



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 24, 2019 Government Records Council Meeting

Stacie Percella
Complainant

Complaint No. 2017-202

v.

City of Bayonne (Hudson)
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 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 August 14, 2017 OPRA request asking multiple questions regarding medical benefits and employment status is invalid under OPRA. See Percella v. City of Bayonne (Hudson), GRC Complaint No. 2017-203 & 2017-204 (June 2019); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009); 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 request. N.J.S.A. 47:1A-6.
2. The Custodian unlawfully denied access to the portion of the Complainant’s August 14, 2017 OPRA request seeking Mr. Greaves’s “step.” Specifically, a public employee’s “step” is inextricably connected to their remuneration, thus rendering it a part of a “payroll record” as determined in Percella v. City of Bayonne (Hudson), GRC Complaint No. 2017-203 & 2017-204 (June 2019) and disclosable under OPRA. N.J.S.A. 47:1A-10. However, the Council should decline to order disclosure because the Custodian, by way of Ms. LaGatta via e-mail, disclosed to the Complainant an AFSCME “step” spreadsheet on November 21, 2017.
3. The Custodian unlawfully denied access to the requested “step” information sought in the August 14, 2017 OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the portion of the Complainant’s August 14, 2017 OPRA request asking questions was invalid. Percella v. City of Bayonne (Hudson), GRC Complaint No. 2017-203 & 2017-204 (June 2019). Also, the Custodian, through Ms. LaGatta, provided all remaining requested personnel information to the Complainant prior to or after the filing of this complaint. N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did 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 24th Day of September 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: September 27, 2019

**TATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**Stacie Percella¹
Complainant**

GRC Complaint No. 2017-202

v.

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

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

1. “All documents” regarding Raymond Greaves, including “Date of hire, Title, Dept. assigned to[,] Salary at date of hire and ‘step’ of salary guideline he is being paid at.”
2. “[I]s Mr. Greaves receiving benefits from [the] City of Bayonne [(“City”)]?”
3. “Is this position seasonal, PT, [or] FT?”

Custodian of Record: Robert F. Sloan³

Request Received by Custodian: August 14, 2017

Response Made by Custodian: August 18, 2017

GRC Complaint Received: October 19, 2017

Background⁴

Request and Response:

On August 14, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 18, 2017, Christina LaGatta responded in writing on behalf of the Custodian disclosing a one-page copy of Mr. Greaves’s “CAMPS” profile, which included the title, department, salary,⁵ date of hire, and position status (full time).

¹ No legal representation listed on record.

² Represented by Jessica H. Connors, Esq. Previously represented by Karla Y. Garcia, Esq. (Bayonne, NJ).

³ The current Custodian of Record is Madelene Medina.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁵ The GRC notes that salary information, which was sought in the OPRA request at issue is an “immediate access” item. N.J.S.A. 47:1A-5(e). However, the GRC does not address this issue because the Complainant did not raise it in her Denial of Access Complaint.

Denial of Access Complaint:

On October 19, 2017 the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the City of Bayonne’s (“City”) response to her OPRA request was incomplete. The Complainant noted that she previously requested a list of all new employees receiving medical benefits in an OPRA request dated April 30, 2015 and received said list. The Complainant argued that the Custodian should have therefore provided information indicating whether Mr. Greaves was receiving medical benefits. The Complainant also noted that the Custodian failed to provide Mr. Greaves’s salary “step” information.

The Complainant asserted that over the last year and a half, the Custodian and the City’s Law Director, John F. Coffey, II, Esq., have provided incomplete responses to her OPRA requests and hindered government transparency. The Complainant contended that the Custodian and the Law Director should be fined for not abiding by OPRA and the GRC. The Complainant also noted that as vice president of Local 2261, she was entitled to the omitted personnel information.

Supplemental Response

On November 21, 2017, Ms. LaGatta e-mailed the Complainant providing access to two (2) additional records she deemed responsive to the Complainant’s August 14, 2017 OPRA request: 1) Mr. Greaves’s profile from the New Jersey Division of Pensions and Benefits (with redactions); and 2) an AFSCME “Step” guide.

Statement of Information:

On December 1, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 14, 2017. The Custodian certified that the request was forwarded to the Personnel Office. The Custodian certified that, on his behalf, Ms. LaGatta responded in writing on August 18, 2017.

The Custodian argued that due to an inundation of OPRA requests, the City’s incomplete response was a result of an inadvertent oversight. The Custodian certified that the CAMPS document provided Mr. Greaves’ date of hire, title, department, and salary. The Custodian admitted that the document was not responsive to the Complainant’s request for Mr. Greaves’s “step” information nor whether he receives medical benefits. The Custodian then certified that Ms. LaGatta, without his knowledge, provided additional records containing the omitted information on November 21, 2017.

The Custodian asserted that in the future the Complainant should contact the City directly if she felt that the responses to her OPRA requests were incomplete.

Additional Submissions

On January 4, 2018, the Complainant responded to the Custodian’s SOI. The Complainant asserted that she does not have to be helpful to the City on properly responding to OPRA requests.

The Complainant argued that it is the function of the Custodian to assist clerks or other employees, and it is his responsibility to ensure that the responses are complete. The Complainant reiterated her claim of the City's negligence and should be fined for knowingly and willfully denying access to public information under OPRA.

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 Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files." Id. at 549 (emphasis added). Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);⁶ N.J. Builders Ass'n 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).

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

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

government record under N.J.S.A. 47:1A-10, and that “payroll records” must be disclosed pursuant to Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004). The Council thus held that the complainant’s March 25, 2009, request for “[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008, to March 24, 2009” was a valid request pursuant to OPRA. Id. at 5.

