



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

October 25, 2016 Government Records Council Meeting

Keith Werner
Complainant

Complaint No. 2015-236

v.

NJ Department of Treasury
Custodian of Record

At the October 25, 2016 public meeting, the Government Records Council (“Council”) considered the October 18, 2016 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. Because the Custodian has established in her motion for reconsideration of the Council’s December 15, 2015 Interim Order that the GRC’s decision is based upon a “palpably incorrect or irrational basis,” said motion for reconsideration is granted. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996), *D’Atria v. D’Atria*, 242 N.J. Super. 392 (Ch. Div. 1990) and In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council amends paragraph 2 of its December 15, 2015 Interim Order to provide that, although the Custodian’s response was insufficient because he failed to disclose immediate access records immediately, the evidence of record does not indicate that the actions of the Custodian and/or Cynthia Jablonski had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the actions of the Custodian and/or Cynthia Jablonski 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 25th Day of October, 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 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
October 25, 2016 Council Meeting**

**Keith Werner¹
Complainant**

GRC Complaint No. 2015-236

v.

**New Jersey Department of Treasury²
Custodial Agency**

Records Relevant to Complaint:

1. A copy of each writ of execution, execution/garnishment on wages, and writ of attachment levied against Raphael Dolce, Tina M. Cortes, Nancy A. Zook, Antonio Campos, Lisa Swift, George Robinson, Fred Galileo, Steve Alaimo, and Nancy Martin.
2. The full name, hire date, employee relations group, job title, and salary for Raphael Dolce, Ralph Woodward, Gina M. DiPasquale, Jessica M. Smith, Nancy Martin, and Anthony or Alan Berude.

Custodian of Record: Alexander Sitts

Request Received by Custodian: April 7, 2015

Response Made by Custodian: April 16, 2015

GRC Complaint Received: July 6, 2015

Background

December 15, 2015 Council Meeting:

At its December 15, 2015 public meeting, the Government Records Council (“Council”) considered the December 8, 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, found that:

1. Cynthia Jablonski, Manager of the Government Records Access Unit, complied with the Council’s October 27, 2015 Interim Order because Ms. Jablonski in a timely manner forwarded certified confirmation of compliance to the Executive Director, wherein she stated that she had the Custodian prepare wage garnishment records of

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Clifford T. Roncs.

Department of Corrections employees Fred Galileo and Steven Alaimo, redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received as per the Council's Order. The Custodian's Counsel thereafter disclosed said records to the Complainant.

2. The Custodian and/or Cynthia Jablonski violated OPRA because on or about June 11, 2015, when a transcription error was noticed and responsive records were located for the name Raphael Dolce, the Custodian and/or Cynthia Jablonski should have immediately disclosed those records to the Complainant. However, the evidence of record reveals that the Custodian and/or Cynthia Jablonski deprived the Complainant of access to the records until after the complaint was filed and the Statement of Information was prepared on August 25, 2015, at which time the Custodian and/or Cynthia Jablonski disclosed the records to the Complainant as an attachment to said Statement of Information. Consequently, the actions of the Custodian and/or Cynthia Jablonski represented a delay in the disclosure of immediate access records for a period of time exceeding two (2) months. Accordingly, the actions of the Custodian and/or Cynthia Jablonski might have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a 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 December 30, 2015, the ninth (9th) business day following transmission of the Council's Order to the Custodian, the Custodian's Counsel filed a request for reconsideration based on mistake. On February 17, 2016, the complaint was transmitted to the Office of Administrative Law. On March 18, 2016, the complaint was referred back to the GRC so that the complaint could be reconsidered.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian's Counsel filed the request for reconsideration of the Council's December 15, 2015 Interim Order on December 30, 2015, nine (9) business days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Here, the Custodian’s Counsel filed the request for reconsideration based on allegations of mistake. Counsel argues that the Council mistakenly determined that Ms. Jablonski discovered a transcription error on June 11, 2015, but that she did not grant access to the records until August 25, 2015. Counsel contends that in fact Ms. Jablonski only became aware of the transcription error on August 13, 2015, and records were provided thereafter. As such, Counsel argues that instead of a delay exceeding two months, the records were provided only twelve days from the date Ms. Jablonski first became aware of the error, which does not rise to the necessary level of a knowing and willful violation. Counsel argues that the GRC should reconsider its decision in the Interim Order to refer the matter to the Office of Administrative Law (“OAL”), contending that penalties are not warranted.

