



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

March 31, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-209

v.

Middle Township Public Schools (Cape May)
Custodian of Record

At the March 31, 2015 public meeting, the Government Records Council (“Council”) considered the March 24, 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 February 24, 2015 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant a copy of the Board’s first week payroll for March 2014 and first week payroll for May 2014, together with a detailed document index explaining the specific lawful basis for each redaction.
2. Although the Custodian failed to provide the requested records within the extended time frame, which resulted in a “deemed” denial of the Complainant’s request, and failed to set forth a detailed lawful basis for each redaction made to the records, she did fully comply with the Council’s Interim Order disclosing the records ordered for disclosure along with a detailed document index explaining the specific lawful basis for each redaction. 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 31st Day of March, 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 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 31, 2015 Council Meeting**

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

GRC Complaint No. 2014-209

v.

**Middle Township Public Schools (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. Payroll register for all Middle Township High School employees for the first week of March 2014.
2. Payroll register for all Middle Township High School employees for the first week of May 2014.³

Custodian of Record: Diane S. Fox

Request Received by Custodian: May 8, 2014

Response Made by Custodian: May 15, 2014

GRC Complaint Received: May 27, 2014

Background⁴

February 24, 2015 Council Meeting:

At its February 24, 2015 public meeting, the Government Records Council (“Council”) considered the February 17, 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. Although the Custodian timely responded to the Complainant’s May 8, 2014 OPRA request in writing requesting an extension of time until May 16, 2014 to disclose the records responsive to item number 2, the Custodian’s failure to provide said records within the extended time frame results in a “deemed” denial of the Complainant’s request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). *See also Kohn v. Township of Livingston Library (Essex)*, GRC Complaint No. 2007-124 (March

¹ No legal representation listed on record.

² Represented by Kelli A. Prinz, Esq., of Cooper Levenson, P.A. (Atlantic City, NJ).

³ 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.

Harry B. Scheeler, Jr. v. Middle Township Public Schools (Cape May), 2014-209 – Supplemental Findings and Recommendations of the Executive Director

- 2008). The Custodian also violated OPRA by failing to immediately grant or deny access to the salary and overtime information contained within the requested payroll records, request additional time to respond, or request clarification of the request. N.J.S.A. 47:1A-5(e). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian violated OPRA because she failed to set forth a detailed lawful basis for each redaction at the time of the denial; therefore, the Custodian must disclose to the Complainant the records responsive to the request, together with a detailed document index explaining the specific lawful basis for each redaction. N.J.S.A. 47:1A-5(g). See also American Civil Liberties Union of NJ v. NJ Div. of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014), and Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008).
 3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
 4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 25, 2015, the Council distributed its February 24, 2015 Interim Order to all parties. On March 3, 2015, the Custodian responded to the Council's Interim Order by providing certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant the records ordered for disclosure pursuant to the Council's February 24, 2015 Interim Order, which consist of a copy of the Board's first week payroll for March 2014 and first week payroll for May 2014, together with a detailed document index explaining the specific lawful basis for each redaction.

Analysis

Compliance

On February 24, 2015, the Council ordered the above-referenced compliance. On February 25, 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 March 4, 2015. On March 3, 2015, the fourth (4th) business day after the Custodian received the Interim Order, she forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant the records ordered for disclosure pursuant to the Council's February 24, 2015 Interim Order, which consist of a copy of the Board's first week payroll for March 2014 and first week payroll for May 2014, together with a detailed document index explaining the specific lawful basis for each redaction.

On March 17, 2015, the Complainant informed the GRC that the Custodian satisfactorily responded to him in compliance with the Council's Order.

Therefore, the Custodian complied with the Council's February 24, 2015 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant a copy of the Board's first week payroll for March 2014 and first week payroll for May 2014, together with a detailed document index explaining the specific lawful basis for each redaction.

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 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 (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)).

Although the Custodian failed to provide the requested records within the extended time frame, which resulted in a “deemed” denial of the Complainant's request, and failed to set forth a detailed lawful basis for each redaction made to the records, she did fully comply with the Council's Interim Order disclosing the records ordered for disclosure along with a detailed document index explaining the specific lawful basis for each redaction. 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 February 24, 2015 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein she stated that she disclosed to the Complainant a copy of the Board's first week payroll for March 2014 and first week payroll for May 2014, together with a detailed document index explaining the specific lawful basis for each redaction.

