



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

March 25, 2014 Government Records Council Meeting

Christopher Lotito  
Complainant

Complaint No. 2013-65

v.

New Jersey Department of Labor,  
Human Resources  
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian lawfully denied access to the PARS file because same contains performance evaluations that are not subject to disclosure under OPRA. N.J.S.A. 47:1A-6; Cibo, Jr. v. Rowan University, GRC Complaint No. 2003-42 (February 2014); Baker v. NJ Civil Service Comm’n, GRC Complaint No. 2009-253 (Interim Order dated July 27, 2010) and Young v. NJ Dep’t of Personnel, GRC Complaint No. 2007-210 (Interim Order dated September 30, 2009).
3. The Custodian unlawfully denied access to the responsive job description and payroll report because same were clearly subject to disclosure. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the Council should decline to order disclosure of these records because she provided them to the Complainant as part of the Statement of Information.



4. Since the Custodian certified in the SOI that no training records exist, and because there is no evidence in the record to refute the Custodian's certifications, the Custodian did not unlawfully deny access to the requested training records. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian unlawfully denied access to the job description and payroll record, the Custodian attached same to the Statement of Information. Further, the Custodian lawfully denied access to Ms. Washington's PARS because same is exempt and training record because same does not exist. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of March, 2014

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: March 27, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 25, 2014 Council Meeting**

**Christopher Lotito<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2013-65**

v.

**New Jersey Department of Labor,  
Human Resources<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of the employee record for Gwen Washington, Claims Examiner for the New Jersey Department of Labor's ("DOL") Unemployment Insurance Division ("UID"), to include performance evaluations, education and qualifications, wage raises, and training assigned and whether she completed said training.

**Custodian of Record:** Ellen Spurlock  
**Request Received by Custodian:** February 19, 2013  
**Response Made by Custodian:** March 4, 2013  
**GRC Complaint Received:** February 28, 2013

**Background<sup>3</sup>**

**Request and Response:**

On February 17, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On March 4, 2013, the eighth (8<sup>th</sup>) business day after receipt of the request, the Custodian responded in writing advising the Complainant of Ms. Washington's start date, title and salary. The Custodian stated that employee performance evaluations, the record of education or qualifications which allowed Ms. Washington to secure her appointment and the training record cannot be disclosed. N.J.S.A. 47:1A-10.

**Denial of Access Complaint:**

On February 28, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he received no response

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Adam Verone.

<sup>3</sup> 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.

Christopher Lotito v. New Jersey Department of Labor, Human Resources, 2013-65 – Findings and Recommendations of the Executive Director

to his OPRA request.

Statement of Information:

On April 2, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 19, 2013. The Custodian certified that no search was necessary because she knew precisely where the responsive records were located. The Custodian affirmed that she responded on March 4, 2013, providing a title, starting date, salary, and current salary. The Custodian certified that she denied access to the following under N.J.S.A. 47:1A-10:

- Course registration and report.
- Individual employee file.
- Payroll reports.
- Performance Assessment Review File (“PARS”).

The Custodian contended that if the Complainant was not satisfied with the format in which she provided the information, he should have contacted her asking for more formal information. The Custodian certified that to this end, she has attached a redacted payroll record showing the name, title, position, salary and length of service as is required for disclosure under N.J.S.A. 47:1A-10. The Custodian affirmed that she has also attached the DOL’s “Job Description and Requirements for a Claims Examiner.” The Custodian certified that these records can be cross-referenced to glean the educational and experiential qualification of Ms. Washington, thus simultaneously addressing the Complainant’s educational qualification and wage raises request items.

Additional Submissions

On March 5, 2014, the GRC requested additional information regarding two (2) of the records the Custodian identified as responsive in the SOI. Specially, the GRC requested that the Custodian respond to the following:

1. Is Ms. Washington required to engage in continuing education in order to maintain her position? If so, does the registration and report track the fulfillment of this requirement?
2. Please provide the number of pages comprising the registration and report as well as the employee file.

The GRC required the Custodian to respond in the form of a legal certification by close of business on March 10, 2014.

On March 12, 2014, the Custodian stated that Ms. Washington was not required to engage in continuing education to maintain her position. The Custodian noted that if there was a change to the Unemployment Compensation Law requiring additional training, all claimers examiners would be trained. On March 12, 2014, the GRC acknowledged receipt of the Custodian’s e-mail and advised that it was deficient. Specially, the Custodian did not provide a response to question No. 2 and failed to include the full certification language.

On March 14, 2014, the Custodian responded to the GRC's request for additional information. The Custodian certified to the following:

1. Ms. Washington is not required to engage in continuing education in order to maintain her position. Additionally, the Claims Examiner Training Class is conducted by DUI technicians and is given to employees who were promoted to the position of Claims Examiner. The training class is not given by Human Resources ("HR") and there is no registration in the personnel file. Thus, no actual registration exists.
2. The personnel file is 114 pages.

### Analysis

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>4</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In this matter, the Custodian certified in the SOI that she received the Complainant's OPRA request on February 19, 2013 and did not respond until March 4, 2013, or nine (9) business days after receipt of the request. Thus, the Custodian failed to respond in the statutorily mandated seven (7) business day time frame.

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

#### 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.

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<sup>4</sup> A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Christopher Lotito v. New Jersey Department of Labor, Human Resources, 2013-65 – Findings and Recommendations of the Executive Director

OPRA provides that:

“. . . 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: an individual's *name, title, position, salary, payroll record, length of service*, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record; personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person . . . and *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 . . .”

