



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

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

March 26, 2024 Government Records Council Meeting

Kenneth S. Goodkind
Complainant

Complaint No. 2021-84

v.

NJ Civil Service Commission
Custodian of Record

At the March 26, 2024 public meeting, the Government Records Council (“Council”) considered the March 19, 2024 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 dismiss the complaint because the Complainant, through Mr. Cohen, withdrew the instant complaint in a letter to the Office of Administrative Law dated December 22, 2023. Therefore, no further adjudication is required.

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 26th Day of March 2024

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, 2024



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 26, 2024 Council Meeting**

**Kenneth S. Goodkind¹
Complainant**

GRC Complaint No. 2021-84

v.

**N.J. Civil Service Commission²
Custodial Agency**

Records Relevant to Complaint:

February 26, 2021 OPRA Request: Copies of any and all e-mails to or from four (4) individuals regarding the plan, tentative plan, or proposed date(s) to announce, have applications available, and administer the “NJ Law Enforcement Entry Exam” (“LEE”) and “Firefighter Entry Exam” (“FEE”).

March 29, 2021 OPRA Request: Copies of any and all e-mails sent to or from five (5) individuals between January 1, 2021 and March 24, 2021 regarding test date scheduling for three (3) promotional exams; or alternatively scheduling and test date information for each

Custodian of Record: Randy Belin

Request Received by Custodian: February 26, 2021; March 29, 2021

Response Made by Custodian: March 3, 2021; April 7, 2021

GRC Complaint Received: April 19, 2021

Background

August 29, 2023 Council Meeting:

At its August 29, 2023 public meeting, the Council considered the August 22, 2023 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 did not fully comply with the Council’s June 28, 2022 Interim Order. Specifically, the Custodian responded timely within the extended time frame to do so provided certified confirmation of compliance to the Executive Director. However, the Custodian did not submit a completed document index and did not disclose a redacted version of the withheld e-mail he did include in that index.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Craig S. Keiser.

2. Due to contested facts, the GRC is unable to determine whether the Custodian unlawfully denied access to either of the Complainant’s two (2) OPRA requests. The Administrative Procedures Act provides that the Office of Administrative Law “shall acquire jurisdiction over a matter only after it has been [determined] to be a contested case by an agency head and has been filed with the Office of Administrative Law” N.J.A.C. 1:1-3.2(a). Accordingly, it is necessary to refer this matter to the Office of Administrative Law for a hearing to develop the record in order to determine whether the Custodian lawfully denied access to any records responsive to the Complainant’s two (2) OPRA requests. This fact-finding hearing should include a definitive clarification of the factual record currently beset by conflicting statements made by the Custodian, Ms. Todd, and the Complainant, a full accounting all responsive records and whether they were disclosed or denied, an *in camera* to determine the application of a particular exemption (where applicable), and any additional actions necessary to fully develop the record. Further, for purposes of efficacy, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Procedural History:

On August 29, 2023, the Council distributed its Interim Order to all parties. On December 19, 2023, the Government Records Council (“GRC”) transmitted the complaint to the Office of Administrative Law (“OAL”). On December 22, 2023, Jeffrey A. Cohen, Esq., the Complainant’s law firm partner, sent a letter to the OAL withdrawing the instant complaint.³ On February 22, 2024, the OAL returned the complaint back to the GRC marked “Withdrawal.”

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss the complaint because the Complainant, through Mr. Cohen, withdrew the instant complaint in a letter to the Office of Administrative Law dated December 22, 2023. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

March 19, 2024

³ The Complainant was copied on this letter and Mr. Cohen later explained to the OAL in an e-mail that he was a “fellow shareholder of the [Complainant]” and took the complaint over for him.



State of New Jersey

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PHILIP D. MURPHY
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SHEILA Y. OLIVER
Lieutenant Governor

KIMBERLY K. HOLMES
Acting Commissioner

INTERIM ORDER

August 29, 2023 Government Records Council Meeting

Kenneth S. Goodkind
Complainant

Complaint No. 2021-84

v.

