



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

August 28, 2018 Government Records Council Meeting

Stacie Percella
Complainant

Complaint No. 2017-70

v.

City of Bayonne (Hudson)
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 21, 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 the Council accept Administrative Law Judge Michael Antoniewicz’s June 15, 2018 Initial Decision in which he found that Bayonne did not knowingly and willfully violate OPRA and unreasonably deny access, and that accordingly, the complaint should be dismissed.

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 28th Day of August, 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: August 30, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Stacie Percella¹
Complainant**

GRC Complaint No. 2017-70

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of all Department of Public Works daily sick call sheets from July 1, 2014, to present.

Custodian of Record: Robert F. Sloan

Request Received by Custodian: February 23, 2017

Response Made by Custodian: February 27, 2017

GRC Complaint Received: April 4, 2017

Background

December 19, 2017 Council Meeting:

At its December 19, 2017 public meeting, the Government Records Council (“Council”) considered the December 12, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has not complied with the terms of the Council’s October 31, 2017 Interim Order because it appears that he failed to disclose to the Complainant all of the records ordered by the Council for disclosure; failed to provide a detailed document index explaining the lawful basis for any redactions; and failed to provide certified confirmation of compliance to the Executive Director by the extended deadline date of November 30, 2017. The Council therefore finds the Custodian, Robert F. Sloan, in violation of the Council’s Order.

2. The Council’s October 31, 2017 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6.

¹ No legal representation listed on record.

² Represented by Jessica Connors, Esq. (Bayonne, NJ).

3. Because this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council emphasizes that with respect to disclosure of the Department of Public Works daily sick call sheets from July 1, 2014, to February 23, 2017, redacted to remove medical information and/or a person's health status, the issue has already been determined by the Council and thus is not an outstanding issue before the Office of Administrative Law.
4. The Custodian violated OPRA because he failed in a timely manner to: (a) disclose to the Complainant all of the records ordered by the Council for disclosure; (b) provide a detailed document index explaining the lawful basis for any redactions; and (c) provide certified confirmation of compliance to the Executive Director. As such the Custodian, Robert F. Sloan, is in violation of the Council's October 31, 2017 Interim Order. Accordingly, the Custodian's actions may be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a proof hearing to determine whether the Custodian, and/or any other municipal official, knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Procedural History:

On December 20, 2017, the Council distributed its December 19, 2017 Interim Order to all parties. On February 21, 2018, the complaint was transmitted to the Office of Administrative Law ("OAL"). On June 15, 2018, the Honorable Michael Antoniewicz, Administrative Law Judge ("ALJ") issued an Initial Decision as follows:

*"Based on the [Findings of Facts and Conclusion of Law], I hereby find that Bayonne did not knowingly and willfully violate OPRA and did not unreasonably deny access. Based on the finding, I **ORDER** that the GRC complaint against Bayonne is **DISMISSED**."*

The Initial Decision also provided that "[w]ithin thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the [GRC] . . ." No written exceptions were submitted to the GRC within the time period provided.

Because the GRC had to allow time for the parties to file any written exceptions, the complaint could not be placed on the agenda for the Council's June 26, 2018 meeting, and the Council's next meeting, scheduled for July 31, 2018, was beyond the 45-day time frame for adoption, modification or rejection of the Initial Decision. As such, the GRC requested, and was granted, an Order of Extension until September 14, 2018.

On August 8, 2018, the Complainant e-mailed the GRC with further argument.³

³ The Complainant's argument was not considered by the GRC because it was not submitted in a timely manner.

Analysis

Administrative Law Judge's Initial Decision

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989) (certif. denied 121 N.J. 615 (1990)). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." Id. at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Here, the ALJ evaluated witness testimony, which he determined was sincere and credible. Thereafter, the ALJ made findings of fact consistent with such evidence. The ALJ found that said evidence did not support a knowing and willful violation OPRA either by the Custodian or the City of Bayonne. The ALJ's conclusions are clearly aligned and consistent with the evidence of record. As such, the GRC is satisfied that it can ascertain from the record what the ALJ accepted as fact and finds that those facts provide a reasonable basis for his conclusions.

Therefore, the Council should accept the ALJ's June 15, 2018 Initial Decision in which he found that Bayonne did not knowingly and willfully violate OPRA and unreasonably deny access, and that accordingly, the complaint should be dismissed.

