INTERIM ORDER

June 28, 2022 Government Records Council Meeting

Kenneth S. Goodkind
Complainant

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

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.

“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.”

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
Kenneth S. Goodkind v. N.J. Civil Service Commission, 2021-84 – Findings and Recommendations of the Executive Director
June 28, 2022 Council Meeting

Kenneth S. Goodkind1
Complainant

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

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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.

Kenneth S. Goodkind v. N.J. Civil Service Commission, 2021-84 – Findings and Recommendations of the Executive Director
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. 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. 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, GRC 2017-134.

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 deliver\textsuperscript{5} certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,\textsuperscript{6} to the Executive Director.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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.”

\textsuperscript{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.