



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

December 20, 2013 Government Records Council Meeting

Dr. Alan Bell
Complainant

Complaint No. 2013-04

v.

Paterson Public Schools (Passaic)
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 2013 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:

1. The Custodian complied with the Council’s October 29, 2013 Interim Order because he submitted nine (9) copies of the Affirmative Action File at issue to the GRC, certified that no June 6, 2007 memorandum existed, provided the Complainant a copy of the June 6, 2007 letter with attachment and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. The Custodian lawfully denied access to the requested Affirmative Action File because same is exempt from disclosure as information related to a sexual harassment complaint and grievances filed by or against an individual. N.J.S.A. 47:1A-1.1.; N.J.S.A. 47:1A-6.
3. The Custodian did not unlawfully deny access to the June 6, 2007 letter attachment because the Complainant acknowledged that he was already in possession of said record. N.J.S.A. 47:1A-6; Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008). Additionally, because the Custodian bore his burden of proving a lawful denial of access to the Affirmative Action File and June 6, 2007 letter and attachment, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA.

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 20th Day of December, 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: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

**Dr. Alan Bell¹
Complainant**

GRC Complaint No. 2013-04

v.

**Paterson Public Schools (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Complainant's discipline file from May through June 2007 (as identified in a handwritten note on a 2007 letter).
2. The attachment to a June 6, 2007 memorandum hand-delivered to the Complainant and Jim Joyner, Paterson Education Association.
3. The entire contents of "Captain" Smith's file from 2012 regarding the Complainant that substantiated Captain Smith's letter to Commissioner Chris Cerf,³ Governor Chris Christie and others.

Custodian of Record: Boris Zaydel
Request Received by Custodian: Date Unknown⁴
Response Made by Custodian: None.
GRC Complaint Received: January 10, 2013

Records Submitted for *In Camera* Examination: Complainant's Affirmative Action File

Background

October 29, 2013 Council Meeting:

At its October 29, 2013 public meeting, the Council considered the October 22, 2013 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 No legal representation listed on record.

² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

³ Commissioner Cerf is the current Commissioner of Education and previous referrals to Commissioner Cerf as "former" were made in error; and his current status is hereby corrected for the record. However, the error does not constitute a substantive change and has no effect on the Council's October 29, 2013 Interim Order.

⁴ The Complainant identified several months in the Denial of Access Complaint and attached an OPRA request that appears to be dated March 12, 2012.

1. The GRC must conduct an *in camera* review of the Affirmative Action file to determine the validity of the Custodian's assertion that the file contains only information "... generated in connection with a sexual harassment complaint ... or with any grievance filed ..." exempt from disclosure under OPRA. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); *Lagerkvist v. NJ Dep't of Treasury, Div. of Pensions & Benefits*, GRC Complaint No. 2011-110 (Interim Order dated September 25, 2012); N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Custodian may have unlawfully denied access to the record responsive to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. The Custodian shall either locate and provide the attachment to the Complainant or certify to the GRC if the responsive attachment does not exist.
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.⁸**
5. The Custodian certified in the Statement of Information that he confirmed that no file responsive to request item No. 3 exists. Thus, since the Custodian certified to this fact, and because the Complainant did not submit any evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to this request item. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
6. 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.

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

⁸ 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.

Procedural History:

On October 30, 2013, the Council distributed its Interim Order to all parties.⁹

On November 5, 2013, the Custodian's Counsel requested one (1) additional day to respond to the Council's Interim Order, which the GRC granted on November 6, 2013. On November 7, 2013, the Custodian responded to the Council's Interim Order providing nine (9) copies of the unredacted Affirmative Action File ("File") requested for an *in camera* review and a certification.

The Custodian asserts that as noted in the Statement of Information, the File contains investigative records relating to a sexual harassment complaint and/or other grievances. N.J.S.A. 47:1A-1.1. The Custodian asserts that redactions of names would not sufficiently protect the individuals that filed the complaints or any witnesses, and may lead to unsolicited contact from the Complainant. The Custodian asserts that ordering disclosure of the File in any way will have a chilling effect on the investigative process conducted by the District and, by extension, all other school districts.

