



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

August 29, 2017 Government Records Council Meeting

James Keenan
Complainant

Complaint No. 2015-388

v.

NJ Department of Labor and Workforce Development,
Division of Disability Determination Services
Custodian of Record

At the August 29, 2017 public meeting, the Government Records Council (“Council”) considered the August 22, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not fully comply with the Council’s June 27, 2017 Interim Order. Specifically, the Custodian responded in the extended time frame by providing to all parties Ms. Fitzgerald’s legal certification, affirming that no contracts responsive to OPRA request item Nos. 4 and 7 existed. However, the Custodian neglected to provide certified confirmation of compliance simultaneously to the Executive Director.
2. The Custodian failed to respond timely, which resulted in a “deemed” denial of access. Further, the Custodian did not bear his burden of proving a lawful denial of access to the Complainant’s OPRA request item Nos. 1 and 3. In addition, the Custodian did not fully comply with the Council’s June 27, 2017 Interim Order. However, the Custodian ultimately provided access to records responsive to OPRA request item Nos. 1 and 3 as part of the Statement of Information. Additionally, the Custodian lawfully denied access to the Complainant’s OPRA request item Nos. 2 and 5, as well as 4 and 7 because no records existed. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). 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 29th Day of August, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 31, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 29, 2017 Council Meeting**

**James Keenan¹
Complainant**

GRC Complaint No. 2015-388

v.

**New Jersey Department of Labor & Workforce Development,
Division of Disability Determination Services²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. The most recent accounting balance sheet produced by or for the Division of Disability Determination Services (“DDS”).
2. A list of names of persons Mr. Noble Osabu deemed not disabled in continuing disability reviews throughout his tenure as a DDS hearing officer.
3. Mr. Osabu’s payroll record (the total amount of funds Mr. Osabu was paid to perform his duty as a “claims adjuster”).
4. Mr. Osabu’s employment contract.
5. Mr. Osabu’s employment application file.
6. Mr. William Larezza’s “title, position, salary, payroll record and length of service.”
7. Contracts on file between Cheryl Sanford and DDS.

Custodian of Record: Mark Radcliffe

Request Received by Custodian: October 16, 2015

Response Made by Custodian: October 21, 2015

GRC Complaint Received: December 4, 2015

Background

June 27, 2017 Council Meeting:

At its June 27, 2017 public meeting, the Council considered the June 20, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his 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

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Peter H. Jenkins.

- respond in writing to the Complainant's OPRA request item Nos. 1 and 3 through 7, 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 failed to bear his burden of proof that he lawfully denied access to the records responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6. However, the Council should decline to order disclosure because the Custodian included copies of these records as part of the Statement of Information, which was copied to all parties.
 3. The Custodian lawfully denied access to the list of names responsive to item No. 2. N.J.S.A. 47:1A-6. Such information is exempt from disclosure under Federal and State law, and there is no evidence in the record indicating that the affected individuals consented to disclosure. N.J.S.A. 47:1A-9(a); U.S.C. § 552a(b); 42 U.S.C. § 1306(a); 20 C.F.R. § 401.100 - 401.200. See also Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2013-97 (Interim Order dated January 28, 2014).
 4. The Custodian unlawfully denied access to the personnel information responsive to the Complainant's OPRA request item No 3 because his assertion that DDS already provided same in response to a prior OPRA request was not lawful. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211, *et seq.* (January 2006). Further, there was no evidence in the record to support that the Complainant still possessed Ms. Spurlock's July 31, 2015 response. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008). However, the Council should decline to order disclosure because the Custodian included Ms. Spurlock's letter in the SOI, which was copied to all parties.
 5. The Custodian may have unlawfully denied access to contracts responsive to the Complainant's OPRA request item Nos. 4 and 7. N.J.S.A. 47:1A-6. The Custodian must disclose those records that exist. However, if no contracts responsive to either request item exist, the Custodian must certify to this fact.
 6. **The Custodian shall comply with conclusion No. 5 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 1:4-4,³ to the Executive Director.⁴**

