office of County Adjustor received the Complainant's OPRA request dated September 14, 2009. The GRC also requests that Counsel provide a copy of the fax machine log, if one exists.

December 16, 2010

Facsimile from Custodian's Counsel to the GRC, attaching Counsel's legal certification. Custodian's Counsel certifies that the Office of County Adjustor received the Complainant's OPRA request on September 14, 2009. Counsel further certifies that no fax machine log exists.

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.

OPRA further provides that:

"...any limitations on the right of access accorded by [OPRA] ... shall be construed in favor of the public's right of access[.]"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.

⁷ The evidence of record indicates that Counsel is employed as Hudson County Adjustor in the Office of County Adjustor.

OPRA provides that:

“[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5.h.

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.

The evidence of record indicates that the Complainant filed the instant OPRA request with the Office of the County Adjustor on September 14, 2009. Moreover, Custodian’s Counsel has certified that he received the Complainant’s OPRA request on September 14, 2009. The Custodian certified that she did not receive the request until it was forwarded to her by the Office of the County Adjustor on September 18, 2009. Thus, the evidence of record indicates that Custodian’s Counsel forwarded the Complainant’s OPRA request to the Custodian four (4) business days after receipt thereof.

N.J.S.A. 47:1A-5.h. provides, and the Council has consistently held, that an employee of a public agency who receives an OPRA request must either direct the requestor to the appropriate custodian or forward the requestor’s OPRA request to the appropriate custodian. In Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006), the Council determined that because the employee who received an OPRA request did not forward the request to the custodian or direct the requestor to the custodian the employee violated N.J.S.A. 47:1A-5.h. Similarly, in Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), the Council found that because an employee improperly forwarded the complainant’s OPRA request to the custodian the employee violated N.J.S.A. 47:1A-5.h. More recently, in Morgano v. NJ Office of the Public Defender, Essex County, GRC Complaint No. 2008-79 (July 2008), the Council determined that a deputy public defender who personally responded to an OPRA request, rather than forwarding the OPRA request to the Custodian or directing the Complainant to the Custodian, violated OPRA.

Therefore, because Custodian’s Counsel failed to promptly forward the Complainant’s September 14, 2009 OPRA request to the Custodian, having forwarded such request to the Custodian four (4) business days after receipt thereof, Custodian’s

Counsel has violated OPRA. N.J.S.A. 47:1A-5.h. See, e.g., Mourning, *supra*, Vessio, *supra*, Morgano, *supra*.

The evidence of record also indicates that the Custodian responded in writing to the Complainant's OPRA request on September 29, 2009, the seventh (7th) business day following receipt of such request; the Custodian caused copies of records responsive to the Complainant's OPRA request to be hand delivered to the Complainant's designee, Mr. Louis D'Amico.

N.J.S.A. 47:1A-5.e. states in pertinent part that "[i]mmediate access *ordinarily shall be granted to ... public employee salary and overtime information.*"

Because the Custodian failed to grant immediate access to the records responsive to the Complainant's request for "a current list of all Hudson County employees in alphabetical order by last name, including ... annual salary [and] overtime hours earned in 2008 and 2009[.]" the Custodian has violated N.J.S.A. 47:1A-5.e.

Moreover, the Custodian's September 29, 2009 response to the OPRA request failed to address the Complainant's request for compensatory time for all Hudson County employees.

In Roarty v. Secaucus Board of Education (Hudson), GRC Complaint No. 2009-221 (January 2011), the Council determined that the Custodian's response to the OPRA request was 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.

Thus, because the Custodian's September 29, 2009 response to the OPRA request failed to address the Complainant's request for compensatory time for all Hudson County employees, the Custodian's response was insufficient under OPRA. N.J.S.A. 47:1A-5.g.; Roarty, *supra*; Shanker, *supra*.

Moreover, the evidence of record indicates that the records which the Custodian provided to the Complainant on September 29, 2009 were partially illegible. The evidence of record further indicates that Custodian's Counsel provided legible records to the Complainant; on October 27, 2009, as part of the SOI, Counsel stated that the Custodian provided Counsel with a copy of the requested records which contains legible hire dates; Counsel asserted that he would forward such records to the Complainant. Thus, the evidence of record indicates that legible copies of the requested records existed at the time of the Complainant's OPRA request.

The Council has previously determined that it has no authority over the condition or legibility of records provided by a Custodian, and that the integrity of a requested record is similarly outside the Council's authority. Louis Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005); Jay Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003). However, the matter before the Council

differs materially from these cases. *See also Paff v. Willingboro Board of Education (Burlington)*, GRC Complaint No. 2007-272 (May 2008).⁸

In *Toscano, supra*, the complainant's denial of access complaint focused on the disorganized manner in which the requested records were provided to him. The complainant stated that "[i]t cost me \$85 to obtain this record, a stack of hundreds of documents arranged in no chronological order whatsoever." The Council determined that pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority over the condition of records sent by the Custodian of Records.

In *Katinsky, supra*, the complainant indicated to the GRC that the records provided to him by the custodian were "incomplete, improper and inaccurate" and one disclosure form was illegible. However, the custodian certified that copies of the requested documents given to the complainant were complete, correct and there were no redactions, and that the agency did not have a more legible set of the documents. The GRC determined that "[t]he facts in this case indicate that the custodian provided the requester with the requested documents, and the custodian certified that they were complete, correct and contained no redactions. Therefore, the request in this case has been satisfied. The integrity of the requested documents is outside of the jurisdiction of the GRC. For these reasons, the Council should dismiss the Complaint."

The facts of the matter before the Council are therefore inapposite to *Toscano, Paff* and *Katinsky*. In this case, the evidence of record indicates that the Custodian provided illegible records to the Complainant on September 29, 2009, although legible copies of the requested records were subsequently provided to the Complainant after he objected to the records provided to him.