2. Although the Custodian failed to provide the requested records within the extended time frame, which resulted in a "deemed" denial of the Complainant's request, and failed to set forth a detailed lawful basis for each redaction made to the records, she did fully comply with the Council's Interim Order disclosing the records ordered for disclosure along with a detailed document index explaining the specific lawful basis for each redaction. 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

Approved By: Dawn R. SanFilippo
Deputy Executive Director

March 24, 2015



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

February 24, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-209

v.

Middle Township Public Schools (Cape May)
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council (“Council”) considered the February 17, 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. Although the Custodian timely responded to the Complainant’s May 8, 2014 OPRA request in writing requesting an extension of time until May 16, 2014 to disclose the records responsive to item number 2, the Custodian’s failure to provide said records within the extended time frame results in a “deemed” denial of the Complainant’s request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). *See also Kohn v. Township of Livingston Library (Essex)*, GRC Complaint No. 2007-124 (March 2008). The Custodian also violated OPRA by failing to immediately grant or deny access to the salary and overtime information contained within the requested payroll records, request additional time to respond, or request clarification of the request. N.J.S.A. 47:1A-5(e). *See also Herron v. Twp. of Montclair*, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian violated OPRA because she failed to set forth a detailed lawful basis for each redaction at the time of the denial; therefore, the Custodian must disclose to the Complainant the records responsive to the request, together with a detailed document index explaining the specific lawful basis for each redaction. N.J.S.A. 47:1A-5(g). *See also American Civil Liberties Union of NJ v. NJ Div. of Criminal Justice*, 435 N.J. Super. 533 (App. Div. 2014), and Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008).
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide**



**certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹
to the Executive Director.²**

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

Interim Order Rendered by the
Government Records Council
On The 24th Day of February, 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: February 25, 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
February 24, 2015 Council Meeting**

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

GRC Complaint No. 2014-209

v.

**Middle Township Public Schools (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. Payroll register for all Middle Township High School employees for the first week of March 2014.
2. Payroll register for all Middle Township High School employees for the first week of May 2014.³

Custodian of Record: Diane S. Fox

Request Received by Custodian: May 8, 2014

Response Made by Custodian: May 15, 2014

GRC Complaint Received: May 27, 2014

Background⁴

Request and Response:

On May 8, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 15, 2014, the fifth (5th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the requested records have been sent to the Complainant’s e-mail address; however, she would need an extension of time until May 16, 2014, to disclose the records responsive to request item number 2.

¹ No legal representation listed on record.

² Represented by Kelli A. Prinz, Esq., of Cooper Levenson, P.A. (Atlantic City, NJ).

³ 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.

Harry B. Scheeler, Jr. v. Middle Township Public Schools (Cape May), 2014-209 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On May 27, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that his complaint is being filed regarding redactions to payroll registers.

The Complainant states that he submitted two (2) OPRA requests to the Custodian on May 8, 2014, and that the Custodian responded to the requests on May 16, 2014.⁵ The Complainant further states that he sent an e-mail to the Custodian objecting to several denials, including material that was redacted without sufficient explanation. The Complainant states that on May 22, 2014, the Custodian disclosed the “additional withheld documents” but again failed to sufficiently explain the reason for redacting material from the records. The Complainant also contends that the Custodian redacted some of the material on the records by using white correction fluid, which he asserts is “prohibited.”

Statement of Information:

On June 9, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on May 8, 2014, and responded to the request on May 15, 2014.⁶ The Custodian certifies that the payroll registers for the first week of March 2014, consisting of 164 pages, were responsive to the Complainant’s request item number 1; and the payroll register for the first week of May 2014, consisting of 28 pages, was responsive to the Complainant’s request item number 2.

