



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

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**January 29, 2013 Government Records Council Meeting**

Robert Brown  
Complainant

Complaint No. 2011-271

v.

Ocean City Board of Education (Cape May)  
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian timely complied with the Council’s December 18, 2012 Interim Order by providing the requested records to the Complainant and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. In the matter before the Council, the Custodian failed to bear his burden of proof that he timely responded to the Complainant’s request. In addition, the Custodian’s request for clarification from the Complainant was unreasonable given the sufficient specificity of the Complainant’s request and accordingly constituted an unlawful restriction of access. However, the Custodian lawfully denied the Complainant’s request for *individual* employee health benefits and waivers information as such information is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C.A. Section 1301, *N.J.A.C.* 17:9-1.2, and N.J.S.A. 47:1A-9. Moreover, the Custodian timely complied with the Council’s December 18, 2012 Interim Order requiring the disclosure of certain records. 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 29<sup>th</sup> Day of January, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 5, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 29, 2013 Council Meeting**

**Robert Brown<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-271**

v.

**Ocean City Board of Education (Cape May)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

Salary, wages, health benefits, pension information, health insurance waivers, life insurance costs, and legal costs for:

- Dr. Matthew Jamison in 2009 and 2010
- Dr. Pamela Vaughan in 2009 and 2010
- Dr. Joanne Walls in 2009 and 2010
- Steve Terhune in 2009 through September 2010
- Mark Ritter in October 2010 to November 2010
- Thomas Grossi in November 2010 to December 2010
- Nick Salvai in 2009 through June 2010
- Thomas Campo in 2009 and 2010
- Dr. Christine Lentz in 2009 and 2010
- Susan Palmer in December 2010
- Michael Stanton in 2009 and 2010
- Robert Gannon in 2009 and 2010
- Kenneth Sharp in 2009 and 2010
- Ed Comby in September 2010 to December 2010
- Carla Migliaccio in 2009 through July 2010
- Adam Stern Gutierrez and Lattiboudere in January 2009 through June 2009
- Capehart and Scatchard in July 2009 and 2010
- Parker McCay and Criscuolo in January 2009 through June 2009
- McManimon and Scotland in July 2009 through 2010

**Request Made:** June 14, 2011

**Response Made:** June 24, 2011

**Custodian:** Thomas P. Grossi

**GRC Complaint Filed:** August 18, 2011<sup>3</sup>

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Michael P. Stanton, Esq., of McCrosson & Stanton, PC. (Ocean City, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

## **Background**

### **December 18, 2012**

Government Records Council's ("Council") Interim Order. At its December 18, 2012 public meeting, the Council considered the November 20, 2012<sup>4</sup> Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian's failure to *immediately* respond in writing to the Complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification or requesting an extension of time results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011).
2. The Custodian's request for clarification was without a factual basis and constituted an unlawful denial of access in that it requested the Complainant to specify a particular date range when the Complainant's request *already* contained the required date information. Accordingly, the Complainant's request for salary, wage, pension amount, life insurance costs, and legal costs was a valid request pursuant to N.J.S.A. 47:1A-5.e., N.J.S.A. 47:1A-10., and N.J.S.A. 47:1A-1. Thus, the Custodian must disclose the responsive records.
3. Because the Complainant has requested *individual* employee health benefits and waivers information that is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C.A. Section 1301, N.J.A.C. 17:9-1.2, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See* Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).
4. While N.J.A.C. 17:9-1.2 makes confidential "*all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims,*" the *sum total* amount of money the Ocean City Board of

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<sup>4</sup> This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.

Education (“Board”) spends to provide its employees with health benefits is not exempt from disclosure. Nor is the disclosure of such a sum prohibited by the Privacy Rule of Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C.A. Section 1301 and OPRA. In addition, HIPAA does not include life insurance plans in the definition of “health plans” nor does HIPAA qualify life insurance plans as confidential in its Privacy Rule. 45 C.F.R. 160.103. In the absence of such exemptions, the Custodian must disclose the amount of money the Board spends to provide its employees with health benefits and the costs the Board contributes towards its employee’s life insurance plans.

