



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

May 26, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-108

v.

Salem County Special Services School District
Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 2015 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 complied with the Council’s April 28, 2015, Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant the records responsive to paragraph 3 of said Order, along with a detailed document index explaining the lawful basis for each redaction.
2. Because the Custodian was ordered to disclose all Rice notices responsive to the request redacted to exclude all but the individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received, and because the Custodian’s document index stated that the records were redacted to disclose all but said excepted information, the Complainant’s objection that the redaction index is not properly prepared because same does not show each piece of information redacted is without merit.
3. Although the Custodian failed to disclose the requested Rice notices, he did disclose said notices with appropriate redactions in compliance with the Council’s Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 May, 2015

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: May 28, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 26, 2015 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-108

v.

**Salem County Special Services School District²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. Last five Due Process petitions filed against Salem County Special Services School District.
3. Last five adjudication orders entered by the Director of the Department of Education and or OAL Judge as a result of a Due Process Petition.
6. Any and all Rice notices issued in the 2012-2013 or 2013-2014 school year.³

Custodian of Record: John H. Bolil

Request Received by Custodian: February 26, 2014

Response Made by Custodian: March 10, 2014

GRC Complaint Received: March 11, 2014

Background

April 28, 2015 Council Meeting:

At its April 28, 2015, public meeting, the Government Records Council (“Council”) considered the April 21, 2015, 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. Because the requested record is a student record pursuant to N.J.A.C. 6A:32-1.1, and the Complainant failed to submit evidence to indicate that he is a person authorized to have access to student records under N.J.A.C. 6A:32-7.5, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access to request item number 1. N.J.S.A. 47:1A-6. *See also*

¹ No legal representation listed on record.

² Represented by Mark G. Toscano, Esq., of Comegno Law Group, P.C. (Moorestown, NJ).

³ The items are identified as numbered in the OPRA request because there were other records requested that are not relevant to this complaint.

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Popkin v. Englewood Bd. of Educ. (Bergen), GRC Complaint No. 2011-263 (December 2012).

2. The Custodian did not unlawfully deny access to request item number 3 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant's request for item number 6 was a valid request, the Custodian must disclose all Rice notices responsive to the request, redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received. N.J.S.A. 47:1A-10.
4. **The Custodian shall comply with paragraph #3 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, to the Executive Director.**
5. 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.

Procedural History:

On April 29, 2015, the Council distributed its April 28, 2015, Interim Order to all parties. On May 5, 2015, the Custodian responded to the Council's Interim Order by providing certified confirmation of compliance to the Executive Director wherein he stated that he received the Council's April 28, 2015, Interim Order on April 29, 2015. The Custodian further certified that he disclosed to the Complainant the records responsive to paragraph 3 of the Council's Interim Order, along with a detailed document index explaining the lawful basis for each redaction.

By e-mail dated May 11, 2015, the Complainant stated that he objects to the response provided by the Custodian on the grounds that the redaction index is not properly filled out because same does not show each piece of information redacted. The Complainant also stated that the point of the Rice notice is to inform the employee of the date, time, and location of a meeting in which the employee's employment is being discussed. The Complainant contends that there is no exemption for such information but that the Custodian redacted it. The Complainant attached to his e-mail copies of the records disclosed as well as a copy of the redaction index.

By e-mail dated May 11, 2015, the Custodian's Counsel replied to the Complainant's noted objections. The Custodian's Counsel stated that the Council found that Rice notices do constitute personnel records under OPRA and could be redacted to exclude all information but that which is set forth in N.J.S.A. 47:1A-10. Counsel restated paragraph 3 of the Council's

Interim Order and maintained that the Custodian complied with same by redacting all information except for the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received.

Counsel argued that the Complainant's objection to the document index is not valid. Counsel stated that the purpose of the index is to provide for the requestor an explanation for each redaction that is sufficient, without revealing privileged information, to enable the requestor to assess the applicability of the privilege being asserted. Counsel stated that the Custodian identified each responsive document by identification number, date, and type of document. Counsel also stated that the Custodian provided an explanation for each redaction that was made to each of the documents.

The Custodian's Counsel asserted that the Complainant's issues seem to be more with the Interim Order itself than with the actions of the Custodian in responding to the Order.

