



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

July 28, 2015 Government Records Council Meeting

Harry Dunleavy
Complainant

Complaint No. 2014-372

v.

Jefferson Township Board of Education (Morris)
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 Supplemental 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 complied with the Council’s June 30, 2015, Interim Order because she responded in the extended time frame, certifying that on October 17, 2014, she provided Ms. Penderson’s résumé to the Complainant that contained responses to the June 30, 2014, OPRA request item Nos. 1 and 3. Additionally, the Custodian certified that she provided Ms. Penderson’s salary as part of her October 17, 2014, response, which satisfied the Complainant’s June 30, 2014, OPRA request item No. 5. Moreover, the Custodian disclosed Mr. Annett’s “Certification of Eligibility with Advanced Standing” to the Complainant in response to his October 9, 2014, OPRA request item No. 2 and certified that no additional certificates existed. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond timely to the Complainant’s June 30, 2014, OPRA request resulted in a “deemed” denial of said request. Moreover, although the Custodian unlawfully denied access to personnel information and records from both the June 30, and October 9, 2014, OPRA requests respectively, she timely complied with the Council’s June 30, 2015, Interim Order. Further, the Complainant’s June 30, 2014, OPRA request item No. 4 was invalid, and the Custodian certified that no records responsive to the Complainant’s October 9, 2014, OPRA request item Nos. 1 and 3 existed. 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 28th Day of July, 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 30, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Harry Dunleavy¹
Complainant**

GRC Complaint No. 2014-372

v.

**Jefferson Township Board of Education (Morris)²
Custodial Agency**

Records Relevant to Complaint:

June 30, 2014 OPRA request: Copies of:

1. The type of license and qualifications of the individual hired to replace Mr. Bryant N. Annett.
2. Résumé of the hired individual.
3. The name of the hired individual.
4. Is the particular individual still employed?
5. The salary of the hired individual. If no longer employed, the total amount paid during time of employee

October 9, 2014 OPRA request: Copies of:

1. The “Certificate of Eligibility” (“CE”) held by Mr. Annett.
2. The “Certification of Eligibility with Advanced Standing” (“CEAS”) held by Mr. Annett.
3. The “Provisional Certificate” (“PC”) of Mr. Annett, which is required for a CE or CEAS when accepting a monitored teaching position.

Custodian of Record: Dora Zeno

Request Received by Custodian: October 9, 2014

Response Made by Custodian: October 17, 2014

GRC Complaint Received: November 6, 2014

Background

June 30, 2015 Council Meeting:

At its June 30, 2015, public meeting, the Council considered the June 23, 2015, Findings and Recommendations of the Executive Director and all related documentation submitted by the

¹ No legal representation listed on record.

² Represented by Joseph D. Castellucci, Esq., of Schwatz, Simon, Edelstein, & Celso, LLC (Whippany, NJ).

parties. By a majority vote, the Council adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she 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 June 30, 2014, OPRA request item Nos. 1, 3, and 5 are valid because the requested information is defined as a "government record" under OPRA. N.J.S.A. 47:1A-10; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010). To these items, the Custodian has unlawfully denied access. N.J.S.A. 47:1A-6. The Custodian must disclose the information regarding Mr. Annett's replacement and the individual's résumé to the Complainant. If the Custodian already provided the résumé and salary for the individual that replaced Mr. Annett as part of her October 17, 2014, response, she must certify to this fact and provide supporting documentation (such as a copy of the résumé she provided at that time).
3. **The Custodian shall comply with item No. 2 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**
4. Because the Complainant's June 30, 2014, request item No. 4 asked a question regarding the employment status of the individual that replaced Mr. Annett, the request item is invalid 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); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Thus, the Custodian has not unlawfully denied access to this request item. *See also* Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009), and Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

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.

