



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

July 26, 2011 Government Records Council Meeting

Edward J. Guz
Complainant

Complaint No. 2010-33

v.

New Jersey Civil Service Commission
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council (“Council”) considered the July 19, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian’s Counsel provided a copy of Mr. Myers’ Juris Doctor degree to the Complainant on May 27, 2011 under cover of letter, and because the current Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the current Custodian has complied with the Council’s May 24, 2011 Interim Order.
2. Although the original Custodian failed to bear his burden of proving a lawful denial of access to Mr. Myers’ Juris Doctor degree pursuant to N.J.S.A. 47:1A-6, the current Custodian timely complied with the Council’s May 24, 2011 Interim Order by providing access to the requested Juris Doctor degree on May 27, 2011 and providing certified confirmation of his compliance to the GRC Executive Director on June 3, 2011. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original 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 26th Day of July, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 27, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 26, 2011 Council Meeting**

**Edward J. Guz¹
Complainant**

GRC Complaint No. 2010-33

v.

**New Jersey Civil Service Commission²
Custodian of Records**

Records Relevant to Complaint: Copy of the Juris Doctor degree (“JD”) for Mr. Christopher Myers (“Mr. Myers”), Labor Analyst, which is a mandatory requirement and educational qualification for his employment with the New Jersey Civil Service Commission (“CSC”).

Request Made: January 6, 2010

Response Made: January 12, 2010

Custodian: Christopher Randazzo³

GRC Complaint Filed: February 18, 2010⁴

Background

May 24, 2011

Government Records Council’s (“Council”) Interim Order. At its May 24, 2011 public meeting, the Council considered the April 20, 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, found that:

1. Pursuant to the Council’s holding in Bonanno v. Garfield Board of Education, Business Department, GRC Complaint No. 2006-62 (Interim Order dated March 28, 2007), Mr. Myers’ Juris Doctor degree is a government record pursuant to N.J.S.A. 47:1A-10 because it exhibits Mr. Myers’ educational qualifications to hold the position of Labor Analyst. **Thus the Custodian has unlawfully denied access to the requested record and shall disclose same to the Complainant with the appropriate redactions, if any.**

2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council’s Interim Order with**

¹ No legal representation listed on record.

² Represented by DAG Lisa Dorio Ruch, on behalf of the NJ Attorney General.

³ The original Custodian of Record is Mark Perkiss.

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

appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.⁶

3. The Appellate Division's holding in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), does not apply in the instant complaint because the Complainant was not requesting the same records as in the previous requests discussed by the Custodian in the Statement of Information. The evidence of record provided by the Custodian in the Statement of Information indicates that the Complainant previously requested "specific qualifications (experiential and educational)" and "a copy of any certification" regarding Mr. Myers' educational qualifications respectively. The request at issue in this complaint specifically sought Mr. Myers' Juris Doctor degree. Although disclosure of the Juris Doctor degree would be akin to disclosing information displaying "conformity with ... educational ... qualifications required for government employment," the Complainant's OPRA request relevant to this complaint sought the actual record as opposed to information or a certification regarding Mr. Myers' qualifications. Also, the evidence of record does not support a conclusion that the Complainant maintained actual, physical possession of the requested record at the time the Complainant made the OPRA request as was the case in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008).
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

May 26, 2011

Council's Interim Order distributed to the parties.

May 27, 2011

Letter from the Custodian's Counsel to the Complainant attaching Mr. Myers' JD. Counsel states that in accordance with the Council's May 24, 2011 Interim Order, a copy of Mr. Myers' JD is being provided to the Complainant.

June 3, 2011

Custodian's response to the Council's Interim Order attaching a letter from the Custodian's Counsel to the Complainant dated May 27, 2011 (with attachments). The

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Custodian certifies that in response to the Council's May 24, 2011 Interim Order, the Custodian directed Counsel to send the Complainant a copy of Mr. Myers' JD. The Custodian certifies that Counsel sent the JD by letter on May 27, 2011.

Analysis

Whether the Custodian complied with the Council's May 24, 2011 Interim Order?