NJ Civil Service Commission
Custodian of Record

At the August 29, 2023 public meeting, the Government Records Council (“Council”) considered the August 22, 2023 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 did not fully comply with the Council’s June 28, 2022 Interim Order. Specifically, the Custodian responded timely within the extended time frame to do so provided certified confirmation of compliance to the Executive Director. However, the Custodian did not submit a completed document index and did not disclose a redacted version of the withheld e-mail he did include in that index.
2. Due to contested facts, the GRC is unable to determine whether the Custodian unlawfully denied access to either of the Complainant’s two (2) OPRA requests. The Administrative Procedures Act provides that the Office of Administrative Law “shall acquire jurisdiction over a matter only after it has been [determined] to be a contested case by an agency head and has been filed with the Office of Administrative Law . . .” N.J.A.C. 1:1-3.2(a). Accordingly, it is necessary to refer this matter to the Office of Administrative Law for a hearing to develop the record in order to determine whether the Custodian lawfully denied access to any records responsive to the Complainant’s two (2) OPRA requests. This fact-finding hearing should include a definitive clarification of the factual record currently beset by conflicting statements made by the Custodian, Ms. Todd, and the Complainant, a full accounting all responsive records and whether they were disclosed or denied, an *in camera* to determine the application of a particular exemption (where applicable), and any additional actions necessary to fully develop the record. Further, for purposes of efficacy, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 29th Day of August 2023

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 29, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 29, 2023 Council Meeting**

**Kenneth S. Goodkind¹
Complainant**

GRC Complaint No. 2021-84

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Records Relevant to Complaint:

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March 29, 2021 OPRA Request: Copies of any and all e-mails sent to or from five (5) individuals between January 1, 2021 and March 24, 2021 regarding test date scheduling for three (3) promotional exams; or alternatively scheduling and test date information for each

Custodian of Record: Randy Belin

Request Received by Custodian: February 26, 2021; March 29, 2021

Response Made by Custodian: March 3, 2021; April 7, 2021

GRC Complaint Received: April 19, 2021

Background

June 28, 2022 Council Meeting:

At its June 28, 2022 public meeting, the Council considered the June 21, 2022 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 may have unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). Specifically, the evidence and arguments presented by the Custodian does not per say support the non-existence of records. See also Welenc v. N.J. State Police, GRC Complaint No. 2017-134

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Craig S. Keiser.

(Interim Order dated February 26, 2019). Instead, the Custodian's assertion of exempt e-mails is not akin to a factual determination that no records to either OPRA request exist. Thus, the Custodian shall perform a search for the records sought and disclose those that exist, including a document index identifying the responsive e-mails located for each OPRA request. Should the Custodian locate responsive e-mails and believe that portions thereof are exempt from disclosure, he must present that argument within the index and disclose the e-mail with redactions. Should the Custodian ultimately determine that no records for one or both e-mails exist, he must also certify to this fact.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 29, 2022, the Council distributed its Interim Order to all parties. On July 6, 2022, Custodian's Counsel e-mailed the Government Records Council ("GRC") seeking a five (5) business day extension of time to comply with the Council's Order based on the potential that disclosure may have resolved the matter. On July 7, 2022, the GRC responded granting an extension of time through July 14, 2022. On July 14, 2022, Custodian's Counsel e-mailed the GRC seeking a second extension of five (5) business days to comply with the Council's Order based on a potential settlement. On July 15, 2022, the GRC granted a second extension of time through July 21, 2022.

On July 21, 2022, the Custodian responded to the Council's Interim Order. Therein, the Custodian affirmed that a search for responsive records resulted in 824 e-mails, of which only two (2) were responsive to the Complainant's OPRA requests. The Custodian certified that the first e-mail was disclosed to the Complainant in its entirety; however, the second e-mail and draft attachments were withheld under the "inter-agency or intra-agency advisory, consultative or deliberative [("ACD")] material" exemption. N.J.S.A. 47:1A-1.1.