5. The Custodian may have unlawfully denied access to the certificates responsive to the Complainant's October 9, 2014, OPRA request. N.J.S.A. 47:1A-10; Herron v. NJ Dep't of Educ., GRC Complaint No. 2011-324 (Interim Order dated December 18, 2012). The Custodian must disclose Mr. Annett's responsive certificates that it maintains on file. If any of the certificates do not exist within the Jefferson Township Board of Education's files, the Custodian must specifically certify to this fact.
6. **The Custodian shall comply with item No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
7. The Council defers analysis of whether the Custodian or Superintendent Kraemer 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 July 1, 2015, the Council distributed its Interim Order to all parties. On the same day, the Custodian's Counsel requested an extension of time until July 13, 2015, to comply with the Council's Order, which the GRC granted.

On July 13, 2015, the Custodian responded to the Council's Interim Order and copied the Complainant. The Custodian certified that on October 17, 2014, she provided the Complainant with the résumé of Susan Elizabeth Penderson with redactions of the home address, telephone number, and e-mail address under the privacy interest exemption. N.J.S.A. 47:1A-1. The Custodian certified that the résumé contained responses to the Complainant's June 30, 2014, OPRA request item Nos. 1 (types of licenses) and 3 (name of the individual hired). The Custodian noted that a copy of this résumé is attached to her compliance package. Further, the Custodian affirmed that she provided the Complainant with Ms. Penderson's salary as part of her October 17, 2014, response.

The Custodian certified that she located a CEAS for Mr. Annett and attached same. Further, the Custodian affirmed that the Jefferson Township Board of Education ("BOE") did not maintain a copy of Mr. Annett's CE and PC.⁵

Analysis

Compliance

At its June 30, 2015, meeting, the Council ordered the Custodian to disclose to the

⁵ On July 15, 2015, the Complainant alleged that the BOE engaged in illegal hiring practices. On July 16, 2015, the Custodian's Counsel objected to the Complainant's submission. The GRC notes that it does not have the authority to adjudicate such an issue. N.J.S.A. 47:1A-7(b).

Complainant records providing excepted personnel information sought in the June 30, 2014, OPRA request. Moreover, the Council ordered the Custodian to provide the identified certificates responsive to the Complainant's October 9, 2014, OPRA request or certify to the nonexistence of same. Additionally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 1, 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 July 9, 2015.

On July 1, 2015, the Custodian's Counsel sought an extension of time until July 13, 2015, to provide compliance, which the GRC granted. On July 13, 2015, the last day of the extension of time to comply, the Custodian responded to the Council's Order. Therein, the Custodian certified that she provided to the Complainant Ms. Penderson's résumé containing responses to the Complainant's June 30, 2014, OPRA request item Nos. 1 and 3 on October 17, 2014. Additionally, the Custodian certified that she provided to the Complainant Ms. Penderson's salary as part of the same response. The Custodian also provided to the Complainant a CEAS responsive to his October 9, 2014, OPRA request item No. 2 and certified that the BOE maintained no additional certificates. Finally, the Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's June 30, 2015, Interim Order because she responded in the extended time frame certifying that on October 17, 2014, she provided Ms. Penderson's résumé to the Complainant that contained responses to the June 30, 2014, OPRA request item Nos. 1 and 3. Additionally, the Custodian certified that she provided Ms. Penderson's salary as part of her October 17, 2014, response, which satisfied the Complainant's June 30, 2014, OPRA request item No. 5. Moreover, the Custodian disclosed Mr. Annett's CEAS to the Complainant in response to his October 9, 2014, OPRA request item No. 2 and certified that no additional certificates existed. Finally, 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)).