The Council's May 24, 2011 Interim Order specifically directed the Custodian to disclose the requested JD to the Complainant. Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

On May 27, 2011, or one (1) business day after receipt of the Council's Interim Order, the Custodian's Counsel forwarded the record ordered to be disclosed to the Complainant via e-mail and overnight mail. Additionally, the Custodian provided certified confirmation of compliance with the Council's order on June 3, 2011 to the Executive Director of the GRC.

Therefore, because the Custodian's Counsel provided a copy of Mr. Myers' JD to the Complainant on May 27, 2011 under cover of letter, and because the current Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the current Custodian has complied with the Council's May 24, 2011 Interim Order.

Whether the Custodian's unlawful denial of access to the requested record 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, 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 original Custodian failed to bear his burden of proving a lawful denial of access to Mr. Myers' JD pursuant to N.J.S.A. 47:1A-6, the current Custodian timely complied with the Council's May 24, 2011 Interim Order by providing access to the requested JD on May 27, 2011 and providing certified confirmation of his compliance to the GRC Executive Director on June 3, 2011. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original 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 the Custodian's Counsel provided a copy of Mr. Myers' Juris Doctor degree to the Complainant on May 27, 2011 under cover of letter, and because the current Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the current Custodian has complied with the Council's May 24, 2011 Interim Order.
2. Although the original Custodian failed to bear his burden of proving a lawful denial of access to Mr. Myers' Juris Doctor degree pursuant to N.J.S.A. 47:1A-6, the current Custodian timely complied with the Council's May 24, 2011 Interim Order by providing access to the requested Juris Doctor degree on May 27, 2011 and providing certified confirmation of his compliance to the GRC Executive Director on June 3, 2011. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original 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

July 19, 2011



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

May 24, 2011 Government Records Council Meeting

Edward J. Guz
Complainant

Complaint No. 2010-33

v.

New Jersey Civil Service Commission
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council ("Council") considered the April 20, 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. Pursuant to the Council's holding in Bonanno v. Garfield Board of Education, Business Department, GRC Complaint No. 2006-62 (Interim Order dated March 28, 2007), Mr. Myers' Juris Doctor degree is a government record pursuant to N.J.S.A. 47:1A-10 because it exhibits Mr. Myers' educational qualifications to hold the position of Labor Analyst. **Thus the Custodian has unlawfully denied access to the requested record and shall disclose same to the Complainant with the appropriate redactions, if any.**
2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**
3. The Appellate Division's holding in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), does not apply in the instant complaint because the Complainant was not requesting the same records as in the previous requests discussed by the Custodian in the Statement of Information. The evidence of record provided by the Custodian in the Statement of Information indicates that the Complainant previously requested "specific qualifications (experiential and

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

educational)” and “a copy of any certification” regarding Mr. Myers’ educational qualifications respectively. The request at issue in this complaint specifically sought Mr. Myers’ Juris Doctor degree. Although disclosure of the Juris Doctor degree would be akin to disclosing information displaying “conformity with ... educational ... qualifications required for government employment,” the Complainant’s OPRA request relevant to this complaint sought the actual record as opposed to information or a certification regarding Mr. Myers’ qualifications. Also, the evidence of record does not support a conclusion that the Complainant maintained actual, physical possession of the requested record at the time the Complainant made the OPRA request as was the case in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008).

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

Interim Order Rendered by the
Government Records Council
On The 24th Day of May, 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: May 26, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Edward J. Guz¹
Complainant**

GRC Complaint No. 2010-33

v.

**New Jersey Civil Service Commission²
Custodian of Records**

Records Relevant to Complaint: Copy of the Juris Doctor degree (“JD”) for Mr. Christopher Myers (“Mr. Myers”), Labor Analyst, which is a mandatory requirement and educational qualification for his employment with the New Jersey Civil Service Commission (“CSC”).

Request Made: January 6, 2010

Response Made: January 12, 2010

Custodian: Mark Perkiss

GRC Complaint Filed: February 18, 2010³

Background

January 6, 2010

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.

January 12, 2010

Custodian’s response to the 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 personnel 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 ... educational ... qualifications required for government employment ...” N.J.S.A. 47:1A-10.

¹ No legal representation listed on record.

² Represented by DAG Lisa Dorio Ruch, on behalf of the NJ Attorney General.