N.J.S.A. 47:1A-1 states in pertinent part that:

"government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, ... and any limitations on the right of access accorded by [OPRA] ... shall be construed in favor of the public's right of access[.]"

Moreover, the GRC has the statutory authority and the obligation to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian[.]" N.J.S.A. 47:1A-7.b.

Thus, the Custodian's provision of illegible records to the Complainant in response to the OPRA request when legible records existed constitutes a limitation on the right of access accorded by OPRA pursuant to N.J.S.A. 47:1A-1 and a violation of OPRA.

The GRC notes that the evidence of record indicates that the records responsive to the Complainant's OPRA request were voluminous; if the Custodian required additional time to respond to the OPRA request, she should have requested an extension of time to do so in writing within the statutorily-mandated seven (7) business day time

⁸ The cause of the records' illegibility is unclear in the record in *Paff*.
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period. *See, e.g., Rivera v. Union City Board of Education (Hudson)*, GRC Complaint No. 2008-112 (April 2010).

Finally, the Custodian certified in the SOI that no records of compensatory time existed at the Hudson County Personnel Office or the Hudson County Finance Office. The Complainant certified on July 8, 2010 that he is employed by Hudson County as a Senior Road Inspector; the Complainant previously stated in an e-mail to the GRC dated July 5, 2010 that he has earned compensatory time hours in past years and that he has records of such compensatory time earned. Moreover, in an e-mail to the GRC dated July 13, 2010, the Custodian stated that the Complainant's attendance sheet is maintained by the payroll clerk in his division and that such clerk would have a record of the Complainant's compensatory time earnings and usage; the Custodian further stated that any additional information regarding compensatory time must be addressed by the Complainant's department.

As previously stated herein, N.J.S.A. 47:1A-5.h. provides that an employee of a public agency who receives an OPRA request must either direct the requestor to the appropriate custodian or forward the requestor's OPRA request to the appropriate custodian. In the matter before the Council, the Custodian should have forwarded the Complainant's request for compensatory hours earned for all Hudson County employees in 2008 and 2009 to the custodians of each department and division within Hudson County so that responsive records could be located and provided, or directed the Complainant to said custodians.

Therefore, because the Custodian failed to forward the Complainant's request for compensatory hours earned for all Hudson County employees in 2008 and 2009 to the custodians of each department and division within Hudson County so that responsive records could be located and provided or direct the Complainant to said custodians, the Custodian has violated OPRA. N.J.S.A. 47:1A-5.h. *See, e.g., Mourning, supra, Vessio, supra, Morgano, supra.*

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).

Although the Custodian violated N.J.S.A. 47:1A-5.e. by failing to grant immediate access to the requested salary and overtime records, violated N.J.S.A. 47:1A-5.g. by failing to address the Complainant’s request for overtime records in the response to the OPRA request, violated N.J.S.A. 47:1A-5.h. by failing to forward the OPRA request to the appropriate custodians of records to obtain the requested compensatory time records, and provided illegible records when legible ones existed, creating a limitation on access pursuant to N.J.S.A. 47:1A-1, the Custodian provided to the Complainant all of the records responsive that existed at the Hudson County Personnel and Finance Departments. 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. Because Custodian’s Counsel failed to promptly forward the Complainant’s September 14, 2009 OPRA request to the Custodian, having forwarded such request to the Custodian four (4) business days after receipt thereof, Custodian’s Counsel has violated OPRA. N.J.S.A. 47:1A-5.h. *See, e.g., Mourning v. Department of Corrections*, GRC Complaint No. 2006-75 (August 2006); Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Morgano v. NJ Office of the Public Defender, Essex County, GRC Complaint No. 2008-79 (July 2008).

2. Because the Custodian failed to grant immediate access to the records responsive to the Complainant's request for "a current list of all Hudson County employees in alphabetical order by last name, including ...annual salary [and] overtime hours earned in 2008 and 2009[,]" the Custodian has violated N.J.S.A. 47:1A-5.e.
3. Because the Custodian's September 29, 2009 response to the OPRA request failed to address the Complainant's request for compensatory time for all Hudson County employees, the Custodian's response was insufficient under OPRA. N.J.S.A. 47:1A-5.g.; Roarty v. Secaucus Board of Education (Hudson), GRC Complaint No. 2009-221 (January 2011); Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009).
4. The Custodian's provision of illegible records to the Complainant in response to the OPRA request when legible records existed constitutes a limitation on the right of access accorded by OPRA pursuant to N.J.S.A. 47:1A-1 and a violation of OPRA.
5. Because the Custodian failed to forward the Complainant's request for compensatory hours earned for all Hudson County employees in 2008 and 2009 to the custodians of each department and division within Hudson County so that responsive records could be located and provided or direct the Complainant to said custodians, the Custodian has violated OPRA. N.J.S.A. 47:1A-5.h.; N.J.S.A. 47:1A-5.h. See, e.g., Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006); Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Morgano v. NJ Office of the Public Defender, Essex County, GRC Complaint No. 2008-79 (July 2008).
6. Although the Custodian violated N.J.S.A. 47:1A-5.e. by failing to grant immediate access to the requested salary and overtime records, violated N.J.S.A. 47:1A-5.g. by failing to address the Complainant's request for overtime records in the response to the OPRA request, violated N.J.S.A. 47:1A-5.h. by failing to forward the OPRA request to the appropriate custodians of records to obtain the requested compensatory time records, and provided illegible records when legible ones existed, creating a limitation on access pursuant to N.J.S.A. 47:1A-1, the Custodian provided to the Complainant all of the records responsive that existed at the Hudson County Personnel and Finance Departments. 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: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.

Executive Director

March 22, 2011