Here, the Custodian's failure to respond timely to the Complainant's June 30, 2014, OPRA request resulted in a "deemed" denial of said request. Moreover, although the Custodian unlawfully denied access to personnel information and records from both the June 30, and October 9, 2014, OPRA requests respectively, she timely complied with the Council's June 30, 2015, Interim Order. Further, the Complainant's June 30, 2014, OPRA request item No. 4 was invalid, and the Custodian certified that no records responsive to the Complainant's October 9, 2014, OPRA request item Nos. 1 and 3 existed. 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 June 30, 2015, Interim Order because she responded in the extended time frame, certifying that on October 17, 2014, she provided Ms. Penderson's résumé to the Complainant that contained responses to the June 30, 2014, OPRA request item Nos. 1 and 3. Additionally, the Custodian certified that she provided Ms. Penderson's salary as part of her October 17, 2014, response, which satisfied the Complainant's June 30, 2014, OPRA request item No. 5. Moreover, the Custodian disclosed Mr. Annett's "Certification of Eligibility with Advanced Standing" to the Complainant in response to his October 9, 2014, OPRA request item No. 2 and certified that no additional certificates existed. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian's failure to respond timely to the Complainant's June 30, 2014, OPRA request resulted in a "deemed" denial of said request. Moreover, although the Custodian unlawfully denied access to personnel information and records from both the June 30, and October 9, 2014, OPRA requests respectively, she timely complied with the Council's June 30, 2015, Interim Order. Further, the Complainant's June 30, 2014, OPRA request item No. 4 was invalid, and the Custodian certified that no records responsive to the Complainant's October 9, 2014, OPRA request item Nos. 1 and 3 existed. 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

July 21, 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
Commissioner

INTERIM ORDER

June 30, 2015 Government Records Council Meeting

Harry Dunleavy
Complainant

Complaint No. 2014-372

v.

Jefferson Township Board of Education (Morris)
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 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 did not bear her burden of proof that she 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 June 30, 2014, OPRA request item Nos. 1, 3, and 5 are valid because the requested information is defined as a “government record” under OPRA. N.J.S.A. 47:1A-10; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010). To these items, the Custodian has unlawfully denied access. N.J.S.A. 47:1A-6. The Custodian must disclose the information regarding Mr. Annett’s replacement and the individual’s résumé to the Complainant. If the Custodian already provided the résumé and salary for the individual that replaced Mr. Annett as part of her October 17, 2014, response, she must certify to this fact and provide supporting documentation (such as a copy of the résumé she provided at that time).
3. **The Custodian shall comply with item No. 2 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

4. Because the Complainant's June 30, 2014, request item No. 4 asked a question regarding the employment status of the individual that replaced Mr. Annett, the request item is invalid 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); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Thus, the Custodian has not unlawfully denied access to this request item. See also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009), and Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).
5. The Custodian may have unlawfully denied access to the certificates responsive to the Complainant's October 9, 2014, OPRA request. N.J.S.A. 47:1A-10; Herron v. NJ Dep't of Educ., GRC Complaint No. 2011-324 (Interim Order dated December 18, 2012). The Custodian must disclose Mr. Annett's responsive certificates that it maintains on file. If any of the certificates do not exist within the Jefferson Township Board of Education's files, the Custodian must specifically certify to this fact.
6. **The Custodian shall comply with item No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
7. The Council defers analysis of whether the Custodian or Superintendent Kraemer 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 30th Day of June, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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.

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 1, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Harry Dunleavy¹
Complainant**

GRC Complaint No. 2014-372

v.

**Jefferson Township Board of Education (Morris)²
Custodial Agency**

Records Relevant to Complaint:

June 30, 2014 OPRA request: Copies of:

1. The type of license and qualifications of the individual hired to replace Mr. Bryant N. Annett.
2. Résumé of the hired individual.
3. The name of the hired individual.
4. Is the particular individual still employed?
5. The salary of the hired individual. If no longer employed, the total amount paid during time of employee

October 9, 2014 OPRA request: Copies of:

1. The “Certificate of Eligibility” (“CE”) held by Mr. Annett.
2. The “Certification of Eligibility with Advanced Standing” (“CEAS”) held by Mr. Annett.
3. The “Provisional Certificate” (“PC”) of Mr. Annett, which is required for a CE or CEAS when accepting a monitored teaching position.