As part of the Statement of Information in this matter, Ms. Jablonski prepared a certification dated August 13, 2015, that was attached to Counsel’s legal argument as Exhibit A. In the certification, Ms. Jablonski stated that on June 9, 2015, she received an inquiry from the Complainant dated June 2, 2015, checking on the status of his March 24, 2015 request. Ms. Jablonski stated that she noticed name discrepancies within the attachments to the Complainant’s June 2, 2015 inquiry, which prompted her to ask Custodian Sitts to produce any documents associated with certain names. Ms. Jablonski also averred that:

It was also found that during transcription of the handwritten request, one of the names of the employees Mr. Werner was searching for was entered incorrectly. Raphael Dolce was entered as Ralph Dolce and that is the name OMB searched for. Therefore, I also instructed Alex Sitts to search for Raphael Dolce as this is the correct name Mr. Werner is requesting.

Ms. Jablonski further stated that responsive records were located for the name Raphael Dolce and were included in the SOI. In the Custodian’s certification, there is no mention of any

actions taking place sometime *after* the complaint was received by the agency. According to the certification, all of the actions took place between June 9, 2015, and June 11, 2015, which was the date the Custodian re-sent a response to the Complainant. The gap in the certification was the evidence of record on which the GRC relied upon to conclude that “notwithstanding the fact the Custodian knew on or about June 11, 2015, that responsive records existed [for Raphael Dolce], he did not grant access to the records until August 25, 2015.” The GRC therefore concluded that by delaying disclosure of immediate access records for a period of time exceeding two months, the actions of the Custodian and/or Cynthia Jablonski could have been intentional and deliberate with knowledge of their wrongfulness. As such, the GRC recommended that the complaint be referred to OAL for a hearing.

Upon reconsideration of this complaint, the GRC has reviewed Counsel’s legal argument dated December 30, 2015, which includes Ms. Jablonski’s certification dated December 29, 2015. The GRC has also revisited the original case file and the legal argument contained in the SOI. In the legal argument, Counsel states:

When the GRC complaint was received . . . Treasury also discovered the inadvertent omission of the name Raphael Dolce from the electronic version of Werner’s March 24th request, and requested a search for this name as well. (6)³

Moreover, Ms. Jablonski, in her certification attached to the motion for reconsideration dated December 29, 2015, averred that “I did not become aware of the transcription error until August 13, 2015, when I reviewed in detail all of the actions and steps taken in response to the OPRA request at issue.” (§ 7)

Accordingly, upon reconsideration the GRC determines that the Custodian and/or Cynthia Jablonski did not realize there were responsive records for the name Raphael Dolce until after the complaint was received and reviewed by Cynthia Jablonski on or about August 13, 2015. As such, penalties are not warranted and there is no need to transmit the complaint to OAL for a knowing and willful hearing.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; namely: 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. 374. The Custodian has so established.

Therefore, because the Custodian has established in her motion for reconsideration of the Council’s December 15, 2015 Interim Order that the GRC's decision is based upon a “palpably incorrect or irrational basis,” said motion for reconsideration is granted. *See Cummings*, 295 N.J. Super. 374, *D’Atria*, 242 N.J. Super. 392, and *Comcast Cablevision*, 2003 N.J. PUC LEXIS 438.