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.

On August 19, 2022, the GRC contacted the Complainant to determine whether all issues in this complaint were resolved and that he would be withdrawing the instant complaint. On August 22, 2022, the Complainant e-mailed the GRC advising that he contacted Custodian's Counsel regarding an incomplete response. The Complainant noted that he was still seeking an amicable conclusion and would advise further upon contact from Custodian's Counsel. On October 24, 2022, the GRC e-mailed the Complainant seeking a status update. On October 25, 2022, the Complainant responded advising that he had "not received further" records from the Civil Service Commission ("CSC"). The Complainant noted that he attempted to continue working with CSC employee Eugene Lanzoni but had been unsuccessful. The Complainant further noted that he received most of the records sought "from other sources" but that CSC was not absolved from disclosing responsive records.

Analysis

Compliance

At its June 29, 2022 meeting, the Council ordered the Custodian to perform a new search and disclose those e-mails responsive to the Complainant's two (2) OPRA requests. The Council further ordered that should the Custodian locate e-mails, he must submit a document index identifying each and indicating any exemptions that may apply thereto. The Council also ordered the Custodian to redact and disclose to the Complainant those e-mails he believed contained exempt information. Finally, the Custodian was required to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On June 29, 2022, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 7, 2022.

On July 6, 2022, Custodian's Counsel e-mailed the GRC seeking an extension of the compliance response time frame, which the GRC granted through July 14, 2022. On July 14, 2022, Custodian's Counsel sought another extension of time through July 21, 2022 due to a potential resolution to this complaint, which the GRC again granted. On July 21, 2022, the final business day of the extended time frame to comply, the Custodian responded to the Interim Order. Therein, the Custodian certified that searches relative to both OPRA requests were performed, and 824 e-mails were located as potentially responsive thereto. The Custodian certified that upon review, he determined that two (2) e-mails were responsive to the OPRA requests: one was disclosed concurrent to his certification and the other (along with draft attachments) is exempt under the ACD exemption.

Upon review, the GRC finds that the Custodian did not comply fully with the Council's Order. Timeliness is not an issue here, as Custodian's Counsel sought extensions and the Custodian's certification was received prior to the expiration thereof. However, the Order specifically required the Custodian to: 1) provide a document index identifying all records located; and 2) redact and disclose any located e-mails if he was asserting that they contained exempted material. While the Custodian did submit a document index, it only identifies the e-mail he asserted was exempt. Further, the evidence of record does not support that the Custodian disclosed the record with redactions due to the vague wording within the Custodian's certification and document

index. Thus, the GRC is persuaded that the Custodian failed to follow the Council's Order in its entirety.

Therefore, the Custodian did not fully comply with the Council's June 28, 2022 Interim Order. Specifically, the Custodian responded timely within the extended time frame to do so provided certified confirmation of compliance to the Executive Director. However, the Custodian did not submit a completed document index and did not disclose a redacted version of the withheld e-mail he did include in that index.

Contested Facts

The Administrative Procedures Act ("APA") provides that the Office of Administrative Law ("OAL") "shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . ." N.J.A.C. 1:1-3.2(a). In the past, when the issue of contested facts have arisen from a custodian's compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. See Hyman v. City of Jersey City (Hudson), GRC Complaint No. 2007-118 (Interim Order dated September 25, 2012); Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); Latz v. Twp. of Barnegat (Ocean), GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

