



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**December 18, 2018 Government Records Council Meeting**

Edward Stevens  
Complainant

Complaint No. 2018-166

v.

New Horizons Community Charter School (Essex)  
Custodian of Record

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

1. The Custodian complied with the Council’s October 30, 2018 Interim Order because the Custodian in a timely manner. The Custodian also forwarded certified confirmation of compliance to the Council Staff wherein she stated that she attached the record responsive to request item number 1 to the certification even though it was nonexistent at the time of the request. The evidence of record reveals the certification was provided to the Complainant on November 6, 2018.
2. Although the Custodian insufficiently responded to the Complainant’s request, failed to provide a lawful reason for denying access, and failed to provide a completed Statement of Information to the GRC, the Custodian did comply with the Council’s October 30, 2018 Interim Order in a timely manner and disclosed to the Complainant a copy of the school nepotism policy which was nonexistent at the time of the request. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, there was no record in existence responsive to request item number 1, and the request for item number 2 was not valid. Therefore, the



Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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 18<sup>th</sup> Day of December, 2018

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: December 20, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Edward Stevens**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2018-166**

v.

**New Horizons Community Charter School (Essex)**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

- (1) “[T]he nepotism policy for of (sic) New Horizons Community Charter School, as required by NJAC 6A:23A-22.10”<sup>3</sup>
- (2) “Any documentation surrounding the hiring of Yashmine Cooper to her current position as Vice Principal, including ... dates of interviews and names of interviewers ... ”<sup>4</sup>

**Custodian of Record:** Rhonda Wilson  
**Request Received by Custodian:** June 22, 2018  
**Response Made by Custodian:** June 26, 2018  
**GRC Complaint Received:** August 6, 2018

**Background**

October 30, 2018 Council Meeting:

At its October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian’s response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).

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<sup>1</sup> Represented by Randi Donner April, Esq., of Oxfeld Cohen, P.C. (Newark, NJ).

<sup>2</sup> Represented by Derlys M. Gutierrez, Esq., of Adams Gutierrez & Lattiboudere, LLC (Newark, NJ).

<sup>3</sup> N.J.A.C. 6A:23A-22.10 (a) provides in relevant part, “As a condition of receiving charter school aid, charter school board of trustees shall implement the nepotism policy established by this subsection.”

<sup>4</sup> There were other records requested that are not relevant to this complaint.

Edward Stevens v. New Horizons Community Charter School (Essex), 2018-166 – Supplemental Findings and Recommendations of the Council Staff

2. Because the GRC attempted several times to obtain a completed Statement of Information from the Custodian, and even granted additional time for the Custodian to complete and submit the Statement of Information, the Custodian's failure to provide a completed Statement of Information to the GRC results in a violation of N.J.A.C. 5:105-2.4(a).
3. Because the Custodian failed to disclose the record responsive to request item number 1, or provide the Complainant with a lawful reason for denying access, the Custodian failed to bear her burden of proof that the denial of access to said record was lawful, and therefore must disclose it. N.J.S.A. 47:1A-6.
4. **The Custodian shall comply with paragraph #3 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 deliver certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Council Staff.**
5. The Complainant's request item number 2, seeking dates of interviews and names of interviewers in a hiring process, is invalid because it fails to seek identifiable government records. MAG Entm't, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Thus, the Custodian did not unlawfully deny access to the request item. N.J.S.A. 47:1A-6.
6. Because the Complainant did not seek interviewers' notes in his OPRA request which formed the basis of the complaint, the complaint, with respect to said interviewers' notes, is without any reasonable factual basis to pursue. N.J.S.A. 47:1A-7(e).
7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On October 31, 2018, the Council distributed its October 30, 2018 Interim Order to all parties. On November 6, 2018, the Custodian's Counsel responded to the Council's Interim Order by providing the Custodian's certified confirmation of compliance to the Council Staff.