Accordingly, the Council amends paragraph 2 of its December 15, 2015 Interim Order to provide that, although the Custodian’s response was insufficient because he failed to disclose immediate access records immediately, the evidence of record does not indicate that the actions

³ The Custodian certified that the agency received the complaint on August 11, 2015.

of the Custodian and/or Cynthia Jablonski had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the actions of the Custodian and/or Cynthia Jablonski 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. Because the Custodian has established in her motion for reconsideration of the Council's December 15, 2015 Interim Order that the GRC's decision is based upon a "palpably incorrect or irrational basis," said motion for reconsideration is granted. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996), *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990) and In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council amends paragraph 2 of its December 15, 2015 Interim Order to provide that, although the Custodian's response was insufficient because he failed to disclose immediate access records immediately, the evidence of record does not indicate that the actions of the Custodian and/or Cynthia Jablonski had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the actions of the Custodian and/or Cynthia Jablonski 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: John E. Stewart

October 18, 2016



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INTERIM ORDER

December 15, 2015 Government Records Council Meeting

Keith Werner
Complainant

Complaint No. 2015-236

v.

NJ Department of Treasury
Custodian of Record

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the December 8, 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. Cynthia Jablonski, Manager of the Government Records Access Unit, complied with the Council’s October 27, 2015 Interim Order because Ms. Jablonski in a timely manner forwarded certified confirmation of compliance to the Executive Director, wherein she stated that she had the Custodian prepare wage garnishment records of Department of Corrections employees Fred Galileo and Steven Alaimo, redacted to exclude all but the individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received as per the Council’s Order. The Custodian’s Counsel thereafter disclosed said records to the Complainant.
2. The Custodian and/or Cynthia Jablonski violated OPRA because on or about June 11, 2015, when a transcription error was noticed and responsive records were located for the name Raphael Dolce, the Custodian and/or Cynthia Jablonski should have immediately disclosed those records to the Complainant. However, the evidence of record reveals that the Custodian and/or Cynthia Jablonski deprived the Complainant of access to the records until after the complaint was filed and the Statement of Information was prepared on August 25, 2015, at which time the Custodian and/or Cynthia Jablonski disclosed the records to the Complainant as an attachment to said Statement of Information. Consequently, the actions of the Custodian and/or Cynthia Jablonski represented a delay in the disclosure of immediate access records for a period of time exceeding two (2) months. Accordingly, the actions of the Custodian and/or Cynthia Jablonski might have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a



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**

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

**Keith Werner¹
Complainant**

GRC Complaint No. 2015-236

v.

**New Jersey Department of Treasury²
Custodial Agency**

Records Relevant to Complaint:

1. A copy of each writ of execution, execution/garnishment on wages, and writ of attachment levied against Ralphael Dolce, Tina M. Cortes, Nancy A. Zook, Antonio Campos, Lisa Swift, George Robinson, Fred Galileo, Steve Alaimo, and Nancy Martin.
2. The full name, hire date, employee relations group, job title, and salary for Raphael Dolce, Ralph Woodward, Gina M. DiPasquale, Jessica M. Smith, Nancy Martin, and Anthony or Alan Berude.

Custodian of Record: Alexander Sitts

Request Received by Custodian: April 7, 2015

Response Made by Custodian: April 16, 2015

GRC Complaint Received: July 6, 2015

Background

October 27, 2015 Council Meeting:

At its October 27, 2015 public meeting, the Government Records Council (“Council”) considered the October 20, 2014 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’s response was insufficient because the salary information responsive to request item number 2 is an immediate access record; however, the Custodian failed to disclose said record to the Complainant immediately. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(e) and Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Fatima Younus.

2. The Custodian must disclose all writs of execution, executions/garnishments on wages, and writs of attachment responsive to request item number 1, redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received. N.J.S.A. 47:1A-10. See also Healy v. N.J. Dep't of Labor & Workforce Dev., GRC Complaint No. 2008-108 (Interim Order October 26, 2010).
3. **The Custodian shall comply with paragraph #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, to the Executive Director.**
4. Barring the two names for which the Custodian located records, the Custodian did not unlawfully deny access to records for the names listed on request item number 2 because the Custodian certified that records for the other listed names do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian failed to do so immediately, he did disclose to the Complainant the requested information for two named individuals within seven (7) business days from receipt of request item number 2. However, the Custodian unlawfully denied access to the requested information for the name Ralphael Dolce because, notwithstanding the fact the Custodian knew on or about June 11, 2015, that responsive records existed, he did not grant access to the records until August 25, 2015. As such, the Custodian failed to bear his burden of proving that the denial of access was authorized by law. N.J.S.A. 47:1A-6.
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 October 28, 2015, the Council distributed its October 27, 2015 Interim Order to all parties. On November 5, 2015, Cynthia Jablonski, Manager of the Government Records Access Unit, responded to the Council's Interim Order by providing certified confirmation of compliance to the Executive Director wherein she stated that she had the Custodian prepare wage garnishment records of Department of Corrections employees Fred Galileo and Steven Alaimo, redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received as per the Council's Order.³