The Custodian further certifies that he did not locate a June 6, 2007 memorandum and thus certifies that no such record exists. The Custodian certifies that the memorandum may actually be a letter with the same date. The Custodian certifies that this letter, addressed to the Complainant and signed by the former Superintendent, has only a "Personnel Transaction Request and Personnel Action Form" ("Form") attached. The Custodian certifies that he has attached the letter along with two (2) letters dated April 10, 2012 and May 18, 2012, to the Complainant supporting that the Complainant is already in possession of both the letter and attachment.

Analysis

Compliance

On October 29, 2013, the Council ordered the Custodian to submit nine (9) copies of the Complainant's File for an *in camera* review and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. The Council further ordered the Custodian to either provide the June 6, 2007 memorandum attachment or certify that same did not exist. On October 30, 2013, the Council distributed its Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian received the Council's Order on October 30, 2013; thus, November 6, 2013 was the last day to comply. On November 5, 2013, the Custodian's Counsel sought an extension of one (1) day to respond. On November 6, 2013, the GRC granted a one (1) day extension to comply with the Council's Order.

⁹ On November 5, 2013, the Complainant inquired as to whether the Council's Order accepted the June 6, 2007 letter as legitimate. The GRC notes that its Order does not address the validity of records before the GRC. Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004). The Complainant further included additional arguments not relevant to the issue of access under OPRA.

On November 7, 2013, the last day to comply, the Custodian submitted to the GRC nine (9) copies of the File and certified confirmation of compliance. The Custodian further certified that no June 6, 2007 memorandum existed, but that a June 6, 2007 letter with attachment existed and that the Complainant is already in possession of the record. Nonetheless, the Custodian provided same to the Complainant as part of his compliance.

Therefore, the Custodian complied with the Council's October 29, 2013 Interim Order because he submitted nine (9) copies of the File at issue to the GRC, certified that no June 6, 2007 memorandum existed, provided the Complainant a copy of the June 6, 2007 letter with attachment and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.

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

OPRA further provides that "... information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual ..." is exempt from access under OPRA. N.J.S.A. 47:1A-1.1.

Regarding the File sought in item No. 1, the Custodian contended that it contains information related to a sexual harassment complaint and other grievances. The GRC conducted an *in camera* examination on the submitted File and determined that the entire file is related to said sexual harassment complaint and two (2) grievances. These records are therefore not subject to disclosure under OPRA because they are specifically exempt under N.J.S.A. 47:1A-1.1.

Thus, the Custodian lawfully denied access to the requested File because same is exempt from disclosure as information related to a sexual harassment complaint and grievances filed by or against an individual. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.

Regarding the June 6, 2007 letter attachment sought in item No. 2, the Custodian provided the records to the Complainant and noted that the Complainant was already in possession of same. The Custodian supported his certification with two (2) letters, one of which confirmed that an action was taken on June 6, 2007 and the other confirming that the Complainant was in receipt of the letter and attachment. Further, the Complainant noted on his OPRA request that he was in receipt of the letter and attachment, but believed that his copy omitted certain information.

Notwithstanding the GRC's inability to adjudicate issues of content in a record, the Appellate Division's decision in Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App.

Div. 2008),¹⁰ holding that a custodian could not unlawfully deny access to a record that the requestor already had in his or her possession applies here. The Court's decision was based on the fact that the complainant admitted to be in possession of the record. Here, the Complainant noted in his request that he was in possession of the record but believed it may be incomplete. Thus, even though the Complainant may contend that his copy of the record is incomplete in some manner, the Custodian could not have denied access to the record which was already in the Complainant's possession.