## Analysis

### Compliance

On October 30, 2018, the Council ordered the above-referenced compliance. On October 31, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before November 8, 2018. On November 6, 2017, the third (3<sup>rd</sup>) business day after receipt of the Interim Order, the Custodian's Counsel forwarded the Custodian's certified confirmation of compliance dated November 5, 2017, to the Council Staff.

The Custodian certified that she attached to the certification as "Exhibit A" a true and accurate copy of the record responsive to request item number 1, which is the nepotism policy for New Horizons Community Charter School. The GRC notes that on November 6, 2018, both the Complainant and Complainant's Counsel were copied on the certified confirmation of compliance; therefore, the Custodian disclosed to the Complainant in a timely manner the record responsive to request item number 1 in compliance with paragraph 4 of the Council's October 30, 2018 Interim Order.

The Custodian also certified that at the time of the request the New Horizons Community Charter School did not have a nepotism policy; therefore, there was no record responsive to request item number 1. The Custodian certified that the nepotism policy was prepared by an outside consultant and subsequently approved by the School's Board of Trustees on October 16, 2018.

The fact that a nepotism policy was nonexistent at the time of the Complainant's request, however, was not made clear in the response. Albert Wright, responding on behalf of the Custodian, stated: "New Horizons Community Charter School is in the process of updating the school's Bylaws, policy and Regulation Manuals. The Consultants at Strauss Esmay Associates, L.L.P. is currently working on these update (sic), and we will be able to provide you a copy of nepotism policy once this work is completed." The response, therefore, implied that there *was* a nepotism policy, but it was presently in the process of being updated. Moreover, the GRC could not have known that there was no record responsive to request item number 1 at the time of the request because the Custodian failed to submit a completed Statement of Information to the GRC. At present, however, the GRC is satisfied that there was no record responsive to request item number 1 at the time of the request because the Custodian certified on November 5, 2017, that no such record existed at that time and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification.

Thus, the Custodian complied with the Council's October 30, 2018 Interim Order because the Custodian in a timely manner. The Custodian also forwarded certified confirmation of compliance to the Council Staff wherein she stated that she attached the record responsive to request item number 1 to the certification even though it was nonexistent at the time of the request. The evidence of record reveals the certification was provided to the Complainant on November 6, 2018.

## **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 (Berg); 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)).

Although the Custodian insufficiently responded to the Complainant’s request, failed to provide a lawful reason for denying access, and failed to provide a completed SOI to the GRC, the Custodian did comply with the Council’s October 30, 2018 Interim Order in a timely manner and disclosed to the Complainant a copy of the school nepotism policy which was nonexistent at the time of the request. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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.

## **Prevailing Party Attorney’s Fees**

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” Mason, 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76 (2008).]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert denied (1984).

[Id. at 76.]

Here, two request items are relevant to the complaint. The evidence of record revealed that the record responsive to request item number 1, a nepotism policy, did not exist at the time of the request. Further, the request seeking item number 2, dates of interviews and names of interviewers in a hiring process, was invalid because it failed to seek identifiable government records.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 423. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, there was no record in existence responsive to request item number 1, and the request for item number 2 was not valid. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s October 30, 2018 Interim Order because the Custodian in a timely manner. The Custodian also forwarded certified confirmation of compliance to the Council Staff wherein she stated that she attached the record responsive to request item number 1 to the certification even though it was nonexistent at the time of the request. The evidence of record reveals the certification was provided to the Complainant on November 6, 2018.
2. Although the Custodian insufficiently responded to the Complainant’s request, failed to provide a lawful reason for denying access, and failed to provide a completed Statement of Information to the GRC, the Custodian did comply with the Council’s October 30, 2018 Interim Order in a timely manner and disclosed to the Complainant a copy of the school nepotism policy which was nonexistent at the time of the request. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v.



DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, there was no record in existence responsive to request item number 1, and the request for item number 2 was not valid. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: John E. Stewart

December 11, 2018



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**

**October 30, 2018 Government Records Council Meeting**

Edward Stevens  
Complainant

Complaint No. 2018-166

v.