On May 11, 2015, the Complainant sent a reply e-mail to the Custodian's Counsel in which he stated, "...if the GRC fails to amend or further clarify their order I will appeal to the appellate division."

Analysis

Compliance

On April 28, 2015, the Council ordered the above-referenced compliance. On April 29, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before May 6, 2015. On May 5, 2015, the fourth (4th) business day after the Custodian received the Interim Order, he forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant the records responsive to paragraph 3 of the Council's Interim Order, along with a detailed document index explaining the lawful basis for each redaction.

Therefore, the Custodian complied with the Council's April 28, 2015, Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant the records responsive to paragraph 3 of said Order, along with a detailed document index explaining the lawful basis for each redaction.

The Complainant, however, objected to the Custodian's compliance because he argued that the Custodian improperly completed the document index by failing to show each piece of information redacted. The Complainant asserted that the point of a Rice notice is to inform the employee of the date, time, and location of a meeting in which the employee's employment is being discussed and that there is no exemption for such information.

To try to determine the document classification of a Rice notice under OPRA, the GRC looked to the court's decision in Rice v. Union Cnty. Regional High School Bd. of Educ., 155

N.J. Super. 64 (App. Div. 1977). There the court held that certain employees were entitled to reasonable notice of the intention of the board to consider personnel matters related to them.” Id. at 74. The Council paraphrased the court’s finding in the Interim Order Findings and Recommendations of the Executive Director at 7 by stating that “[a] Rice notice refers to the right of a public employee to receive advance notice when personnel matters related to him or her will be discussed at a public meeting.” Accordingly, the Council concluded that “[g]iven the purpose of Rice notices, they...fall into the category of personnel records...” Id. at 8.

Once the Council concluded that a Rice notice is properly classified as a personnel record under OPRA, it turned to N.J.S.A. 47:1A-10 which is the section of OPRA that addresses personnel records. N.J.S.A. 47:1A-10 provides that personnel records are not considered public records. However, that section of OPRA does provide for certain exceptions. The exceptions are unequivocally set forth in the statute as, “an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received...” For this reason the Council ordered the Custodian to disclose the responsive Rice notices redacted to exclude all but this very specific information.

The Complainant in his objection to the Custodian’s completion of the document index is confusing exemptions with exceptions. In the former case, when a document is a disclosable government record, the custodian may redact exempt material but must provide in the document index a valid lawful basis for each redaction. In the latter case, when a document is not a disclosable government record, but there exists an exception for certain information, the custodian may redact all but the very specific excepted information. This is what the Custodian was ordered to do here, and it is what the Custodian properly did.⁴

Accordingly, because the Custodian was ordered to disclose all Rice notices responsive to the request redacted to exclude all but the individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received, and because the Custodian’s document index stated that the records were redacted to disclose all but said excepted information, the Complainant’s objection that the redaction index is not properly prepared because same does not identify each piece of information redacted is without merit.

The Complainant’s further argument that the point of a Rice notice is to inform the employee of the date, time, and location of a meeting in which the employee’s employment is being discussed may essentially be correct; however, such information is for the benefit of the affected employee, not the general public. The Complainant’s argument is therefore irrelevant.

Knowing & Willful

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

⁴ Based upon a review of the Custodian’s document index that the Complainant provided to the GRC.
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access under the totality of the circumstances. Specifically, OPRA states "... [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7(e).

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

Although the Custodian failed to disclose the requested Rice notices, he did disclose said notices with appropriate redactions in compliance with the Council's Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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 complied with the Council's April 28, 2015, Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant the records responsive to paragraph 3 of said Order, along with a detailed document index explaining the lawful basis for each redaction.
2. Because the Custodian was ordered to disclose all Rice notices responsive to the request redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received, and because the Custodian's document index stated that the records were redacted to disclose all but said excepted information, the Complainant's objection that the redaction index is not properly prepared because same does not show each piece of information redacted is without merit.
3. Although the Custodian failed to disclose the requested Rice notices, he did disclose said notices with appropriate redactions in compliance with the Council's Order.

Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: John E. Stewart

Reviewed By: Joseph Glover
Executive Director

May 19, 2015



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

April 28, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-108

v.

