State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

April 30, 2013 Government Records Council Meeting

David Herron
Complainant
v.
New Jersey Department of Education
Custodian of Record

Complaint No. 2011-324

At the April 30, 2013 public meeting, the Government Records Council ("Council") considered the January 22, 2013[1] Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian timely complied with the Council's December 18, 2012 Order by certifying that she re-redacted the responsive transcripts and sent same to the Complainant via e-mail and further identified those records that did not exist within the extended time frame.

2. Although the Custodian unlawfully redacted grade point averages from the responsive transcripts pursuant to N.J.S.A. 47:1A-10, the Custodian timely complied with the Council's Order. 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, it is concluded that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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.

[1] This complaint was prepared for adjudication at the Council's January 29, February 26, and March 22, 2013 meetings; however, the complaint could not be adjudicated due to lack of quorum.

Final Decision Rendered by the
Government Records Council
On The 30th Day of April, 2013

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: May 2, 2013

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting

David Herron[1] **GRC Complaint No. 2011-324**
Complainant

v.

New Jersey Department of Education[2]
Custodian of Records

Records Relevant to Complaint: Copy of the following:

- Bell, Steven – All college transcripts.
- Brennan, Benjamin – All college transcripts.
- Brennan, Benjamin – All certifications and licenses.
- Cattano, Andrew – All college transcripts.
- Cattano, Andrew – All certifications and licenses.
- Chiles, Jr., Michael – Oakwood College transcript.
- Chiles, Jr., Michael – Essex County College transcript.
- Chiles, Jr., Michael – Unredacted transcripts showing Grade Point Average (GPA).
- Citro, Gerard T. – All college transcripts.
- Citro, Gerard T. – All certifications and licenses.
- Cooper, Damen – Unredacted transcripts showing GPA.
- Dalbo, Anthony – All college transcripts.
- Decker, Rebecca L. – Unredacted transcripts showing GPA.
- Denson, Robert – All college transcripts.
- Frisch, Maryann – Unredacted transcripts showing GPA.
- Golding, Keshia Nicole – Unredacted transcripts showing GPA.
- Jannah, Latifah – All college transcripts.
- Lendman, Linda – All college transcripts.
- Mulvaney, Sharon – All college transcripts.
- Polizzano, Debra – All college transcripts.
- Sackner, Karen Pearl – Unredacted transcripts showing GPA.
- Settembrino, III, Arthur – Unredacted transcripts showing GPA.
- Smith, Christina E. – Unredacted transcripts showing GPA.
- Sullivan, Karen P. – Unredacted transcript showing GPA.
- Weintraub, Rebecca Lynn – Unredacted transcripts showing GPA.
- Yarborough, Leonard – All college transcripts.

[1] No legal representation listed on record.
[2] Represented by DAG Susan Huntley, on behalf of the NJ Attorney General.

Request Made: September 6, 2011
Response Made: September 7, 2011
Custodian: Maria Casale
GRC Complaint Filed: October 24, 2011[3]

Background

December 18, 2012

Government Records Council's ("Council") Interim Order. At its December 18, 2012 public meeting, the Council considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. Because the individual grades are not data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to N.J.S.A. 47:1A-10, the Custodian's redaction of the individual grades contained in the requested transcripts is lawful pursuant to N.J.S.A. 47:1A-10. However, because a minimum grade point average is required to obtain licensure from the New Jersey Department of Education, the grade point average is data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to N.J.S.A. 47:1A-10. As such, the grade point averages contained on the requested transcripts are public and the Custodian unlawfully redacted the grade point averages. Thus, the Custodian must disclose all transcripts without redaction of the grade point average.

2. The Custodian must disclose to the Complainant any additional records that exist. In the case of transcripts, the Custodian must provide same in conformity with the GRC's previous analysis. Moreover, if records do not exist for certain individuals, the Custodian must state as such for each individual. If no further records responsive beyond those already provided exist, the Custodian must certify to same.

3. **The Custodian shall comply with Items No. 1 and 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[4] to the Executive Director.[5]**

[3] The GRC received the Denial of Access Complaint on said date.
[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 records 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

4. 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.

December 19, 2012

Council's Interim Order ("Order") distributed to the parties.

December 21, 2012

E-mail from the Custodian to the GRC. The Custodian requests an extension of time to comply with the Council's Order. The Custodian states that she does not have copies of unredacted records in her possession and must obtain same from the Office of Licensure and Credentials ("OLC") and will not be in the office for a week.

