



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

July 30, 2019 Government Records Council Meeting

David H. Weiner
Complainant

Complaint No. 2017-189

v.

County of Essex
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s June 25, 2019 Interim Order. Specifically, the current Custodian responded in the prescribed time frame providing access to an updated and more comprehensive spreadsheet. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to additional responsive personnel information, including employee names, salaries, titles, and dates of hire. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the current Custodian timely complied with the Council’s June 25, 2019 Interim Order. 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 30th Day of July 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: August 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

**David H. Weiner¹
Complainant**

GRC Complaint No. 2017-189

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of “documents” showing the name, title, dates of hire, union affiliation, and salaries, and salary origin for all County of Essex (“County”) employees assigned to the Division of Family Assistance and Benefits (“DFAB”) (formally the Division of Welfare) from January 1, 2016 through May 18, 2017.

Custodian of Record: Maite Gaeta³

Request Received by Custodian: May 18, 2017

Response Made by Custodian: August 22, 2017

GRC Complaint Received: September 15, 2017

Background

June 25, 2019 Council Meeting:

At its June 25, 2019 public meeting, the Council considered the June 18, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The original Custodian may have unlawfully denied access to a complete copy of a spreadsheet containing every DFAB employee for the time period January 1, 2016 through May 18, 2017. N.J.S.A. 47:1A-6. The Custodian must produce a new spreadsheet to compare to the one provided to the Complainant and either 1) disclose same to the Complainant if it is complete; or 2) certify that the spreadsheet is the same as the one previously produced. If the Custodian is unable to produce said spreadsheet for any reason, she must detail those reasons in the form of a legal certification.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions,**

¹ No legal representation listed on record.

² Represented by Courtney Gaccione, Esq., (Newark, NJ).

³ The current custodian of record is Valentina Smoot Palchetti.

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

3. 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 June 27, 2019, the Council distributed its Interim Order to all parties. On July 5, 2019, the current Custodian responded to the Council's Interim Order. Therein, the current Custodian certified that she was not the custodian of record at the time of the request and response but that she did respond to the instant complaint. The current Custodian affirmed that she noticed the spreadsheet attached to the Denial of Access Complaint did not include multiple pieces of information sought by the Complainant.

The current Custodian affirmed that upon receipt of the Council's Order, she asked the Office of Accounts and Control to run a comprehensive report containing most, if not all, the sought information. The current Custodian certified that she was providing to the Complainant a spreadsheet that contained all information except the "salary origin." The current Custodian affirmed that the County could not build a report including this information; notwithstanding that same is not part of the excepted disclosures under N.J.S.A. 47:1A-10.

Analysis

Compliance

At its June 25, 2019 meeting, the Council ordered the current Custodian to produce a new spreadsheet and either: 1) disclose it to the Complainant if it is complete; or 2) certify that the spreadsheet is the same as the one already provided. The Council also ordered the current Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On June 27, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 5, 2019.

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.

On July 5, 2019, the fifth (5th) business day after receipt of the Council’s Order, the current Custodian disclosed a new spreadsheet to the Complainant consisting of over 2,600 entries. These entries contained employee names, their title, date of hire, union affiliation, and salary. A number of the names were duplicates to reflect salary changes during the requested time period. Upon review of the list, the GRC is thus satisfied that the disclosed spreadsheet, inclusive of additional information not provided in the original response, sufficiently meets the requirements of the Council’s Order.

Therefore, the current Custodian complied with the Council’s June 25, 2019 Interim Order. Specifically, the current Custodian responded in the prescribed time frame providing access to an updated and more comprehensive spreadsheet. Further, the current 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 before the Council, the Custodian unlawfully denied access to additional responsive personnel information, including employee names, salaries, titles, and dates of hire. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the current Custodian timely complied with the Council’s June 25, 2019 Interim Order. 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 current Custodian complied with the Council's June 25, 2019 Interim Order. Specifically, the current Custodian responded in the prescribed time frame providing access to an updated and more comprehensive spreadsheet. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

2. The Custodian unlawfully denied access to additional responsive personnel information, including employee names, salaries, titles, and dates of hire. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the current Custodian timely complied with the Council's June 25, 2019 Interim Order. 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

July 23, 2019



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

INTERIM ORDER

June 25, 2019 Government Records Council Meeting

David H. Weiner
Complainant

Complaint No. 2017-189

v.

County of Essex
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council ("Council") considered the June 18, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The original Custodian may have unlawfully denied access to a complete copy of a spreadsheet containing every DFAB employee for the time period January 1, 2016 through May 18, 2017. N.J.S.A. 47:1A-6. The Custodian must produce a new spreadsheet to compare to the one provided to the Complainant and either 1) disclose same to the Complainant if it is complete; or 2) certify that the spreadsheet is the same as the one previously produced. If the Custodian is unable to produce said spreadsheet for any reason, she must detail those reasons in the form of a legal certification.
2. **The Custodian shall comply with conclusion No. 1 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**
3. 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.

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 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.

Interim Order Rendered by the
Government Records Council
On The 25th Day of June 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: June 27, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**David H. Weiner¹
Complainant**

GRC Complaint No. 2017-189

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of “documents” showing the name, title, dates of hire, union affiliation, and salaries, and salary origin for all County of Essex (“County”) employees assigned to the Division of Family Assistance and Benefits (“DFAB”) (formally the Division of Welfare) from January 1, 2016 through May 18, 2017.

