



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 18, 2018 Government Records Council Meeting

Susan M. Vandy
Complainant

Complaint No. 2016-319

v.

Burlington County Board
of Social Services
Custodian of Record

At the December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s November 13, 2018 Interim Order because she responded in the prescribed time frame disclosing the proper time sheets and summaries. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the responsive time sheets, time summaries, and successful candidate resumes. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the remainder of the records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; Executive Order No. 26 (Gov. McGreevey, 2002). 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 18th Day of December, 2018

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 20, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
December 18, 2018 Council Meeting**

**Susan M. Vandy¹
Complainant**

GRC Complaint No. 2016-319

v.

**Burlington County Board
of Social Services²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via pick-up of “all documents[,] including but not limited to,” interview score sheets for each interviewee, notes made by the members of the interview panel, any notes made by Kathleen Dobie, as well as essays and resumes of the first six (6) candidates (of which the Complainant was one) regarding a September 8, 2016 interview for four (4) open Assistant Administrative Supervisory of Income Maintenance positions.

Custodian of Record: Nicole LeCates

Request Received by Custodian: September 27, 2016

Response Made by Custodian: September 27, 2016

GRC Complaint Received: December 15, 2016

Background

November 13, 2018 Council Meeting:

At its November 13, 2018 public meeting, the Council considered the November 7, 2018 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 responsive interview score sheets, summaries, and bank questions with notations are exempt from disclosure under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. N.J.S.A. 47:1A-1.1; Fegley, Esq. v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2006-91 (December 2006). For this reason, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.
2. The Custodian unlawfully denied access to the responsive time sheets and summaries for each of the eight (8) employees. N.J.S.A. 47:1A-6; Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004); Vargas v. Camden City Sch. Dist. (Camden),

¹ No legal representation listed on record.

² Represented by Evan H. C. Crook, Esq., of Capehart Scatchard, P.A. (Trenton, NJ).

GRC Complaint No. 2011-315 (Interim Order dated January 29, 2013). The Custodian shall disclose these records to the Complainant, with redactions if and where applicable. Should the Custodian assert that certain sensitive information was subject to redaction, she must provide a specific lawful basis for same. See Baker v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2009-253 (Interim Order dated July 27, 2010).

3. **The Custodian shall comply with conclusion 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, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Council Staff.⁵**
4. The Custodian lawfully denied access to the "Performance Evaluation Control Cards" because same contain performance evaluations that are not subject to disclosure under OPRA. N.J.S.A. 47:1A-6; Lotito v. N.J. Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014).
5. The responsive resumes of the successful candidates were subject to disclosure under OPRA. Executive Order No. 26 (Gov. McGreevey, 2002). Thus, for these records, the Custodian unlawfully denied access to them. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure because the Custodian did so on January 18, 2017 via e-mail.
6. The responsive essays fall within the term "other information concerning job applicants" and are thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002). For this reason, the Custodian lawfully denied access to the essays. N.J.S.A. 47:1A-6.
7. The responsive disciplinary and corrective action records are exempt from disclosure as "personnel records." N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). Thus, the Custodian lawfully denied access to these records. N.J.S.A. 47:1A-6.
8. 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.

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "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."

⁵ 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.

Procedural History:

On November 14, 2018, the Council distributed its Interim Order to all parties. On November 19, 2018, the Custodian e-mailed the Complainant the responsive time sheets and time summaries. Additionally, Charles Young hand-delivered the responsive records to the Complainant at her residence.

On the same day, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she sent responsive time sheets and summaries to the Complainant via e-mail and hand delivery.

Analysis

Compliance

At its November 13, 2018 meeting, the Council ordered the Custodian to disclose to the Complainant responsive time sheets and summaries. The Council further ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On November 14, 2018, 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 November 1, 2018.

On November 19, 2018, the third (3rd) business day after receipt of the Council's Order, the Custodian disclosed the responsive time sheets and summaries to the Complainant via e-mail and hand delivery. The Custodian also provided certified confirmation of compliance to the Council Staff.

