



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

September 29, 2016 Government Records Council Meeting

John F. Huegel
Complainant

v.

County of Essex
Custodian of Record

Complaint No. 2014-305

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted entirety of said findings and recommendations. The Council, therefore, finds that the Council dismisses the complaint because the Complainant withdrew the complaint in writing to the Office of Administrative Law on June 2, 2016.

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 29th Day of September, 2016

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: October 4, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 29, 2016 Council Meeting**

**John F. Huegel¹
Complainant**

GRC Complaint No. 2014-305

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: “A list of ALL Essex County employees residing OUTSIDE of the County of Essex, including the employee’s Title/Position, Full-time or Part-time employee status, and Annual Salary for All.”

Custodian of Record: Michael Venezia

Request Received by Custodian: August 13, 2014

Response Made by Custodian: August 20, 2014

GRC Complaint Received: August 28, 2014

Background

December 15, 2015 Council Meeting

At its December 15, 2015, public meeting, the Government Records Council (“Council” considered the November 10, 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 violated OPRA’s immediate access provision by failing to respond immediately to that portion of the Complainant’s OPRA request seeking salary information. N.J.S.A. 47:1A-5 (e). See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011-237 (Interim Order dated December 18, 2012).
2. Aside from finding that the Custodian violated OPRA’s immediate access provision, the Council is unable to determine, based on the inconclusive evidence of record, whether there was a lawful denial of access to the Complainant’s OPRA request. Therefore, this complaint should be referred to the Office of Administrative Law for a

¹ No legal representation listed on record.

² Represented by James Pagenelli, Esq. (Newark NJ).

hearing to resolve the facts. *See Semprevivo*, GRC No. 2007-135. *See also Esposito v. Twp. of Belleville (Essex)*, GRC Complaint No. 2014-310 (June 2015). Furthermore, this Complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Procedural History:

On December 16, 2015, the Council distributed its December 15, 2015 Interim Order to all parties. On February 16, 2016, this complaint was transmitted to the Office of Administrative Law (“OAL”). On June 2, 2016, the Complainant withdrew the complaint in writing to the OAL. On July 19, 2016, the OAL returned the complete file jacket to the GRC.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss the complaint because the Complainant withdrew the complaint in writing to the Office of Administrative Law on June 2, 2016.

Prepared By: Ernest Bongiovanni
Staff Attorney

September 22, 2016



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

INTERIM ORDER

December 15, 2015 Government Records Council Meeting

John F. Huegel
Complainant

Complaint No. 2014-305

v.

County of Essex
Custodian of Record

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian violated OPRA’s immediate access provision by failing to respond immediately to that portion of the Complainant’s OPRA request seeking salary information. N.J.S.A. 47:1A-5 (e). See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011-237 (Interim Order dated December 18, 2012).
2. Aside from finding that the Custodian violated OPRA’s immediate access provision, the Council is unable to determine, based on the inconclusive evidence of record, whether there was a lawful denial of access to the Complainant’s OPRA request. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. See Semprevivo, GRC No. 2007-135. See also Esposito v. Twp. of Belleville (Essex), GRC Complaint No. 2014-310 (June 2015). Furthermore, this Complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.



Interim Order Rendered by the
Government Records Council
On The 15th Day of December, 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: December 16, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2015 Council Meeting**

**John F. Huegel¹
Complainant**

GRC Complaint No. 2014-305

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: “A list of ALL Essex County employees residing OUTSIDE of the County of Essex, including the employee’s Title/Position, Full-time or Part-time employee status, and Annual Salary for All.”

Custodian of Record: Michael Venezia

Request Received by Custodian: August 13, 2014

Response Made by Custodian: August 20, 2014

GRC Complaint Received: August 28, 2014

Background³

Request and Response:

On August 13, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian, seeking the above-mentioned records. On August 20, 2014, five (5) business days following the receipt of the request, the Custodian responded in writing, stating “[t]here are no records on file with the County of Essex.”

Denial of Access Complaint:

On August 28, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he made a reasonable request. He further alleged that the Custodian’s response unlawfully denied access to records because the Custodian must have such records concerning employees in his files.

Statement of Information:

¹ No legal representation listed on record.

² Represented by James Pagenelli, Esq. (Newark NJ).

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.

On September 24, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 13, 2014, and that he responded to the Complainant by e-mail on August 20, 2014, advising him that no responsive records were on file with the County. He elaborated in his SOI that “[t]here are currently no records which exist which are responsive to [the Complainant’s] request for a list of employees residing OUTSIDE the County of Essex. Custodians are not required to conduct research, gather information or create new records in response to an OPRA request.”

Additional Submissions

On September 30, 2015, the GRC sent a letter to the Custodian to seek additional information needed to adjudicate the Complaint. The GRC requested information regarding access to records in the Custodian’s personnel database. To that end, the GRC asked the Custodian the following:

1. Does your agency utilize PMIS or some other database to manage personnel information? If so, can the system be queried to obtain electronic information in groups (*i.e.*, new hires, promotions, employee names and addresses, *etc.*)?
2. Does your agency use any internal or CSC form to process personnel actions?
3. Would a query of your system or database enable you to provide the requested record?
4. Would the CSC or internal forms provide the requested record?

