



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
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Rose D. Richardson
Complainant

Complaint No. 2014-277

v.

NJ Office of the Attorney General
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 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 May 26, 2015, Interim Order because he responded in the extended time frame by providing two (2) responsive reports from the Personnel Management Information System containing sufficient information to satisfy the Complainant’s OPRA request. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian failed to respond to the Complainant in a timely manner and further unlawfully denied access to information responsive to the Complainant’s OPRA request item No. 2 and a portion of item No. 3. However, the Complainant’s request item No. 1 and a portion of item No. 3 were invalid. Further, the Custodian timely complied with the Council’s May 26, 2015, Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 30th Day of June, 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: July 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting**

**Rose D. Richardson¹
Complainant**

GRC Complaint No. 2014-277

v.

**New Jersey Office of the Attorney General²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Total number of all promotions, title changes, and salary adjustments given within the Office of the Attorney General (“OAG”) to include a breakdown within each unit.
2. Last name of each person within the OAG that received a promotion, title change, and/or salary adjustment since 2007 to include each individual’s previous and new title, reason for salary adjustment, and length of time between promotions, title changes, and/or adjustments.
3. Names of individuals within the OAG that did not receive a promotion, title change, and/or salary adjustment since 2007 with each individual’s current section (or last section if no longer with the OAG). This should include all staff consolidated since 2007 from the Division of Criminal Justice and Division of Law.

Custodian of Record: Bruce J. Solomon, Esq.

Request Received by Custodian: July 3, 2014

Response Made by Custodian: September 11, 2014

GRC Complaint Received: August 1, 2014

Background

May 26, 2015 Council Meeting:

At its May 26, 2015, public meeting, the Council considered the May 19, 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. 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. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access,

¹ No legal representation listed on record.

² No legal representation listed on record.

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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Complainant’s request item No. 1 and the portion of item No. 3 seeking section information are invalid requests for information that fail to seek identifiable government records. Specifically, the information sought is either raw numbers of individuals receiving promotions or information on section location, none of which is considered government records under OPRA. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6; LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). *See also* Vance v. Cnty. of Sussex, Sheriff’s Office, GRC Complaint No. 2012-188 (June 2013). However, the remainder of the Complainant’s OPRA request seeks personnel information that is subject to disclosure under N.J.S.A. 47:1A-10. *See* Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010).
3. The Custodian may have unlawfully denied access to records responsive to the Complainant’s OPRA request item No. 2 (except for the reason for a salary adjustment on a performance-related basis) and the portion of item No. 3 seeking names of individuals not that did not receive a promotion, title change, and/or salary adjustment. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009); Healy v. NJ Dep’t of Labor & Workforce Dev., GRC Complaint No. 2008-108 (Interim Order dated October 26, 2010); Lotito v. NJ Dep’t of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014). The Custodian must disclose the responsive information in the most comprehensive record available, whether from the Personnel Management Information System, on appropriate internal Human Resources forms, or on appropriate Civil Service Commission forms. *See* Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012). If the Custodian believes a special service charge is warranted, he must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.
4. **The Custodian shall comply with item No. 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 1:4-4,³ to the Executive Director.⁴

5. **If applicable, the Custodian shall advise the Complainant of any proposed special service charge within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon the Complainant's payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director. Should the Complainant reject the proposed charge, the Custodian shall provide certified confirmation of compliance to the Executive Director to such within ten (10) business days from receipt of the Council's Interim Order.**
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.

Procedural History:

On May 28, 2015, the Council distributed its Interim Order to all parties. On June 4, 2015, the Custodian sought additional time to respond to the Council's Order. On June 5, 2015, the GRC granted the Custodian an extension until June 11, 2015, to comply with the Order. On June 11, 2015, the Custodian sought a second (2nd) extension of time until June 17, 2015, due to extenuating circumstances. On June 12, 2015, the GRC granted this extension, noting that it would not grant any further extensions.

On June 17, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that the OAG utilizes the Personnel Management Information System ("PMIS") to manage personnel information. The Custodian noted that PMIS only tracks OAG employees receiving a pay check from the OAG; thus, employees functioning within the OAG that are on other payrolls in the New Jersey Department of Law & Public Safety ("LPS") are not captured. The Custodian certified that he met with OAG's Human Resources ("HR") staff to determine whether it was possible to comply with the Council's Order through PMIS without creating new records from multiple databases and conducting research.

