



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2019 Government Records Council Meeting

Stacie Percella
Complainant

Complaint No. 2017-112, 2017-113 and 2017-114

v.

City of Bayonne (Hudson)
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 2019 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 portion of the Complainant’s April 3, 2017 OPRA request No. 2 seeking overtime information and raises is valid under OPRA. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010); Lotito v. N.J. Dep’t of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014). Thus, the Custodian unlawfully denied access to this portion of said request. N.J.S.A. 47:1A-6. Notwithstanding, the GRC declines to order disclosure because the Custodian did so as part of the Statement of Information on May 26, 2017.
2. The remaining portions of the Complainant’s three (3) requests asking multiple questions regarding employment status, union status, and benefit receipt are invalid under OPRA. See Dunleavy v. Jefferson Twp. Bd. Educ. (Morris), GRC Complaint No. 2014-372 (Interim Order dated June 30, 2015). Thus, the Custodian lawfully denied access to these portions of the Complainant’s requests. N.J.S.A. 47:1A-6.
3. The Custodian timely disclosed (via Ms. LaGatta) the title, salary and date of hire for all employees identified in the Complainant’s three (3) OPRA requests. Further, the Custodian lawfully denied access to the portion of the Complainant’s requests asking questions because they were invalid. N.J.S.A. 47:1A-6. However, the Custodian unlawfully denied access to the portion of the April 3, 2017 OPRA request No. 2 seeking “overtime information” and “raises” because same was valid. N.J.S.A. 47:1A-6. Notwithstanding, the Custodian disclosed responsive records to the Complainant as part of the SOI on May 26, 2017. 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 26th Day of February, 2019

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: March 1, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
February 26, 2019 Council Meeting**

**Stacie Percella¹
Complainant**

**GRC Complaint No. 2017-112
2017-113 and 2017-114**

v.

**City of Bayonne (Hudson)²
Custodial Agency**

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

April 3, 2017 OPRA requests:

1. For Marta Wozniak, date of hire, salary, title, “part-time, full-time, what are her hours per week[?] Is she in AFSCME Union? Is she seasonal? Is she receiving benefits[?]”³
2. For all employees in the Zoning and Planning Department: date of hire, salary, title, “raises, dates of raises, amount of raises, [and] all overtime accrued from July 1, 2014 [to] present.”⁴

April 4, 2017 OPRA request: For Zachary Matthijs, “what are his hours now? Days he is working? Where is he working? Title, salary, is he still seasonal? If not[,] what is hi[s] employment status? [A]nd what date has his status changed and reason.”⁵

Custodian of Record: Robert Sloan

Request Received by Custodian: April 3, 2017, April 4, 2017

Response Made by Custodian: April 7, 2017

GRC Complaint Received: May 10, 2017

Background⁶

Request and Response:

On April 3, 2017, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On April 4, 2017, the Complainant

¹ No legal representation listed on record.

² Represented by John F. Coffey, II, Esq. (Bayonne, NJ).

³ This OPRA request is the subject of GRC 2017-112.

⁴ This OPRA request is the subject of GRC 2017-113.

⁵ This OPRA request is the subject of GRC 2017-114.

⁶ 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.

submitted an OPRA request to the Custodian seeking the above-mentioned records. On April 7, 2017, on behalf of the Custodian, Christina LaGatta responded in writing to all three (3) requests providing access to three (3) pages of payroll summaries in Microsoft® Excel.

On April 10, 2017, the Complainant e-mailed the Custodian asserting that the City of Bayonne's ("City") responses to her OPRA requests were incomplete. The Complainant asserted that she was well-versed in utilizing OPRA and she composed her requests "as written in the [Government Records Council's ("GRC")] instructions." The Complainant contended that if the City did not complete the response, she would be forced to file complaints with the GRC. On April 17, 2017, the Complainant sought an update on when she could receive a completed response from the City.

Denial of Access Complaint:

On May 10, 2017, the Complainant filed three (3) Denial of Access Complaints with the GRC. The Complainant asserted that the City's response to each OPRA request was incomplete. The Complainant specified that the Custodian failed to provide answers to her questions and overtime/salary adjustment information. The Complainant noted that she contacted the Custodian on April 10, 2017 via e-mail advising that the response was incomplete; however, the Custodian never responded.