The GRC’s letter also requested a certification per N.J. Court Rule 1:4-4 and asked that the information be supplied no later than October 14, 2014. Having not received a response, the GRC sent the Custodian an e-mail on October 14, 2014, reminding him that his reply was due that day. As of this writing, the Custodian has not responded to the GRC.

Analysis

Immediate Access

OPRA provides that “[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiation agreements and individual employment contracts, and *public employee salary* and overtime information.” N.J.S.A. 47:1A-5(e)(emphasis added).

In Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the “immediate access language of OPRA [N.J.S.A. 47:1A-5(e)] suggests that the Custodian was . . . obligated to immediately notify the Complainant. . . .” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond, or requesting clarification of the request. Additionally, if immediate access items are contained within a larger OPRA request that contains a combination of records requiring a response within seven (7) business days and immediate access records requiring an immediate response, a custodian still has an obligation to

respond to the immediate access items immediately. *See* Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

Moreover, in Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011-237 (Interim Order dated December 18, 2012), the complainant's OPRA request sought a contract. The custodian responded on the fourth (4th) business day by providing access to a contract. However, the Council determined that the custodian violated N.J.S.A. 47:1A-5(e) because she "failed to immediately respond to the [c]omplainant's OPRA request for a contract . . ." Id. at 4.

In the instant matter, the Complainant's OPRA request sought a "list of ALL Essex County employees residing OUTSIDE of the County of Essex, including the employee's Title/Position, Full-time or Part-time employee status, and Annual Salary for All." To the extent that it sought salary information, the request was for "immediate access" records. *See* Giambri v. Sterling High School Dist. (Camden), GRC Complaint No. 2014-395 (July 2015). As such, the Custodian was obligated to respond immediately, either granting access, denying access, seeking clarification, or requesting additional time to provide salary information to the Complainant. However, the evidence of record shows that the Custodian did not initially respond to the Complainant's OPRA request until August 20, 2014, or the fifth (5th) business day after receipt of same. The Custodian's response time here exceeded the custodian's response in Kaplan by one (1) business day.

Thus, the Custodian violated OPRA's immediate access provision by failing to respond immediately to that portion of the Complainant's OPRA request seeking salary information. N.J.S.A. 47:1A-5(e); Herron, GRC 2006-178; Kohn, GRC 2011-330; Kaplan, GRC 2011-237.

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.

In Semprevivo v. Pinelands Reg'l Sch. Dist. Bd. of Educ., GRC Complaint No. 2007-135 (October 2008), the GRC requested that the custodian provide the GRC with information that was missing from the custodian's SOI. In reply, the custodian forwarded to the GRC three policies that the custodian said would provide the legal basis for the custodian to deny the complainant access to requested Board records. The GRC found that because the Council had inadequate evidence to render a meaningful decision in the matter, the complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts.

In the current matter, the evidence of record indicates that the Custodian responded to the Complainant's OPRA request on August 20, 2014, stating that no responsive records were on file. In response to the Complaint, the Custodian stated that complying with the request would require research. The Custodian's SOI did not elaborate on why or how research would have to

be conducted to comply with the Complainant's request. In order to obtain a clear understanding of the facts, the GRC sought additional information from the Custodian concerning the agency's personnel database. However, the Custodian failed to respond to the GRC's request for additional information, despite receiving a written reminder on the due date. Absent the Custodian's response, the GRC finds the evidence of record inadequate and inconclusive.

Accordingly, aside from finding that the Custodian violated OPRA's immediate access provision, the Council is unable to determine, based on the inconclusive evidence of record, whether there was a lawful denial of access to the Complainant's OPRA request. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. *See Semprevivo*, GRC No. 2007-135. *See also Espositio v. Twp. of Belleville (Essex)*, GRC Complaint No. 2014-310 (June 2015). Furthermore, this Complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated OPRA's immediate access provision by failing to respond immediately to that portion of the Complainant's OPRA request seeking salary information. N.J.S.A. 47:1A-5 (e). *See Herron v. Twp. of Montclair*, GRC Complaint No. 2006-178 (February 2007); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011-237 (Interim Order dated December 18, 2012).
2. Aside from finding that the Custodian violated OPRA's immediate access provision, the Council is unable to determine, based on the inconclusive evidence of record, whether there was a lawful denial of access to the Complainant's OPRA request. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. *See Semprevivo*, GRC No. 2007-135. *See also Espositio v. Twp. of Belleville (Essex)*, GRC Complaint No. 2014-310 (June 2015). Furthermore, this Complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Ernest Bongiovanni
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

November 10, 2015⁴

⁴ The GRC originally scheduled the Complaint for adjudication at the September 2015 meeting, but the Council instead chose to table the matter. This complaint was again prepared for adjudication at the November 17, 2015 meeting, but could not be adjudicated due to lack of quorum.