Conclusions and Recommendations

The Council Staff respectfully recommends that the Council accept Administrative Law Judge Michael Antoniewicz's June 15, 2018 Initial Decision in which he found that Bayonne did not knowingly and willfully violate OPRA and unreasonably deny access, and that accordingly, the complaint should be dismissed.

Prepared By: John E. Stewart

August 21, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

December 19, 2017 Government Records Council Meeting

Stacie Percella
Complainant

Complaint No. 2017-70

v.

City of Bayonne (Hudson)
Custodian of Record

At the December 19, 2017 public meeting, the Government Records Council (“Council”) considered the December 12, 2017 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 has not complied with the terms of the Council’s October 31, 2017 Interim Order because it appears that he failed to disclose to the Complainant all of the records ordered by the Council for disclosure; failed to provide a detailed document index explaining the lawful basis for any redactions; and failed to provide certified confirmation of compliance to the Executive Director by the extended deadline date of November 30, 2017. The Council therefore finds the Custodian, Robert F. Sloan, in violation of the Council’s Order.
2. The Council’s October 31, 2017 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6.
3. Because this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council emphasizes that with respect to disclosure of the Department of Public Works daily sick call sheets from July 1, 2014, to February 23, 2017, redacted to remove medical information and/or a person’s health status, the issue has already been determined by the Council and thus is not an outstanding issue before the Office of Administrative Law.
4. The Custodian violated OPRA because he failed in a timely manner to: (a) disclose to the Complainant all of the records ordered by the Council for disclosure; (b) provide a detailed document index explaining the lawful basis for any redactions; and (c) provide certified confirmation of compliance to the Executive Director. As such the Custodian, Robert F. Sloan, is in violation of the Council’s October 31, 2017 Interim Order. Accordingly, the Custodian’s actions may be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.



Therefore, this complaint should be referred to the Office of Administrative Law for a proof hearing to determine whether the Custodian, and/or any other municipal official, knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 19th Day of December, 2017

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, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 19, 2017 Council Meeting**

Stacie Percella¹
Complainant

GRC Complaint No. 2017-70

v.

City of Bayonne (Hudson)²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of all Department of Public Works daily sick call sheets from July 1, 2014, to present.

Custodian of Record: Robert F. Sloan

Request Received by Custodian: February 23, 2017

Response Made by Custodian: February 27, 2017

GRC Complaint Received: April 4, 2017

Background

October 31, 2017 Council Meeting:

At its October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 24, 2017 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. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving a lawful basis for a denial of access to the requested records because said records are considered payroll records pursuant to N.J.S.A. 47:1A-10 and Burdick, *supra*. As such, the Custodian must disclose the Department of Public Works daily sick call sheets from July 1, 2014, to February 23, 2017. In the event notations revealing medical information or a person’s health status are contained on any of the requested records, such information should be redacted.

2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council’s Interim Order with any appropriate redactions, including a detailed document index explaining the lawful basis for each such**

¹ No legal representation listed on record.

² Represented by Karla Garcia, Esq. (Bayonne, NJ).

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

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 November 1, 2017, the Council distributed its October 31, 2017 Interim Order to all parties. On November 8, 2017, the Custodian's Counsel e-mailed the GRC to request a three week extension of time to comply with the Council's Interim Order. The Custodian's Counsel informed the GRC that the Department of Public Works was not adequately staffed because the main administrative assistant is on maternity leave and that it will take the Director time to organize the documents. The GRC informed the Custodian's Counsel that, upon review of the facts of the complaint, the GRC found it reasonable to allow for the requested extension. Accordingly, the GRC granted an extension of time until Thursday, November 30, 2017, for the Custodian to comply with the Interim Order.

On November 9, 2017, the Complainant e-mailed the GRC to state that she disagreed with the GRC's decision to grant the Custodian an extension of time. The Complainant stated that the Custodian obtained the extension of time under false pretenses. The Complainant stated that the Department of Public Works is not shorthanded due to the administrative assistant's maternity leave because the Department has two people available to comply with the Council's Order.