The Complainant argued that, regarding her April 3, 2017 OPRA request No. 1 and April 4, 2017 OPRA request, she sought this information because the individuals may have been hired in violation of an executive order. The Complainant further contended that, regarding her April 3, 2017 OPRA request No. 2, she knew employees in Zoning and Planning were working overtime since 2014.

Statement of Information:

On May 26, 2017, the Custodian filed a Statement of Information ("SOI") for each complaint. The Custodian certified that he received the Complainant's April 3, 2017 OPRA requests on the same day. The Custodian further certified that he received the Complainant's April 4, 2017 OPRA request on the same day. The Custodian certified that his/her search included providing the record to Gines P. Persia in the City's Personnel Department ("Personnel"), who reviewed all relevant individuals' personnel records. The Custodian affirmed that Personnel then prepared a Microsoft® Excel spreadsheet based on all "available information." The Custodian certified that, on his behalf, Ms. LaGatta responded in writing to all three (3) OPRA requests on April 7, 2017.

Regarding the Complainant's April 3, 2017 OPRA request No. 1, the Custodian argued that the request sought information and was thus invalid. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian argued that notwithstanding this, he obtained information on Ms. Wozniak's employment status from Personnel. The Custodian further asserted that because no comprehensive record containing answers to the Complainant's questions existed, Personnel created a spreadsheet listing the "current department, [t]itle, [s]alary, and [d]ate of [h]ire." The Custodian contended that the Complainant's Denial of Access Complaint

arguments confirmed she sought answers to questions and not specific records. The Custodian affirmed that the record provided on April 7, 2017 “was complete and responsive” to her request.

Regarding the Complainant’s April 3, 2017 OPRA request No. 2, the Custodian reiterated that the request was invalid because it sought information. MAG, 375 N.J. Super. 534. The Custodian averred that the records provided on April 7, 2017 were “complete and responsive.” The Custodian noted that in preparing the SOI, the City discovered additional records that may provide overtime and pay raise information. The Custodian affirmed that those records were attached to the SOI as “Supplemental Information.”

Regarding the Complainant’s April 4, 2017 OPRA request, the Custodian reiterated that the request was invalid because it sought information. MAG, 375 N.J. Super. 534. The Custodian further reiterated that the Complainant’s Denial of Access Complaint arguments confirmed that she sought answers to questions. The Custodian also affirmed that the record provided on April 7, 2017 “was complete and responsive” to her request.

Additional Submissions:

On May 26, 2017, the Complainant e-mailed the GRC asserting that she never received the overtime records responsive to the April 3, 2017 OPRA request No. 2 prior to receiving the SOI. The Complainant contended that the Custodian, Counsel, and Ms. LaGatta lied about what they disclosed on April 7, 2017. The Complainant requested that the GRC “investigate the lies this administration is trying to pull.”⁷

Analysis

Validity of Request

The New Jersey Appellate Division has held that:

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

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

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case*

⁷ The GRC notes that the Custodian did not assert in the SOI that the overtime records were disclosed to the Complainant on April 7, 2017. In fact, the Custodian specifically stated that they located those records while preparing the SOI and were attaching them to that submission.

prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁸ N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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

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

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

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

[N.J.S.A. 47:1A-10 (emphasis added)].

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

⁸ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Notwithstanding the forgoing, in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), the Council held that the complainant's September 13, 2007, request seeking answers to five (5) questions regarding a property named the Villa Maria was invalid. See also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009); Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). To this end, in Dunleavy v. Jefferson Twp. Bd. Educ. (Morris), GRC Complaint No. 2014-372 (Interim Order dated June 30, 2015), the complainant's June 30, 2014 OPRA request sought five items:

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

The custodian denied access, and later argued in the SOI, that item Nos. 1, 3, 4, and 5 were invalid. The Council disagreed in part, finding that item Nos. 1, 3, and 5 sought information otherwise identified as a "government record" under OPRA. However, the Council held that item No. 4, which was a question pertaining to an individual's employment status, was invalid. Id. at 7 (citing Ohlson, GRC 2007-233 and Rummel, GRC 2011-168).