Custodian of Record: Dora Zeno

Request Received by Custodian: October 9, 2014

Response Made by Custodian: October 17, 2014

GRC Complaint Received: November 6, 2014

¹ No legal representation listed on record.

² Represented by Joseph D. Castellucci, Esq., of Schwartz, Simon, Edelstein, & Celso, LLC (Whippany, NJ).

Background³

Request and Response:

On October 9, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records and attaching his previously filed OPRA request from June 30, 2014.

On October 17, 2014, the Custodian responded in writing, noting that she received both of the Complainant’s OPRA requests on October 10, 2014. The Custodian noted that the Complainant’s June 30, 2014, OPRA request was addressed to Superintendent Joseph Kraemer and not her. Additionally, the Custodian noted that the Complainant was precluded at that time from seeking records from the Jefferson Township Board of Education (“BOE”) due to pending litigation. The Custodian provided the following responses to each OPRA request:

June 30, 2014, OPRA request

The Custodian stated that request item Nos. 1, 3, and 4 seek information or ask questions and are thus invalid. NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian noted that any information responsive to item No. 1 would be considered exempt as personnel records because N.J.S.A. 47:1A-10 does not permit disclosure of a public employee’s license and qualifications. However, the Custodian advised the Complainant that possible responsive information may be located in an attached document.

The Custodian granted access to request item No. 2 with redactions for privacy information. N.J.S.A. 47:1A-1. Further, the Custodian stated that request item No. 5 also sought information and was thus invalid; however, the individual’s salary was \$52,805.00.

October 9, 2014, OPRA request

The Custodian first noted that Mr. Annett is no longer an employee of the BOE. In any event, the Complainant’s OPRA request sought personnel records that are not subject to access. N.J.S.A. 47:1A-10.

Finally, the Custodian stated that she sent the responsive records to the Complainant via U.S. mail. Further, the Custodian stated that the BOE waived the applicable copy cost.

Denial of Access Complaint:

On November 6, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he recently filed a complaint against the BOE with the New Jersey Department of Law & Public Safety, Division on Civil Rights (“DCR”). The Complainant noted that DCR already advised that they did not

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.

possess the hired individual's "questionable" teaching licenses but that the Complainant was entitled to same if they existed.

Statement of Information:

On February 12, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's two (2) OPRA requests on October 10, 2014. The Custodian noted that the Complainant sent his June 30, 2014, OPRA request to Superintendent Kraemer and not to her. The Custodian certified that her search included reviewing the BOE's personnel files. The Custodian certified that she responded in writing on October 17, 2014, addressing both OPRA requests.

The Custodian argued that four (4) of the five (5) items in the Complainant's October 9, 2014, OPRA request sought information and asked questions; thus, same were 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); NJ Builders, 390 N.J. Super. at 180. The Custodian contended that the Complainant's June 30, 2014, OPRA request and remaining item of the October 9, 2014, OPRA request sought personnel records that are not disclosable under N.J.S.A. 47:1A-10. The Custodian certified that Mr. Annett no longer works for the BOE: nonemployees must consent to the disclosure of their personnel information. Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2013-97 (March 2014)(holding that the custodian lawfully denied access to résumés of unsuccessful candidates under Executive Order No. 26 (Gov. McGreevey, 2002)). Additionally, the Custodian asserted that Mr. Annett may have obtained additional certificates of which the BOE is unaware.

Finally, the Custodian argued the BOE's position that the requests and instant complaint are frivolous and meant to harass the BOE and Custodian, based on his dissatisfaction with the outcome of the DCR complaint.⁴ N.J.S.A. 2A:15-59.1; Deutch & Shur, P.C. v. Roth, 284 N.J. Super. 133, 139 (March 3, 1995); Caggiano v. Borough of Stanhope, GRC Complaint No. 2007-161 (October 2007). The Custodian argued that the Complainant did not agree to mediate this complaint, which indicates his bad faith in filing this complaint. The Custodian stated that the Complainant previously requested similar information and records from the BOE on December 15, 2011, to which she responded to on December 23, 2011, by providing access to same. The Custodian also affirmed that the Complainant received the records at issue here from DCR as part of his complaint against the BOE for age discrimination. Further, the Custodian stated that DCR already made factual findings as to the veracity of the certificates the Complainant sought. The Custodian noted that any disagreement with DCR's findings should be addressed to that agency and not the BOE.