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

The Custodian states that the information responsive to the Complainant's OPRA request was previously requested by the Complainant pursuant to OPRA and provided to him by the CSC on September 3, 2009.

February 18, 2010

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

- Complainant's OPRA request dated January 6, 2010.
- Letter from the Custodian to the Complainant dated January 12, 2010.⁴

The Complainant states that on January 4, 2010, the GRC responded to an inquiry from the Complainant seeking guidance concerning an earlier OPRA request which the Complainant submitted to the CSC. The Complainant states that during this conversation, the GRC advised that the CSC was obligated to provide access to the record requested by the Complainant. The Complainant states that based on the guidance received by the GRC, the Complainant submitted the OPRA request at issue in this complaint to the CSC on January 6, 2010. The Complainant states that the Custodian responded on January 12, 2010 denying access to the requested JD.

The Complainant states that Mr. Myers was required to present his JD to the CSC in order to qualify for his previous positions with the CSC (and the New Jersey Department of Personnel ("DOP") before that).⁵ The Complainant asserts that the JD thus became a government record. The Complainant argues that the requested record is important to establish that Mr. Myers is qualified to hold the position of Labor Analyst which involves research and evaluation of appeals filed with the State Merit Board. The Complainant argues that the JD should be disclosed in order to establish the public trust that Mr. Myers is qualified to participate in State Merit Board decisions affecting the conditions of employment of innumerable State employees.

The Complainant argues that no assurance of the foregoing can be accomplished without disclosure of the requested JD. The Complainant argues that the right to inspect a copy of Mr. Myers' JD held by the CSC should be no different than the right of any citizen to confirm the existence and validity of a medical degree held by a physician employed by one of the State's psychiatric hospitals. The Complainant notes that compliance would resolve the matter despite the evasiveness of the CSC as demonstrated in the Custodian's written response dated January 12, 2010.

The Complainant does not agree to mediate this complaint.

March 15, 2010

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

⁴ The Custodian also attached an OPRA request dated December 28, 2009; however, the Complainant does not identify this request as being at issue in the instant complaint.

⁵ On June 30, 2008, New Jersey Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Civil Service Commission, abolishing the State of New Jersey Department of Personnel and transferring its functions, powers and duties primarily to the Civil Service Commission.

March 19, 2010

Custodian's SOI with the following attachments:

- Letter from the Custodian to the Complainant dated September 3, 2009.⁶
- Letter from the Custodian to the Complainant dated December 15, 2009.⁷
- Complainant's OPRA request dated January 6, 2010.
- Letter from the Custodian to the Complainant dated January 12, 2010.

The Custodian certifies that his search for the requested JD involved locating same within the CSC's files.

The Custodian also certifies that 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 the instant complaint.

The Custodian certifies that he received the Complainant's OPRA request on January 6, 2010. The Custodian certifies that he responded to said request on January 12, 2009 stating that personnel 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 ... educational ... qualifications required for government employment ..." N.J.S.A. 47:1A-10.

The Custodian certifies that he further advised that the Complainant was previously provided with the requested information on September 3, 2009 in response to a previous OPRA request.

The Custodian certifies that in response to this previous OPRA request dated August 25, 2009, the Custodian provided the Complainant with a list of all titles held by Mr. Myers and the educational level required and attained by Mr. Myers for each position. The Custodian certifies that the Complainant subsequently filed a second (2nd) OPRA request on November 20, 2009 seeking Mr. Myers' JD.⁸ The Custodian certifies that the CSC responded in writing advising that the Complainant had already received this information in response to his August 25, 2009 OPRA request. The Custodian states that the request at issue in this complaint represents the third (3rd) OPRA request from the Complainant for identical information.

⁶ Although the Custodian's written response to a previous OPRA request is not at issue in this complaint, the GRC includes reference to this letter in order to fully address the Custodian's assertions in the SOI.

⁷ See FN No. 5.

⁸ The evidence of record indicates that the Complainant was seeking a copy of any certification that was submitted to the CSC by Mr. Myers certifying that Mr. Myers had a license to practice law and had attained a JD.