The Custodian affirmed that he provided two (2) reports to the Complainant (without assessment of a special service charge). The Custodian certified that the first report captures promotions, title changes, and salary adjustments received by employees on OAG's payroll from

³ "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."

⁴ 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.

January 1, 2007, to present. The Custodian averred that the second report contains the name and title of each employee on OAG's payroll from January 1, 2007, to the present. The Custodian certified that there are no existing reports that could be extracted from PMIS showing the names of OAG employees who did not receive a promotion, title change, and/or salary adjustment during that time period. The Custodian certified that, based on the foregoing, the Complainant will be able to compare the two (2) reports to obtain this information.

The Custodian averred that, in order to identify functional OAG employees not on OAG's payroll, he would have to perform research that is not required under OPRA. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-512 (App. Div. 2010); Burke v. Brandes, 429 N. J. Super. 169, 176-77 (App. Div. 2012); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). Further, the Custodian affirmed that he would be required to use discretion to determine which employees are functional OAG employees but are not included in PMIS. The Custodian noted that this discretion is not required per ACLU v. NJ Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014). The Custodian certified that, beyond PMIS, HR does not maintain a database or list that contains the data field descriptors identified by the Complainant's OPRA request.

Analysis

Compliance

At its May 26, 2015 meeting, the Council ordered the Custodian to disclose the responsive information in the most comprehensive record available, notify the Complainant if a special service charge would be accessed, and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 28, 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. Thus, the Custodian's response was due by close of business on June 4, 2015.

On June 4, 2015, the fifth (5th) business day after receipt of the Council's Order, the Custodian sought an extension, which the GRC granted. Prior to the expiration of said extension, the Custodian sought another extension until June 17, 2015. The GRC also granted this extension but noted that it would not grant any additional time beyond that date. On June 17, 2015, the Custodian responded to the Council's Order. Therein, he provided to the Complainant two (2) reports generated from PMIS without assessment of a special service charge. The first report identified those employees receiving promotions, title changes, and/or adjustments between 2007 and the date of compliance, while the second report identified all OAG employees during that time. The Custodian noted that these lists only reflected those employees on the OAG payroll and that any other employees functionally working within OAG and paid by other divisions within LPS were not captured in PMIS.

The GRC has reviewed the records provided and the Custodian's certification. Based on that review, the GRC is satisfied that the Custodian adequately complied with the Council's Order. Specifically, the Complainant can easily differentiate between the individuals that did and did not receive promotions, title changes, and/or adjustments over the identified time period.

Additionally, the Custodian is not required to conduct research, especially by going to other agencies within LPS that may maintain information on employees functionally working for OAG but on the others' payroll. Production of the records here meets the standard set forth in Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009)(holding that the custodian was under no obligation to create a list compatible to the complainant's OPRA request because OPRA does not require a custodian to produce new documents).

Therefore, the Custodian complied with the Council's May 26, 2015, Interim Order because he responded in the extended time frame by providing two (2) responsive reports from PMIS containing sufficient information to satisfy the Complainant's OPRA request. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

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 (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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 this matter, the Custodian failed to respond to the Complainant in a timely manner and further unlawfully denied access to information responsive to the Complainant's OPRA request item No. 2 and a portion of item No. 3. The Complainant's request item No. 1 and a portion of item No. 3 were invalid. Further, the Custodian timely complied with the Council's May 26, 2015, Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and

deliberate. Therefore, 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 complied with the Council's May 26, 2015, Interim Order because he responded in the extended time frame by providing two (2) responsive reports from the Personnel Management Information System containing sufficient information to satisfy the Complainant's OPRA request. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian failed to respond to the Complainant in a timely manner and further unlawfully denied access to information responsive to the Complainant's OPRA request item No. 2 and a portion of item No. 3. However, the Complainant's request item No. 1 and a portion of item No. 3 were invalid. Further, the Custodian timely complied with the Council's May 26, 2015, Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

June 23, 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

May 26, 2015 Government Records Council Meeting

Rose D. Richardson
Complainant

Complaint No. 2014-277

v.

NJ Office of the Attorney General
Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 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:

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. As such, the Custodian’s failure to respond in writing to the 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Complainant’s request item No. 1 and the portion of item No. 3 seeking section information are invalid requests for information that fail to seek identifiable government records. Specifically, the information sought is either raw numbers of individuals receiving promotions or information on section location, none of which is considered government records under OPRA. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6; LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). *See also Vance v. Cnty. of Sussex, Sheriff’s Office*, GRC Complaint No. 2012-188 (June 2013). However, the remainder of the Complainant’s OPRA request seeks personnel information that is subject to disclosure under N.J.S.A. 47:1A-10. *See Danis v. Garfield Bd. of Educ. (Bergen)*, GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010).