Additional Submissions

On February 19, 2015, the Complainant e-mailed the GRC to assert that the SOI presumably means that the BOE does not possess licenses responsive to his October 9, 2014, OPRA request. The Complainant noted that the records attached to the SOI are already in his possession.

⁴ The Custodian noted that DCR determined that the BOE did not violate the Complainant's civil rights.

On June 9, 2015, the GRC sought additional information from the Custodian. Specifically, the GRC stated that there was a lack of evidence in the record as to Superintendent Kraemer's handling of the Complainant's June 30, 2014, OPRA request. The GRC thus requested that Superintendent Kraemer (and/or the individual that received the Complainant's OPRA request) provide a legal certification responding to the following:

1. On what date did Superintendent Kraemer (or his staff) receive the Complainant's June 30, 2014, OPRA request?
2. Did Superintendent Kraemer respond in writing directing the Complainant to the Custodian or, as an alternative, forward the request to the Custodian? If so, provide supporting documentation.

The GRC required the Custodian to submit his legal certification by close of business on June 12, 2015. Further, the GRC stated that submissions received after the deadline may not be considered as part of this adjudication.

On June 11, 2015, the Custodian's Counsel sought an extension of time until June 19, 2015, to submit the requested response, which the GRC granted. On June 19, 2015, Superintendent Kraemer responded to the GRC's request for additional information. Therein, Superintendent Kraemer certified that he received the Complainant's June 30, 2014, OPRA request on July 1, 2014, and forwarded same to the Custodian. Superintendent Kraemer also noted that, without waiving the BOE's attorney-client privilege, no response was sent to the Complainant based on advice that the BOE should have no interaction with the Complainant due to pending litigation.

Analysis

Timlieness

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).⁵ 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 Complainant sent his June 30, 2014, OPRA request to Superintendent Kraemer. However, the Custodian certified in the SOI that she never received the request. Superintendent Kraemer subsequently certified that he forwarded the Complainant's OPRA request to the

⁵ 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.

Custodian. Notwithstanding the inconsistency between the Custodian’s SOI certification and Superintendent Kraemer’s certification as to receipt of the OPRA request, it appears that the Custodian did not respond to this request due to pending litigation. However, the Council has previously determined that “pending litigation” is not a valid exemption under OPRA. Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014) at 3. For this reason, the Custodian was required to respond in writing within seven (7) business days of receipt of the OPRA request and failed to do so.

Therefore, the Custodian did not bear her burden of proof that she 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, 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. at 549 (emphasis added). Bent, 381

N.J. Super. at 37;⁶ NJ Builders, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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 (emphasis added).

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.

Notwithstanding the forgoing, in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), the Council held that the complainant’s September 13, 2007, request seeking answers to five (5) questions regarding a property named the Villa Maria was invalid. *See also* Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009) *and* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

June 30, 2014, OPRA request Item Nos. 1, 3 and 5:

In this matter, the Complainant’s OPRA request Nos. 1, 3, and 5 sought “the license and qualifications of the individual hire to replace” Mr. Annett, the name of this individual, and the

⁶ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

individual's salary⁷ (or amount paid if no longer employed). These request items, although seeking information, are considered government records under N.J.S.A. 47:1A-10. More specifically, the name and salary of the individual are obviously identified as records. Additionally, "type of licenses and qualifications" certainly speaks to the individual's "experiential and educational" qualifications to obtain a teaching job in the State of New Jersey.

