



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

March 30, 2021 Government Records Council Meeting

Paul Liobe
Complainant

Complaint No. 2019-115

v.

County of Sussex
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 2021 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 failed to fully comply with the Council’s November 10, 2020 Interim Order. Specifically, the Custodian responded in the extended time frame disclosing the responsive personnel information and simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian only did so to the GRC and not the Complainant. This disclosure finally occurred on February 4, 2021.
2. The Custodian’s failure to timely respond resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the responsive disclosable personnel information and failed to fully comply with the Council’s Interim Order. Notwithstanding, the Custodian ultimately disclosed the responsive records to the Complainant on February 4, 2021. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 30th Day of March 2021

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: April 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 30, 2021 Council Meeting**

**Paul Liobe¹
Complainant**

GRC Complaint No. 2019-115

v.

**County of Sussex²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the name, title, position, salary, payroll record, length of service, date of separation (if applicable) and amount and type of pension received (if applicable) for all employees within the Sussex County Sheriff's Office ("SCSO") for 2016, 2017, and 2018.

Custodian of Record: Teresa Lyons
Request Received by Custodian: April 3, 2019
Response Made by Custodian: May 2, 2019
GRC Complaint Received: June 24, 2019

Background

November 10, 2020 Council Meeting:

At its November 10, 2020 public meeting, the Council considered the October 27, 2020 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 did not bear her burden of proof that she timely responded to the Complainant's April 1, 2019 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access to the Complainant's OPRA request seeking disclosable personnel information on the basis that same was invalid. N.J.S.A. 47:1A-

¹ No legal representation listed on record.

² No legal representation listed on record.

6; N.J.S.A. 47:1A-10; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010). Thus, the Custodian must disclose those records containing the most comprehensive amount of personnel information sought for 2016, 2017 and 2018. Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012). Should the Custodian believe a special service charge is warranted, she must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.

3. **The Custodian shall comply with conclusion No. 2 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 deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
4. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁶ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director within that twenty (20) business days a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**

³ 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.

⁴ "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."

⁵ 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.

⁶ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

5. 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 12, 2020, the Council distributed its Interim Order to all parties. On the same day, the Custodian e-mailed the Government Records Council ("GRC") stating that some scheduling issues may delay her response. The Custodian stated that she would speak with the Finance Department and provide a potential extension date to the GRC prior to the expiration of the prescribed time frame. On November 18, 2020, the GRC e-mailed the Custodian preemptively extending the time frame to respond through November 30, 2020. On November 25, 2020, the Custodian e-mailed the GRC seeking another extension of time to respond through December 4, 2020. On November 30, 2020, the GRC granted said extension.

On December 3, 2020, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she attached unredacted and redacted copies of payroll reports for 2016, 2017, and 2018. The Custodian noted that the redaction of deduction information was consistent with exemptions in Executive Order No. 11 (Gov. Byrne, 1974) ("EO 11"). The Custodian further certified that she was attaching a "December 1, 2020 Payroll Overview" created by the County Chief Financial Officer. The Custodian noted that the payroll reports did not include annual salary, but that the Complainant could "simply multiple income by 24 payments." The Custodian also certified that the County did not maintain any document or report containing dates of separation or type of pension.⁷ The Custodian stated that pensions are "determined by the State of New Jersey" and that an OPRA request to the pension fund administrators (PERS & PFRS) may be more appropriate.

On January 27, 2021, the Complainant e-mailed the Custodian stating that he only received a copy of her cover letter with no attachments. On January 28, 2021, the GRC e-mailed the parties confirming that the Custodian did not disclose redacted copies of the responsive records to the Complainant. The GRC noted that this failure to adhere to the Council's Order resulted in a failure to comply with it. The GRC thus required the Custodian to disclose the redacted records by February 4, 2021 and submit a supplemental certification to the GRC. On February 4, 2021, the Custodian e-mailed the Complainant the responsive redacted records and apologizing for her "misunderstanding of instructions." On the same day, the Complainant responded alleging that responsive records only included SCSO employees and not other divisions under that office (*i.e.* Bureau of Corrections, Communications Center, Emergency Management and Fire Marshal). The Custodian responded advising that she would discuss the Complainant's concerns with the Finance Department. On February 5, 2021, the Custodian e-mailed the Complainant stating that he only sought personnel information from the SCSO. The Custodian stated that the information disclosed came directly from the SCSO budget. The Custodian noted that the other identified offices are contained in separate budgets.