³ The Custodian's Counsel disclosed said records to the Complainant via a copy of the certification of compliance, sent by regular mail.

Analysis

Compliance

On October 27, 2015, the Council ordered the above-referenced compliance. On October 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. Therefore, compliance was due on or before November 5, 2015. On November 5, 2015, the fifth (5th) business day after the Custodian received the Interim Order, Cynthia Jablonski, Manager of the Government Records Access Unit, responded to the Council's Interim Order by forwarding certified confirmation of compliance to the Executive Director. Ms. Jablonski certified that she had the Custodian prepare wage garnishment records of Department of Corrections employees Fred Galileo and Steven Alaimo, redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received as per the Council's Order. The Custodian's Counsel disclosed said records to the Complainant via a copy of the certification of compliance, sent by regular mail.

Therefore, Cynthia Jablonski, Manager of the Government Records Access Unit, complied with the Council's October 27, 2015 Interim Order because Ms. Jablonski in a timely manner forwarded certified confirmation of compliance to the Executive Director, wherein she stated that she had the Custodian prepare wage garnishment records of Department of Corrections employees Fred Galileo and Steven Alaimo, redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received as per the Council's Order. The Custodian's Counsel thereafter disclosed said records to the Complainant.

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 (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Custodian and/or Cynthia Jablonski violated OPRA because on or about June 11, 2015, when a transcription error was noticed and responsive records were located for the name Raphael Dolce, the Custodian and/or Cynthia Jablonski should have immediately disclosed those records to the Complainant. However, the evidence of record reveals that the Custodian and/or Cynthia Jablonski deprived the Complainant of access to the records until after the complaint was filed and the Statement of Information was prepared on August 25, 2015, at which time the Custodian and/or Cynthia Jablonski disclosed the records to the Complainant as an attachment to said Statement of Information. Consequently, the actions of the Custodian and/or Cynthia Jablonski represented a delay in the disclosure of immediate access records for a period of time exceeding two (2) months. Accordingly, the actions of the Custodian and/or Cynthia Jablonski might have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a 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. Cynthia Jablonski, Manager of the Government Records Access Unit, complied with the Council's October 27, 2015 Interim Order because Ms. Jablonski in a timely manner forwarded certified confirmation of compliance to the Executive Director, wherein she stated that she had the Custodian prepare wage garnishment records of Department of Corrections employees Fred Galileo and Steven Alaimo, redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received as per the Council's Order. The Custodian's Counsel thereafter disclosed said records to the Complainant.
2. The Custodian and/or Cynthia Jablonski violated OPRA because on or about June 11, 2015, when a transcription error was noticed and responsive records were located for the name Raphael Dolce, the Custodian and/or Cynthia Jablonski should have immediately disclosed those records to the Complainant. However, the evidence of record reveals that the Custodian and/or Cynthia Jablonski deprived the Complainant of access to the records until after the complaint was filed and the Statement of Information was prepared on August 25, 2015, at which time the Custodian and/or Cynthia Jablonski disclosed the records to the Complainant as an attachment to said Statement of Information. Consequently, the actions of the Custodian and/or Cynthia Jablonski represented a delay in the disclosure of immediate access records for a period of time exceeding two (2) months. Accordingly, the actions of the Custodian

and/or Cynthia Jablonski might have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart

Reviewed By: Joseph D. Glover
Executive Director

December 8, 2015



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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INTERIM ORDER

October 27, 2015 Government Records Council Meeting

Keith Werner
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Complaint No. 2015-236

v.