The GRC notes that, notwithstanding her denial, the Custodian stated in her response that the Complainant could glean information responsive to item Nos. 1 and 3 from the résumé she was providing in response to item No. 2. Additionally, the Custodian provided a salary for item No. 5. While neither of the parties dispute that a résumé was disclosed to the Complainant, there is a lack of evidence as to whose résumé was disclosed. Specifically, the Custodian only identifies the résumé (and salary information) as the "individual." As part of the SOI, the only attached résumé is Mr. Annett's; however, the Complainant's OPRA request very clearly sought information regarding the individual that replaced him. While it seems sensible to refer to this replacement as the "individual," it is unclear whether the Custodian disclosed the appropriate responsive records.

Therefore, the Complainant's June 30, 2014 OPRA request item Nos. 1, 3 and 5 are valid because the requested information is defined as a "government record" under OPRA. N.J.S.A. 47:1A-10; Danis, GRC 2009-156 *et seq.* To these items, the Custodian has unlawfully denied access. N.J.S.A. 47:1A-6. The Custodian must disclose the information regarding Mr. Annett's replacement and the individual's résumé to the Complainant. If the Custodian already provided the résumé and salary for the individual that replaced Mr. Annett as part of her October 17, 2014, response, she must certify to this fact and provide supporting documentation (such as a copy of the résumé she provided at that time).

June 30, 2014, OPRA request Item No. 4:

The Complainant's request item No. 4 asked whether the individual that replaced Mr. Annett was still employed. Although the response to this question could implicate the employee's "date of separation," contemplated as disclosable in N.J.S.A. 47:1A-10, the request item is purely a question requiring a yes or no response. For this reason, the item is invalid because it is a question.

Thus, because the Complainant's June 30, 2014, request item No. 4 asked a question regarding the employment status of the individual that replaced Mr. Annett, the request item is invalid under OPRA. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Watt, GRC 2007-246. Thus, the Custodian has lawfully denied access to this request item. *See also* Ohlson, GRC 2007-233 and Rummel, GRC 2011-168.

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

⁷ The GRC notes that salary is also an "immediate access" record. N.J.S.A. 47:1A-5(e).

“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.

As noted above, although N.J.S.A. 47:1A-10 begins with a presumption of nondisclosure, the provision contains exceptions providing for disclosure of certain information which include “data contained in *information which disclose conformity with specific experiential [or] educational qualifications required for government employment . . .*” Id. (emphasis added).

October 9, 2014, OPRA request:

In Herron v. NJ Dep’t of Educ., GRC Complaint No. 2011-324 (Interim Order dated December 18, 2012), the complainant sought unredacted transcripts, certificates, and licenses. Thus, the Council was tasked with determining whether the custodian lawfully redacted grade point averages (“GPA”) from transcripts. After reviewing prior case law and taking judicial notice of the New Jersey Department of Education’s (“DOE”) regulations, the Council determined that the redactions were unlawful and ordered disclosure of the transcripts with this information unredacted. In reaching this conclusion, the Council determined that DOE’s regulations required applicants to maintain a certain GPA; thus, this information related directly to the individuals’ educational qualifications required for government employment. Id. at 7. Of note, the Council also required disclosure of additional certificates and licenses that the custodian may not have initially provided.

DOE’s regulations, codified at N.J.A.C. 6A:9-2.1, provide the following definitions of certificates issued to educators:

“[CE]” means a credential with lifetime validity issued to persons who have completed degree, academic study and applicable test requirements for certification. The CE permits the applicant to seek and accept employment in positions requiring certification.

“[CEAS]” means a credential with lifetime validity issued to persons who have completed degree, academic study, applicable test requirements and traditional professional preparation programs for certification. The CEAS permits the applicant to seek and accept employment in positions requiring certification.

. . .

“[PC]” means a two-year certificate issued to candidates who have met the requirements for initial employment but who have not yet met the requirements for standard certification. Provisional certificates are issued to newly-employed instructional, administrator, and educational services staff who are employed as part of a State-approved district training program or residency leading to standard certification. Provisional certificates are also issued to initially-employed educational services staff who have at least one year, but less than three years, of successful full time experience or the equivalent in another state under that state's standard certificates.