⁷ The GRC notes that the "Sheriff Payroll Overview" for 2020 did contain date of separation and pension information responsive to the subject OPRA request.

Later on February 5, 2021, the GRC e-mailed the parties confirming receipt of correspondence between them. The GRC noted that it did not receive the required supplemental certification and asked the Custodian whether she was sending via U.S. mail. On the same day, the Custodian confirmed that she would send the certification via U.S. mail.

On March 15, 2021, the GRC emailed the Custodian advising that it never received the supplemental certification. The GRC thus required the Custodian to e-mail the supplemental certification “as soon as possible.” On March 16, 2021, the Custodian submitted her supplemental certification. Therein, the Custodian certified that her failure to send the records to the Complainant was in error, but that she later disclosed them to the Complainant via e-mail on February 4, 2021. The Custodian further noted that she only provided personnel information from the SCSO budget and that the other offices identified by the Complainant in his February 5, 2021 e-mail were part of a separate budget.

Analysis

Compliance

At its November 10, 2020 meeting, the Council ordered the Custodian to disclose those records containing the most comprehensive amount of SCSO personnel information sought by the Complainant. The Council noted that should the Custodian determine that a special service charge is warranted, she must complete a 14-point analysis and present the resulting estimated cost to the Complainant. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4, to the Executive Director. On November 12, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on November 19, 2020.

On December 3, 2020, following a timely request for an extension of time, the Custodian responded to the Council’s Order by providing redacted and unredacted responsive records only to the GRC without imposition of a special service charge. On January 27, 2021, the Complainant notified the parties that he had not received the records previously provided to the GRC. On February 4, 2021, the Custodian forwarded copies of the redacted records to the Complainant apologizing for her “misunderstanding of instructions.”⁸ Thereafter, in response to the Complainant’s assertion that the disclosure was incomplete, the Custodian responded advising that the information disclosed was contained in the SCSO budget and those other offices were not part of that budget. The Custodian submitted a supplemental certification attesting to this fact, which the GRC received on March 16, 2021.

Upon review of the facts here, the evidence of record supports that the Custodian failed to fully comply with the Council’s Order. Initially, although the Custodian responded to the order within the extended time frame, she failed to provide copies of the responsive records to the Complainant. This disclosure did not occur until well after the expiration of the time frame to

⁸ This “misunderstanding” was likely due to a concurrent order in Liobe v. Cnty. of Sussex, GRC Complaint No. 2019-114 (Interim Order dated November 10, 2020), where the Custodian was required to submit redacted and unredacted copies of responsive records to the GRC only for an *in camera* review.

comply. However, the GRC is satisfied that the records ultimately disclosed were responsive to the request in question. This is because the Complainant's OPRA request specifically sought SCSO personnel information, and not any other County office information. Further, the disclosed records reasonably contain all information sought in the subject OPRA request.

Therefore, the Custodian failed to fully comply with the Council's November 10, 2020 Interim Order. Specifically, the Custodian responded in the extended time frame disclosing the responsive personnel information and simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian only did so to the GRC and not the Complainant. This disclosure finally occurred on February 4, 2021.

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's failure to timely respond resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the responsive disclosable personnel information and failed to fully comply with the Council's Interim Order. Notwithstanding, the Custodian ultimately disclosed the responsive records to the Complainant on February 4, 2021. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to fully comply with the Council's November 10, 2020 Interim Order. Specifically, the Custodian responded in the extended time frame disclosing the responsive personnel information and simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian only did so to the GRC and not the Complainant. This disclosure finally occurred on February 4, 2021.
2. The Custodian's failure to timely respond resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the responsive disclosable personnel information and failed to fully comply with the Council's Interim Order. Notwithstanding, the Custodian ultimately disclosed the responsive records to the Complainant on February 4, 2021. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

March 23, 2021



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

November 10, 2020 Government Records Council Meeting

Paul Liobe
Complainant

Complaint No. 2019-115

v.

County of Sussex
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 2020 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 did not bear her burden of proof that she timely responded to the Complainant’s April 1, 2019 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access to the Complainant’s OPRA request seeking disclosable personnel information on the basis that same was invalid. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010). Thus, the Custodian must disclose those records containing the most comprehensive amount of personnel information sought for 2016, 2017 and 2018. Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012). Should the Custodian believe a special service charge is warranted, she must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

4. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁴ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director within that twenty (20) business days a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
5. 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.

Interim Order Rendered by the
Government Records Council
On The 10th Day of November 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁴ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

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 12, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting**

**Paul Liobe¹
Complainant**

GRC Complaint No. 2019-115

v.