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

7. The Custodian lawfully denied access to the Complainant's OPRA request item No. 5, which sought Mr. Osabu's employment application, because same is exempt from public access pursuant to N.J.S.A. 47:1A-10, Executive Order 26 (McGreevey 2002), and Toscano v. NJ Dep't of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011). *See also* Deutsch v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-361 (March 2013).
8. Because the Custodian, through Ms. Spurlock, provided all information responsive to the Complainant's OPRA request item No. 6 on October 21, 2015, subsequently certified to this disclosure in the SOI, and there is no competent, credible evidence to refute the Custodian's certification, he has met his burden of proving that there was no unlawful denial of access. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 29, 2017, the Council distributed its Interim Order to all parties. On June 29, 2017, the Custodian's Counsel sought an extension of time until July 19, 2017 because the Custodian was unavailable until July 12, 2017. On June 30, 2017, the Government Records Council ("GRC") granted the extension of time given the circumstances Counsel presented.

On July 19, 2017, the Custodian responded to the Council's Interim Order by providing to all parties a legal certification from Mary Fitzgerald, Director of Human Resources and Labor Relations, in which she certified that no employment contracts existed.⁵

Analysis

Compliance

At its June 27, 2017 meeting, the Council ordered the Custodian to disclose the contracts responsive to the Complainant's OPRA request item Nos. 4 and 7. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On June 29, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 7, 2017.

On June 29, 2017, the Custodian's Counsel sought an extension of time until July 19, 2017, which the GRC granted. On July 19, 2017, the last day of the extended time frame, the

⁵ On July 24, 2017, the GRC e-mailed the Custodian, advising that Ms. Fitzgerald's legal certification was not valid because it did not contain the exact language required under R. 1:4-4. The GRC thus requested that the Custodian cure the deficiency on or before July 27, 2017. On July 25, 2017, the Custodian's Counsel provided to all parties an updated copy of Ms. Fitzgerald's certification to reflect the appropriate language required under R. 1:4-4.

Custodian provided to all parties Ms. Fitzgerald's certification wherein she affirmed that no employment contracts existed. However, the Custodian did not simultaneously provide certified confirmation of compliance to the Executive Director. The evidence of record nonetheless supports that the Custodian partially complied with the Interim Order by adequately addressing the disclosure order in conclusion Nos. 5 and 6.

Therefore, the Custodian did not fully comply with the Council's June 27, 2017 Interim Order. Specifically, the Custodian responded in the extended time frame by providing to all parties Ms. Fitzgerald's legal certification, affirming that no contracts responsive to OPRA request item Nos. 4 and 7 existed. However, the Custodian neglected to provide certified confirmation of compliance simultaneously to the Executive Director.

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 (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 (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)).

In the instant complaint, the Custodian failed to respond timely, which resulted in a "deemed" denial of access. Further, the Custodian did not bear his burden of proving a lawful denial of access to the Complainant's OPRA request item Nos. 1 and 3. In addition, the Custodian did not fully comply with the Council's June 27, 2017 Interim Order. However, the Custodian ultimately provided access to records responsive to OPRA request item Nos. 1 and 3 as part of the SOI. Additionally, the Custodian lawfully denied access to the Complainant's OPRA request item Nos. 2 and 5, as well as 4 and 7 because no records existed. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). 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 fully comply with the Council's June 27, 2017 Interim Order. Specifically, the Custodian responded in the extended time frame by providing to all parties Ms. Fitzgerald's legal certification, affirming that no contracts responsive to OPRA request item Nos. 4 and 7 existed. However, the Custodian neglected to provide certified confirmation of compliance simultaneously to the Executive Director.
2. The Custodian failed to respond timely, which resulted in a "deemed" denial of access. Further, the Custodian did not bear his burden of proving a lawful denial of access to the Complainant's OPRA request item Nos. 1 and 3. In addition, the Custodian did not fully comply with the Council's June 27, 2017 Interim Order. However, the Custodian ultimately provided access to records responsive to OPRA request item Nos. 1 and 3 as part of the Statement of Information. Additionally, the Custodian lawfully denied access to the Complainant's OPRA request item Nos. 2 and 5, as well as 4 and 7 because no records existed. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). 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
Communications Specialist/Resource Manager