Id.

Pursuant to N.J.A.C. 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence) and generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. *See Sanders v. Div. of Motor Vehicles*, 131 N.J. Super. 95 (App. Div. 1974).

In the instant matter, the Complainant's OPRA request sought a CE, CEASand PC for Mr. Annett. The Custodian initially denied access to the records under N.J.S.A. 47:1A-10 and noted that Mr. Annett no longer worked for the BOE. In the SOI, the Custodian maintained that the Complainant's request sought personnel information; however, the Custodian also noted that she did not know how many records existed. Additionally, the Custodian asserted that Mr. Annett was a former employee and would have to consent to disclosure of these records. Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2013-97 (March 2014). Finally, the Custodian argued that she was unaware of any additional certificates Mr. Annett may have obtained after leaving the BOE.

Initially, the GRC notes that its determination in Inzelbuch, GRC 2013-97, does not apply to the facts of this complaint. The issue there turned on the disclosability of résumés for unsuccessful candidates per EO 26 and not the disclosability of records for former employees.

The Council's holding in Herron, GRC 2011-324, offers significant guidance on the disclosure of the records at issue here. Similar to the records at issue in Herron, DOE's regulations clearly require an individual seeking government employment in certain education positions to obtain any combination of the certificates that the Complainant sought in his OPRA request. This regulatory requirement conforms with OPRA's exception for disclosure of personnel information that discloses conformity of educational and experiential qualifications required for government employment.

Based on the foregoing, the GRC is not satisfied that the Custodian lawfully denied access to these records, if they exist. The GRC further notes that even if Mr. Annett obtained additional certificates after leaving the BOE, the Custodian would only be responsible for disclosing those records that the BOE maintained at the time of the Complainant's request: that is, the Custodian would not be responsible for disclosing any certificates, which Mr. Annett received after leaving and which are not maintained or received at the BOE.

Accordingly, the Custodian may have unlawfully denied access to the certificates responsive to the Complainant's October 9, 2014, OPRA request. N.J.S.A. 47:1A-10; Herron, GRC 2011-324. The Custodian must disclose Mr. Annett's responsive certificates that it maintains on file. If any of the certificates do not exist within the BOE's files, the Custodian must specifically certify to this fact.

Knowing & Willful

The Council defers analysis of whether the Custodian or Superintendent Kraemer 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 her burden of proof that she 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 June 30, 2014, OPRA request item Nos. 1, 3, and 5 are valid because the requested information is defined as a "government record" under OPRA. N.J.S.A. 47:1A-10; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010). To these items, the Custodian has unlawfully denied access. N.J.S.A. 47:1A-6. The Custodian must disclose the information regarding Mr. Annett's replacement and the individual's résumé to the Complainant. If the Custodian already provided the résumé and salary for the individual that replaced Mr. Annett as part of her October 17, 2014, response, she must certify to this fact and provide supporting documentation (such as a copy of the résumé she provided at that time).
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁸ to the Executive Director.⁹**
4. Because the Complainant's June 30, 2014, request item No. 4 asked a question regarding the employment status of the individual that replaced Mr. Annett, the request item is invalid 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,

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Thus, the Custodian has not unlawfully denied access to this request item. *See also* Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009), *and* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

5. The Custodian may have unlawfully denied access to the certificates responsive to the Complainant's October 9, 2014, OPRA request. N.J.S.A. 47:1A-10; Herron v. NJ Dep't of Educ., GRC Complaint No. 2011-324 (Interim Order dated December 18, 2012). The Custodian must disclose Mr. Annett's responsive certificates that it maintains on file. If any of the certificates do not exist within the Jefferson Township Board of Education's files, the Custodian must specifically certify to this fact.
6. **The Custodian shall comply with item No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
7. The Council defers analysis of whether the Custodian or Superintendent Kraemer 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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June 23, 2015