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

It should be noted that the request and underlying facts in this matter are identical to those Percella v. City of Bayonne (Hudson), GRC Complaint No. 2017-203 & 2017-204 (June 2019). In that matter, the Complainant sought the same personnel information of a City employee, including asking 1) whether the employee was receiving medical benefits; and 2) whether the position was full-time, part-time, or seasonal. In her initial response, Ms. LaGatta provided the same CAMPS profile containing the employee’s name, title, salary, and date of hire. Ms. LaGatta also provided additional records to address the above-mentioned questions that were unanswered. The Council held that, notwithstanding Ms. LaGatta’s failure to address the questions in her initial response, there was no unlawful denial of access as those questions were invalid. Id. (citing Watt, GRC 2007-246, and Dunleavy, GRC 2014-372).

Therefore, the portion of the Complainant’s August 14, 2017 OPRA request asking multiple questions regarding medical benefits and employment status is invalid under OPRA. See Percella, GRC 2017-203, *et al.*; Watt, GRC 2007-246; and Dunleavy, GRC 2014-372. Thus, there was no unlawful denial of access to this portion of the Complainant’s request. N.J.S.A. 47:1A-6.

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.

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

In Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004), the Council was tasked with defining the term “payroll record” because that term is not addressed in OPRA. The Council looked to the ordinary meaning of the term as set forth in Black's Law Dictionary (7th Ed., 1999) and N.J.A.C. 12:16-2.1, a Department of Labor regulation entitled “Payroll records.” The Council held that “payroll” records referred to the following:

Every employing unit having workers in employment, regardless of whether such unit is or is not an “employer” as defined in the Unemployment Compensation Law, shall keep payroll records that shall show, for each pay period:

1. The beginning and ending dates;
2. The full name of each employee and the day or days in each calendar week on which services for remuneration are performed;
3. The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so reported, the minimum wage rate prescribed under applicable laws of this State or of the United States

- or the amount of remuneration actually received by the employee from his employing unit, whichever is the higher; and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;
4. The total amount of all remuneration paid to all employees;
 5. The number of weeks worked.

[Id.]

As was previously mentioned, the facts and circumstances in this matter are identical to those in Percella, GRC 2017-203, *et al.* In that case, in addition to answers to the questions discussed above, the Complainant sought the employee's date of hire, title, assigned department, salary, and "step" on the date of hire. Similar to the current matter, Ms. LaGatta initially responded on behalf of the Custodian by providing the employee's CAMPS profile, which contained information regarding the employee's date of hire, salary, and department. However, the document did not include information on the employee's "step," resulting in the Complainant filing her complaint. Subsequently, on November 21, 2017, Ms. LaGatta provided the Complainant with an AFSCME "step" spreadsheet, containing positions and salary breakdowns organized by "step" tiers.

As a matter of first impression, the Council held that an employee's "step" falls under the definition of a "payroll records" as defined under Jackson, 2002-98. The Council determined that "payroll records" relate to an employee's direct earnings and the categories of remuneration they receive, such as regular or overtime hours work, or compensatory time. The Council found that an employee's "step" tier is directly related to their remuneration, as each "step" denotes the employee's salary cap within each "step." The Council therefore concluded that an employee's salary "step" is directly linked to an employee's payroll record and determined that the Custodian was required to disclose the employee's "step" information during the initial response to the request. The Council held that the Custodian unlawfully denied action to that portion of the Complainant's OPRA request. In the current matter, there are no facts or evidence to distinguish from Percella, GRC 2017-203, *et al.*

Accordingly, the Custodian unlawfully denied access to the portion of the Complainant's August 14, 2017 OPRA request seeking Mr. Greaves's "step." Specifically, a public employee's "step" is inextricably connected to their remuneration, thus rendering it a part of a "payroll record" as determined in Percella, GRC 2017-203, *et al.* and disclosable under OPRA. N.J.S.A. 47:1A-10. However, the Council should decline to order disclosure because the Custodian, by way of Ms. LaGatta via e-mail, disclosed to the Complainant an AFSCME "step" spreadsheet on November 21, 2017.

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 the requested “step” information sought in the August 14, 2017 OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the portion of the Complainant’s August 14, 2017 OPRA request asking questions was invalid. Percella, GRC 2017-203, *et al.* Also, the Custodian, through Ms. LaGatta, provided all remaining requested personnel information to the Complainant prior to or after the filing of this complaint. N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The portion of the Complainant’s August 14, 2017 OPRA request asking multiple questions regarding medical benefits and employment status is invalid under OPRA. See Percella v. City of Bayonne (Hudson), GRC Complaint No. 2017-203 & 2017-204 (June 2019); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009); 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 request. N.J.S.A. 47:1A-6.
2. The Custodian unlawfully denied access to the portion of the Complainant’s August 14, 2017 OPRA request seeking Mr. Greaves’s “step.” Specifically, a public employee’s “step” is inextricably connected to their remuneration, thus rendering it a part of a “payroll record” as determined in Percella v. City of Bayonne (Hudson), GRC Complaint No. 2017-203 & 2017-204 (June 2019) and disclosable under OPRA.

N.J.S.A. 47:1A-10. However, the Council should decline to order disclosure because the Custodian, by way of Ms. LaGatta via e-mail, disclosed to the Complainant an AFSCME “step” spreadsheet on November 21, 2017.

3. The Custodian unlawfully denied access to the requested “step” information sought in the August 14, 2017 OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the portion of the Complainant’s August 14, 2017 OPRA request asking questions was invalid. Percella v. City of Bayonne (Hudson), GRC Complaint No. 2017-203 & 2017-204 (June 2019). Also, the Custodian, through Ms. LaGatta, provided all remaining requested personnel information to the Complainant prior to or after the filing of this complaint. N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did 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: Samuel A. Rosado
Staff Attorney

September 17, 2019