3. The Custodian may have unlawfully denied access to records responsive to the Complainant's OPRA request item No. 2 (except for the reason for a salary adjustment on a performance-related basis) and the portion of item No. 3 seeking names of individuals not that did not receive a promotion, title change, and/or salary adjustment. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009); Healy v. NJ Dep't of Labor & Workforce Dev., GRC Complaint No. 2008-108 (Interim Order dated October 26, 2010); Lotito v. NJ Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014). The Custodian must disclose the responsive information in the most comprehensive record available, whether from the Personnel Management Information System, on appropriate internal Human Resources forms, or on appropriate Civil Service Commission forms. *See* Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012). If the Custodian believes a special service charge is warranted, he must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.
4. **The Custodian shall comply with item No. 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. **If applicable, the Custodian shall advise the Complainant of any proposed special service charge within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon the Complainant's payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director. Should the Complainant reject the proposed charge, the Custodian shall provide certified confirmation of compliance to the Executive Director to such within ten (10) business days from receipt of the Council's Interim Order.**
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.

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.

Interim Order 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**

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

**Rose D. Richardson¹
Complainant**

GRC Complaint No. 2014-277

v.

**New Jersey Office of the Attorney General²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Total number of all promotions, title changes and salary adjustments given within the Office of the Attorney General (“OAG”) to include a breakdown within each unit.
2. Last name of each person within the OAG that received a promotion, title change and/or salary adjustment since 2007 to include each individual’s previous and new title, reason for salary adjustment, and length of time between promotions, title changes and/or adjustments.
3. Names of individuals within the OAG that did not receive a promotion, title change, and/or salary adjustment since 2007 with each individual’s current section (or last section if no longer with the OAG). This should include all staff consolidated since 2007 from the Division of Criminal Justice and Division of Law.

Custodian of Record: Bruce J. Solomon, Esq.

Request Received by Custodian: July 3, 2014

Response Made by Custodian: September 11, 2014

GRC Complaint Received: August 1, 2014

Background³

Request and Response:

On July 3, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On August 1, 2014, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² No legal representation listed on record.

³ 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.

Rose D. Richardson v. New Jersey Office of the Attorney General, 2014-277 – Findings and Recommendations of the Executive Director

Government Records Council (“GRC”). The Complainant stated that she submitted an OPRA request to the OAG on July 3, 2014 and never received a response.

Supplemental Submissions:

On September 11, 2014, the forty-eighth (48th) business day after receipt of the OPRA request, the Custodian responded to the Complainant in writing. The Custodian stated that, after reviewing OAG’s Human Resources (“HR”) records, no records responsive to the subject OPRA request exist. Additionally, the Custodian stated that the Complainant’s OPRA request would require research and was thus invalid. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 511-512 (App. Div. 2010); Burke v. Brandes, 429 N. J. Super. 169, 176-77 (App. Div. 2012).

Statement of Information:

On September 11, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 3, 2014. The Custodian noted that the Complainant’s request was nearly identical to two (2) OPRA requests submitted by the Complainant’s OAG colleagues on June 26, 2014. However, the Custodian affirmed that, based on slight variations in the Complainant’s OPRA request, he determined that he wanted to review same with Mirella Bednar, Director of HR. The Custodian certified that he was unable to meet with Ms. Bednar until September 2, 2014, at which time he concluded that no records existed and production of the responsive information would require research. The Custodian certified that he responded to the Complainant on September 11, 2014, denying the Complainant’s OPRA request.

The Custodian contended that the Complainant’s request was overly broad and thus invalid because it failed to identify specific records. Instead, the Custodian argued that the request sought information that would have required research to determine the full universe of responsive records. The Custodian asserted that the Courts and GRC have long determined that similar requests are invalid. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; Burnett, 415 N.J. Super. at 511-512; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Taylor v. Elizabeth Bd. of Educ. (Union), GRC Complaint No. 2007-214 (April 2008); Shahid v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2008-251 (November 2009); Cavanaugh v. NJ Dep’t of Law & Pub. Safety, GRC Complaint No. 2009-302 (July 2010); Piszar v. NJ Dep’t of Env’tl. Protection, GRC Complaint No. 2010-176 (July 2011).