On November 11, 2017, the Complainant e-mailed the GRC to state that the Custodian's Counsel is misleading the GRC. The Complainant stated that, contrary to Counsel's representations that the Director needs time to organize the documents, the Complainant has knowledge that the Director left for a vacation in New Orleans. The Complainant alleged that the City of Bayonne is intentionally depriving her of the requested records and is now doing so by lying to the GRC. The Complainant asked the GRC to fine the Custodian for continuously and intentionally denying her access to the requested records.

By e-mail dated November 13, 2017, the GRC informed the Complainant that the GRC understands she is seeking a knowing and willful violation against the Custodian. The GRC asked the Complainant to provide the GRC with a certification setting forth what she alleged in her November 9, 2017 and November 11, 2017 e-mails.³

On November 22, 2017, the Complainant e-mailed the GRC to state that the Custodian disclosed to her some of the records she had requested. The GRC, by e-mail dated November 24, 2017, asked the Complainant if she could confirm whether she received all of the records. The Complainant by reply e-mail on the same date informed the GRC that she could not yet confirm that she received all the records. The GRC again sent the Complainant a follow-up e-mail on November 28, 2017, in an effort to determine whether she received all of the records. The GRC

³ The Complainant did not submit the requested certification.

asked the Complainant to itemize the records she still had not received. By reply e-mail that same date, the Complainant confirmed that she would do so.

The Custodian failed to abide by the extended deadline of November 30, 2017, for complying with the Council's October 31, 2017 Interim Order to disclose to the Complainant all of the Department of Public Works daily sick call sheets from July 1, 2014, to February 23, 2017, with any appropriate redactions and include a detailed document index explaining the lawful basis for each such redaction. The Custodian also failed to provide certified confirmation of compliance to the Executive Director.

Analysis

Compliance

On October 31, 2017, the Council ordered the above-referenced compliance. On November 1, 2017, the Council distributed its Interim Order to the parties. The Order directed the Custodian to disclose to the Complainant within five (5) business days from receipt of the Council's Order the Department of Public Works daily sick call sheets from July 1, 2014, to February 23, 2017, with any appropriate redactions. The Order further directed the Custodian to provide a detailed document index explaining the lawful basis for any redaction(s) and to provide certified confirmation of compliance to the Executive Director.

Upon request of the Custodian's Counsel, the GRC granted a liberal extension of time until November 30, 2017, for the Custodian to comply with the Interim Order. The Custodian failed to comply with the terms of the Council's October 31, 2017 Interim Order by the November 30, 2017 extended deadline date. The GRC learned from the Complainant that some of the records ordered to be disclosed were disclosed by the Custodian on or about November 22, 2017; however, it is unknown whether all of said records were disclosed because the Custodian failed to comply with the terms of the Order.

Accordingly, the Custodian has not complied with the terms of the Council's October 31, 2017 Interim Order because it appears that he failed to disclose to the Complainant all of the records ordered by the Council for disclosure; failed to provide a detailed document index explaining the lawful basis for any redactions; and failed to provide certified confirmation of compliance to the Executive Director by the extended deadline date of November 30, 2017. The Council therefore finds the Custodian in violation of the Council's Order.

Council's October 31, 2017 Interim Order is Enforceable

"The Council shall, pursuant to New Jersey Rules Governing the Courts, *R. 4:67-6*, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's October 31, 2017 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6.

Because this complaint should be referred to the Office of Administrative Law ("OAL") for the limited purposes described below, the Council emphasizes that with respect to disclosure

of the Department of Public Works daily sick call sheets from July 1, 2014, to February 23, 2017, redacted to remove medical information and/or a person's health status, the issue has already been determined by the Council and thus is not an outstanding issue before the OAL.

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

Here, the Custodian violated OPRA because he failed in a timely manner to: (a) disclose to the Complainant all the records ordered by the Council for disclosure; (b) provide a detailed document index explaining the lawful basis for any redactions; and (c) provide certified confirmation of compliance to the Executive Director. As such the Custodian, Robert F. Sloan, is in violation of the Council's October 31, 2017 Interim Order. Accordingly, the Custodian's actions may be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to OAL for a proof hearing to determine whether the Custodian and/or any other municipal official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not complied with the terms of the Council's October 31, 2017 Interim Order because it appears that he failed to disclose to the Complainant all of the records ordered by the Council for disclosure; failed to provide a detailed document index explaining the lawful basis for any redactions; and failed to provide certified

confirmation of compliance to the Executive Director by the extended deadline date of November 30, 2017. The Council therefore finds the Custodian, Robert F. Sloan, in violation of the Council's Order.