5. **The Custodian shall comply with items #2 and #4 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 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
6. 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.

#### **December 19, 2012**

Council’s Interim Order distributed to the parties.

#### **January 4, 2013<sup>7</sup>**

Custodian’s response to the Council’s Interim Order. The Custodian responds to the GRC via letter. The Custodian certifies that a copy of the GRC’s Interim Order was received via e-mail on December 19, 2012 by the Board. The Custodian further certifies that the Board was closed from December 21, 2012 through January 2, 2013. The Custodian certifies that he mailed the requested records to the Complainant as ordered on January 4, 2013. In addition, the Custodian certifies that he mailed a copy of a certification of compliance to the GRC by regular mail on January 4, 2013. The Custodian further notes that he had to resubmit his Compliance on January 7, 2013.

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<sup>5</sup> "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."

<sup>6</sup> 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.

<sup>7</sup> Amended January 7, 2012.

## Analysis

### **Whether the Custodian complied with the Council's December 18, 2012 Interim Order?**

At its December 18, 2012 meeting, the Council ordered the Custodian to provide to the Complainant copies of certain salary, wage, pension amount, employee benefit costs, life insurance costs, and legal costs. The Council ordered the Custodian to do so within five (5) business days of receipt of said Order.

The Council disseminated its Interim Order to the parties on December 19, 2012. Thus, the Custodian's response was anticipated by the close of business on December 27, 2012.<sup>8</sup> However, in a letter responding to the Council's Interim Order dated and postmarked January 4, 2013, the Custodian certified that the Ocean City Board of Education was closed from December 21, 2012 through January 2, 2013.

Accounting for this close of business and noting that the Custodian received the Council's Interim Order on December 19, 2012, the certification of compliance was therefore due by January 7, 2013, the fifth (5<sup>th</sup>) business day the Board was open since their receipt of the order. Accordingly the Custodian's January 4, 2013 certification of compliance shall be deemed as sent on the fourth (4<sup>th</sup>) business day, and acknowledged as received by the GRC and Executive Director on January 7, 2013.

Therefore, the Custodian timely complied with the Council's December 18, 2012 Interim Order by providing the requested records to the Complainant and providing certified confirmation to the GRC within the prescribed time frame to comply.

### **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,

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<sup>8</sup> Accounting for the December 25, 2012 Christmas holiday.

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 (Felder 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 the matter before the Council, the Custodian failed to bear his burden of proof that he timely responded to the Complainant’s request. In addition, the Custodian’s request for clarification from the Complainant was unreasonable given the sufficient specificity of the Complainant’s request and accordingly constituted an unlawful restriction of access. However, the Custodian lawfully denied the Complainant’s request for *individual* employee health benefits and waivers information as such information is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C.A. Section 1301, N.J.A.C. 17:9-1.2, and N.J.S.A. 47:1A-9. Moreover, the Custodian timely complied with the Council’s December 18, 2012 Interim Order requiring the disclosure of certain records. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council’s December 18, 2012 Interim Order by providing the requested records to the Complainant and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. In the matter before the Council, the Custodian failed to bear his burden of proof that he timely responded to the Complainant’s request. In addition, the Custodian’s request for clarification from the Complainant was unreasonable given the sufficient specificity of the Complainant’s request and accordingly constituted an unlawful restriction of access. However, the Custodian lawfully denied the Complainant’s request for *individual* employee health

benefits and waivers information as such information is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C.A. Section 1301, N.J.A.C. 17:9-1.2, and N.J.S.A. 47:1A-9. Moreover, the Custodian timely complied with the Council’s December 18, 2012 Interim Order requiring the disclosure of certain records. 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: Darryl C. Rhone  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

January 22, 2013





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

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

Robert Brown  
Complainant

Complaint No. 2011-271

v.