The Custodian certifies that redactions were made to the requested records pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1 in order to conceal the employees’ home addresses, unlisted phone numbers, pension ID numbers and social security numbers. The Custodian further certifies that she blacked out entries in their entirety for persons “who are not employees of Middle Township High School, and thus were not records requested by Mr. Scheeler.” The Custodian certifies that she requested an extension of time to disclose the records responsive to request item number 2 and that she disclosed those records on May 22, 2014. The Custodian further certifies that the records responsive to request item number 2 contained redactions of the net pay column which appeared to be whited-out but that the redactions were the result of a computer formatting error. The Custodian certifies that by copy of the SOI she is supplying the Complainant with missing information and/or explaining appropriate redactions.

The Custodian’s Counsel attached a letter dated June 10, 2014 to the SOI. Counsel contends that the Custodian did not knowingly and willfully violate OPRA because the

⁵ The Complainant failed to attach copies of any OPRA requests to the complaint. However, the Custodian did attach one (1) OPRA request to the SOI. The request itself was undated but had a faxed date stamp revealing it was submitted on May 8, 2014 at 1:15 p.m. The Custodian made no reference to receiving another request from the Complainant on May 8, 2014, but the request she did attach to the SOI listed the items that the Complainant stated formed the basis of his complaint. Moreover, on June 10, 2014, the Complainant responded to the Custodian’s SOI by, in part, attaching a copy of the SOI to his submission; however, at no time did the Complainant object to the Custodian’s assertion in the SOI that only one (1) OPRA request formed the basis of this complaint.

⁶ The evidence of record reveals that the response to the request was made on May 15, 2014, not May 16, 2014, as asserted by the Complainant.

Custodian provided the requested records to the Complainant in a timely manner. Counsel further states that the redactions made to the records were lawful because OPRA provides for specific information to be redacted and the definition of a payroll record does not include the itemized monetary deductions. Counsel cites to Executive Order 26 (McGreevey), which states that information describing a natural person's finances is exempt from public access. Counsel also asserts that all remaining redacted information was not the subject of the Complainant's request because it contained information unrelated to the request. Counsel reiterates the Custodian's assertion that the alleged whiteout method used by the Custodian was actually a formatting error.

Additional Submissions:

On June 10, 2014, the Complainant submitted a reply to the Custodian's SOI. The Complainant states that the Custodian improperly redacted sections of the responsive records that contained information that was not specifically requested by the Complainant. According to the Complainant, ACLU of NJ v. NJ Attorney General Division of Criminal Justice states, "the court emphasized that records custodians are not empowered to subjectively decide what information within a public document can be disclosed."⁷

The Complainant also states that he rejects the Custodian's claim that white correction fluid was not used because computer errors do not make brush strokes which curve and leave words, letters, and numbers partially exposed. The Complainant specifically points to Joseph Towns' payroll register, which the Complainant attached to his submission.⁸

Analysis

Timeliness

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). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁹ 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

⁷ A full citation was not provided by the Complainant.

⁸ This particular payroll register appears to be from a response to a request that did not form the basis of this complaint because it is an eight (8) page record for Joseph Towns for the period September 13, 2013 through May 15, 2014. Moreover, in the records responsive to request items numbered 1 and 2, the payroll register for Mr. Towns is disclosed on numbered page 121 and page 24, respectively. The fact that Mr. Towns' payroll register was included within the registers responsive to request items numbered 1 and 2, but his register for the period September 13, 2013 through May 15, 2014 was not, supports the likelihood that the records the Complainant attached to his reply to the SOI were received in response to another request, and are therefore not relevant to the instant complaint.

⁹ 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.

Harry B. Scheeler, Jr. v. Middle Township Public Schools (Cape May), 2014-209 – Findings and Recommendations of the Executive Director

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).

OPRA provides that a custodian may request an extension of time to respond to the complainant's request but that a specific response date must be provided and further, that should the custodian fail to provide a response on that specific date "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's request, seeking a twenty-one (21) business day extension of time until April 20, 2007, to fulfill the complainant's request. However, the custodian subsequently failed to disclose the requested records until May 31, 2007. The Council held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i)...however...[b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i), resulting in a "deemed" denial of access to the records.

Id.

Here, as in Kohn, the Custodian responded in writing to the Complainant's May 8, 2014 OPRA request in a timely manner requesting an extension of time until May 16, 2014, to disclose the records responsive to request item number 2; however, the Custodian failed to disclose said records until May 22, 2014, four (4) days after expiration of the extended deadline to respond.