Moreover, the Custodian certified that he performed an adequate search through HR and determined that no records exist. The Custodian argued that the Complainant did not provide any evidence to refute this certification. The Custodian asserted that his denial is consistent with prior GRC case law in which the Council determined that no unlawful denial of access occurred. Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Kehoe v. NJ Dep’t of Env’tl. Protections, Div. of Fish & Wildlife, GRC Complaint No. 2010-300 (July 2012); Tormasi v. NJ Dep’t of Corrections, GRC Complaint No. 2012-203 *et seq.* (June 2013).

Additional Submissions

On May 1, 2015, the GRC sought additional information from the Custodian. Specifically, the evidence of record was unclear as to whether the OAG utilizes the “Personnel Management Information System” (“PMIS”) to manage personnel information or whether the OAG utilizes internal or Civil Service Commission (“CSC”) required forms to perform personnel actions. Based on the foregoing, the GRC requested that the Custodian submit a legal certification responding to the following:

1. Does the OAG utilize PMIS to manage personnel information? If so, can the system be queried to obtain electronic information in groups (*i.e.*, new hires, promotions, *etc.*).
2. Does the OAG use an internal form to process promotions?
3. Does the OAG use a CSC form to process promotions?

The GRC noted that it may be helpful if Ms. Bednar also submitted a legal certification. The GRC required the Custodian to submit his legal certification by close of business on May 6, 2015. Further, the GRC stated that submissions received after the deadline may not be considered as part of this adjudication.

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).⁴ 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Custodian certified in the SOI that he received the Complainant’s OPRA request on July 3, 2014, but did not respond until September 11, 2014. By the Custodian’s own admission, he failed to respond to the Complainant’s OPRA request until forty-eight (48) business days after receipt of same. Additionally, the Custodian did not provide any evidence that he timely responded to seek an extension of time.

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. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7)

⁴ 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.

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, GRC 2007-11.

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.”* N.J.S.A. 47:1A-1.

MAG, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁵ NJ Builders, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant’s request was a request for information, holding that “. . . because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to [MAG] . . .” Id. at 6. *See also* Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004). Rose D. Richardson v. New Jersey Office of the Attorney General, 2014-277 – Findings and Recommendations of the Executive Director

Regarding personnel records, OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

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

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

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

Moreover, in Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010), the Council determined that “name, title, position, salary, payroll record and length of service” is information which is specifically considered to be a government record under N.J.S.A. 47:1A-10, and that “payroll records” must be disclosed pursuant to Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004). The Council thus held that the complainant’s March 25, 2009, request for “[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008, to March 24, 2009” was a valid request pursuant to OPRA. Id. at 5.

Here, the Complainant’s OPRA request is composed of three (3) items that seek a variety of information. Item No. 1 seeks raw data as to the number of all promotions, title changes, and salary adjustments. Item No. 2 seeks names of individuals that received a promotion, title change and/or salary adjustment, previous and new titles, previous and new salaries, reason for a salary adjustments and what can be construed as lengths of service in a particular title. Item No. 3 seeks names of individuals that did not receive a promotion, title change and/or salary adjustment, and the section or sections in which the individuals work or worked (if they were no longer with the OAG).

Regarding request item No. 1 and the portion of request item No. 3 referring to section information, the Council’s holding in Danis does not apply. These items seek basic numbers and information about the location of individuals within the OAG. As was the case in LaMantia, these items are invalid because they failed to identify specific identifiable records.

Accordingly, the Complainant’s request item No. 1 and the portion of item No. 3 seeking section information is an invalid request for information that fails to seek identifiable government records. Specifically, the information sought is either raw numbers of individuals

receiving promotions or information on section location that are not considered government records under OPRA. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to same. N.J.S.A. 47:1A-6; LaMantia, GRC 2008-140; Ohlson, GRC 2007-233. *See also Vance v. Cnty. of Sussex, Sheriff's Office*, GRC Complaint No. 2012-188 (June 2013). However, the remainder of the Complainant's OPRA request seeks personnel information subject to disclosure under N.J.S.A. 47:1A-10. *See Danis*, GRC 2009-156 *et seq.*

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.

On May 1, 2015, the GRC sought additional information from the Custodian in accordance with N.J.A.C. 5:105-2.4(1) to ascertain whether the OAG utilizes PMIS, CSC forms, or has internal forms on which the requested information may exist. The Custodian's response was due by the close of business on Tuesday, May 6, 2015. To date, the Custodian has not submitted a response. For that reason, the GRC is proceeding with the adjudication of this complaint based on past case law and a basic knowledge of the State's HR and CSC process.