August 22, 2017



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

June 27, 2017 Government Records Council Meeting

James Keenan
Complainant

Complaint No. 2015-388

v.

NJ Department of Labor & Workforce Development,
Division of Disability Determination Services
Custodian of Record

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 2017 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 his 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 item Nos. 1 and 3 through 7, 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 failed to bear his burden of proof that he lawfully denied access to the records responsive to the Complainant’s OPRA request item No. 1. N.J.S.A. 47:1A-6. However, the Council should decline to order disclosure because the Custodian included copies of these records as part of the Statement of Information, which was copied to all parties.
3. The Custodian lawfully denied access to the list of names responsive to item No. 2. N.J.S.A. 47:1A-6. Such information is exempt from disclosure under Federal and State law, and there is no evidence in the record indicating that the affected individuals consented to disclosure. N.J.S.A. 47:1A-9(a); U.S.C. § 552a(b); 42 U.S.C. § 1306(a); 20 C.F.R. § 401.100 - 401.200. See also Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2013-97 (Interim Order dated January 28, 2014).
4. The Custodian unlawfully denied access to the personnel information responsive to the Complainant’s OPRA request item No 3 because his assertion that DDS already provided same in response to a prior OPRA request was not lawful. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No.



2005-211, *et seq.* (January 2006). Further, there was no evidence in the record to support that the Complainant still possessed Ms. Spurlock's July 31, 2015 response. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008). However, the Council should decline to order disclosure because the Custodian included Ms. Spurlock's letter in the SOI, which was copied to all parties.

5. The Custodian may have unlawfully denied access to contracts responsive to the Complainant's OPRA request item Nos. 4 and 7. N.J.S.A. 47:1A-6. The Custodian must disclose those records that exist. However, if no contracts responsive to either request item exist, the Custodian must certify to this fact.
6. **The Custodian shall comply with conclusion No. 5 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**
7. The Custodian lawfully denied access to the Complainant's OPRA request item No. 5, which sought Mr. Osabu's employment application, because same is exempt from public access pursuant to N.J.S.A. 47:1A-10, Executive Order 26 (McGreevey 2002), and Toscano v. NJ Dep't of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011). *See also* Deutsch v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-361 (March 2013).
8. Because the Custodian, through Ms. Spurlock, provided all information responsive to the Complainant's OPRA request item No. 6 on October 21, 2015, subsequently certified to this disclosure in the SOI, and there is no competent, credible evidence to refute the Custodian's certification, he has met his burden of proving that there was no unlawful denial of access. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
9. 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.

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

Interim Order Rendered by the
Government Records Council
On The 27th Day of June, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 29, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2017 Council Meeting**

**James Keenan¹
Complainant**

GRC Complaint No. 2015-388

v.

**New Jersey Department of Labor & Workforce Development,
Division of Disability Determination Services²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. The most recent accounting balance sheet produced by or for the Division of Disability Determination Services (“DDS”).
2. A list of names of persons Mr. Noble Osabu deemed not disabled in continuing disability reviews throughout his tenure as a DDS hearing officer.
3. Mr. Osabu’s payroll record (the total amount of funds Mr. Osabu was paid to perform his duty as a “claims adjuster”).
4. Mr. Osabu’s employment contract.
5. Mr. Osabu’s employment application file.
6. Mr. William Larezza’s “title, position, salary, payroll record and length of service.”
7. Contracts on file between Cheryl Sanford and DDS.