New Horizons Community Charter School (Essex)  
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the GRC attempted several times to obtain a completed Statement of Information from the Custodian, and even granted additional time for the Custodian to complete and submit the Statement of Information, the Custodian’s failure to provide a completed Statement of Information to the GRC results in a violation of N.J.A.C. 5:105-2.4(a).
3. Because the Custodian failed to disclose the record responsive to request item number 1, or provide the Complainant with a lawful reason for denying access, the Custodian failed to bear her burden of proof that the denial of access to said record was lawful, and therefore must disclose it. N.J.S.A. 47:1A-6.
4. **The Custodian shall comply with paragraph #3 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 deliver<sup>1</sup>**

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<sup>1</sup> 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.



**certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>2</sup> to the Council Staff.<sup>3</sup>**

5. The Complainant's request item number 2, seeking dates of interviews and names of interviewers in a hiring process, is invalid because it fails to seek identifiable government records. MAG Entm't, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Thus, the Custodian did not unlawfully deny access to the request item. N.J.S.A. 47:1A-6.
6. Because the Complainant did not seek interviewers' notes in his OPRA request which formed the basis of the complaint, the complaint, with respect to said interviewers' notes, is without any reasonable factual basis to pursue. N.J.S.A. 47:1A-7(e).
7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of October, 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: October 31, 2018**

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<sup>2</sup> "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."

<sup>3</sup> 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.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
October 30, 2018 Council Meeting**

**Edward Stevens <sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-166**

v.

**New Horizons Community Charter School (Essex) <sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

- (1) “[T]he nepotism policy for of (sic) New Horizons Community Charter School, as required by NJAC 6A:23A-22.10”<sup>3</sup>
- (2) “Any documentation surrounding the hiring of Yashmine Cooper to her current position as Vice Principal, including ... dates of interviews and names of interviewers ... ”<sup>4</sup>

**Custodian of Record:** Rhonda Wilson  
**Request Received by Custodian:** June 22, 2018<sup>5</sup>  
**Response Made by Custodian:** June 26, 2018  
**GRC Complaint Received:** August 6, 2018

**Background**<sup>6</sup>

**Request and Response:**

On June 22, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 26, 2018, the second (2<sup>nd</sup>) business day following receipt of said request, the Custodian responded through Human Resource Director Albert Wright, in writing, addressing some of the requested items and disclosing records and/or information responsive to other items. With respect to request item number 1, the Custodian stated, “New Horizons Community Charter School is in the process of updating the school’s

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<sup>1</sup> Represented by Randi Donner April, Esq., of Oxfeld Cohen, P.C. (Newark, NJ).

<sup>2</sup> Represented by Derlys M. Gutierrez, Esq., of Adams Gutierrez & Lattiboudere, LLC (Newark, NJ).

<sup>3</sup> N.J.A.C. 6A:23A-22.10 (a) provides in relevant part, “As a condition of receiving charter school aid, charter school board of trustees shall implement the nepotism policy established by this subsection.”

<sup>4</sup> There were other records requested that are not relevant to this complaint.

<sup>5</sup> Although the Complainant stated that the request was provided to the Custodian on June 21, 2018, the evidence of record reveals that the request was provided to the Custodian via e-mail on June 22, 2018.

<sup>6</sup> 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.

Bylaws, policy and Regulation Manuals. The Consultants at Strauss Esmay Associates, L.L.P. is currently working on these update (sic), and we will be able to provide you a copy of nepotism policy once this work is completed.”

#### Denial of Access Complaint:

On August 6, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he filed an OPRA request with the Custodian dated June 21, 2018, seeking numerous records. The Complainant stated that the Custodian responded to the request on July 2, 2018 providing some, but not all, of the requested records.<sup>7</sup> The Complainant states that he did not receive the requested nepotism policy, the dates of the interviews, and names of the interviewers and the interviewers’ notes.