Salem County Special Services School District
Custodian of Record

At the April 28, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 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 requested record is a student record pursuant to N.J.A.C. 6A:32-1.1, and the Complainant failed to submit evidence to indicate that he is a person authorized to have access to student records under N.J.A.C. 6A:32-7.5, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access to request item number 1. N.J.S.A. 47:1A-6. *See also Popkin v. Englewood Bd. of Educ. (Bergen)*, GRC Complaint No. 2011-263 (December 2012).
2. The Custodian did not unlawfully deny access to request item number 3 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant’s request for item number 6 was a valid request, the Custodian must disclose all Rice notices responsive to the request, redacted to exclude all but the individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received. N.J.S.A. 47:1A-10.
4. **The Custodian shall comply with paragraph #3 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 1:4-4,¹ to the Executive Director.²

5. 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 28th Day of April, 2015

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: April 29, 2015

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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2015 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-108

v.

**Salem County Special Services School District²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. Last five Due Process petitions filed against Salem County Special Services School District.
3. Last five adjudication orders entered by the Director of the Department of Education and or OAL Judge as a result of a Due Process Petition.
6. Any and all Rice notices issued in the 2012-2013 or 2013-2014 school year.³

Custodian of Record: John H. Bolil

Request Received by Custodian: February 26, 2014

Response Made by Custodian: March 10, 2014

GRC Complaint Received: March 11, 2014

Background⁴

Request and Response:

On February 26, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 10, 2014, the seventh (7th) business day following receipt of said request, the Custodian responded in writing to inform the Complainant that one (1) due process petition filed in 2011 was determined to be responsive to request item number 1; however, it is a student record, which can only be disclosed to an authorized person.⁵ The Custodian states that the Complainant is not an authorized person; therefore, the request for that record is denied. The Custodian cites N.J.A.C.

¹ No legal representation listed on record.

² Represented by Mark G. Toscano, Esq., of Comegno Law Group, P.C. (Moorestown, NJ).

³ The items are identified as numbered in the OPRA request because there were other records requested that are not relevant to this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁵ The Custodian certified in the Statement of Information that the District was closed on March 3, 2014 due to inclement weather.

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6A:32-2.1, N.J.A.C. 6A:32-7.5(a), and Popkin v. Englewood Bd. of Educ. (Bergen), GRC Complaint No. 2011-263 (December 2012), in support of the denial.

The Custodian further informs the Complainant that the Salem County Special Services School District (“District”) is not in possession of any records responsive to the request for item number 3. The Custodian informs the Complainant that those records are also student records, however, and if they did exist, they would not be subject to disclosure for the same reasons set forth as grounds for denying access to request item number 1.

The Custodian also states that the request for item number 6 is denied because Rice notices are personnel records exempt from access pursuant to N.J.S.A. 47:1A-10, and the exceptions set forth in that provision of OPRA do not apply to Rice notices. The Custodian further states that the District’s only copies of Rice notices are retained in an individual’s personnel file; therefore, retrieving same would require the Custodian to conduct research and review all of its employees’ personnel files to locate responsive records. The Custodian asserts that he is not obligated to conduct such research because “...OPRA does not authorize unbridled searches of an agency’s property.” The Custodian cites Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005), in support of his assertion.

Denial of Access Complaint:

On March 11, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that he submitted the OPRA request to the Custodian on February 26, 2014, and that the Custodian unlawfully denied him access to request items numbered 1, 3, and 6 on March 11, 2014.⁶

The Complainant asserts that the Custodian denied his request for items number 1 and 3, citing Popkin, GRC 2011-263. The Complainant asserts that in Popkin the Council held that a due process petition was a student record based on the “Department of Education Administrative Code.” The Complainant contends that the Council erred by not considering the Appellate Division’s decision in “O’Shea Vs. Twp. of West Milford (2009)” (sic).⁷ The Complainant quotes the O’Shea court as stating, “absent specific legislative leave, no agency is authorized to deviate from expressed or implied legislative policies.” The Complainant contends that “[a]ny agencies [sic] administrative code does not supersede OPRA.” The Complainant then states that N.J.S.A. 47:1A-9(a) closely mirrors O’Shea v Township of West Milford. The Complainant states that the statute clearly provides that “the provisions of this act, P.L. 2001, c.404 (C.47:1A-5 *et al.*), shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L. 1963, c.73 (C.47:1A-1 *et seq.*); any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” The Complainant contends that the New Jersey Administrative Code is not a statute; therefore, the Council’s decision in Popkin, GRC 2011-263, was wrong.