In the matter before the Council, the evidence of record before the GRC contains significant contested facts resulting from vague and confusing statements from the parties. The Council's Interim Order was further met with vague and confusing statements that only exacerbated the confusion. The overall evidence of record is one of unclear and contested facts driven by the following significant issues: 1) the Custodian's Statement of Information certification that no records existed even though records were disclosed before and after said submission; 2) the Custodian's assertion that 824 located e-mails resulted in only two (2) responsive records, even though several others were disclosed previously; 3) statements on April 27, 2021 from Senior Counsel Patricia Todd that no 2021 e-mails exist, followed by the identification of a responsive March 3, 2021 e-mail identified as exempt in the Custodian's compliance response; and 4) apparent offers to disclose additional records in an attempt to resolve this complaint following the Custodian's compliance response. The result of the above is the GRC's inability to conduct a meaningful adjudication needed to reach a conclusion due to the lack of competent and credible evidence. Thus, the GRC finds that referral to the OAL for a fact-finding hearing to develop the record is necessary.

Therefore, due to contested facts, the GRC is unable to determine whether the Custodian unlawfully denied access to either of the Complainant's two (2) OPRA requests. The APA provides that the OAL "shall acquire jurisdiction over a matter only after it has been [determined] to be a contested case by an agency head and has been filed with the [OAL] . . ." N.J.A.C. 1:1-3.2(a). Accordingly, it is necessary to refer this matter to the OAL for a hearing to develop the record in order to determine whether the Custodian lawfully denied access to any records responsive to the Complainant's two (2) OPRA requests. This fact-finding hearing should include a definitive clarification of the factual record currently beset by conflicting statements made by the Custodian, Ms. Todd, and the Complainant, a full accounting all responsive records and

whether they were disclosed or denied, an *in camera* to determine the application of a particular exemption (where applicable), and any additional actions necessary to fully develop the record. Further, for purposes of efficacy, the OAL should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council’s June 28, 2022 Interim Order. Specifically, the Custodian responded timely within the extended time frame to do so provided certified confirmation of compliance to the Executive Director. However, the Custodian did not submit a completed document index and did not disclose a redacted version of the withheld e-mail he did include in that index.

2. Due to contested facts, the GRC is unable to determine whether the Custodian unlawfully denied access to either of the Complainant’s two (2) OPRA requests. The Administrative Procedures Act provides that the Office of Administrative Law “shall acquire jurisdiction over a matter only after it has been [determined] to be a contested case by an agency head and has been filed with the Office of Administrative Law . . .” N.J.A.C. 1:1-3.2(a). Accordingly, it is necessary to refer this matter to the Office of Administrative Law for a hearing to develop the record in order to determine whether the Custodian lawfully denied access to any records responsive to the Complainant’s two (2) OPRA requests. This fact-finding hearing should include a definitive clarification of the factual record currently beset by conflicting statements made by the Custodian, Ms. Todd, and the Complainant, a full accounting all responsive records and whether they were disclosed or denied, an *in camera* to determine the application of a particular exemption (where applicable), and any additional actions necessary to fully develop the record. Further, for purposes of efficacy, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

August 22, 2023



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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 28, 2022 Government Records Council Meeting

Kenneth S. Goodkind
Complainant

Complaint No. 2021-84

v.
NJ Civil Service Commission
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 2022 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 may have unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). Specifically, the evidence and arguments presented by the Custodian does not per say support the non-existence of records. See also Welenc v. N.J. State Police, GRC Complaint No. 2017-134 (Interim Order dated February 26, 2019). Instead, the Custodian’s assertion of exempt e-mails is not akin to a factual determination that no records to either OPRA request exist. Thus, the Custodian shall perform a search for the records sought and disclose those that exist, including a document index identifying the responsive e-mails located for each OPRA request. Should the Custodian locate responsive e-mails and believe that portions thereof are exempt from disclosure, he must present that argument within the index and disclose the e-mail with redactions. Should the Custodian ultimately determine that no records for one or both e-mails exist, he must also certify to this fact.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

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

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.

Interim Order Rendered by the
Government Records Council
On The 28th Day of June 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 29, 2022

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 Executive Director
June 28, 2022 Council Meeting**

**Kenneth S. Goodkind¹
Complainant**

GRC Complaint No. 2021-84

v.