December 21, 2012

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until January 4, 2013 to submit compliance.

January 4, 2013

Custodian's response to the Council's Order attaching the following:

- Government Records Request Receipt printed on January 4, 2013.
- Responsive records.

The Custodian certifies that she obtained 28 pages of unredacted transcripts from the OLC and re-redacted same. The Custodian certifies that semester and cumulative grade point averages ("GPA") are now visible in accordance with the Council's Order.

The Custodian further certifies that she revised the records receipt to clearly state which individuals were not found in the OLC database. The Custodian certifies that the receipt clearly identifies those individuals for which she had either credential information or transcripts as well as those individuals for which credential information existed but not transcripts. The Custodian thus certifies that no transcripts or certifications existed for the following:

- Alvarez, Nancy
- Brennan, Benjamin
- Cattano, Andrew
- Citro, Gerard T.
- Gilbert, Johanna
- Lennon, Barbara
- Malone, Jamie
- Yarborough, Cassandra

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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.

The Custodian further certifies that no transcripts existed for the following:

- Bell, Steven
- Dalbo, Anthony
- Denson, Robert
- Jannah, Latifah
- Lendman, Linda
- Mulvaney, Sharon
- Polizzano, Debra
- Yarborough, Leonard

Analysis

Whether the Custodian complied with the Council's December 18, 2012 Interim Order?

At its December 18, 2012 meeting, the Council ordered the Custodian to:

> "…disclose all transcripts without redaction of the grade point average ... [and] any additional records that exist. In the case of transcripts, the Custodian must provide same in conformity with the GRC's previous analysis. Moreover, if records do not exist for certain individuals, the Custodian must state as such for each individual. If no further records responsive beyond those already provided exist, the Custodian must certify to same. **The Custodian shall comply with Item 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**" (Footnotes omitted.)

The Council disseminated its Order to the parties on December 19, 2012. Thus, the Custodian's response was due by close of business on December 27, 2012. On December 21, 2012, the Custodian sought an extension of time to comply with the Council's Order. The GRC granted the Custodian said extension until January 4, 2013.

On January 4, 2013, the Custodian e-mailed her certified confirmation of compliance along with copies of the redacted records in accordance with the Council's Order to all parties. The Custodian's certification further identified those records that did not exist.[6]

Therefore, the Custodian timely complied with the Council's December 18, 2012 Order by certifying that she re-redacted the responsive transcripts and sent same to the

[6] The GRC compared the records identified as at issue in this complaint with the Custodian's certification and determined that all records were accounted for by the Custodian.

Complainant via e-mail and further identified those records that did not exist within the extended time frame.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

> "… If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]…" N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

Although the Custodian unlawfully redacted GPAs from the responsive transcripts pursuant to N.J.S.A. 47:1A-10, the Custodian timely complied with the Council's Order. 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, it is concluded that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council's December 18, 2012 Order by certifying that she re-redacted the responsive transcripts and sent same to the Complainant via e-mail and further identified those records that did not exist within the extended time frame.

2. Although the Custodian unlawfully redacted grade point averages from the responsive transcripts pursuant to N.J.S.A. 47:1A-10, the Custodian timely complied with the Council's Order. 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, it is concluded that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

January 22, 2013[7]

[7] This complaint was prepared for adjudication at the Council's January 29, February 26, and March 22, 2013 meetings; however, the complaint could not be adjudicated due to lack of quorum.

State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

David Herron
Complainant
v.
New Jersey Department of Education
Custodian of Record

Complaint No. 2011-324

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the individual grades are not data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to N.J.S.A. 47:1A-10, the Custodian's redaction of the individual grades contained in the requested transcripts is lawful pursuant to N.J.S.A. 47:1A-10. However, because a minimum grade point average is required to obtain licensure from the New Jersey Department of Education, the grade point average is data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to N.J.S.A. 47:1A-10. As such, the grade point averages contained on the requested transcripts are public and the Custodian unlawfully redacted the grade point averages. Thus, the Custodian must disclose all transcripts without redaction of the grade point average.

2. The Custodian must disclose to the Complainant any additional records that exist. In the case of transcripts, the Custodian must provide same in conformity with the GRC's previous analysis. Moreover, if records do not exist for certain individuals, the Custodian must state as such for each individual. If no further records responsive beyond those already provided exist, the Custodian must certify to same.