⁶ The evidence of record reveals the Custodian responded in writing, denying the relevant request items on March 10, 2014.

⁷ The Complainant is referring to O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009).

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The Complainant also states that a due process petition is a court document and not a student record. The Complainant states that when a person initiates litigation, that person waives the right to privacy.

With respect to request item number 6, the Complainant states that he was “completely shocked at this denial.” The Complainant contends that “RICE notices have become a dime a dozen.” The Complainant states that the Custodian argued that because Rice notices are kept in an employee’s personnel file, the Complainant’s request will require the Custodian to conduct research. The Complainant alleges that the Custodian maintains “inadequate record keeping” and claims that the Rice notices should be kept with the corresponding meeting minutes. The Complainant cited Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), in support of his assertion.

Statement of Information:

On April 24, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies he received the Complainant’s request on February 26, 2014, and responded to the request on March 10, 2014. The Custodian certifies that the District was closed on March 3, 2014, due to inclement weather.

The Custodian certifies that that one (1) due process complaint totaling five (5) pages, which was filed on February 3, 2012, was determined to be responsive to request item number 1. The Custodian certifies that the record contains such information as the student’s classification, placement, and program. The Custodian also certifies the record sets forth the services provided to the student. The Custodian certifies that, as such, the due process complaint is a student record, which can only be disclosed to an authorized person. The Custodian states that the Complainant is not an authorized person; therefore the request for that record is denied. The Custodian cites N.J.A.C. 6A:32-2.1 and N.J.A.C. 6A:32-7.5(a) as controlling law in support of the denial. The Custodian also cites the Council’s decision in Popkin, GRC 2011-263, wherein the Council held that a settlement agreement entered into between the parents of a student and the Board of Education in regard to a due process complaint was properly withheld in response to an OPRA request because the settlement agreement constituted a student record, and the complainant was not authorized to receive such records. The Custodian also asserts that the record is protected from disclosure pursuant to the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g; 34 CFR Part 99.

With respect to request item number 3, the Custodian certifies that he searched all special education files in the District’s possession for any records responsive to the request for this item. The Custodian also certifies that he conducted a search of the minutes from the District’s Board meetings from January 2006 through January 28, 2014, with relevant search terms. The Custodian certifies that, notwithstanding the thoroughness of his search, the District does not have any Orders that are responsive to the Complainant’s request for item number 3.

The Custodian certifies that request item number 6 is denied because Rice notices are personnel records exempt from access pursuant to N.J.S.A. 47:1A-10, and the exceptions set forth in that provision of OPRA do not apply to Rice notices. The Custodian further states that

the District's only copies of Rice notices are retained in an individual's personnel file; therefore retrieving same would require the Custodian to conduct research and review all of its employees' personnel files to locate responsive records. The Custodian asserts that he is not obligated to conduct such research and cites Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005) in support of his assertion.

The Custodian also certifies that under La Fronz v. Weehawken Bd. of Educ., 164 N.J. Super. 5 (App. Div. 1978) and McGovern v. Rutgers, 418 N.J. Super. 458 (App. Div. 2011), a board does not specifically have to list the names of employees who will be discussed in closed session even though the employees received Rice notices. The Custodian argues that if Rice notices were subject to disclosure under OPRA, the holdings in LaFronz and McGovern would be pointless because the public could circumvent the holdings by obtaining employee names from Rice notices.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA also provides that:

[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...any other statute; resolution of either or both Houses of the Legislature; ***regulation promulgated under the authority of any statute or Executive Order of the Governor***; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order. (Emphasis added).

N.J.S.A. 47:1A-9(a).

Request item number 1 – last five due process petitions filed against the District

The rules of the State Board of Education and the Commissioner of Education define a "student record" as ". . . information related to an individual student *gathered within or outside the school district and maintained within the school district*, regardless of the physical form in which it is maintained." N.J.A.C. 6A:32-1.1 (emphasis added). The rules of the State Board of Education and the Commissioner of Education provide that "[o]nly authorized organizations, agencies or persons as defined herein shall have access to student records . . . persons from outside the school if they have the written consent of a parent . . ." N.J.A.C. 6A:32-7.5.