2. The Council's October 31, 2017 Interim Order is enforceable in the Superior Court if Complainant chooses that option. R. 4:67-6.
3. Because this complaint should be referred to the Office of Administrative Law for the limited purposes described below, the Council emphasizes that with respect to disclosure of the Department of Public Works daily sick call sheets from July 1, 2014, to February 23, 2017, redacted to remove medical information and/or a person's health status, the issue has already been determined by the Council and thus is not an outstanding issue before the Office of Administrative Law.
4. The Custodian violated OPRA because he failed in a timely manner to: (a) disclose to the Complainant all of the records ordered by the Council for disclosure; (b) provide a detailed document index explaining the lawful basis for any redactions; and (c) provide certified confirmation of compliance to the Executive Director. As such the Custodian, Robert F. Sloan, is in violation of the Council's October 31, 2017 Interim Order. Accordingly, the Custodian's actions may be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a proof hearing to determine whether the Custodian, and/or any other municipal official, knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart

December 12, 2017



State of New Jersey
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

October 31, 2017 Government Records Council Meeting

Stacie Percella
Complainant

Complaint No. 2017-70

v.

City of Bayonne (Hudson)
Custodian of Record

At the October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 24, 2017 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. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving a lawful basis for a denial of access to the requested records because said records are considered payroll records pursuant to N.J.S.A. 47:1A-10 and Burdick, *supra*. As such, the Custodian must disclose the Department of Public Works daily sick call sheets from July 1, 2014, to February 23, 2017. In the event notations revealing medical information or a person’s health status are contained on any of the requested records, such information should be redacted.
2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council’s Interim Order with any appropriate redactions, including a detailed document index explaining the lawful basis for each such redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
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 "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If 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 31st Day of October, 2017

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 1, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 31, 2017 Council Meeting**

Stacie Percella¹
Complainant

GRC Complaint No. 2017-70

v.

City of Bayonne (Hudson)²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of all Department of Public Works daily sick call sheets from July 1, 2014, to present.

Custodian of Record: Robert F. Sloan

Request Received by Custodian: February 23, 2017

Response Made by Custodian: February 27, 2017

GRC Complaint Received: April 4, 2017

Background³

Request and Response:

On February 23, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 27, 2017, the second (2nd) business day following receipt of said request, Christina LaGatta in the office of the Custodian’s Counsel responded in writing, informing the Complainant that the request is denied pursuant to “N.J.S.A. 47:1A-10(c).”

Denial of Access Complaint:

On April 4, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on February 23, 2017, she submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records and that on February 27, 2017, the Custodian, through counsel, denied the request.

¹ No legal representation listed on record.

² Represented by John F. Coffey, Esq. (Bayonne, 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

The Complainant states that the Custodian's Counsel denied access to the requested records as personnel records; however, she states that the requested records are timekeeping records, not personnel records. The Complainant states that the requested records do not contain personal information. The Complainant also states that they are not medical records, not kept in the personnel department, and not secured in a locked area. The Complainant states that the requested records are stored in a manila file on the secretary's desk. The Complainant further states that, although the records are called "sick call sheets," they are actually used to track various types of leave time, including vacation, personal time, training time, sick leave, funeral leave, unexcused absences, etc. The Complainant describes the sick call sheets as containing information transcribed from sign in sheets that are maintained in the Central Garage. The Complainant states that she has firsthand knowledge of this information because she worked in the Department of Public Works ("DPW") and is the Vice President of AFSCME Local 2261 for the City of Bayonne.

The Complainant contends that she should be granted access to the requested records because the Custodian wrongfully denied access under the personnel records exemption when the records are not personnel records. The Complainant states that the requested records are time records, "plain and simple."

Statement of Information:

On April 19, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's OPRA request on February 23, 2017, and responded to the request on February 27, 2017. The Custodian certifies that the records responsive to the request are "[a]pproximately 950 pages of City of Bayonne DPW 'Daily Sick Calls' Sheets (7/1/14 – present)."