Thus, the Custodian did not unlawfully deny access to the June 6, 2007 letter attachment because the Complainant acknowledged that he was already in possession of said record. N.J.S.A. 47:1A-6; Bart, 403 N.J. Super. at 609. Additionally, because the Custodian bore his burden of proving a lawful denial of access to the File and June 6, 2007 letter and attachment, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's October 29, 2013 Interim Order because he submitted nine (9) copies of the Affirmative Action File at issue to the GRC, certified that no June 6, 2007 memorandum existed, provided the Complainant a copy of the June 6, 2007 letter with attachment and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. The Custodian lawfully denied access to the requested Affirmative Action File because same is exempt from disclosure as information related to a sexual harassment complaint and grievances filed by or against an individual. N.J.S.A. 47:1A-1.1.; N.J.S.A. 47:1A-6.
3. The Custodian did not unlawfully deny access to the June 6, 2007 letter attachment because the Complainant acknowledged that he was already in possession of said record. N.J.S.A. 47:1A-6; Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008). Additionally, because the Custodian bore his burden of proving a lawful denial of access to the Affirmative Action File and June 6, 2007 letter and attachment, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA.

Prepared By: Frank F. Caruso
Senior Case Manager

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

December 10, 2013

¹⁰ On appeal from Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (August 2006).



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

October 29, 2013 Government Records Council Meeting

Dr. Alan Bell
Complainant

Complaint No. 2013-04

v.

Paterson Public Schools (Passaic)
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council ("Council") considered the October 22, 2013 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 GRC must conduct an *in camera* review of the Affirmative Action file to determine the validity of the Custodian's assertion that the file contains only information "... generated in connection with a sexual harassment complaint ... or with any grievance filed ..." exempt from disclosure under OPRA. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); Lagerkvist v. NJ Dep't of Treasury, Div. of Pensions & Benefits, GRC Complaint No. 2011-110 (Interim Order dated September 25, 2012); N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Custodian may have unlawfully denied access to the record responsive to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. The Custodian shall either locate and provide the attachment to the Complainant or certify to the GRC if the responsive attachment does not exist.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "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."

4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**⁴
5. The Custodian certified in the Statement of Information that he confirmed that no file responsive to request item No. 3 exists. Thus, since the Custodian certified to this fact, and because the Complainant did not submit any evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to this request item. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
6. 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 29th Day of October, 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: October 30, 2013

⁴ 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
October 29, 2013 Council Meeting**

**Dr. Alan Bell¹
Complainant**

GRC Complaint No. 2013-04

v.

**Paterson Public Schools (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Complainant's discipline file from May through June 2007 (as identified in a handwritten note on a 2007 letter).
2. The attachment to a June 6, 2007 memorandum hand-delivered to the Complainant and Jim Joyner, Paterson Education Association.
3. The entire contents of "Captain" Smith's file from 2012 regarding the Complainant that substantiated Captain Smith's letter to former Commissioner Chris Cerf, Governor Chris Christie and others.

Custodian of Record: Boris Zaydel
Request Received by Custodian: Date Unknown³
Response Made by Custodian: None.
GRC Complaint Received: January 10, 2013

Background⁴

Request and Response:

The Complainant alleges that he submitted an Open Public Records Act ("OPRA") request on numerous occasions to the Custodian seeking the above-mentioned records. The Custodian did not provide a response to the alleged OPRA request.

Denial of Access Complaint:

On January 10, 2013, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

³ The Complainant identified several months in the Denial of Access Complaint and attached an OPRA request that appears to be dated March 12, 2012.

⁴ 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.

Government Records Council (“GRC”). The Complainant provides no arguments regarding the disclosability of the records.