In Popkin v. Englewood Bd. of Educ. (Bergen), GRC Complaint No. 2011-263 (December 2012), the complainant sought a settlement agreement between the Board of Education and parents of a special education student. Following the Denial of Access Complaint, the Board argued that the settlement agreement was a student record exempt from disclosure under N.J.A.C. 6A:32. The Council agreed, holding that:

[B]ecause the requested record is a student record pursuant to N.J.A.C. 6A:32-1.1, and because N.J.A.C. 6A:32-7.5 provides that only authorized persons enumerated in the regulation shall have access to student records, and because the evidence of record reveals the Complainant is not such an authorized person, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access . . .

Id.

Here, the Complainant sought due process petitions filed against the District. The Custodian found one (1) record responsive to the request item; however, the Custodian certified that because it contains such information as the student's classification, placement, program and the services provided to the student, it is a student record pursuant to N.J.A.C. 6A:32-2.1. The Custodian stated that the Complainant did not allege that he is a person authorized to have access to such a record under N.J.A.C. 6A:32-7.5. For these reasons, the Custodian denied access to the record. The Custodian also cited the Council's decision in Popkin, GRC 2011-263, in support of the denial.

The Complainant stated that although the Custodian relied on Popkin to deny him access to item number 1, the GRC erred in Popkin because it failed to consider the Appellate Division's decision in O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 384 (App. Div. 2009). The Complainant quoted the O'Shea court as stating "absent specific legislative leave, no agency is authorized to deviate from expressed or implied legislative policies." The Complainant thus argued that the GRC was wrong to conclude that an agency's administrative code can supersede OPRA; therefore the decision in Popkin was wrong.

The Complainant misunderstands the law, and as such, quotes it out of context. The court in O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 384 (App. Div. 2009) stated that it was aware regulations exist which require completion of certain reports and exempt same from the provisions of OPRA; however, there were no such regulations before the court in O'Shea. For this reason, the court went on to say that:

We are, *in this matter*, guided by the concept that administrative actions, including those stated in or imported to duly promulgated rules and regulations, cannot override a legislative enactment such as OPRA. Absent specific legislative leave, no agency is authorized to deviate from expressed or implied legislative policies. (Emphasis added).

Id. at 385.

In Popkin, the GRC did not subordinate OPRA, a New Jersey statute, to an agency regulation, as suggested by the Complainant. In section 9, OPRA specifically provides that it shall not abrogate any exemption of a public record or government record from public access made pursuant to certain other laws, regulations, and orders. The regulation cited in Popkin was made pursuant to statutory authority, and OPRA provided for the exemption found in said regulation to remain in force.

The Complainant's argument that N.J.S.A. 47:1A-9(a) closely mirrors O'Shea is somewhat nebulous but seems to reinforce the Council's reasoning for applying the exemption in N.J.A.C. 6A:32-1.1 *et seq.* as it did in Popkin.

The facts of this complaint are similar to the facts in Popkin, GRC 2011-263. Specifically, the responsive record falls within the definition of a student record for purposes of N.J.A.C. 6A:32-1.1, and the Complainant failed to provide any evidence to indicate that he is a person authorized to have access to student records. N.J.A.C. 6A:32-7.5.

Accordingly, because the requested record is a student record pursuant to N.J.A.C. 6A:32-1.1, and the Complainant failed to submit evidence to indicate that he is a person authorized to have access to student records under N.J.A.C. 6A:32-7.5, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access to request item number 1. N.J.S.A. 47:1A-6. *See also* Popkin, GRC 2011-263.

Finally, the Complainant argued that a due process petition is a court document and not a student record. The Complainant continued to argue that when someone initiates litigation he or she waives the right to privacy. The Complainant's argument is unconvincing because he failed to cite any legal authority supporting his assertions.

Request item number 3 – last five adjudication orders entered by the Director of the Department of Education and or Office of Administrative Law Judge as a result of a due process petition

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that he searched all special education files in the District's possession for any records responsive to the request for this item. The Custodian also certified that he conducted a search of the minutes from the District's Board meetings from January 2006 through January 28, 2014, with relevant search terms, and concluded that no records responsive to request item number 3 exist.