3. **The Custodian shall comply with Items No. 1 and 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, and simultaneously provide certified confirmation of**

compliance, in accordance with N.J. Court Rule 1:4-4,[1] to the Executive Director.[2]

4. 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 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 19, 2012

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

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

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting

David Herron[1] **GRC Complaint No. 2011-324**
Complainant

v.

New Jersey Department of Education[2]
Custodian of Records

Records Relevant to Complaint: Copy of the following:

- Bell, Steven – All college transcripts.
- Brennan, Benjamin – All college transcripts.
- Brennan, Benjamin – All certifications and licenses.
- Cattano, Andrew – All college transcripts.
- Cattano, Andrew – All certifications and licenses.
- Chiles, Jr., Michael – Oakwood College transcript.
- Chiles, Jr., Michael – Essex County College transcript.
- Chiles, Jr., Michael – Unredacted transcripts showing Grade Point Average (GPA).
- Citro, Gerard T. – All college transcripts.
- Citro, Gerard T. – All certifications and licenses.
- Cooper, Damen – Unredacted transcripts showing GPA.
- Dalbo, Anothy – All college transcripts.
- Decker, Rebecca L. – Unredacted transcripts showing GPA.
- Denson, Robert – All college transcripts.
- Frisch, Maryann – Unredacted transcripts showing GPA.
- Golding, Keshia Nicole – Unredacted transcripts showing GPA.
- Jannah, Latifah – All college transcripts.
- Lendman, Linda – All college transcripts.
- Mulvaney, Sharon – All college transcripts.
- Polizzano, Debra – All college transcripts.
- Sackner, Karen Pearl – Unredacted transcripts showing GPA.
- Settembrino, III, Arthur – Unredacted transcripts showing GPA.
- Smith, Christina E. – Unredacted transcripts showing GPA.
- Sullivan, Karen P. – Unredacted transcript showing GPA.
- Weintraub, Rebecca Lynn – Unredacted transcripts showing GPA.
- Yarborough, Leonard – All college transcripts.

[1] No legal representation listed on record.
[2] Represented by DAG Susan Huntley, on behalf of the NJ Attorney General.

Request Made: September 6, 2011
Response Made: September 7, 2011
Custodian: Maria Casale
GRC Complaint Filed: October 24, 2011[3]

Background

September 6, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

September 7, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian requests that the Complainant identify what specific records he is seeking regarding the list of names contained in the subject OPRA request.

September 7, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he is seeking transcripts, certifications and endorsements.

September 15, 2011

E-mail from the Custodian to the Complainant. The Custodian notifies the Complainant that she will need until September 21, 2011 to complete the Complainant's OPRA request.

September 21, 2011

E-mail from the Custodian to the Complainant. The Custodian notifies the Complainant that she will need until September 28, 2011 to complete the Complainant's OPRA request.

September 26, 2011

E-mail from the Custodian to the Complainant with the following attachments:

- Letter from the Custodian to the Complainant dated September 19, 2011.
- Government Records Request Receipt dated September 26, 2011.
- Responsive records.

The Custodian states that the information listed was obtained based on the names that the Complainant provided as part of his OPRA request. The Custodian states that the records were located based solely on a name search because the Complainant did not provide any social security numbers. The Custodian states that her search did not yield information regarding the following names:

[3] The GRC received the Denial of Access Complaint on said date.

- Alvarez, Nancy
- Brennan, Benjamin
- Cattano, Andew
- Citro, Gerard T.
- Gilbert, Johnna
- Lennon, Barbara
- Malone, Jamie
- Yarborough, Cassandra

The Custodian states that enclosed is a certification letter (3 pages) and transcripts (28 pages) responsive to the Complainant's OPRA request. The Custodian states that certain information to include social security numbers, birthdates, grades were redacted. The Custodian states that these redactions were made in accordance with N.J.S.A. 47:1A-1, Burnett v. County of Bergen, 198 N.J. 408 (2009) and the Family Educational Rights and Privacy Act ("FERPA").

September 27, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he has received the Custodian's response and believes that the following was unlawfully redacted: grades located on transcripts. The Complainant states that the Custodian cited N.J.S.A. 47:1A-1 as the lawful basis for the redactions, which allows a public agency to exempt access to information pursuant to any other statute or resolution promulgated by the State.

The Complainant states that the State requires that candidates for certification achieve a cumulative GPA of at least 2.75 for students graduating on or after September 1, 2004. The Complainant states that teachers and administrators must meet this requirement in order to be employed in a State school district. The Complainant states that because there is a required GPA, this information is a government record subject to disclosure pursuant to N.J.S.A. 47:1A-10 (allowing for the disclosure of information that discloses "… conformity with specific … educational … qualifications required for government employment …").