Therefore, the Custodian complied with the Council's November 13, 2018 Interim Order because she responded in the prescribed time frame disclosing the proper time sheets and summaries. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated

OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter currently before the Council, the Custodian unlawfully denied access to the responsive time sheets, time summaries, and successful candidate resumes. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the remainder of the records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; Executive Order No. 26 (Gov. McGreevey, 2002). 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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's November 13, 2018 Interim Order because she responded in the prescribed time frame disclosing the proper time sheets and summaries. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the responsive time sheets, time summaries, and successful candidate resumes. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the remainder of the records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; Executive Order No. 26 (Gov. McGreevey, 2002). 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

December 11, 2018



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DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
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INTERIM ORDER

November 13, 2018 Government Records Council Meeting

Susan M. Vandy
Complainant

Complaint No. 2016-319

v.

Burlington County Board of
Social Services
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council ("Council") considered the November 7, 2018 Findings and Recommendations of the Council Staff 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 responsive interview score sheets, summaries, and bank questions with notations are exempt from disclosure under the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption. N.J.S.A. 47:1A-1.1; Fegley, Esq. v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2006-91 (December 2006). For this reason, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.
2. The Custodian unlawfully denied access to the responsive time sheets and summaries for each of the eight (8) employees. N.J.S.A. 47:1A-6; Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004); Vargas v. Camden City Sch. Dist. (Camden), GRC Complaint No. 2011-315 (Interim Order dated January 29, 2013). The Custodian shall disclose these records to the Complainant, with redactions if and where applicable. Should the Custodian assert that certain sensitive information was subject to redaction, she must provide a specific lawful basis for same. See Baker v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2009-253 (Interim Order dated July 27, 2010).
3. **The Custodian shall comply with conclusion 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, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Council Staff.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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



4. The Custodian lawfully denied access to the “Performance Evaluation Control Cards” because some contain performance evaluations that are not subject to disclosure under OPRA. N.J.S.A. 47:1A-6; Lotito v. N.J. Dep’t of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014).
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6. The responsive essays fall within the term “other information concerning job applicants” and are thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002). For this reason, the Custodian lawfully denied access to the essays. N.J.S.A. 47:1A-6.
7. The responsive disciplinary and corrective action records are exempt from disclosure as “personnel records.” N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). Thus, the Custodian lawfully denied access to these records. N.J.S.A. 47:1A-6.
8. 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 13th Day of November, 2018

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: November 14, 2018

record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

**Susan M. Vandy¹
Complainant**

GRC Complaint No. 2016-319

v.

**Burlington County Board
of Social Services²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via pick-up of “all documents[,] including but not limited to,” interview score sheets for each interviewee, notes made by the members of the interview panel, any notes made by Kathleen Dobie, as well as essays and resumes of the first six (6) candidates (of which the Complainant was one) regarding a September 8, 2016 interview for four (4) open Assistant Administrative Supervisory of Income Maintenance positions.

Custodian of Record: Nicole LeCates
Request Received by Custodian: September 27, 2016
Response Made by Custodian: September 27, 2016
GRC Complaint Received: December 15, 2016

Background³

Request and Response:

On September 27, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing denying access to the OPRA request under N.J.S.A. 47:1A-10.

Denial of Access Complaint:

On December 15, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the Burlington County Board of Social Services (“BCBSS”) held interviews for a possible promotion to what was said to be two (2) Assistant Administrative Supervisor positions. The Complainant stated that nine (9) individuals interviewed, after which BCBSS selected four (4) individuals to fill the available supervisor

¹ No legal representation listed on record.

² Represented by Evan H. C. Crook, Esq., of Capehart Scatchard, P.A. (Trenton, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

positions, as well as two (2) added positions. The Complainant asserted that she attempted to obtain access to the above records after being “skipped over” for one of the positions. The Complainant disputed that the requested records were exempt as personnel records under OPRA because they are not kept in “personnel” files. The Complainant thus requested that the GRC order the Custodian to disclose the records sought.

Statement of Information:

On January 18, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 27, 2016 and responded on the same day denying same under N.J.S.A. 47:1A-10. The Custodian certified that, on advice of Custodian’s Counsel, she obtained and was disclosing as part of the SOI the resumes of all four (4) successful candidates in accordance with Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”).