**County of Sussex²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the name, title, position, salary, payroll record, length of service, date of separation (if applicable) and amount and type of pension received (if applicable) for all employees within the Sussex County Sheriff’s Office (“SCSO”) for 2016, 2017, and 2018.

Custodian of Record: Teresa Lyons
Request Received by Custodian: April 3, 2019
Response Made by Custodian: May 2, 2019
GRC Complaint Received: June 24, 2019

Background³

Request and Response:

On April 1, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 2, 2019, the twentieth (20th) business day after receipt of the OPRA request, the Custodian responded in writing denying the OPRA request as invalid because it sought information or asked questions.

Denial of Access Complaint:

On June 24, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian unlawfully denied his OPRA request as invalid. The Complainant noted that OPRA specifically identified that certain personnel information constituted records subject to access. N.J.S.A. 47:1A-10.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

Statement of Information:⁴

On September 17, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 3, 2019. The Custodian certified that she responded in writing on May 2, 2019 denying the request as invalid.

The Custodian contended that the Complainant’s April 1, 2019 request failed to identify specific government records. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian argued that she was not required to conduct research or create records in order to respond to the subject request.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the matter before the Council, the Custodian certified in the SOI that she received the subject OPRA request on April 3, 2019. However, the Custodian also certified that she did not respond to the subject OPRA request until May 2, 2019, the twentieth (20th) business day after receipt of same. Thus, the evidence of record clearly supports that the Custodian failed to respond within the statutory time frame. Thus, a “deemed” denial occurred here.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s April 1, 2019 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

⁴ On July 16, 2019, this complaint was referred to mediation. On August 15, 2019, this complaint was referred back for adjudication.

⁵ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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. (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).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004).

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant's request was a request for information, holding that "because request Item No. 2 of the Complainant's June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to [MAG] . . ." Id. at 6. See also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).

However, 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 exceptions include "an 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." N.J.S.A. 47:1A-10.

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010), the Council determined that "name, title, position, salary, payroll record and length of service" is information which is specifically considered to be a "government record" under N.J.S.A. 47:1A-10, and that "payroll records" must be disclosed pursuant to Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004) (defining a "payroll record" for purposes of OPRA as records relating to payment of a public employee). 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. Additionally, prior GRC case law supports the disclosure of database information regarding personnel actions. See Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009). Further, the Council has previously required that responding to an OPRA request for personnel information requires a custodian provide the most comprehensive records containing the responsive information. Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012).

Here, the Complainant's OPRA request sought the name, title, position, salary, payroll record, length of service, date of separation (if applicable) and amount and type of pension received (if applicable) for all employees within the SCSO for 2016, 2017, and 2018. The Custodian responded denying the request as invalid because it sought information and did not identify a specific "government record." This complaint ensued, wherein the Complainant argued that he sought "allowable records" under N.J.S.A. 47:1A-10. In the SOI, the Custodian maintained her position that said request was invalid citing Bent, 381 N.J. Super. 30.

While the Complainant only identified information within his OPRA request, the Council's decision in Danis supports a conclusion that the request was valid. Specifically, the Complainant composed his request based on the exact language contained within N.J.S.A. 47:1A-10. As this information is specifically identified as government records for purposes of OPRA, this complaint is similar to Danis and can be distinguished from LaMantia, GRC 2008-140. For this reason, the subject OPRA request is valid pursuant to Danis, 2009-156, *et seq.* and the Custodian was required to disclose those records, whether paper or electronic, that contained the disclosable personnel information sought.

Accordingly, the Custodian unlawfully denied access to the Complainant's OPRA request seeking disclosable personnel information on the basis that same was invalid. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Danis, GRC 2009-156. Thus, the Custodian must disclose those records containing the most comprehensive amount of personnel information sought for 2016, 2017 and 2018. Valdes, GRC 2011-64. Should the Custodian believe a special service charge is warranted, she must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.

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. The Custodian did not bear her burden of proof that she timely responded to the Complainant's April 1, 2019 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access to the Complainant's OPRA request seeking disclosable personnel information on the basis that same was invalid. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010). Thus, the Custodian must disclose those records containing the most comprehensive amount of personnel information sought for 2016, 2017 and 2018. Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012). Should the Custodian believe a special service charge is warranted, she must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁷**

⁷ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹

4. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis¹⁰ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director within that twenty (20) business days a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

October 27, 2020

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

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

¹⁰ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf> .