The Complainant further states that FERPA does not apply here because the law only applies to students and does not extend to a board of education with regards to transcripts of employees.

The Complainant states that the records the Custodian provided in responsive to his OPRA request are not responsive. The Complainant requests that the Custodian provide him with copies of the records without the GPA redacted.

October 14, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he has not received a reply from the Custodian regarding his September 27, 2011 e-mail. The Complainant reiterates that the Custodian has not provided him with responsive records. The Complainant states that he awaits the Custodian's response.

October 24, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Letter from the Custodian to the Complainant dated September 19, 2011 (with attachments).
- Government Records Request Receipt dated September 26, 2011.
- E-mail from the Complainant to the Custodian dated September 27, 2011.
- E-mail from the Complainant to the Custodian dated October 14, 2011.

The Complainant states that he submitted an OPRA request to the New Jersey Department of Education ("DOE") on September 6, 2011. The Complainant states that the Custodian responded on September 7, 2012 seeking clarification. The Complainant states that he provided clarification on the same date. The Complainant states that after two (2) extensions of time, the Custodian responded on September 26, 2011 providing access to records.

The Complainant states that on September 27, 2011, he contacted the Custodian challenging redactions of GPAs and grades on transcripts and advising that the Custodian failed to provide transcripts for many of the individuals identified in his OPRA request. The Complainant states that he sent a second letter to the Custodian on October 14, 2011 reiterating that the Custodian failed to provide responsive records. The Complainant states that the Custodian did not respond to either letter; thus, the Complainant filed this complaint.

The Complainant does not agree to mediate this complaint.

November 4, 2011

Request for the Statement of Information ("SOI") sent to the Custodian.

November 16, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension of time to submit the SOI.

November 16, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until November 23, 2011 to submit the SOI.

November 23, 2011[4]

Custodian's SOI attaching a Government Records Request Receipt dated September 26, 2011 (printed on November 23, 2011).

The Custodian certifies that she received the Complainant's OPRA request on September 6, 2011. The Custodian certifies that she responded on September 7, 2011,

[4] The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

September 15, 2011, September 21, 2011 and finally on September 26, 2011. The Custodian certifies that she provided the Complainant with one (1) licensing letter dated September 19, 2011 and redacted transcripts for eleven (11) of the individuals identified in the Complainant's OPRA request.

The Custodian contends that redactions of social security numbers, birthdates, grades and GPAs were made pursuant to N.J.S.A. 47:1A-1, Burnett, *supra*, and FERPA.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

> "…government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*…" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

> "… any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* … or *that has been received* in the course of his or its official business …" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

> "…[t]he public agency shall have the burden of proving that the denial of access is authorized by law…" N.J.S.A. 47:1A-6.

OPRA further mandates that:

> "the personnel or pension records of any individual in the possession of a public agency … shall not be considered a government record and shall not be made available for public access, *except that … data contained in information which disclose conformity with specific experiential, educational* or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, *shall be a government record.*" (Emphasis added.) N.J.S.A. 47:1A-10.

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 Complainant filed the instant complaint arguing that the Custodian unlawfully redacted grades and GPAs for the transcripts provided. Moreover, the Complainant alleged that the Custodian unlawfully denied access to a number of other transcripts and, in the case of two (2) individuals, certifications and licenses. In the SOI, the Custodian asserted that she redacted the records pursuant to N.J.S.A. 47:1A-1, Burnett, *supra*, and FERPA.[5]

Regarding the Complainant's dispute with the redactions of individual grades, the issue falls squarely within the Council's previous decision in Bonanno v. Garfield Board of Education, GRC Complaint No. 2006-62 (Interim Order dated July 2007). The records at issue therein were individual grades on college transcripts of teachers and/or administrators. The Council held that:

> "OPRA excludes personnel records from the definition of a government record with the exception of data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to N.J.S.A. 47:1A-10. While employees and administrators of a [Board of Education] must meet specific experiential and educational requirements, individual grades included in a college transcript are not part of such requirement; the degree earned is such a requirement or qualification. Thus, the individual grades are part of an employee's personnel record and are exempt from public access under N.J.S.A. 47:1A-10." *Id.*

The Council further noted that "[a]lthough the BOE is an educational agency, the requested employees' transcripts relate exclusively to the employees of the BOE and said employees are not students of the BOE. Thus, FERPA does not apply as a lawful basis for the redaction of individual grades." (*citing* 20 USCA § 1232g. (a)(4B)(iii)) *Id.*

Therefore, previous case law supports the conclusion in the matter before the Council that the Custodian's redaction of the individual grades contained in the requested transcripts are lawful pursuant to N.J.S.A. 47:1A-10; however, FERPA does not apply to these transcripts.