N.J.S.A. 47:1A-10 (emphasis added).

In the Complainant’s OPRA request, he sought the following pieces of personnel information: “performance evaluations, education and qualifications, wage raises, and training assigned and whether she completed said training.” The Custodian initially responded providing the Complainant Ms. Washington’s start date, title and salary. Thereafter, in the SOI, the Custodian identified four (4) records responsive to the Complainant’s OPRA request. The GRC will henceforth evaluate whether the Custodian disclosed responsive records based on the criterion set forth in the Complainant’s OPRA request.

“Performance evaluations”

In Cibo, Jr. v. Rowan University, GRC Complaint No. 2003-42 (February 2014), the Council determined that the custodian lawfully denied access to the underlying reasons for wage increases because “. . . bases for salary increases are integrally intertwined with employee performance evaluations, which are clearly not subject to disclosure under OPRA.” Id. See also McCalley v. Rowan University, GRC Complaint No. 2003-90 (February 2004), Baker v. NJ Civil Service Comm’n, GRC Complaint No. 2009-253 (Interim Order dated July 27, 2010) and Young v. NJ Dep’t of Personnel, GRC Complaint No. 2007-210 (Interim Order dated September 30, 2009).

In the SOI, the Custodian identified a PARS as responsive to the Complainant’s OPRA request. The Custodian noted that a PARS contains an evaluation of the job functions of an employee and are conducted by the employee’s supervisor. Similar to the facts in Cibo, OPRA does not expressly allow for disclosure “. . . performance evaluations . . .” Thus, on its face, the PARS file is not subject to disclosure under OPRA because it a performance evaluation.

Therefore, the Custodian lawfully denied access to the PARS file because same contains performance evaluations that are not subject to disclosure under OPRA. N.J.S.A. 47:1A-6; Cibo, GRC 2003-42; McCalley, GRC 2003-90; Baker, GRC 2009-253; Young, GRC 2007-210.

### “Education & qualifications” and “Wage Raises”

Included in the excepted information subject to disclosure under OPRA is that “. . . which disclose conformity with specific experiential [and] educational . . . qualifications required for government employment . . .” N.J.S.A. 47:1A-10. The Council has previously ordered disclosure of different types of records sought that disclose such information. Bonanno v. Garfield Bd. of Educ., Bus. Dep’t, GRC Complaint No. 2006-62 (March 2007); Guz v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2010-33 (June 2010).

Additionally, payroll records are specifically subject to disclosure under OPRA. N.J.S.A. 47:1A-10; Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004)(defining a “payroll record” for purposes of OPRA). Moreover, the Council has repeatedly ordered disclosure of payroll records. Marinaccio v. Borough of Fanwood (Union), GRC Complaint No. 2012-174 (July 2013); Vargas v. Camden City Sch. Dist. (Camden), GRC Complaint No. 2011-315(Interim Order dated January 29, 2013); Roarty v. Secaucus Bd. of Educ. (Hudson), GRC Complaint No. 2009-221 (January 2011).

In the SOI, the Custodian certified that the job description and payroll records attached reveals that Ms. Washington met the education/experiential qualification present on the Claims Examiner job description in order to obtain her position. Review of these two (2) records confirms that adequate information is provided in same to show the qualifications required for Ms. Washington to obtain the position of Claims Examiner. However, both records should have been disclosed initially in response to the OPRA request and were not.

Therefore, the Custodian unlawfully denied access to the responsive job description and payroll report because same were clearly subject to disclosure. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the Council should decline to order disclosure of these records because she provided them to the Complainant as part of the SOI.

### “Training Record”

Moreover, 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.”

In the SOI, the Custodian identified a course registration and report, which she later certified on March 14, 2014 that HR did not conduct the Claims Examiner training and no registration is required for said training conducted by UID, thus no record exists. In the absence of any other evidence to the contrary, the GRC is satisfied that no responsive records exist.

Therefore, since the Custodian certified in the SOI that no training records exist, and because there is no evidence in the record to refute the Custodian's certifications, the Custodian did not unlawfully deny access to the requested training records. See Pusterhofer, GRC 2005-49.

### **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]. . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, although the Custodian unlawfully denied access to the job description and payroll record, the Custodian attached same to the SOI. Further, the Custodian lawfully denied access to Ms. Washington's PARS because same is exempt and training record because same does not exist. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the



statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian lawfully denied access to the PARS file because same contains performance evaluations that are not subject to disclosure under OPRA. N.J.S.A. 47:1A-6; Cibo, Jr. v. Rowan University, GRC Complaint No. 2003-42 (February 2014); Baker v. NJ Civil Service Comm’n, GRC Complaint No. 2009-253 (Interim Order dated July 27, 2010) and Young v. NJ Dep’t of Personnel, GRC Complaint No. 2007-210 (Interim Order dated September 30, 2009).
3. The Custodian unlawfully denied access to the responsive job description and payroll report because same were clearly subject to disclosure. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, the Council should decline to order disclosure of these records because she provided them to the Complainant as part of the Statement of Information.
4. Since the Custodian certified in the SOI that no training records exist, and because there is no evidence in the record to refute the Custodian’s certifications, the Custodian did not unlawfully deny access to the requested training records. See Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian unlawfully denied access to the job description and payroll record, the Custodian attached same to the Statement of Information. Further, the Custodian lawfully denied access to Ms. Washington’s PARS because same is exempt and training record because same does not exist. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
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Senior Counsel

March 18, 2014