#### Statement of Information:

On August 10, 2018, the GRC sent the Custodian a request for the Statement of Information (“SOI”). On August 13, 2018, the Custodian’s Counsel e-mailed the GRC a letter of representation, asking that all further correspondence be directed to Counsel. The Custodian failed to submit the SOI to the GRC.

#### Additional Submissions:

On August 13, 2018, the GRC sent the Custodian, through Counsel, a notice that if the GRC did not receive the SOI within three (3) business days, the complaint would proceed to adjudication based only upon the information contained within the complaint.

On August 20, 2018, the Custodian’s Counsel e-mailed the GRC a letter seeking an extension of time until August 27, 2018 for the Custodian to submit the SOI. Although the GRC replied by e-mail on the same date approving the extension of time, the Custodian thereafter failed to submit the SOI or otherwise respond to the GRC.

On October 16, 2018, the Complainant’s Counsel e-mailed the GRC and stated that she was last informed of the status of this matter on August 20, 2018, when the GRC granted the Custodian’s Counsel an extension of time until August 27, 2018 for the Custodian to submit the SOI. The Complainant’s Counsel asked the GRC to advise her of the next steps. On this same date, the GRC replied to the Complainant’s Counsel, informing her that the complaint was prepared for the October 30, 2018 Council meeting.<sup>8</sup>

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<sup>7</sup> The evidence of record reveals that the Custodian responded to the request on June 26, 2018, disclosing some of the requested records and information. The evidence of record further reveals that the Complainant was on vacation and did not receive the June 26, 2018 response until he returned, at which time he e-mailed the Custodian to inform her that she did not respond to his request for the dates of the interviews and names of the interviewers. The Complainant asked the Custodian to respond to those two items.

<sup>8</sup> The GRC notes that the Custodian’s Counsel was copied on the e-mail from the Complainant’s Counsel to the GRC and on the e-mail from the GRC to the Complainant’s Counsel. The Custodian’s Counsel did not thereafter submit the SOI or otherwise communicate with the GRC regarding the Custodian’s failure to submit the SOI.

## Analysis

### Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "...[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually." Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).

Here, Mr. Wright on behalf of the Custodian, responded to the Complainant's OPRA request which contained several request items, by addressing some of the items, but failing to address other items. Because the Custodian failed to respond to each request item individually, the Complainant needed to e-mail the Custodian to inquire about two (2) request items that were never addressed.

Therefore, the Custodian's response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

### Failure to Submit SOI

In furtherance of the GRC's obligation to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to government records[,]" pursuant to N.J.S.A. 47:1A-7(b), the GRC requires a custodian to submit a completed SOI. The New Jersey Administrative Code provides:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

N.J.A.C. 5:105-2.4(f).

In Kovacs v. Irvington Police Dep't (Essex), 2014-196, GRC Complaint No. 2014-196 (January 2015), after the custodian ignored two requests from the GRC for submission of the SOI, the custodian's counsel responded to the GRC seeking an extension of time to submit the SOI. Although the GRC immediately granted the extension, the SOI was never submitted. The Council subsequently determined that the custodian violated N.J.A.C. 5:105-2.4(a).

Here, in a fact pattern similar to Kovacs, the GRC attempted on two occasions to obtain a completed SOI from the Custodian. And, upon request from the Custodian's Counsel, immediately granted an extension of time for the Custodian to submit the SOI. The Custodian, however, never submitted a completed SOI to the GRC.

Therefore, because the GRC attempted several times to obtain a completed SOI from the Custodian, and even granted additional time for the Custodian to complete and submit the SOI, the Custodian's failure to provide a completed SOI to the GRC results in a violation of N.J.A.C. 5:105-2.4(a).

### **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.

#### **Request item number 1 - the nepotism policy for New Horizons Community Charter School**

The Complainant requested this item, and even included a cite to the regulation; however, the Custodian failed to disclose the item or provide the Complainant with a lawful reason for denying access. The Custodian stated that she would disclose a copy of the nepotism policy once the "Bylaws, policy and Regulation Manuals" were updated. The Complainant, however, did not request a copy of an updated policy, but rather the policy that existed as of the date of the request.