Also at issue are the GPAs contained in the transcripts. The Complainant, in a letter to the Custodian on September 27, 2011, contended that candidates seeking employment as teachers and administrators in the State are required to achieve a standard cumulative GPA. The Complainant further argued that because a certain GPA is required for employment, this information is actually disclosable as a personnel record pursuant to

[5] The GRC notes that it will not address the privacy interest redactions of social security numbers and birthdates pursuant to N.J.S.A. 47:1A-1 and Burnett, *supra*, because the evidence of record indicates that the Complainant did not take issue with these redactions. *See* Letter from the Complainant to the Custodian dated September 27, 2011.

N.J.S.A. 47:1A-10 (allowing for the disclosure of educational qualifications required for government employment). The Custodian neither confirmed nor denied this assertion.

However, DOE's regulations at *N.J.A.C.* 6A:9-16 provide that a "candidate shall be subject to all requirements in effect at the time the application is received in the Office. Requirements include, but are not limited to, coursework … GPA …" *Id.* Moreover, *N.J.A.C.* 6A:9-8.1(a)2 provides the following GPA requirements to obtain a certificate of eligibility:

> "[a]chieve a cumulative GPA of at least 2.50 when a GPA of 4.00 equals an A grade for students graduating before September 1, 2004 a baccalaureate degree program, higher degree program or a state-approved post-baccalaureate certification program with a minimum of 13 semester-hour credits; for students graduating on or after September 1, 2004, achieve a cumulative GPA of at least 2.75 when a GPA of 4.00 equals an A grade …" *Id.*

Pursuant to *N.J.A.C.* 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. *See* Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

Because these two (2) regulations were not part of the evidence of record, the GRC is taking judicial notice of same. These two (2) regulations provide that the GPAs contained on the transcripts are data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to N.J.S.A. 47:1A-10. Teacher and administrator candidates cannot receive State certification from DOE unless they meet a minimum GPA requirement. Without a State certification, these candidates cannot obtain employment with a public school district in New Jersey. *See* Bonanno, *supra*.

Therefore, because the individual grades are not data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to N.J.S.A. 47:1A-10, the Custodian's redaction of the individual grades contained in the requested transcripts is lawful pursuant to N.J.S.A. 47:1A-10. However, because a minimum GPA is required to obtain licensure from DOE, the GPA is data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to N.J.S.A. 47:1A-10. As such, the GPAs contained on the requested transcripts are public and the Custodian unlawfully redacted the GPAs. Thus, the Custodian must disclose all transcripts without redaction of the GPA.

Regarding the remaining transcripts, certification and licenses not provided, the Custodian never indicated in the SOI that the records provided represented all records responsive to the Complainant's OPRA request. Thus, it is unclear whether the Custodian unlawfully denied access to these records.

Therefore, the Custodian must disclose to the Complainant any additional records that exist. In the case of transcripts, the Custodian must provide same in conformity with the GRC's previous analysis. Moreover, if records do not exist for certain individuals, the Custodian must state as such for each individual. If no further records responsive beyond those already provided exist, the Custodian must certify to same.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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. Because the individual grades are not data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to N.J.S.A. 47:1A-10, the Custodian's redaction of the individual grades contained in the requested transcripts is lawful pursuant to N.J.S.A. 47:1A-10. However, because a minimum grade point average is required to obtain licensure from the New Jersey Department of Education, the grade point average is data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to N.J.S.A. 47:1A-10. As such, the grade point averages contained on the requested transcripts are public and the Custodian unlawfully redacted the grade point averages. Thus, the Custodian must disclose all transcripts without redaction of the grade point average.

2. The Custodian must disclose to the Complainant any additional records that exist. In the case of transcripts, the Custodian must provide same in conformity with the GRC's previous analysis. Moreover, if records do not exist for certain individuals, the Custodian must state as such for each individual. If no further records responsive beyond those already provided exist, the Custodian must certify to same.

3. **The Custodian shall comply with Items No. 1 and 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, and simultaneously provide certified**

confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[6] to the Executive Director.[7]

4. 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
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012[8]

[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 records 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.

[8] This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.