As such, the Custodian did not unlawfully deny access to request item number 3 because the Custodian certified that such records do not exist and the Complainant failed to submit any

competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

Request item number 6 – any and all Rice notices issued in the 2012-2013 or 2013-2014 school year

OPRA provides that:

[T]he personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record.

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

A Rice notice refers to the right of a public employee to receive advance notice when personnel matters related to him or her will be discussed at a public meeting. See Rice v. Union Cnty. Regional High School Bd. of Educ., 155 N.J. Super. 64, 74 (App. Div. 1977).

The Complainant stated that the Custodian's argument -- to wit, Rice notices are kept in an employee's personnel file and the Complainant's request will require the Custodian to conduct research that is not required under OPRA -- is without merit. The Complainant argues that he should not be denied access due to the Custodian's "inadequate record keeping." The Complainant cited Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), in support of his argument.

The Custodian's Counsel stated in the SOI that when a Rice notice is sent to an employee, a copy of the notice is placed in the employee's individual personnel file, evidencing the personnel aspect of the notice. Counsel further stated that the copy in the employee's personnel file is the District's only copy; therefore, complying with the Complainant's request for item number 6 would require the Custodian to conduct research by reviewing all of its personnel files in an effort to locate the notices responsive to the request. Counsel, citing Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), argued that "...OPRA does not authorize unbridled searches of an agency's property."

In Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005, to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

Pursuant to [MAG], the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as "to go or look through carefully in order to find something missing or lost." The word *research*, on the other hand, means "a close and careful study to find new facts or information." (Footnotes omitted.)

Id.

Here, request item number 6 seeks Rice notices issued in the 2012-2013 or 2013-2014 school years. The request is valid because it requires the Custodian to search for a specific identifiable record during a finite time period (two school years). The Custodian's search for the responsive records does not require research but rather requires the Custodian to conduct a search of the files based on the information provided in order to locate the responsive records.

The Custodian and Counsel also argued, however, that the records were denied because the records sought are not government records under N.J.S.A. 47:1A-10, and the exceptions set forth in that provision of OPRA do not apply to Rice notices. This is not accurate. Given the purpose of Rice notices, they do fall into the category of personnel records, but there *are* several exceptions to the exemption. Specifically, OPRA provides that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record. A responsive Rice notice, therefore, may be redacted to exclude all but this very specific information.

The Custodian and Counsel further argue that the Appellate Division's decisions in La Fronz, 164 N.J. Super. 5 and McGovern 418 N.J. Super. 458, holding that a board does not specifically have to list the names of employees who will be discussed in closed session, would be circumvented by someone obtaining employee names from Rice notices.

In La Fronz the court determined that listing "personnel" on the meeting agenda was "...good and sufficient notice..." Id. at 7. The McGovern court, in holding that a particular meeting notice was inadequate, mentioned that their conclusion was "...not inconsistent with our determination in La Fronz [citations omitted] that listing 'personnel' on the agenda was sufficient notice...because there the privacy of particular employees was at issue." Id. at 470-71.

Although the court's findings that listing "personnel" on a meeting agenda was sufficient, they did not hold that doing so was necessary. Conversely, under OPRA, disclosing certain specific information on personnel records is necessary, and the Custodian has an obligation to do so.

Accordingly, because the Complainant's request for item number 6 was a valid request, the Custodian must disclose all Rice notices responsive to the request, redacted to exclude all but

the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received. N.J.S.A. 47:1A-10.

Knowing & Willful

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. Because the requested record is a student record pursuant to N.J.A.C. 6A:32-1.1, and the Complainant failed to submit evidence to indicate that he is a person authorized to have access to student records under N.J.A.C. 6A:32-7.5, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access to request item number 1. N.J.S.A. 47:1A-6. *See also Popkin v. Englewood Bd. of Educ. (Bergen)*, GRC Complaint No. 2011-263 (December 2012).
2. The Custodian did not unlawfully deny access to request item number 3 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant's request for item number 6 was a valid request, the Custodian must disclose all Rice notices responsive to the request, redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received. N.J.S.A. 47:1A-10.
4. **The Custodian shall comply with paragraph #3 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 1:4-4,⁸ to the Executive Director.⁹**

⁸ "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."

⁹ 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.

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5. 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: John E. Stewart

Reviewed By: Joseph D. Glover
Executive Director

April 21, 2015