The Custodian's Counsel submits a letter brief in support of the CSC's position. Counsel states that the Custodian properly denied access to the requested record because said record is exempt from disclosure under N.J.S.A. 47:1A-10. Counsel asserts that the GRC should uphold the CSC's denial of access and dismiss the Complainant's complaint. Counsel reiterates that this matter arises out of an OPRA request submitted to the CSC on January 6, 2009 for a copy of Mr. Myers' JD; however, this request is the third (3rd) OPRA request submitted by the Complainant for similar information.

Counsel states that as mentioned above, in response to the Complainant's August 25, 2009 OPRA request seeking "Mr. Myers['] specific qualifications (experiential and educational) for each position he held as a State employee," the Custodian provided a list of Mr. Myers' three (3) former positions and one (1) current position with the CSC. Counsel states that the Complainant was also provided with the relevant dates for each position as well as his educational qualifications, which were indicated as "Juris Doctor."

Counsel states that the Complainant subsequently submitted an OPRA request on November 20, 2009 seeking "a copy of any certification submitted by [Mr. Myers] ... of Mr. Myers' license to practice law and/or his attainment of the degree of JD (law)." Counsel states that the Custodian responded on December 15, 2009 stating that:

"[i]nformation responsive to this request was previously requested in your OPRA request No. W45442, and the response was provided by the CSC in its September 3, 2009 letter to you. As the documents and information in this request have already been produced to you previously, the CSC need not produce documents that are already in your possession. *See* Bart v. City of Paterson, 403 N.J. Super. 609 (App. Div. 2008)(where the court held that because the claimant already had one document in his possession when he demanded a copy under OPRA, he [had] not been wrongfully denied access to the document)."

Counsel states that the Complainant submitted the request relevant to this complaint on January 6, 2010. Counsel states that the Custodian responded in writing on January 12, 2010 denying access to the requested record pursuant to N.J.S.A. 47:1A-10 and advising that the requested information was previously provided on September 3, 2009 in response to a previous OPRA request. Counsel states that the Complainant subsequently filed this complaint.

Counsel argues that the Custodian properly denied access to the requested record because same is a personnel record exempt from disclosure under OPRA and is not subject to the afforded exceptions in N.J.S.A. 47:1A-10. Counsel states that OPRA provides that:

"...the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access ..."
N.J.S.A. 47:1A-10.

Counsel states that OPRA does provide for several exceptions, but that these exceptions do not require disclosure of Mr. Myers' actual JD. Counsel states that OPRA provides that the following shall be provided pursuant to OPRA:

“... an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;

personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.” (Emphasis added.) N.J.S.A. 47:1A-10.

Counsel contends that based on the foregoing, data disclosing Mr. Myers' conformity with education requirements for his position with the CSC is a government record. Counsel contends that the Custodian provided this information on September 3, 2009, stating that Mr. Myers has a JD as an educational qualification for each of the four (4) positions held with the CSC. Counsel contends that the data was provided, but the actual JD is not a government record and was not made available to the Complainant.

Moreover, Counsel states that although OPRA grants broad access to government records consistent with its purpose to promote open government, the Legislature made it equally plain 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...” N.J.S.A. 47:1A-1.

Counsel argues that based on the foregoing, there is no question that the Custodian properly denied access to the requested record in order to protect public employees like Mr. Myers from the public's ability to pry into their personnel matters.

Counsel asserts that the CSC relied on well-established statutory authority when denying access to the requested JD. Counsel reiterates that the requested record that is part of Mr. Myers' personnel record in the possession of the CSC is not considered a government record pursuant to N.J.S.A. 47:1A-10. Counsel states that to the extent that OPRA allows for the disclosure of data disclosing conformity with the specific educational qualifications required are government records, the CSC properly responded to the Complainant's OPRA request by informing him that Mr. Myer's qualification for all four of his positions with the CSC was a JD.

Counsel reiterates that for all of the foregoing reasons, the CSC and the Custodian properly denied access to the requested record as such information is exempt from disclosure pursuant to N.J.S.A. 47:1A-10.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

Additionally, OPRA provides that:

“...data contained in information which *disclose conformity* with specific experiential, *educational* or medical *qualifications required for government employment or for receipt of a public pension*, but not including any detailed medical or psychological information, *shall be a government record.*” (Emphasis added.) N.J.S.A. 47:1A-10.

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.