In the instant complaint, the Complainant's three (3) OPRA requests combine requests for personnel information with questions about the particulars of that information. In each instance, the Custodian disclosed a spreadsheet containing the name, title, salary, and date of hire for each of the eight (8) employees relevant to the Complainant's OPRA requests. The Custodian did not address questions contained within the April 3, 2017 OPRA request No. 1 or April 4, 2017 OPRA request. Further, the Custodian did not address overtime information and raises contained within the April 3, 2017 OPRA request No. 2.

In determining whether the Complainant's OPRA requests were valid, the GRC relies upon Danis, GRC 2009-156, *et seq.*, and Dunleavey, GRC 2014-372. The GRC notes that it will not address the title, salary, and date of hire in each request because the Custodian disclosed this information to the Complainant on April 7, 2017.

Regarding overtime and raise information, the Custodian initially did not provide responsive records sought in the Complainant's April 3, 2017 OPRA request No. 2. In the SOI, the Custodian argued that this portion of the request was invalid. The GRC finds, to the contrary, that this portion was valid because overtime information is not only part of a "payroll record" as defined in Jackson, GRC 2002-98), but is also codified as a "government record" in N.J.S.A. 47:1A-5(e). This is also true of the portion of this request seeking "raises," which the GRC has previously identified to be part of a payroll record. See Lotito v. N.J. Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014).

Regarding the remaining portions of the request that ask multiple questions about employment status, union status, and whether any individuals were receiving benefits, they are invalid. These portions of the request ask questions similar to those in Dunleavy and its progeny. The questions do not identify specific pieces of information deemed to be “government records” under OPRA, nor can their relevance to disclosable personnel information be gleaned. For this reason, the GRC is satisfied that no unlawful denial of access occurred.

Accordingly, the portion of the Complainant’s April 3, 2017 OPRA request No. 2 seeking overtime information and raises is valid under OPRA. Danis, GRC 2009-156, *et seq.*; Lotito, GRC 2913-65. Thus, the Custodian unlawfully denied access to this portion of said request. N.J.S.A. 47:1A-6. Notwithstanding, the GRC declines to order disclosure because the Custodian did so as part of the SOI on May 26, 2017.

Finally, the remaining portions of the Complainant’s three (3) requests asking multiple questions regarding employment status, union status, and benefit receipt are invalid under OPRA. See Dunleavy, GRC 2014-372. Thus, the Custodian lawfully denied access to these portions of the Complainant’s requests. N.J.S.A. 47:1A-6.

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 timely disclosed (via Ms. LaGatta) the title, salary and date of hire for all employees identified in the Complainant’s three (3) OPRA requests. Further, the Custodian lawfully denied access to the portion of the Complainant’s requests asking questions because they were invalid. N.J.S.A. 47:1A-6. However,

the Custodian unlawfully denied access to the portion of the April 3, 2017 OPRA request No. 2 seeking “overtime information” and “raises” because same was valid. N.J.S.A. 47:1A-6. Notwithstanding, the Custodian disclosed responsive records to the Complainant as part of the SOI on May 26, 2017. 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 portion of the Complainant’s April 3, 2017 OPRA request No. 2 seeking overtime information and raises is valid under OPRA. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010); Lotito v. N.J. Dep’t of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014). Thus, the Custodian unlawfully denied access to this portion of said request. N.J.S.A. 47:1A-6. Notwithstanding, the GRC declines to order disclosure because the Custodian did so as part of the Statement of Information on May 26, 2017.
2. The remaining portions of the Complainant’s three (3) requests asking multiple questions regarding employment status, union status, and benefit receipt are invalid under OPRA. See Dunleavy v. Jefferson Twp. Bd. Educ. (Morris), GRC Complaint No. 2014-372 (Interim Order dated June 30, 2015). Thus, the Custodian lawfully denied access to these portions of the Complainant’s requests. N.J.S.A. 47:1A-6.
3. The Custodian timely disclosed (via Ms. LaGatta) the title, salary and date of hire for all employees identified in the Complainant’s three (3) OPRA requests. Further, the Custodian lawfully denied access to the portion of the Complainant’s requests asking questions because they were invalid. N.J.S.A. 47:1A-6. However, the Custodian unlawfully denied access to the portion of the April 3, 2017 OPRA request No. 2 seeking “overtime information” and “raises” because same was valid. N.J.S.A. 47:1A-6. Notwithstanding, the Custodian disclosed responsive records to the Complainant as part of the SOI on May 26, 2017. 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
Acting Executive Director

February 19, 2019