The Custodian contended that OPRA and all relevant executive orders exempt access to personnel records. N.J.S.A. 47:1A-10; Executive Order No. 9 (Gov. Hughes, 1963); Executive Order No. 11 (Gov. Byrne, 1974); Executive Order No. 21 (Gov. McGreevey, 2002) (“EO 21”). The Custodian noted that EO 26 further clarified EO 21 by providing that resumes of successful candidates could be disclosed following the conclusion of the “recruitment” process. The Custodian argued that the request at issue here sought various personnel records relating to the recruitment process for a supervisor position. The Custodian noted that nine (9) individuals were included in the certification for the position, but only eight (8) submitted applications and were interviewed. The Custodian further noted that the Complainant is one of the four (4) applicants not selected for a position.

The Custodian argued that the records sought were expressly exempt from access under OPRA. The Custodian asserted that disclosure of these records would have violated BCBSS employees’ privacy rights. The Custodian contended that the responsive records comprised of the following:

- Interview scores sheets for each of the eight (8) candidates;
- Summary of the interview score sheets;
- Time and leave print-outs for eight (8) applicants;
- A summary of the time and leave data for the eight (8) applicants;
- “Performance Evaluation Control Card” for the eight (8) applicants;
- Interview bank questions used for each interview with notations;
- Discipline and corrective action records relating to the eight (8) applicants;
- Essay answers submitted by six (6) applicants; and
- Resumes for six (6) applicants.

The Custodian contended that most of the records above are exempt from access under N.J.S.A. 47:1A-10. The Custodian also contended that, although not originally advanced as another basis for the denial, some of these records were also exempt under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1.

Regarding resumes, the Custodian averred that BCBSS legal staff advised her that EO 26 required disclosure of resumes for the successful candidates. The Custodian certified that based on this advice, she disclosed four (4) resumes to the Complainant and noted that the other would be disclosed if the unsuccessful candidates consented. The Custodian argued that at all times, she acted in good faith and that her actions did not constitute a knowing and willful violation of OPRA.

Analysis

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.

Interview Score Sheets, Summaries and Bank Questions with Notations

OPRA provides that the definition of a government record “shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [“(ACD”)”] material.” When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Center, 198 N.J. at 285 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

In Fegley, Esq. v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2006-91 (December 2006), the complainant challenged the custodian's denial of scoring forms from an interview. In response to the complaint, the custodian provided a number of authorities for non-disclosure, inclusive of the Council's prior decision in Sooy v. N.J. Dep't of Corr., GRC Complaint No. 2006-

128 (October 2006) (holding that interview scoring forms were exempt as ACD material). The Council agreed, holding that the scoring forms were exempt as ACD material.

Here, the Complainant sought several records regarding a supervisor position. Among the records the Custodian identified as responsive were interview score sheets, summaries, and bank questions. The Custodian denied access under N.J.S.A. 47:1A-10. Subsequently, in the SOI, the Custodian advanced additional arguments, including that some of the records were exempt from disclosure under the ACD exemption.

The Council's decision in Fegley, GRC 2006-91 supports that the Custodian lawfully denied access to these records. Specifically, the deliberative nature of the score sheets and summaries prior to BCBSS's decision to hire certain individuals over others is apparent. The GRC is further satisfied that the bank questions with notations similarly fall within this exemption for the reasons advanced above. It is thus clear that these records meet the two-prong test necessary to qualify as ACD material.

Accordingly, the responsive interview score sheets, summaries, and bank questions with notations are exempt from disclosure under the ACD exemption. N.J.S.A. 47:1A-1.1; Fegley, GRC 2006-91. For this reason, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.

Time Sheets and Summaries

OPRA provides that “[n]otwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record . . .” N.J.S.A. 47:1A-10. OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581 (2011). These include “an individual’s name, title, position, salary [and] *payroll record*.” Id. (emphasis added). See also Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004) (defining a “payroll record” for purposes of OPRA as records relating to payment of a public employee).

Moreover, the Council has repeatedly ordered disclosure of payroll records. For instance, in Roarty v. Secaucus Bd. of Educ. (Hudson), GRC Complaint No. 2009-221 (January 2011) the complainant sought access to, among other records, accumulated sick time. The Council applied its analysis in Jackson, GRC 2002-98 and determined that the requested sick time was a payroll record subject to disclosure. Id. at 9-10. See also Vargas v. Camden City Sch. Dist. (Camden), GRC Complaint No. 2011-315 (Interim Order dated January 29, 2013) (ordering disclosure of attendance records under OPRA because they are “payroll records” subject to disclosure).