NJ Department of Treasury
Custodian of Record

At the October 27, 2015 public meeting, the Government Records Council ("Council") considered the October 20, 2014 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's response was insufficient because the salary information responsive to request item number 2 is an immediate access record; however, the Custodian failed to disclose said record to the Complainant immediately. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(e) and Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian must disclose all writs of execution, executions/garnishments on wages, and writs of attachment responsive to request item number 1, redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received. N.J.S.A. 47:1A-10. See also Healy v. N.J. Dep't of Labor & Workforce Dev., GRC Complaint No. 2008-108 (Interim Order October 26, 2010).
3. **The Custodian shall comply with paragraph #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**

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 the Complainant incurred a copying or special service charge, 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.

4. Barring the two names for which the Custodian located records, the Custodian did not unlawfully deny access to records for the names listed on request item number 2 because the Custodian certified that records for the other listed names do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian failed to do so immediately, he did disclose to the Complainant the requested information for two named individuals within seven (7) business days from receipt of request item number 2. However, the Custodian unlawfully denied access to the requested information for the name Ralphael Dolce because, notwithstanding the fact the Custodian knew on or about June 11, 2015, that responsive records existed, he did not grant access to the records until August 25, 2015. As such, the Custodian failed to bear his burden of proving that the denial of access was authorized by law. N.J.S.A. 47:1A-6.
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.

Interim Order Rendered by the
Government Records Council
On The 27th Day of October, 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: October 28, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 27, 2015 Council Meeting**

**Keith Werner¹
Complainant**

GRC Complaint No. 2015-236

v.

**New Jersey Department of Treasury²
Custodial Agency**

Records Relevant to Complaint:

1. A copy of each writ of execution, execution/garnishment on wages, and writ of attachment levied against Raphael Dolce, Tina M. Cortes, Nancy A. Zook, Antonio Campos, Lisa Swift, George Robinson, Fred Galileo, Steve Alaimo, and Nancy Martin.
2. The full name, hire date, employee relations group, job title, and salary for Raphael Dolce, Ralph Woodward, Gina M. DiPasquale, Jessica M. Smith, Nancy Martin, and Anthony or Alan Berude.

Custodian of Record: Alexander Sitts
Request Received by Custodian: April 7, 2015
Response Made by Custodian: April 16, 2015
GRC Complaint Received: July 6, 2015

Background³

Request and Response:

On April 7, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 16, 2015, the seventh (7th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that no records responsive to request item number 1 can be disclosed because the records are exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian also informed the Complainant that, with respect to request item number 2, records matching two named employees were located and were being disclosed.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Fatima Younus.

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.

Denial of Access Complaint:

On July 6, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he provided the OPRA request to the Custodian on April 7, 2015, and that the Custodian responded on June 16, 2015.

The Complainant states that the denied records consist of:

1. “A copy of each writ of execution, execution/garnishment on wages, and writ of attachment levied against each of the below-listed state employees [Lists names (a) – (i)” (sic).
2. “The full name, hire date, employee relations group, job title and salary for [Lists names (a) – (f)” (sic).⁴

The Complainant contends that there is no exemption under N.J.S.A. 47:1A-10 for the records responsive to request item number 1 because there is no reasonable expectation of privacy in records already made public. The Complainant states that for request item number 2, the Custodian claimed that only two named employees’ records could be located. The Complainant contends, however, that Ralph Dolce, Jessica M. Smith and Nancy Martin were also named in the request and are actively employed by the State of New Jersey. The Complainant states that the names of those three employees appear on the Treasury Department’s website, YourMoney.NJ.Gov.⁵ The Complainant asserts that by excluding these employees, the Custodian has intentionally denied him access to requested records.