Statement of Information:

On April 9, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he never received the Complainant’s OPRA request, although it is not entirely clear what the date of the OPRA request is because the first digit is smudged. The Custodian certifies that although the request at issue was never received, he has reviewed same and responds as follows:

1. The Custodian certifies that no discipline file exists. The Custodian certifies that Paterson Public Schools does maintain an Affirmative Action file regarding certain employees. The Custodian asserts that Affirmative Action file contains records regarding sexual harassment complaints and grievance-related issues and is thus exempt from disclosure. N.J.S.A. 47:1A-1.1. The Custodian further contends that the Complainant’s request item is invalid because it seeks an entire file. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); Redden v. Cape May Cnty. Prosecutor’s Office, GRC Complaint No. 2007-206 (September 2009); Randazzo-Thompson v. City of Vineland (Cumberland), GRC Complaint No. 2010-76 (May 2011).
2. The Custodian certifies that regarding the June 6, 2007 memorandum attachment, he cannot identify a responsive attachment without obtaining clarification as to the sender/recipient of the memo as well as the date of the attachment.
3. The Custodian certifies that regarding Captain Smith’s file, he has confirmed that no file exists.

Additional Submissions:

On April 12, 2013, the Complainant contends that Paterson Public Schools has continuously switched custodians in an attempt to avoid responding to the Complainant’s OPRA requests. The Complainant reasserts that a letter from Harold N. Springstead to Carol Smeltzer, Esq., dated June 7, 2007, has the following hand-written note in the upper-right hand corner: “Dr. Alan Bell – discipline file.”

Analysis⁵

No Correspondence Received

In Krrywda v. Barnegat Twp. Sch. Dist. (Ocean), GRC Complaint No. 2008-138 (February 25, 2009), the complainant submitted an OPRA request to the athletic director and subsequently filed this complaint after receiving no response. In the SOI, the custodian certified that he did not receive the subject OPRA request prior to the filing of the complaint, but that no records responsive exist. The Council held that notwithstanding the fact that “... the Custodian

⁵ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

was not given an adequate opportunity to respond ...” prior to the filing of the denial of access complaint, “... the Custodian certified that no records ... exist ... [and] has borne his burden of proving a lawful denial of access.” Id. at 4.

Here, the GRC acknowledges that the Custodian similarly certified in the SOI that he never received the Complainant’s OPRA request but provided a response to the Complainant’s OPRA request. Thus, notwithstanding the fact that the Custodian did not receive the Complainant’s OPRA request prior to the filing of this complaint, the GRC will consider this complaint based on the Custodian’s SOI response. Krrywda, GRC 2008-138.

It should be noted that had the Custodian simply certified that he never received the OPRA request, and the Complainant did not provide evidence refuting the Custodian’s certification, this complaint would have been administratively disposed of as no correspondence received. However, once the Custodian responded to each item of the OPRA request attached to the Denial of Access Complaint, he effectively put the matter appropriately before the GRC for adjudication.

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.

OPRA provides that “[a] government record shall not include the following ... information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual ...” N.J.S.A. 47:1A-1.1.

Regarding item No. 1 seeking the Complainant’s “discipline file,” in Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC⁶ in which the GRC dismissed the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The Court stated that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court also stated that:

The statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’

⁶ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Complainant sought his "discipline file" based on a handwritten note on a June 7, 2011 letter. The Custodian responded in the SOI advising that no "discipline file" existed but that there was an Affirmative Action file exempt from disclosure under N.J.S.A. 47:1A-1.1.⁷

However, the record lacks a thorough analysis of the confidentiality of the records contained in the file. Specifically, the GRC cannot accurately determine whether every page contained in the file is exempt from disclosure. For example, the record could contain basic personnel records that could be entirely or partially disclosable. That an otherwise disclosable record is included in a file that on its face may be exempt does not necessarily mean that the record is also exempt from disclosure. *See Lagerkvist v. NJ Dep't of Treasury, Div. of Pensions & Benefits*, GRC Complaint No. 2011-110 (Interim Order dated September 25, 2012) at 17-18 (*citing North Jersey Media Group, Inc. v. NJ Dep't of Personnel*, 389 N.J. Super. 527, 536-539 (Law Division 2006)).