Moreover, both request item number 1 and request item number 2 sought payroll records, several of which contained salary and overtime information. OPRA provides that "...[i]mmediate access ordinarily shall be granted to...public employee salary and overtime information. N.J.S.A. 47:1A-5(e). In Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the "...immediate access language of OPRA...suggests that the Custodian was still obligated to immediately notify the Complainant..." Although 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. Here, the evidence of record reveals that the Custodian failed to meet her statutory obligation under OPRA to immediately provide the requested salary and overtime information.

Accordingly, although the Custodian timely responded to the Complainant's May 8, 2014 OPRA request in writing requesting an extension of time until May 16, 2014 to disclose the records responsive to item number 2, the Custodian's failure to provide said records within the

extended time frame results in a “deemed” denial of the Complainant’s request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). *See also* Kohn, GRC 2007-124. The Custodian also violated OPRA by failing to immediately grant or deny access to the salary and overtime information contained within the requested payroll records, request additional time to respond, or request clarification of the request. N.J.S.A. 47:1A-5(e). *See also* Herron, GRC 2006-178.

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.

The Complainant did not argue that he was denied any of the requested records in their entirety, but rather, that he was denied access to certain information contained within the records based upon the Custodian’s redaction of certain material from the records for which she failed to provide a specific lawful basis. The Complainant also stated that the Custodian may not subjectively decide what information within a public record can be disclosed or redacted. The Complainant further stated that the Custodian redacted some of the material on the disclosed records by using white correction fluid, which he claimed is “prohibited.”

The Custodian certified that the redactions were made to the requested records pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1 in order to conceal employees’ home addresses, unlisted phone numbers, pension ID numbers and social security numbers. The Custodian also asserted, through Counsel, that payroll deductions were properly redacted pursuant to Executive Order 26 (McGreevey), which provides that information describing a natural person’s finances is exempt from public access. The Custodian certified that all remaining redacted information was removed because it contained information unrelated to the request. The Custodian certified that although the Complainant asserted that she used a whiteout method for making some of the redactions, the alleged redactions referenced by the Complainant was actually a formatting error.

The issue of providing a specific lawful basis for redactions at the time of the denial was considered by the Council in Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008). In Paff, the custodian provided access to the requested records with certain material redacted. The complainant argued that the custodian violated OPRA by failing to provide a specific lawful basis for the redactions made to the responsive records. The Council held that:

[T]he Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction. *See* Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29, (July 2005)(ordering the custodian to provide redacted executive session minutes with a detailed and lawful basis for each redacted part.). *See also* Schwarz v. NJ Dep’t of Human Services, GRC Complaint No. 2004-60, (February 2005)(setting forth the proposition that specific citations to the law

that allows a denial of access are required at the time of the denial). Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A- 5(g).

Id.

Moreover, recently in American Civil Liberties Union of NJ v. NJ Div. of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014), the court considered whether a government agency has the authority to redact a responsive record in order to withhold information that the agency deems to be outside the scope of the request. In this matter, the American Civil Liberties Union of New Jersey filed an OPRA request with the New Jersey Division of Criminal Justice (“DCJ”) for records pertaining to Automatic License Plate Recognition. DCJ disclosed several pages of records containing redactions made to delete information that the agency believed was outside the scope of the request. The trial court upheld DCJ’s redaction policy; however, the Appellate Division reversed the trial court finding that:

The redaction protocol adopted by the DCJ here cannot stand because it is not grounded on any of the statutorily recognized exemptions to disclosure in OPRA...[it] is based entirely on the unilateral determination by the custodian of records of what, in his or her opinion, is relevant to the...request.

Id. at 536.

Here, the Custodian certified that she determined 164 pages of payroll registers for the first week of March 2014 were responsive to request item number 1, and 28 pages of payroll registers for the first week of May 2014 were responsive to request item number 2. The Custodian extensively redacted the requested records.

An examination of the responsive records by the GRC revealed that of the 164 pages of records found to be responsive to request item number 1, the Custodian redacted 50 pages in their entirety by removal.¹⁰ The evidence of record reveals the Custodian failed to provide a specific lawful basis for the pages redacted by removal, either at the time of the denial or when she submitted the SOI.