In the instant matter, the Complainant submitted an OPRA request to the CSC on January 6, 2010 seeking a “[c]opy of the [JD] for [Mr. Myers], which is a mandatory requirement and educational qualification for his employment with the [CSC].” The Custodian responded on January 12, 2010 denying access to the requested JD pursuant to

N.J.S.A. 47:1A-10 and stating that information responsive to this request was previously provided in response to an earlier OPRA request. The Complainant subsequently filed this Denial of Access Complaint.

In the Denial of Access Complaint, the Complainant argued that he received guidance from the GRC stating that the CSC was obligated to provide access to the requested JD. The Complainant argued that disclosure of the requested record is important to establish that Mr. Myers is qualified to hold the position of Labor Analyst at the CSC. The Complainant argued that there can be no assurance that Mr. Myers is qualified for his current position until a copy of the requested JD is disclosed.

The Custodian argued in the SOI that the OPRA request at issue in the instant complaint was the third (3rd) request for similar information submitted by the Complainant. The Custodian certified that he previously provided information regarding Mr. Myers' educational qualifications to the Complainant on September 3, 2009. The Custodian certified that he responded to a second (2nd) OPRA request on December 15, 2009 indicating that the information requested had already been provided. The Custodian certified that he handled the request relevant to this complaint in the same manner: denying access to the requested JD pursuant to N.J.S.A. 47:1A-10 and advising that information responsive to the Complainant's OPRA request had previously been provided on September 3, 2009.

The Custodian's Counsel also provided a legal brief in support of the CSC's position arguing that the Custodian properly denied access to the requested JD. Counsel argued that the provisions of OPRA allow for certain personnel exceptions, one of which is "data contained in information which *disclose conformity* with specific ... *educational ... qualifications required for government employment or for receipt of a public pension.*" (Emphasis added.) N.J.S.A. 47:1A-10. Counsel argued that although the Custodian must disclose information regarding Mr. Myers' educational qualifications, N.J.S.A. 47:1A-10 did not expressly order disclosure of Mr. Myers' JD.

Counsel further argued denying access to the requested JD upheld the Legislature's intent to "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..." N.J.S.A. 47:1A-1. Counsel argued that public employees like Mr. Myers should not have the public prying into their personnel matters.

The GRC first dealt with the issue of whether diplomas were considered government records subject to disclosure pursuant to N.J.S.A. 47:1A-10 in Bonanno v. Garfield Board of Education, Business Department, GRC Complaint No. 2006-62 (Interim Order dated March 28, 2007). In Bonanno, *supra*, the complainant requested personnel information regarding administrators and teachers with master's degrees and/or master's degrees plus thirty (30) credits or more to include field of study, date of issuance of degree and higher education institution in which the master's degree was received. The custodian responded providing access to two (2) records and stating that the complainant requested records located in individual personnel files that contain information exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The custodian stated that this information included all of the master's degree information and that he has

requested advice from counsel as to whether the information should be released and if so, it will require the Board of Education (“BOE”) an undetermined amount of time to compile the information. The complainant wrote to the custodian arguing that the requested master’s degree information is directly related to the educational qualification exception contained in N.J.S.A. 47:1A-10. The complainant filed a Denial of Access Complaint after receiving no further response from the BOE.

The custodian subsequently argued that he did not believe he could release transcripts and diplomas to a third party based on the procedures by which an individual employee must obtain their own transcripts and diplomas from the issuing institution.

The GRC was subsequently tasked with deciding whether the employees’ certificates, transcripts and diplomas should be provided pursuant to N.J.S.A. 47:1A-10. The Council reasoned that:

“OPRA provides that ‘... data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.’ N.J.S.A. 47:1A-10. As *teachers and administrators must meet specific requirements for employment in a New Jersey school district, the documents requested by the Complainant, i.e. an employee’s field of study, date certificates were issued, names of higher educational institutions, copies of certificates, diplomas, and transcripts, are considered government records pursuant to N.J.S.A. 47:1A-10 and therefore should be releasable to the public with appropriate redactions, if any.*” (Emphasis added.) *Id.* at page 14.