Therefore, the GRC must conduct an *in camera* review of the Affirmative Action file to determine the validity of the Custodian's assertion that the file contains only information "... generated in connection with a sexual harassment complaint ... or with any grievance filed ..." exempt from disclosure under OPRA. *See Paff*, 379 N.J. Super. at 346; *Lagerkvist*, GRC 2011-110; N.J.S.A. 47:1A-1.1.

Regarding item No. 2, seeking the attachment to the June 6, 2007 memorandum, the Council has previously validated an OPRA request seeking "supporting documentation" holding that "... the responsive records are easily identifiable because they should be attached to the

⁷ The Custodian also noted that the Complainant's request was invalid. *Redden*, GRC 2007-206; *Randazzo-Thompson*, GRC 2010-76. However, there is no evidence to support that the file at issue here is as voluminous as the file at issue in *Redden*, GRC 2007-206. Additionally, subsequent to the Council's holding in *Randazzo-Thompson*, the Council has held that a custodian could not identify records responsive to a request item only to argue later that the request was invalid. *See Rivera v. Passaic County Sheriff's Office*, GRC Complaint No. 2010-181 (Interim Order dated June 26, 2012)(*citing Gannett v. County of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005)).

requested purchase orders ...” Charles v. Plainfield Municipal Utilities Authority (Union), GRC Complaint No. 2009-169 (Interim Order dated February 24, 2011) at 21.

Here, the Complainant sought an attachment to a June 6, 2007 memorandum hand-delivered to and regarding him. It is reasonable that the Custodian is simply required to locate that memorandum, determine what, if anything, is attached and provide same in a manner similar to the custodian in Charles.

Thus, the Custodian may have unlawfully denied access to the record responsive to the Complainant’s OPRA request item No. 2. N.J.S.A. 47:1A-6. The Custodian shall either locate and provide the attachment to the Complainant or certify to the GRC if the responsive attachment does not exist.

The GRC notes that the Complainant notes in his denial of access complaint that he maintains an incomplete copy of a record, but it is unclear whether the record is the same record he sought. OPRA does not require a custodian to duplicate another copy of the requested record and send it to the complainant as it “...does not ... advance the purpose of OPRA, which is to ensure an informed citizenry.” Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609, 618 (App. Div. 2008). If it is true that the Complainant is in possession of the record and does not agree with the content, the GRC would have no authority to adjudicate this issue. N.J.S.A. 47:1A-7(b); Kwanzaa v. Dep’t of Corrections, GRC Complaint No. 2004-167 (March 2005).

Regarding item No. 3 seeking “Captain Smith’s file ...,” in Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian’s certification. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access.” Id.

Here, the Custodian certified in the SOI that he confirmed that no file responsive to request item No. 3 exists. Thus, since the Custodian certified to this fact, and because the Complainant did not submit any evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny access to this request item. *See* Pusterhofer, GRC 2005-49.

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 GRC must conduct an *in camera* review of the Affirmative Action file to determine the validity of the Custodian's assertion that the file contains only information "... generated in connection with a sexual harassment complaint ... or with any grievance filed ..." exempt from disclosure under OPRA. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); *Lagerkvist v. NJ Dep't of Treasury, Div. of Pensions & Benefits*, GRC Complaint No. 2011-110 (Interim Order dated September 25, 2012); N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Custodian may have unlawfully denied access to the record responsive to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. The Custodian shall either locate and provide the attachment to the Complainant or certify to the GRC if the responsive attachment does not exist.
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.¹¹**
5. The Custodian certified in the Statement of Information that he confirmed that no file responsive to request item No. 3 exists. Thus, since the Custodian certified to this fact, and because the Complainant did not submit any evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to this request item. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).

⁸ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "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."

¹¹ 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.

6. 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: Brandon D. Minde, Esq.
Executive Director

October 22, 2013¹²

¹² This complaint was prepared for adjudication at the Council's September 24, 2013 meeting; however, the complaint could not be adjudicated due to lack of quorum.