Ocean City Board of Education (Cape May)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian’s failure to *immediately* respond in writing to the Complainant’s OPRA request for immediate access records, either granting access, denying access, seeking clarification or requesting an extension of time results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011).
2. The Custodian’s request for clarification was without a factual basis and constituted an unlawful denial of access in that it requested the Complainant to specify a particular date range when the Complainant’s request *already* contained the required date information. Accordingly, the Complainant’s request for salary, wage, pension amount, life insurance costs, and legal costs was a valid request pursuant to N.J.S.A. 47:1A-5.e., N.J.S.A. 47:1A-10., and N.J.S.A. 47:1A-1. Thus, the Custodian must disclose the responsive records.
3. Because the Complainant has requested *individual* employee health benefits and waivers information that is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C.A. Section 1301, N.J.A.C. 17:9-1.2, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See* Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).



4. While *N.J.A.C. 17:9-1.2* makes confidential “*all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims,*” the *sum total* amount of money the Board spends to provide its employees with health benefits is not exempt from disclosure. Nor is the disclosure of such a sum prohibited by the Privacy Rule of Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C.A. Section 1301 and OPRA. In addition, HIPAA does not include life insurance plans in the definition of “health plans” nor does HIPAA qualify life insurance plans as confidential in its Privacy Rule. 45 C.F.R. 160.103. In the absence of such exemptions, the Custodian must disclose the amount of money the Board spends to provide its employees with health benefits and the costs the Board contributes towards its employee’s life insurance plans.
5. **The Custodian shall comply with items #2 and #4 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 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
6. 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 18<sup>th</sup> Day of December, 2012

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: December 19, 2012**

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<sup>1</sup> "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."

<sup>2</sup> 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.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Robert Brown<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-271**

v.

**Ocean City Board of Education (Cape May)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

Salary, wages, health benefits, pension information, health insurance waivers, life insurance costs, and legal costs for:

- Dr. Matthew Jamison in 2009 and 2010
- Dr. Pamela Vaughan in 2009 and 2010
- Dr. Joanne Walls in 2009 and 2010
- Steve Terhune in 2009 through September 2010
- Mark Ritter in October 2010 to November 2010
- Thomas Grossi in November 2010 to December 2010
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- Thomas Campo in 2009 and 2010
- Dr. Christine Lentz in 2009 and 2010
- Susan Palmer in December 2010
- Michael Stanton in 2009 and 2010
- Robert Gannon in 2009 and 2010
- Kenneth Sharp in 2009 and 2010
- Ed Comby in September 2010 to December 2010
- Carla Migliaccio in 2009 through July 2010
- Adam Stern Gutierrez and Lattiboudere in January 2009 through June 2009
- Capehart and Scatchard in July 2009 and 2010
- Parker McCay and Criscuolo in January 2009 through June 2009
- McManimon and Scotland in July 2009 through 2010

**Request Made:** June 14, 2011

**Response Made:** June 24, 2011

**Custodian:** Thomas P. Grossi

**GRC Complaint Filed:** August 18, 2011<sup>3</sup>

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Michael P. Stanton, Esq., of McCrosson & Stanton, PC. (Ocean City, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

## **Background**

### **June 14, 2011**

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.

### **June 24, 2011**

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the eighth (8<sup>th</sup>) business day following receipt of such request. The Custodian states that the salary and pension information that the Complainant requests is from 2009 and 2010, however, the school year runs from July 1 through June 30 and therefore, further clarification is needed in order to determine the specific school years to which the Complainant is referring.

The Custodian states that the costs of health benefits and health insurance waivers requested by the Complainant are not government records because they constitute OPRA-exempt personnel records and are further not subject to disclosure under the Health Insurance Portability and Accountability Act of 1966 ("HIPAA"). In addition, the Custodian asserts that under OPRA, a "public agency has a responsibility and 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. The Custodian states that the Ocean City Board of Education ("Board") is denying the Complainant's request for health benefit and health insurance waiver information.

### **August 18, 2011**

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

- Complainant's OPRA request dated June 14, 2011
- Letter from the Custodian to the Complainant dated June 24, 2011

The Complainant states that the information that he seeks is what taxpayers are paying to supervisory personnel, administrators, secretaries, and attorneys in the school system. The Complainant asserts that he has been unlawfully denied access to this requested information. The Complainant agrees to mediate this complaint.

### **August 24, 2011**

The Offer of Mediation is sent to the Custodian.