**N.J. Civil Service Commission²
Custodial Agency**

Records Relevant to Complaint:

February 26, 2021 OPRA Request: Copies of any and all e-mails to or from four (4) individuals regarding the plan, tentative plan, or proposed date(s) to announce, have applications available, and administer the “NJ Law Enforcement Entry Exam” (“LEE”) and “Firefighter Entry Exam” (“FEE”).

March 29, 2021 OPRA Request: Copies of any and all e-mails sent to or from five (5) individuals between January 1, 2021 and March 24, 2021 regarding test date scheduling for three (3) promotional exams; or alternatively scheduling and test date information for each

Custodian of Record: Randy Belin

Request Received by Custodian: February 26, 2021; March 29, 2021

Response Made by Custodian: March 3, 2021; April 7, 2021

GRC Complaint Received: April 19, 2021

Background³

Request and Response:

On February 26, 2021, the Complainant submitted his first (1st) Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 3, 2021, the Custodian responded in writing stating that no final plans were approved to administer the FEE and all current entry level lists were extended for either one (1) year or until a new list is available. On the same day, the Complainant responded thanking the Custodian for his response and noting that it only addressed the FEE. The Complainant asked whether the LEE portion of the request

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Craig S. Keiser.

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.

was still under review. On March 5, 2021, the Custodian responded advising that the LEE was issued in May 2020 and did not expire until May 2020 with no extensions necessary.

On March 9, 2021, the Complainant e-mailed the Custodian stating that he believed clarification was necessary. The Complainant noted that he understood no final plan existed, but that he was seeking communications regarding the Civil Service Commission's ("CSC") tentative or most current plan for when LEE and FEE entry exam applications will be available and submitted. The Complainant further noted that an e-mail from one of the individuals identified in the OPRA request advise that there was a tentative and proposed plan for the month and year tests will be administered. The Complainant stated that, in lieu of producing e-mails, he would accept identification of the "tentative planned month and year" applications will be available and exams administered. On March 10, 2021, the Custodian responded in writing reiterating his March 3, 2021 response and noting that communications exchanged under the deliberative process were exempt from disclosure under OPRA. The Custodian asked the Complainant to confirm whether he would like to be notified of CSC's final decision on exam start dates.

On March 15, 2021, the Custodian disclosed three (3) pages of e-mails to the Complainant. On the same day, the Complainant confirmed receipt and noted that the e-mails end in December 2020. The Complainant posited that additional e-mails in 2021 likely exist and he sought those as well. The Complainant further again stressed that he was seeking records showing when the LEE and FEE application processes were due to start.

On March 29, 2021, the Complainant submitted his second (2nd) OPRA request to the Custodian seeking the above-mentioned records. On April 7, 2021, the Custodian responded in writing advising that CSC did not approve any scheduling information for the identified exams. The Custodian further noted that any additional "draft" records, such as e-mails and notes, used during the deliberation process were not subject to disclosure. N.J.S.A. 47:1A-1.1; Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006).

Denial of Access Complaint:

On April 19, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that this complaint is "straightforward": the Custodian disclosed only select correspondence instead of all responsive records. The Complainant argued that the Custodian had no legal basis for failing to produce the responsive records.

Supplemental Response:

On April 27, 2021, Senior Counsel Patricia Todd sent a letter to the Complainant advising that no 2021 e-mails regarding the FEE and LEE existed. Ms. Todd noted that CSC was still exploring options for the resumption of both examinations, but that "[t]hese discussions are ongoing" and "[n]o decisions have yet been made." On April 29, 2021, the Complainant e-mailed Ms. Todd disputing her letter, which did not identify either subject OPRA request or this complaint. The Complainant sought answers to two (2) questions regarding examination scheduling as an alternative to additional records. The Complainant noted however that CSC's

inability to answer the questions would result in him requiring disclosure of all records responsive to the subject OPRA requests.⁴ On the same day, Ms Todd confirmed receipt of the Complainant's e-mail and noted that she would "forward" same to the Custodian for review.