The Custodian certifies that the requested records contain only the date, employee names, and time of the call to report absence. The Custodian further certifies that he denied the Complainant's request under "N.J.S.A. 47:1A-10(c)" as exempt personnel records because the requested records "could provide indication of an employee's medical information or status." The Custodian also asserts that the requested records "could contain indications related to employee health." The Custodian states that the requested records do not distinguish the reason for an employee's absence; rather, the records only document sick leave. The Custodian attached a redacted copy of the requested record to the SOI as a sample.⁴

Additional Submissions:

In response to the GRC's September 21, 2017 request, the Complainant provided a certification dated September 25, 2017, wherein she certified that the Daily Sick Calls records

⁴ The sample attached to the SOI is a form captioned "Department of Public Works Parks and Recreation Daily Sick Calls." There is a line for the date in the upper right corner of the form. The form itself is a chart that contains three columns. The first column is titled "NUMBER" and it has rows listed from 1 through 30. The second column is titled "NAME." The third column is titled "TIME." For any given date, an employee's name is entered on one of the lines in the "NAME" column, followed in the next column by the time a call is received.

are not limited to sick time and that they are used for other types of leave time. The Complainant certified that, as such, they are attendance records. The Complainant attached several examples from the Bayonne Health Department of the type of records she requested. However, the Health Department examples were general attendance reports; they were not specific for sick leave.⁵

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.

Here, the Custodian denied the Complainant access to the requested records as personnel records pursuant to “N.J.S.A. 47:1A-10(c)” because they “could provide indication of an employee’s medical information or status.” However, there is no subsection (c) in N.J.S.A. 47:1A-10, and the Custodian did not indicate in what manner the records could reveal such medical information. There is no prompt on the requested Daily Sick Calls form for the reason an employee took the sick time. It appears, therefore, that the Custodian believes that documentation of an excessive number of sick days or a particular pattern of sick days taken by an employee will reveal that employee’s health and/or medical status. However, such a conclusion cannot necessarily be drawn from the information contained on the requested forms.

The Custodian certified that the requested records do not distinguish the reason for an employee’s absence; they only document sick leave. Conversely, the Complainant certified that the records are simply attendance records.

Whether the requested records document sick leave only or sick leave along with other types of leave is immaterial because the Council has determined that the “number of absences, including sick days . . .” are attendance records which are disclosable under OPRA. *See Vargas (on behalf of the Philadelphia Inquirer) v. Camden City School Dist. (Camden)*, GRC Complaint No. 2011-315 (April 2013).

The Council addressed the issue of whether attendance records were releasable under OPRA in *Burdick v. Franklin Twp. Bd. of Educ. (Hunterdon)*, GRC Complaint No. 2007-74 (Interim Order October 31, 2007). In *Burdick*, the complainant requested attendance records for certain employees of the Franklin Township School. The custodian denied access to the requested attendance records as confidential personnel records. The Council, citing *Weimer v. Twp. Middletown (Monmouth)*, GRC Complaint No. 2004-55 (August 2005), held that “attendance records are considered payroll records which are subject to public access pursuant to N.J.S.A. 47:1A-10 and *Weimer, supra*.”

⁵ The examples were captioned as “Daily Attendance Report For:” followed by a blank space where the name of the Department or Division could be inserted. The reports listed abbreviations for ten (10) different types of leave, including sick leave.

Therefore, pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving a lawful basis for a denial of access to the requested records because said records are considered payroll records pursuant to N.J.S.A. 47:1A-10 and Burdick v. Franklin Twp. Bd. of Educ. (Hunterdon), GRC Complaint No. 2007-74 (Interim Order October 31, 2007). As such, the Custodian must disclose the Department of Public Works daily sick call sheets from July 1, 2014, to February 23, 2017. In the event notations revealing medical information or a person's health status are contained on any of the requested records, such information should be redacted.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proving a lawful basis for a denial of access to the requested records because said records are considered payroll records pursuant to N.J.S.A. 47:1A-10 and Burdick, supra. As such, the Custodian must disclose the Department of Public Works daily sick call sheets from July 1, 2014, to February 23, 2017. In the event notations revealing medical information or a person's health status are contained on any of the requested records, such information should be redacted.
2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council's Interim Order with any appropriate redactions, including a detailed document index explaining the lawful basis for each such redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
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.

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October 24, 2017

⁶ "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."

⁷ 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.