The GRC first re-iterates that OPRA begins with a presumption of non-disclosure of personnel information, but contains exceptions requiring the disclosure of "name, title, position, salary, payroll record, length of service, date of separation and the reason therefore . . ." N.J.S.A. 47:1A-10.

Additionally, prior GRC case law supports the disclosure of database information regarding personnel actions. *See Matthews v. City of Atlantic City (Atlantic)*, GRC Complaint No. 2008-123 (February 2009). Additionally, the GRC has previously been tasked with adjudicating complaints regarding records reflecting unclassified appointment promotion/salary adjustment records. *See Healy v. NJ Dep't of Labor & Workforce Dev.*, GRC Complaint No. 2008-108 (Interim Order dated October 26, 2010). Further, the Council has previously required that responding to an OPRA request for personnel information requires a custodian provide the most comprehensive records containing the responsive information. Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012).

Here, the Complainant's OPRA request item No. 2 and a portion of item No. 3 identified disclosable personnel information. It is unreasonable to assume that the OAG has no process to track personnel actions, whether on official forms or through a database system. Although the Custodian argued in the SOI that the request was overly broad, it is already established that portions were valid based on Danis, GRC 2009-156 *et seq.* Further, both Matthews, GRC 2008-123, and Healy, GRC 2008-108, provide insight into the type of records that can be disclosed in response to those valid portions of the request. Finally, the Council's decision in Valdes, GRC 2011-64, supports the Custodian's obligation to provide the most comprehensive record available

containing the responsive personnel information. For these reasons, the GRC is not satisfied that no records exist.

However, the GRC notes that the “reason for salary adjustment” portion of request item No. 2 may not conform with the excepted categories of information in N.J.S.A. 47:1A-10. Specifically, if the reason was performance-related, it is likely exempt from disclosure because performance-related personnel records are not disclosable under OPRA. See Lotito v. NJ Dep’t of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014)(citing Cibo Jr. v. Rowan Univ., GRC Complaint No. 2003-42 (February 2014)(holding that reasons for salary increases are not disclosable).

Accordingly, the Custodian may have unlawfully denied access to records responsive to the Complainant’s OPRA request item No. 2 (except for the reason for a salary adjustment on a performance-related basis) and a portion of item No. 3 seeking names of individuals not that did not receive a promotion, title change and/or salary adjustment. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Matthews, GRC 2008-123; Healy, GRC 2008-108; Lotito, GRC 2013-65. The Custodian must disclose the responsive information in the most comprehensive record available, whether from PMIS, on internal HR forms, or on CSC forms. See Valdes, GRC 2011-64. If the Custodian believes a special service charge is warranted, he must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.

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. 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. As such, the Custodian’s failure to respond in writing to the 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Complainant’s request item No. 1 and the portion of item No. 3 seeking section information are invalid requests for information that fail to seek identifiable government records. Specifically, the information sought is either raw numbers of individuals receiving promotions or information on section location that are not considered government records under OPRA. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable

Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6; LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). *See also* Vance v. Cnty. of Sussex, Sheriff's Office, GRC Complaint No. 2012-188 (June 2013). However, the remainder of the Complainant's OPRA request seeks personnel information subject to disclosure under N.J.S.A. 47:1A-10. *See* Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010).

3. The Custodian may have unlawfully denied access to records responsive to the Complainant's OPRA request item No. 2 (except for the reason for a salary adjustment on a performance-related basis) and a portion of item No. 3 seeking names of individuals not that did not receive a promotion, title change and/or salary adjustment. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009); Healy v. NJ Dep't of Labor & Workforce Dev., GRC Complaint No. 2008-108 (Interim Order dated October 26, 2010); Lotito v. NJ Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014). The Custodian must disclose the responsive information in the most comprehensive record available, whether from Personnel Management Information System, on internal Human Resources forms, or on Civil Service Commission forms. *See* Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012). If the Custodian believes a special service charge is warranted, he must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.
4. **The Custodian shall comply with item No. 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 1:4-4,⁶ to the Executive Director.⁷**
5. **If applicable, the Custodian shall advise the Complainant of any proposed special service charge within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon the Complainant's payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order and simultaneously**

⁶ "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."

⁷ 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.

provide certified confirmation of compliance to the Executive Director. Should the Complainant reject the proposed charge, the Custodian shall provide certified confirmation of compliance to the Executive Director to such within ten (10) business days from receipt of the Council's Interim Order.

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.

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Executive Director

May 19, 2015