### **August 31, 2011**

The Custodian agrees to mediate the complaint and the case is forwarded to mediation.

### **September 3, 2011**

The complaint is referred back from mediation.

**October 14, 2011**

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

**October 20, 2011**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated June 14, 2011
- Letter from the Custodian to the Complainant dated June 24, 2011

The Custodian certifies that a search for the requested information yielded a one (1) page personnel record for each of the employees named in the Complainant’s request. The Custodian certifies that as per schedule M700101-001, personnel information, including individual health information, must be maintained for six (6) years after the termination of employment so long as an Employment History Record Card is maintained. The Custodian further certifies that if no Employment History Record Card is maintained, the information must be kept for 80 years. The Complainant certifies that no records were destroyed.

The Custodian states that he sought additional clarification from the Complainant but was not provided any further clarification. The Custodian maintains that the school fiscal year runs from July 1 through June 30 of the next year rather than a regular calendar year, so specific years are required to aid the fulfillment of the request.

The Custodian contends that the Complainant was not provided the requested individual health benefits information because it is personnel information that is not considered a disclosable government record under OPRA. In addition, the Custodian states that the health benefit information is barred from public disclosure pursuant to HIPAA. The Custodian further argues that Executive Order 26 provides that “information relating to medical, psychiatric or psychological history, diagnosis, treatment, or evaluation” is not considered a government record subject to public access under OPRA.

The Custodian states that in Michelson v. Wyatt and City of Plainfield, 379 N.J. Super. 611 (App. Div. 2005), the New Jersey Appellate Division held that “information including the name of every person receiving city health benefits, the justification or reason for that person’s benefits, the type of that person’s coverage, the names of that person’s dependents, and that person’s claim history was not subject to disclosure pursuant to [OPRA]. The Custodian maintains that the GRC has consistently followed and applies the Michelson decision to cases where requestors seek information concerning health benefits coverage and cites Fox v. Township of Parsippany-Troy Hills, GRC Complaint No. 2005-19 (May 2005) and Beaver v. Township of Middletown, GRC Complaint No. 2005-243 (August 2006) in support of his arguments.

The Custodian asserts that although he did not provide the Complainant with the cost of health benefits and health insurance waivers for certain named employees in 2009 and 2010, he did offer to provide the Complainant with a summary description of the Board’s health plan, including the general costs for individual and family coverage. The Custodian maintains that the Complainant never responded to the Custodian’s letters

requesting clarification or affirmatively requested a summary description of the Board's health plan.

### Analysis

#### **Whether the Custodian's response to the Complainant's OPRA request was timely?**

OPRA 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 ..." N.J.S.A. 47:1A-5.g.

Also, OPRA provides that:

*"Immediate 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."* (Emphasis added). N.J.S.A. 47:1A-5.e.

OPRA further provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... *as soon as possible, but not later than seven business days after receiving the request...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*" (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>4</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

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<sup>4</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that “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 must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

OPRA requires a written response to an OPRA request. N.J.S.A. 47:1A-5.g. Although N.J.S.A. 47:1A-5.i. speaks directly to the seven (7) business day time frame, the provision carries a caveat for “shorter time [periods] ... otherwise provided by statute ...” Additionally, the Legislature clearly intended that all OPRA requests be responded to in writing by providing that custodians “... shall indicate the specific basis [for a denial of access] on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5.g. Had the Legislature intended to allow custodians to simply grant access to immediate access records without providing a written response, it would have included such language within N.J.S.A. 47:1A-5.e. Moreover, N.J.S.A. 47:1A-5.g. provides for no exceptions when responding to immediate access records.

When a Denial of Access Complaint is filed, a custodian of record bears the burden of proving a denial of access was lawful. N.J.S.A. 47:1A-6. As stated, if a custodian fails to respond in writing within the statutorily mandated time frame, said failure results in a “deemed” denial of access. In complaints where it appears that a “deemed” denial may have occurred, the burden rests on the custodian to prove that he or she responded in writing in a timely manner. See Gonzales v. City of Gloucester (Camden), GRC Complaint No. 2008-255 (November 2009) (holding that the custodian failed to bear his burden of proof that he properly responded to the OPRA request.)

In Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011), the complainant requested, among other records, immediate access records. The GRC determined that immediate access records required an immediate response in writing:

“There is no evidence in the record to indicate that the original Custodian provided any written response to the Complainant’s March 24, 2009 OPRA request for electric bills ... within the statutorily mandated time frame, which in this instance would be immediately upon receipt of the Complainant’s OPRA request because the requested electric bills are immediate access records pursuant to N.J.S.A. 47:1A-5.e. As in Herron, supra, the original Custodian had a duty to respond immediately because the Complainant’s OPRA request sought immediate access records, *i.e.*, bills, pursuant to N.J.S.A. 47:1A-5.e.” *Id.* at pg. 12-13.

The Council held that the custodian’s response “... [resulted] in a ‘deemed’ denial of the [c]omplainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra, ... [and] violated N.J.S.A. 47:1A-5.e.” *Id.* at pg. 13.

Thus, a custodian's response to an OPRA request for immediate access records must be in writing and made immediately upon receipt of said request in order to constitute a lawful response under OPRA. If a custodian fails to do so, said request is "deemed" denied. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Campbell, *supra*.

In the instant matter, the Complainant requested employee salary, wage, and billing information. As indicated in N.J.S.A. 47:1A-5.e., such a request requires an immediate response. The Complainant submitted his request on June 14, 2011, but the Custodian did not provide a response until June 24, 2011, the eighth (8<sup>th</sup>) business day following the receipt of the Complainant's request. Accordingly, such a response is untimely.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian's failure to *immediately* respond in writing to the Complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification or requesting an extension of time results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also Campbell v. Township of Downe (Cumberland)*, GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011).

**Whether the Complainant's request for salary, wage, pension amount, life insurance costs, and legal costs was a valid request?**

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 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:

"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." N.J.S.A. 47:1A-10.



Here, in responding to the Complainant's OPRA request, the Custodian contended that the Complainant's request was unclear and stated that he needed further clarification in order to determine what school years the Complainant's request referred to. However, a review of the Complainant's actual request indicates that the Custodian's request for clarification on such a basis is unfounded because the Complainant's request *already* specified particular date ranges. Such a response is insufficient and constitutes an unlawful denial of access to disclosable salary, wage, bills, invoices, and pension *amount* information.

Therefore, the Custodian's request for clarification was without a factual basis and constituted an unlawful denial of access in that it requested the Complainant to specify a particular date range when the Complainant's request *already* contained the required date information. Accordingly, the Complainant's request for salary, wage, pension amount, life insurance costs, and legal costs was a valid request pursuant to N.J.S.A. 47:1A-5.e., N.J.S.A. 47:1A-10., and N.J.S.A. 47:1A-1. Thus, the Custodian must disclose the responsive records.

### **Whether the Custodian unlawfully denied access to the requested records?**

In addition, the Complainant seeks health benefit and waiver information related to various employees.

OPRA states that:

"[t]he provisions of [OPRA] shall not abrogate any exemption of a public record...from public access made pursuant to [OPRA]...regulation promulgated under the authority of any statute..." N.J.S.A. 47:1A-9.a.

In accordance with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")<sup>5</sup>, New Jersey Administrative Code regarding the State Health Benefits Program states in part that:

"...**records considered confidential** include *all matters related to the coverage of individual participants* and their families, mailing addresses of active and retired participants and individual files related to claims." (Emphasis added.) *N.J.A.C. 17:9-1.2.*

Furthermore, Executive Order 26 (Gov. McGreevey, 2002)("EO 26") also declares information regarding an individual's health history is not a government record subject to public access. The Order provides that "[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation" of an individual will not be considered a government record. EO 26, par. 4(b)(1) (2002).

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<sup>5</sup> HIPAA, 45 C.F.R. 160.103, provides that the Privacy Rule protects all individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information "protected health information (PHI)." Robert Brown v. Ocean City Board of Education (Cape May), 2011-271 – Findings and Recommendations of the Executive Director 7

In denying the Complainant access to the requested health insurance records, the Custodian asserted that the health insurance records are not disclosable under OPRA pursuant to Executive Order 26 and HIPAA as well as OPRA's requirement that a public agency safeguard from public access a citizen's personal information with which it has been trusted. N.J.S.A. 47:1A-1.