Statement of Information:

On August 25, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request, which was dated March 24, 2015, on April 7, 2015. The Custodian’s Counsel states that following receipt of the Complainant’s handwritten request, the agency transcribed the Complainant’s request to create an electronic version of same and, in doing so, substituted the first name of “Ralph” for “Raphael” Dolce in both request item numbers 1 and 2.

Counsel states that in the Custodian’s April 16, 2015, response, the Custodian stated that any records responsive to request item number 1 are denied pursuant to N.J.S.A. 47:1A-10. Counsel states that, although the agency receives requests to withhold funds from the salary of an employee for a variety of reasons, such requests, including those generated by a writ of garnishment, are personnel records exempt under OPRA because they do not fall within the narrow exceptions set forth in N.J.S.A. 47:1A-10. Counsel asserts that in Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 592 (2011), the court explained that personnel records

⁴ No list of names for request item number 1 or 2 was attached to the complaint. The Complainant did attach an OPRA request dated April 27, 2015; however for item number 1, the names are limited to Raphael Dolce, Antonio Campos, Lisa Swift, Fred Galileo, and Alan Martin. All names are set forth in paragraph format. For item number 2, the following five names are listed as (a) through (e): Raphael Dolce, Ralph Woodward, Gina M. DiPasquale, Jessica M. Smith, and Nancy Martin.

⁵ The Complainant does not make further reference to the other employee he named in request item number 2, Anthony or Alan Berude.

are to be maintained in confidence unless the documents are of the type specifically subject to disclosure under N.J.S.A. 47:1A-10. Counsel states that the Complainant wrongly contends that because a garnishment is generated by a court order, which is a public record, where an order exists to require a withholding it must be public *per se*, even if within the scope of a personnel record pursuant to N.J.S.A. 47:1A-10. Counsel disagrees, arguing that OPRA does not provide for this exception. Moreover, Counsel argues that such a literal reading is outweighed by the need for personal privacy and confidentiality, especially under the facts of this case where an inmate is seeking personal information concerning those responsible for his confinement. Counsel further argues that disclosure of the records responsive to request item number 1 would jeopardize the safe and secure operation of the correctional facility because an inmate must not have access to personal identifying information of Department of Corrections employees. Counsel cites to N.J.A.C. 10A:22-2.3(a)(5).⁶

In response to request item number 2, the Custodian's Counsel states that the Custodian only found two names that matched the six names listed in the request.⁷ Counsel further states that records corresponding to the other listed names do not exist. Counsel states that the Custodian disclosed to the Complainant the requested information for the two named employees.

Counsel states that the Complainant subsequently sent a letter to the agency dated June 2, 2015, seeking the status of his OPRA request, which the Complainant claimed to have resent on April 27, 2015. Counsel states that the Custodian did not receive the April 27, 2015, inquiry until it arrived as an attachment to the June 2, 2015, letter, which the Custodian received on June 9, 2015. Counsel states that the Custodian, in reply, resent the April 16, 2015, response to the Complainant on June 11, 2015. Counsel asserts that there are confusing inconsistencies contained within the Complainant's submissions with respect to the named employees and that this prompted the agency to conduct a further search. Counsel states that the only new name to produce results was Raphael Dolce and that the Custodian attached his name, hire date, employee relations group, job title, and salary information to the SOI.

Analysis

The GRC must first consider which of the Complainant's OPRA requests formed the basis of the complaint. The Complainant stated that he provided the request to the Custodian on April 7, 2015; however, he attached a request dated April 27, 2015, to the complaint. The Custodian attached two (2) requests to the SOI: one dated March 24, 2015, and one dated April 27, 2015. To complicate matters further, each of the three (3) requests contains a different set of names for which the Complainant is seeking records.

The Complainant stated that he "***provided the OPRA request to the Custodian*** on April 7, 2015" (emphasis added). A request dated April 27, 2015, naturally could not have been provided to the Custodian on April 7, 2015. The evidence of record reveals that the request

⁶ This regulation provides in relevant part that "...the following records shall not be considered government records subject to public access pursuant to [OPRA]...a report or record relating to an identified individual, which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement.