However, the GRC does note that certain types of time records may contain sensitive or otherwise exempt information that could be redacted. In Barker v. Borough of Lakehurst (Ocean), GRC Complaint No. 2015-26 (Interim Order dated Interim Order dated March 28, 2017), the Council required disclosure of handwritten time sheets, but noted that “it is plausible that certain entries on an officer’s handwritten time sheet might contain sensitive or otherwise exempt information.” Id. at 7. The Council thus directed the custodian to redact any information falling within an exemption and provide a specific lawful basis for it. Id.

In the SOI here, the Custodian identified time sheets and time summaries for each candidate as responsive to the OPRA request. The Custodian denied access to these records under N.J.S.A. 47:1A-10, arguing that they were personnel records otherwise exempt from disclosure. However, the GRC's extensive case law provides otherwise: time-keeping records are part of the "payroll record" and thus disclosable under OPRA, with limited potential exceptions as discussed in Barker, GRC 2015-26.

Accordingly, the Custodian unlawfully denied access to the responsive time sheets and summaries for each of the eight (8) employees. N.J.S.A. 47:1A-6; Jackson, GRC 2002-98; Vargas, GRC 2011-315. The Custodian shall disclose these records to the Complainant, with redactions if and where applicable. Should the Custodian assert that certain sensitive information was subject to redaction, she must provide a specific lawful basis for same. See Barker, GRC 2015-26.

Performance Evaluations

In Lotito v. N.J. Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014), the Council was tasked with determining whether "Performance Assessment Review" files ("PARS") were subject to access under OPRA. The Council looked to its past decision in Cibo, Jr. v. Rowan Univ., GRC Complaint No. 2003-42 (February 2014) for precedent (holding that that the custodian lawfully denied access to the underlying reasons for wage increases because they were ". . . integrally intertwined with employee performance evaluations. . ."). Based on this, the Council held that the responsive PARS were not disclosable because they were performance evaluation. See also Baker v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2009-253 (Interim Order dated July 27, 2010);

In the SOI here, the Custodian identified "Performance Evaluation Control Cards" as responsive to the Complainant's OPRA request. The Custodian noted that the cards contained performance appraisal rating for each of the employees interviewed. Similar to the facts in Lotito, OPRA does not expressly allow for disclosure ". . . performance evaluations . . ." Thus, on its face, the "Performance Evaluation Control Cards" are not subject to disclosure under OPRA because they are performance evaluations.

Therefore, the Custodian lawfully denied access to the "Performance Evaluation Control Cards" because same contain performance evaluations that are not subject to disclosure under OPRA. N.J.S.A. 47:1A-6; Lotito, GRC 2013-65.

Essays and Resumes

Additionally, OPRA provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

EO 26 provides that:

No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

[Id.]

EO 26 is clear on the disclosability of resumes at the conclusion of the recruitment process: successful candidate resumes must be disclosed. Id. However, EO 26 is less clear on applications and “other information concerning job applicants.” To this end, the Council has previously held that employment applications were not disclosable, reasoning that EO 26 made no mention of employment applications being disclosed after the completion of the recruitment search. See Toscano v. N.J. Dep’t of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011). The Council further equated applications to “personnel records” not among the enumerated list of releasable records set forth at N.J.S.A. 47:1A-10 (allowing for limited disclosure of certain personnel information). See also Deutsch v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2011-361 (March 2013).

In the SOI here, the Custodian identified resumes and applicant essays as responsive to the Complainant’s OPRA request. In the SOI, the Custodian argued that these records were exempt under the personnel exemption at N.J.S.A. 47:1A-10. However, the Custodian also acknowledged that she erred by not disclosing the successful candidate resumes. The Custodian further certified that in order to correct the error, she disclosed the successful resumes and would disclose the others if she received consent.

To briefly address the resume issue, EO 26 expressly provides that under OPRA, resumes of successful candidates must be disclosed at the end of the recruitment process. To this end, the evidence of record supports a finding that the Custodian unlawfully denied access to the resumes of the successful candidates. However, since she disclosed them to the Complainant via e-mail on January 18, 2017, no further action is required.