In Beaver v. Township of Middletown, GRC Complaint No. 2005-243 (August 2006), the custodian denied access to records responsive to the complainant's requests for the type of health coverage being provided to certain employees of the Township of Middletown's Sewerage Authority as information exempt under OPRA, *i.e.*, communication with the health benefit provider. The custodian subsequently certified in the SOI that the records responsive, which included monthly invoices received by the Township from State Health Benefits Plan, were exempt under OPRA pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9, *N.J.A.C. 17:9-1.2* and HIPAA. The GRC analyzed how the custodian's asserted exemptions applied to the records responsive within the scope of OPRA and determined that the nature of the complainant's requests extended into privacy information that was protected by the HIPAA Privacy Rule, and by extension *N.J.A.C. 17:9-1.2* and N.J.S.A. 47:1A-9. Accordingly, the Council found that the custodian lawfully denied the complainant's request.

As in Beaver, the Complainant in the instant matter seeks information related to the health insurance benefits and waivers of certain employees. There is no way that the billing information of these employees could be disclosed without infringing upon the privacy and confidentiality protections required by HIPAA. Moreover, the existing exclusionary rule prescribed in *N.J.A.C. 17:9-1.2* and further effectuated by N.J.S.A. 47:1A-9 requires that the requested information be deemed non-disclosable upon its face.

Therefore, because the Complainant has requested *individual* employee health benefits and waivers information that is exempt from disclosure pursuant to the Privacy Rule of HIPAA, *N.J.A.C. 17:9-1.2*, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See Michelson v. Wyatt*, 379 N.J. Super. 611 (App. Div. 2005).

However, while *N.J.A.C. 17:9-1.2* makes confidential "*all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims,*" the *sum total* amount of money the Board spends to provide its employees with health benefits is not exempt from disclosure. Nor is the disclosure of such a sum prohibited by HIPAA and OPRA. In addition, HIPAA does not include life insurance plans in the definition of "health plans" nor does HIPAA qualify life insurance plans as confidential in its Privacy Rule. 45 C.F.R. 160.103. In the absence of such exemptions, the Custodian must disclose the amount of money the Board spends to provide its employees with health benefits and the costs the Board contributes towards its employee's life insurance plans.

**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?**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian's failure to *immediately* respond in writing to the Complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification or requesting an extension of time results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011).
2. The Custodian's request for clarification was without a factual basis and constituted an unlawful denial of access in that it requested the Complainant to specify a particular date range when the Complainant's request *already* contained the required date information. Accordingly, the Complainant's request for salary, wage, pension amount, life insurance costs, and legal costs was a valid request pursuant to N.J.S.A. 47:1A-5.e., N.J.S.A. 47:1A-10., and N.J.S.A. 47:1A-1. Thus, the Custodian must disclose the responsive records.
3. Because the Complainant has requested *individual* employee health benefits and waivers information that is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C.A. Section 1301, N.J.A.C. 17:9-1.2, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See* Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).
4. While N.J.A.C. 17:9-1.2 makes confidential "*all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims,*" the *sum total* amount of money the Board spends to provide its employees with health benefits is not exempt from disclosure. Nor is the disclosure of such a sum prohibited by the Privacy Rule of Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C.A. Section 1301 and OPRA. In addition,

HIPAA does not include life insurance plans in the definition of "health plans" nor does HIPAA qualify life insurance plans as confidential in its Privacy Rule. 45 C.F.R. 160.103. In the absence of such exemptions, the Custodian must disclose the amount of money the Board spends to provide its employees with health benefits and the costs the Board contributes towards its employee's life insurance plans.

5. **The Custodian shall comply with items #2 and #4 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 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**
6. 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: Darryl C. Rhone  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

November 20, 2012<sup>8</sup>

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<sup>6</sup> "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."

<sup>7</sup> 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.

<sup>8</sup> This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.