⁷ The two names are Ralph Woodward and Gina M. DiPasquale.

provided to the Custodian on April 7, 2015, was the request dated March 24, 2015. Further, the Complainant stated in the Records Denied List that request item number 1 listed names (a) – (i) and request item number 2 listed names (a) – (f). Only the request received by the Custodian on April 7, 2015, the request dated March 24, 2015, contained itemized lists that corresponded to the records the Complainant alleged he was denied. Accordingly, the GRC concludes that the OPRA request which formed the basis of this complaint is the request dated March 24, 2015, which was received by the Custodian on April 7, 2015. This is the same request the Custodian responded to on April 16, 2015.

Sufficiency of Response

OPRA provides that immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information. N.J.S.A. 47:1A-5(e).

In Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the “immediate access language of OPRA (N.J.S.A. 47:1A-5(e)) suggests that the Custodian was still 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.

Request item number 2 specifically sought, *inter alia*, salary, which is an immediate access record under N.J.S.A. 47:1A-5(e). The Custodian therefore had an obligation to act immediately, either to grant access or provide the Complainant with the legal basis for denial. The evidence of record reveals, however, that the Custodian did not respond by granting access to the Complainant’s request for the salaries of certain named employees until he responded to the request on the seventh (7th) business day following receipt of the request.

Accordingly, the Custodian’s response was insufficient because the salary information responsive to request item number 2 is an immediate access record; however, the Custodian failed to disclose said record to the Complainant immediately. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(e) and Herron, GRC 2006-178.

Unlawful Denial of Access

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

OPRA also provides that “. . . the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for public access, except that an individual’s name, title, position, salary, payroll

record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record . . .” N.J.S.A. 47:1A-10.

Request Item Number 1

In this request item, the Complainant sought copies of a writ of execution, execution/garnishment on wages, and writ of attachment levied against several employees of the New Jersey Department of Corrections. The Complainant has submitted evidence of his status as an inmate in the New Jersey State Prison.

The Custodian certified that the records responsive to request item number 1 are held as personnel records, and as such they are exempt from access under OPRA because they do not fall within the narrow exceptions set forth in N.J.S.A. 47:1A-10. The Custodian’s Counsel further asserted that the records must not be disclosed because disclosure of the records would jeopardize the safe and secure operation of the correctional facility due to the fact that the Complainant is an inmate seeking personal information about those individuals responsible for his confinement. Counsel argued that disclosure of such records is proscribed by N.J.A.C. 10A:22-2.3(a)(5).

The Custodian certified that the records responsive to request item number 1 are held as personnel records by the agency, and the Complainant failed to submit any competent, credible evidence to refute said certification. However, although personnel records are not considered government records subject to disclosure under OPRA, certain personnel records are government records under the statute – namely, an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received.⁸ N.J.S.A. 47:1A-10.

In Healy v. N.J. Dep’t of Labor & Workforce Dev., GRC Complaint No. 2008-108 (Interim Order October 26, 2010), the custodian denied access to several documents as personnel records pursuant to N.J.S.A. 47:1A-10. After conducting an *in camera* review, the Council ordered several portions of the documents to be disclosed. Those portions consisted of the name, title, position, and salary, as well as specific experiential, educational or medical qualifications. The Council determined that this information must be disclosed because it is “. . . information contained within the requested personnel records that is specifically required under [OPRA] to be government records open to the public.”

Here, the responsive writs of execution, executions/garnishments on wages, and writs of attachment may be redacted to exclude all but the very specific information excepted from exclusion in N.J.S.A. 47:1A-10. Moreover, once redacted, the records will not jeopardize the safe and secure operation of the correctional facility because if the Custodian uses care in redacting the records as recommended by the GRC, no privacy and/or confidential information will be disclosed.

⁸ Data contained in information which disclose conformity with specific experiential, educational, or medical qualifications required for government employment is also considered a government record under N.J.S.A. 47:1A-10, but is not applicable here.

Accordingly, the Custodian must disclose all writs of execution, executions/garnishments on wages, and writs of attachment responsive to request item number 1, redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received. N.J.S.A. 47:1A-10. See also Healy, 2008-108.