Statement of Information:

On June 2, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA requests on February 26, 2021 and March 29, 2021 respectively. The Custodian certified that he responded in writing on March 3, 2021 and April 7, 2021 denying both requests because no final FEE or LEE plans were approved and that any communications regarding same were exempt under the deliberative process. N.J.S.A. 47:1A-1.1; Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006).

The Custodian contended that he properly responded because CSC had no final or tentative plans for either the FEE or the LEE, which was issued in May 2020 and good for two (2) years. The Custodian argued that any discussions regarding either examination process were ultimately deliberative because no plans were approved. The Custodian further averred that no records existed and thus this complaint should be dismissed. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian contended that at no point did CSC advise that records existed, and he has now certified that no e-mails existed. The Custodian further argued that the Complainant failed to submit evidence to contradict the certification as it relates to 2021 e-mails.

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. However, should a complainant provide competent, credible evidence to refute a legal certification, the Council held that a custodian violated OPRA. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). In Welenc v. N.J. State Police, GRC Complaint No. 2017-134 (Interim Order dated February 26, 2019), the Council looked to forgoing in determining that an unlawful denial of access may have occurred therein. The Council reasoned that although the custodian certified that the New Jersey State Police ("NJSP") did not maintain pension information on five (5) officers, he disclosed pension information for one of them. The Council was also persuaded by this disclosure to order the custodian to perform additional searches to ensure that the NJSP did not maintain any of the information sought.

⁴ The Complainant noted that he also filed a new OPRA request for communications and other records related to the FEE and LEE exams with a time frame of January 1, 2021 and April 30, 2021.

In the matter before the Council, the Custodian's responses to the Complainant's two (2) OPRA requests were a combination of assertions that no records existed, records were exempt from disclosure as draft and deliberative documents, as well as an actual disclosure of a few e-mails. The Custodian subsequently certified in the SOI that no responsive records existed. While such a response typically results in a finding similar to Pusterhofer, GRC 2005-49, conflicting facts here require a different outcome. Specifically, the evidence of record supports that at least some e-mails existed because the Custodian disclosed them, even while continuing to assert in the SOI that at no point did he ever indicate the existence thereof. Thus, the argument presented by the Custodian does not support his assertion that no record exists. Welenc, GRC2017-134.

Therefore, the Custodian may have unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carter, GRC 2011-76. Specifically, the evidence and arguments presented by the Custodian does not per say support the non-existence of records. See also Welenc, GRC 2017-134. Instead, the Custodian's assertion of exempt e-mails is not akin to a factual determination that no records to either OPRA request exist. Thus, the Custodian shall perform a search for the records sought and disclose those that exist, including a document index identifying the responsive e-mails located for each OPRA request. Should the Custodian locate responsive e-mails and believe that portions thereof are exempt from disclosure, he must present that argument within the index and disclose the e-mail with redactions. Should the Custodian ultimately determine that no records for one or both e-mails exist, he must also certify to this fact.

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 may have unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). Specifically, the evidence and arguments presented by the Custodian does not per say support the non-existence of records. See also Welenc v. N.J. State Police, GRC Complaint No. 2017-134 (Interim Order dated February 26, 2019). Instead, the Custodian's assertion of exempt e-mails is not akin to a factual determination that no records to either OPRA request exist. Thus, the Custodian shall perform a search for the records sought and disclose those that exist, including a document index identifying the responsive e-mails located for each OPRA request. Should the Custodian locate responsive e-mails and believe that portions thereof are exempt from disclosure, he must present that argument within the index and disclose the e-mail with redactions. Should the Custodian ultimately determine that no records for one or both e-mails exist, he must also certify to this fact.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 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.

Prepared By: Frank F. Caruso
Executive Director

June 21, 2022

⁵ 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.

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.