In the instant complaint, the Custodian certified that Mr. Myers’ JD was located in the CSC’s files. Moreover, the evidence supports that Mr. Myers was required to have a JD and show proof of same in order to hold the position of Labor Analyst. Specifically, in response to the Complainant’s previous two (2) requests that are not at issue in this complaint, the Custodian indicated in both responses that Mr. Myers was required to be in possession of a JD. Thus, the Council’s holding in Bonanno, supra, applies to this complaint because the requested JD at issue here is in fact a government record subject to disclosure pursuant to N.J.S.A. 47:1A-10: it exhibits Mr. Myers’ educational qualifications to hold his current and past positions with the CSC.

Therefore, pursuant to the Council’s holding in Bonanno, supra, Mr. Myers’ JD is a government record pursuant to N.J.S.A. 47:1A-10 because it exhibits Mr. Myers’ educational qualifications to hold the position of Labor Analyst. Thus, the Custodian has unlawfully denied access to the requested record and shall disclose same to the Complainant with the appropriate redactions, if any.

In regards to the Custodian’s argument that the Complainant’s January 6, 2010 OPRA request represented the third (3rd) request submitted by the Complainant for similar records, the Custodian herein cited to the Appellate Division’s decision in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008) in his December 15, 2009 response to the Complainant. The GRC acknowledges that although

that response is not at issue in this complaint, the GRC must address the relevance of Bart, supra, to this complaint for clarification purposes.

In Bart, supra, the Appellate Division held that a complainant could not have been denied access to a requested record if he already had it in his possession at the time of the OPRA request. *Id.* at 617. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *Id.* (citations omitted).

However, Bart, supra, turns upon the specific facts of that case. Specifically, the Appellate Division based its decision on two (2) factors: the certification of the custodian that copies of the requested record were available at the Housing Authority's front desk upon simple verbal request by any member of the public; moreover, the complainant actually admitted that he was in possession of this record at the time of the OPRA request for the same record. Bart v. City of Paterson Housing Authority, GRC Complaint No. 2005-145 (May 2006). Neither factor is present in the instant complaint.

The Appellate Division's holding in Bart, supra, does not apply in the instant complaint because the Complainant was not requesting the same records as in the previous requests discussed by the Custodian in SOI. The evidence of record provided by the Custodian in the SOI indicates that the Complainant previously requested "specific qualifications (experiential and educational)" and "a copy of any certification" regarding Mr. Myers' educational qualifications respectively. The request at issue in this complaint specifically sought Mr. Myers' JD. Although disclosure of the JD would be akin to disclosing information displaying "conformity with ... educational ... qualifications required for government employment," the Complainant's OPRA request relevant to this complaint sought the actual record as opposed to information or a certification regarding Mr. Myers' qualifications. Also, the evidence of record does not support a conclusion that the Complainant maintained actual, physical possession of the requested record at the time the Complainant made the OPRA request as was the case in Bart, supra.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to the Council's holding in Bonanno v. Garfield Board of Education, Business Department, GRC Complaint No. 2006-62 (Interim Order dated March 28, 2007), Mr. Myers' Juris Doctor degree is a government record pursuant to N.J.S.A. 47:1A-10 because it exhibits Mr. Myers' educational qualifications to hold the position of Labor Analyst. **Thus the Custodian has**

unlawfully denied access to the requested record and shall disclose same to the Complainant with the appropriate redactions, if any.

2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁹, to the Executive Director.¹⁰**
3. The Appellate Division's holding in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), does not apply in the instant complaint because the Complainant was not requesting the same records as in the previous requests discussed by the Custodian in the Statement of Information. The evidence of record provided by the Custodian in the Statement of Information indicates that the Complainant previously requested "specific qualifications (experiential and educational)" and "a copy of any certification" regarding Mr. Myers' educational qualifications respectively. The request at issue in this complaint specifically sought Mr. Myers' Juris Doctor degree. Although disclosure of the Juris Doctor degree would be akin to disclosing information displaying "conformity with ... educational ... qualifications required for government employment," the Complainant's OPRA request relevant to this complaint sought the actual record as opposed to information or a certification regarding Mr. Myers' qualifications. Also, the evidence of record does not support a conclusion that the Complainant maintained actual, physical possession of the requested record at the time the Complainant made the OPRA request as was the case in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008).
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011

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

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.