Request Item Number 2

For this item the Complainant requested the name, hire date, employee relations group, job title and salary for nine (9) named individuals. The Custodian certified that upon conducting a search, only two (2) names matched the names listed on the request. Conversely, the Complainant argued that the other names listed on the request are actively employed by the State of New Jersey. The Complainant stated that said names appear on the Treasury Department's website, YourMoney.NJ.Gov.

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

Here, the Custodian certified that he only found two names that matched the six names listed in the request and that records for the other listed names do not exist. There is no evidence in the record to refute the Custodian's certification.

Therefore, barring the two names for which the Custodian located records, the Custodian did not unlawfully deny access to records for the names listed on request item number 2 because the Custodian certified that records for the other listed names do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

Of the information requested for this request item, only disclosure of the name, title, and salary is required under OPRA. The Custodian, however, certified he disclosed all of the requested information for the two named individuals.

Be that as it may, the Custodian's Counsel stated that when the Custodian received the Complainant's June 2, 2015, letter of inquiry, the agency was prompted to conduct a further name search. Counsel stated that at the time of the second search, information responsive to the request was found for the name **Raphael** Dolce. Counsel further stated that the Custodian attached Dolce's name, hire date, employee relations group, job title, and salary information to the SOI.

The Complainant listed the name Raphael Dolce in both request item number 1 and 2. However, the Custodian failed to search his records for the name Raphael Dolce due to a transcription error that was committed by the agency. Although the evidence of record reveals

that the transcription error was not the Custodian's fault, on or about June 11, 2015, when the error was noticed and the Custodian then located responsive records, he should have immediately disclosed those records to the Complainant. However, the evidence of record reveals that the Custodian deprived the Complainant of access to the records until after the complaint was filed and the SOI was prepared, at which time the Custodian disclosed the records to the Complainant as an attachment to the SOI.⁹ Consequently, the Custodian's actions represented a delay in the disclosure of immediate access records for a period of time exceeding two (2) months.

Accordingly, although the Custodian failed to do so immediately, he did disclose to the Complainant the requested information for two named individuals within seven (7) business days from receipt of request item number 2. However, the Custodian unlawfully denied access to the requested information for the name Raphael Dolce because, notwithstanding the fact the Custodian knew on or about June 11, 2015, that responsive records existed, he did not grant access to the records until August 25, 2015. As such, the Custodian failed to bear his burden of proving that the denial of access was authorized by law. N.J.S.A. 47:1A-6.

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's response was insufficient because the salary information responsive to request item number 2 is an immediate access record; however, the Custodian failed to disclose said record to the Complainant immediately. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(e) and Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian must disclose all writs of execution, executions/garnishments on wages, and writs of attachment responsive to request item number 1, redacted to exclude all but the individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received. N.J.S.A. 47:1A-10. See also Healy v. N.J. Dep't of Labor & Workforce Dev., GRC Complaint No. 2008-108 (Interim Order October 26, 2010).
3. **The Custodian shall comply with paragraph #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**

⁹ The evidence of record reveals that the SOI was sent to the Complainant via certified mail on August 25, 2015.

redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁰ to the Executive Director.¹¹

4. Barring the two names for which the Custodian located records, the Custodian did not unlawfully deny access to records for the names listed on request item number 2 because the Custodian certified that records for the other listed names do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian failed to do so immediately, he did disclose to the Complainant the requested information for two named individuals within seven (7) business days from receipt of request item number 2. However, the Custodian unlawfully denied access to the requested information for the name Raphael Dolce because, notwithstanding the fact the Custodian knew on or about June 11, 2015, that responsive records existed, he did not grant access to the records until August 25, 2015. As such, the Custodian failed to bear his burden of proving that the denial of access was authorized by law. N.J.S.A. 47:1A-6.
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.

Prepared By: John E. Stewart

Reviewed By: Joseph D. Glover
Executive Director

October 20, 2015

¹⁰ "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."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If the Complainant incurred a copying or special service charge, 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.