The Custodian made black out redactions to all but one (1) of the remaining 114 pages of records responsive to request item number 1. The Custodian also made black out redactions to 27 of the 28 pages of records responsive to request item number 2. Again, the evidence of record reveals that the Custodian failed to provide a specific lawful basis for any of the redacted pages at the time of the denial. Moreover, when the Custodian did provide a redaction index in the SOI, she merely stated that the records were redacted pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1 in order to conceal the employees’ home addresses, unlisted phone numbers, pension identification numbers and social security numbers. The Custodian also certified in the SOI that

¹⁰ Each page of the records responsive to request item number 1 was sequentially numbered starting with page number 1. The Custodian certified that there were a total of 164 pages responsive to the request item. An examination by the GRC revealed the following pages were redacted in their entirety by removal: 11, 25, 27, 42, 44, 51, 54, 57, 59, 76, 81, 82, 86, 92, 97, 105, 115, 116, 128, 133, and pages numbered from 135 to 164.

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redactions were made to remove payroll deduction information and to delete those employees who were not part of the Complainant's request.

The Custodian's list of "redacted information" followed by her cite to two (2) provisions of OPRA, which she has set forth in the SOI, does not serve to provide a specific lawful basis for making the redactions. The document index, which is item number 9 of the SOI, requires the Custodian to list by page number each record responsive to the request and to provide an accompanying "general nature description" of each redaction along with the statutory citation for the redaction.

It is not the intent of the GRC to unnecessarily overburden the Custodian. So where there are numerous pages with identical redactions, as here, the Custodian need not redundantly recite the statutory citation permitting denial for identical redactions on each and every page number. However, as the GRC states on its website, "[t]he bottom line is that the requester has a right to know the reason for the redaction, and the custodian has the responsibility to provide a reasonable explanation."¹¹ Therefore, the Custodian had a duty to explain each abbreviated item on the payroll register that she redacted; this she failed to do.¹²

Accordingly, the Custodian violated OPRA because she failed to set forth a detailed lawful basis for each redaction at the time of the denial; therefore, the Custodian must disclose to the Complainant the records responsive to the request, together with a detailed document index explaining the specific lawful basis for each redaction. N.J.S.A. 47:1A-5(g). See also American Civil Liberties Union, 435 N.J. Super. 533, and Paff, GRC 2007-209 (December 2008).

With respect to the Complainant's allegation that the Custodian redacted some of the material on the disclosed records by using white correction fluid, the GRC cannot find any evidence supporting that allegation. The Custodian certified that she did not redact any material with correction fluid, but rather that the whiteout method the Complainant alleged she used was a formatting error. The Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. Instead, the Complainant submitted as evidence in support of his allegation a document that is not relevant to this complaint. As such, the GRC declines to further consider this allegation.

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.

¹¹ <http://nj.gov/grc/custodians/redacting/>

¹² For example, if "SS#" is the abbreviation for "social security number" the Custodian should explain that, and thereafter provide the citation in OPRA permitting denial of access for a social security number. After the initial explanation, the Custodian need not repeat the explanation for identical redactions made throughout the responsive record, but care must be taken to not black out the abbreviation "SS#" when making those same redactions.

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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian timely responded to the Complainant's May 8, 2014 OPRA request in writing requesting an extension of time until May 16, 2014 to disclose the records responsive to item number 2, the Custodian's failure to provide said records within the extended time frame results in a "deemed" denial of the Complainant's request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). *See also* Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). The Custodian also violated OPRA by failing to immediately grant or deny access to the salary and overtime information contained within the requested payroll records, request additional time to respond, or request clarification of the request. N.J.S.A. 47:1A-5(e). *See also* Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian violated OPRA because she failed to set forth a detailed lawful basis for each redaction at the time of the denial; therefore, the Custodian must disclose to the Complainant the records responsive to the request, together with a detailed document index explaining the specific lawful basis for each redaction. N.J.S.A. 47:1A-5(g). *See also* American Civil Liberties Union of NJ v. NJ Div. of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014), and Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008).
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹³ to the Executive Director.¹⁴**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart

Approved By: Dawn R. SanFilippo
Deputy Executive Director

February 17, 2014

¹³ "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."

¹⁴ 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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