Therefore, because the Custodian failed to disclose the record responsive to request item number 1, or provide the Complainant with a lawful reason for denying access, the Custodian failed to bear her burden of proof that the denial of access to said record was lawful, and therefore must disclose it. N.J.S.A. 47:1A-6.

#### **Request item number 2 - dates of interviews and names of interviewers in the hiring process of Yashmine Cooper**

The New Jersey Appellate Division has held that OPRA "*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.*" MAG Entm't, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (citing N.J.S.A. 47:1A-1) (quotations omitted).

The Court reasoned that:

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 . . . . 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.]

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; Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>9</sup> 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).

Here, the Complainant sought dates of interviews and names of interviewers in a hiring process. Such a request is a request for information, not for identifiable government records.

Therefore, the Complainant’s request item number 2, seeking dates of interviews and names of interviewers in a hiring process, is invalid because it fails to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass’n, 390 N.J. Super. 166 at 180. Thus, the Custodian did not unlawfully deny access to the request item. N.J.S.A. 47:1A-6.

The Complainant also asserted in the complaint that the Custodian denied him access to the interviewers’ notes from the hiring process of Ms. Cooper. However, the evidence of record reveals that the Complainant never requested interviewers’ notes in his OPRA request dated June 21, 2018, which is the request that formed the basis of this complaint.

OPRA provides that, “[t]he council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or *without any reasonable factual basis.*” N.J.S.A. 47:1A-7(e) (emphasis added). Here, there is no unlawful denial of access to the interviewers’ notes because the Complainant never requested interviewers’ notes; therefore, with respect to this item the complaint lacks a factual basis to pursue.

Therefore, because the Complainant did not seek interviewers’ notes in his OPRA request which formed the basis of the complaint, the complaint, with respect to said interviewers’ notes, is without any reasonable factual basis to pursue. N.J.S.A. 47:1A-7(e).

The GRC also observes that, even if the Complainant did include interviewers’ notes in the request, the notes would likely be exempt from access because such notes are typically made during a meeting or interview as a memory aid. See O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007), where the complainant requested handwritten notes of an executive session meeting, and the court stated, “[w]e reject O’Shea’s contention that the Secretary’s handwritten notes, jotted down as a memory aid to assist in preparing the formal minutes, are public records merely because they were ‘made’ by a government official.” Id. at 538.

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<sup>9</sup> Affirming Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).



## **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.

## **Prevailing Party Attorney's Fees**

The Council defers analysis of whether the Complainant is a prevailing party 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 Custodian's response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the GRC attempted several times to obtain a completed Statement of Information from the Custodian, and even granted additional time for the Custodian to complete and submit the Statement of Information, the Custodian's failure to provide a completed Statement of Information to the GRC results in a violation of N.J.A.C. 5:105-2.4(a).
3. Because the Custodian failed to disclose the record responsive to request item number 1, or provide the Complainant with a lawful reason for denying access, the Custodian failed to bear her burden of proof that the denial of access to said record was lawful, and therefore must disclose it. N.J.S.A. 47:1A-6.
4. **The Custodian shall comply with paragraph #3 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 deliver<sup>10</sup> certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>11</sup> to the Council Staff.<sup>12</sup>**

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<sup>10</sup> 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.

<sup>11</sup> "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."

<sup>12</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

5. The Complainant's request item number 2, seeking dates of interviews and names of interviewers in a hiring process, is invalid because it fails to seek identifiable government records. MAG Entm't, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Thus, the Custodian did not unlawfully deny access to the request item. N.J.S.A. 47:1A-6.
6. Because the Complainant did not seek interviewers' notes in his OPRA request which formed the basis of the complaint, the complaint, with respect to said interviewers' notes, is without any reasonable factual basis to pursue. N.J.S.A. 47:1A-7(e).
7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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