Custodian of Record: Maite Gaeta³
Request Received by Custodian: May 18, 2017
Response Made by Custodian: August 22, 2017
GRC Complaint Received: September 15, 2017

Background⁴

Request and Response:

On May 18, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 22, 2017, the original Custodian responded in writing disclosing a list of employees by name and e-mail address. On the same day, the Complainant sent a letter to the original Custodian stating that the record provided appeared to be incomplete. The Complainant asserted that the record did not include all County employees assigned to the DFAB. The Complainant asserted that he would refrain from filing a complaint to give the original Custodian a chance to correct the error.

Denial of Access Complaint:

On September 15, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the original Custodian failed to provide a complete response.

¹ No legal representation listed on record.

² Represented by Courtney Gaccione, Esq., (Newark, NJ).

³ The current custodian of record is Valentina Smoot Palchetti.

⁴ 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.

David H. Weiner v. County of Essex, 2017-189 – Findings and Recommendations of the Council Staff

Statement of Information:

On October 16, 2017, the Custodian filed a Statement of Information (“SOI”). The current Custodian certified that the original Custodian received the Complainant’s OPRA request on May 18, 2017 and again on August 22, 2017. The current Custodian certified that she could not describe the search conducted for responsive records because she did not handle the subject OPRA request. The Custodian certified that the original Custodian responded in writing to the initial OPRA request on August 22, 2017⁵ disclosing a list of employees totaling twenty-seven (27) pages. The current Custodian averred that the original Custodian did not provide a follow-up response to the August 22, 2017 submission.

The current Custodian averred that she could not argue the County’s position because she was not the official custodian of record that handled the OPRA request. The Custodian did note that it appeared the original Custodian’s failure to respond to the Complainant’s August 22, 2017 letter resulted in a “deemed” denial.

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.

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.

⁵ The GRC notes that the original Custodian did not respond until well after the statutorily mandated time frame to do so expired. N.J.S.A. 47:1A-5(g), (i). However, the GRC does not address this issue because the Complainant did not raise it in the Denial of Access Complaint.

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

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. 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. Further, the Council has previously required that responding to an OPRA request for personnel information requires that a custodian provide the most comprehensive records containing the responsive information. Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012); Richardson v. N.J. Office of the Attorney General, GRC Complaint No. 2014-277 (Interim Order dated May 26, 2015).

Here, the Complainant sought “documents” delineating” basic personnel information⁶ about employees assigned to DFAB from January 1, 2016 through May 18, 2017. The original Custodian responded to this request disclosing a spreadsheet to the Complainant. Thereafter, the Complainant sent a letter to the original Custodian contending that the spreadsheet was not complete and asking her to amend the disclosed record. After receiving no response, the Complainant filed this complaint. In the SOI, the Custodian could only certify to the factual parts of the original Custodian’s response. However, the Custodian also stated that she could not provide an argument because she was not the custodian of record during the pendency of the request and response.

The GRC first notes that the validity of the request is not at issue here; rather, the Complainant contended that the list he received did not include all employees assigned to the DFAB. In the SOI, the Custodian certified that she could not attest to whether the disclosed record was complete because she was not the custodian at the time of receipt of and response to the subject OPRA request.

The evidence of record here is unclear as to whether the original Custodian unlawfully denied access to the responsive personnel information. First, the Complainant contended that the original Custodian’s response was incomplete because it failed to include all DFAB employees for the identified time frame. Second, the Custodian was unable to affirm to whether the original Custodian sent a complete list of all DFAB employees to the Complainant. Thus, the facts as presented infer a possible unlawful denial of access to a spreadsheet complete with all DFAB employee information.

Accordingly, the original Custodian may have unlawfully denied access to a complete copy of a spreadsheet containing every DFAB employee for the time period January 1, 2016 through May 18, 2017. N.J.S.A. 47:1A-6. The Custodian must produce a new spreadsheet to compare to the one provided to the Complainant and either 1) disclose same to the Complainant if it is

⁶ The GRC notes that “union affiliation” is not one of the excepted pieces of personnel information under N.J.S.A. 47:1A-10. Notwithstanding, the Complainant provided no indication that he did not receive this information, nor did the Custodian argue that it was not disclosable for any specific reason.

complete; or 2) certify that the spreadsheet is the same as the one previously produced. If the Custodian is unable to produce said spreadsheet for any reason, she must detail those reasons in the form of a legal certification.

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 original Custodian may have unlawfully denied access to a complete copy of a spreadsheet containing every DFAB employee for the time period January 1, 2016 through May 18, 2017. N.J.S.A. 47:1A-6. The Custodian must produce a new spreadsheet to compare to the one provided to the Complainant and either 1) disclose same to the Complainant if it is complete; or 2) certify that the spreadsheet is the same as the one previously produced. If the Custodian is unable to produce said spreadsheet for any reason, she must detail those reasons in the form of a legal certification.
2. **The Custodian shall comply with conclusion No. 1 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 deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Council Staff.⁹**
3. 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
Acting Executive Director

June 18, 2019

⁷ 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.

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

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

David H. Weiner v. County of Essex, 2017-189 – Findings and Recommendations of the Council Staff