Accordingly, the responsive resumes of the successful candidates were subject to disclosure under OPRA. EO 26. Thus, for these records, the Custodian unlawfully denied access to them. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure because the Custodian did so on January 18, 2017 via e-mail.

Regarding the essays, this issue is more novel: the Council has not previously addressed whether this type of interview process record is disclosable. However, the Council’s decision in Toscano, GRC 2010-147 and its progeny are analogous and thus their reasoning is applied here. Specifically, EO 26 addresses resumes, applications, and “other information concerning job

applicants” during the recruitment process. Further, because EO 26 does not address the disclosability of applications or “other information” at the end of recruitment, the Council has held that said records remain exempt under OPRA as “personnel records.” Id. Here, it is certainly feasible that essays submitted by job candidate would fall within the “other information” category. The GRC is thus satisfied that a similar conclusion for the responsive essays is legal correct here.

Therefore, the responsive essays fall within the term “other information concerning job applicants” and are thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); EO 26. For this reason, the Custodian lawfully denied access to the essays. N.J.S.A. 47:1A-6.

Discipline and Corrective Action Records

As noted above, OPRA’s personnel records exemption begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik, 206 N.J. 581. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004), the Council held that:

[t]he Complainant’s request to review the records of complaints filed against Officer Tuttle were properly denied by the Custodian. N.J.S.A. 47:1A-10 provides in pertinent [part] that “the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a public record and shall not be made available for public access” [emphasis omitted]. As a result, records of complaints filed against Officer Tuttle and/or reprimands he has received are not subject to public access.

[Id.]

Further, the personnel record exemption may apply to records that “. . . bear many of the indicia of personnel files.” North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). In Rodriguez, 2013-296, the Council held that “disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA.” Id. at 5.

In the SOI here, the Custodian identified disciplinary records and corrective action plans as responsive to the Complainant’s OPRA request. The plain language of OPRA provides that disciplinary records and the accompanying corrective action plans are exempt from disclosure. Additional support for this finding rest in the Council’s prior decisions in Merino and Rodriguez.

Accordingly, the responsive disciplinary and corrective action records are exempt from disclosure as “personnel records.” N.J.S.A. 47:1A-10; Merino, GRC 2003-110; Rodriguez, GRC 2013-296. Thus, the Custodian lawfully denied access to these records. 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 Council Staff respectfully recommends the Council find that:

1. The responsive interview score sheets, summaries, and bank questions with notations are exempt from disclosure under the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption. N.J.S.A. 47:1A-1.1; Fegley, Esq. v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2006-91 (December 2006). For this reason, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.
2. The Custodian unlawfully denied access to the responsive time sheets and summaries for each of the eight (8) employees. N.J.S.A. 47:1A-6; Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004); Vargas v. Camden City Sch. Dist. (Camden), GRC Complaint No. 2011-315 (Interim Order dated January 29, 2013). The Custodian shall disclose these records to the Complainant, with redactions if and where applicable. Should the Custodian assert that certain sensitive information was subject to redaction, she must provide a specific lawful basis for same. See Baker v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2009-253 (Interim Order dated July 27, 2010).
3. **The Custodian shall comply with conclusion 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, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Council Staff.⁶**
4. The Custodian lawfully denied access to the "Performance Evaluation Control Cards" because same contain performance evaluations that are not subject to disclosure under OPRA. N.J.S.A. 47:1A-6; Lotito v. N.J. Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014).

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "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."

⁶ 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 responsive resumes of the successful candidates were subject to disclosure under OPRA. Executive Order No. 26 (Gov. McGreevey, 2002). Thus, for these records, the Custodian unlawfully denied access to them. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure because the Custodian did so on January 18, 2017 via e-mail.
6. The responsive essays fall within the term “other information concerning job applicants” and are thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002). For this reason, the Custodian lawfully denied access to the essays. N.J.S.A. 47:1A-6.
7. The responsive disciplinary and corrective action records are exempt from disclosure as “personnel records.” N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). Thus, the Custodian lawfully denied access to these records. N.J.S.A. 47:1A-6.
8. 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: Frank F. Caruso
Communications Specialist/Resource Manager

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