Custodian of Record: Mark Radcliffe

Request Received by Custodian: October 16, 2015

Response Made by Custodian: October 21, 2015

GRC Complaint Received: December 4, 2015

Background³

Request and Response:

On October 15, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.⁴ On October 21, 2015, Ellen

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Peter H. Jenkins.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁴ The Complainant also requested the records at issue here under the common law right of access. The GRC notes that it has no authority to adjudicate common law issues. N.J.S.A. 47:1A-7; Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).

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Spurlock, Human Resources and Labor Relations (“HR”), responded in writing on behalf of the Custodian by providing responsive personnel information for item No. 6.

On October 27, 2015, the Custodian again responded, stating the following:

- Item No. 1: The Custodian stated that he referred this item to the Social Security Administration (“SSA”) for a response because they must authorize disclosure before he can release the responsive accounting sheet.
- Item No. 2: The Custodian stated that DDS did not keep data regarding the names of individuals who apply for disability benefits. The Custodian stated that the SSA owns the requested data and that DDS has no authority to disseminate that data. Further, the Custodian stated that it could not provide data it does not possess. The Custodian noted that he previously advised the Complainant of this fact in letters dated June 5, and September 30, 2015.
- Item Nos. 3-7: Information concerning Mr. Osabu, Mr. Larezza, and/or Ms. Sanford must come from HR. The Custodian affirmed that he forwarded the Complainant’s OPRA request, as well as prior correspondence, to HR for a response.

Denial of Access Complaint:

On December 4, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that, according to a certified mail receipt, the Custodian received his OPRA request on October 16, 2015. The Complainant contended that he received the Custodian’s letter on October 27, 2015, but received no further communications from the Custodian thereafter.

Additional Information:

On January 28, 2016, Michelle L. Christ, Esq., Assistant Regional Counsel for the Social Security Administration (“SSA”), sent a letter to the GRC. Therein, Ms. Christ stated that Federal law and regulations do not allow for the disclosure of SSA records or information about an individual without his or her written consent. 5 U.S.C. § 552a(b)(the Privacy Act); 42 U.S.C. § 1306(a)(the Social Security Act); 20 C.F.R. § 401.100 - 401.200 (SSA regulations). Ms. Christ also noted that the regulations apply to state agencies that make disability determinations under agreements made pursuant to sections 221 and 1633 of these acts. 20 C.F.R. § 401.25. Ms. Christ stated that the scope of the regulations extend to records maintained by medical, psychological, and vocational consultants concerning examinations performed under contract in the social security program. 20 C.F.R. § 401.20. Ms. Christ thus states that the SSA cannot “permissibly satisfy” the Complainant’s OPRA request.

Statement of Information:

On February 5, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 16, 2015. The Custodian certified that Ms. Spurlock responded in writing on his behalf by providing disclosable personnel information for Mr. Larezza. Further, the Custodian certified that he

provided a second response on October 27, 2015, denying access to SSA records and stating that HR had to disclose personnel information.

Initially, the Custodian affirmed that, upon further review, he was providing as part of the SOI budgetary information responsive to the Complainant's OPRA request item No. 1 in the form of SSA-4513 records.

Regarding the Complainant's OPRA request item No. 2, seeking specific individual SSA information, federal law and regulations preclude the disclosure of SSA information at both the Federal and State level. U.S.C. § 552a(b); 42 U.S.C. § 1306(a); 20 C.F.R. § 401.100 - 401.200. Further, the Custodian argued that the records sought are the property of the SSA and that he therefore could not disclose those records.

Regarding the remainder of the OPRA request, which sought personnel records for Mr. Osabu, Mr. Larezza, and/or Ms. Sanford, the Custodian contended that employment contracts and application files were not disclosable under OPRA. N.J.S.A. 47:1A-10. The Custodian certified that Ms. Spurlock previously provided the Complainant with the "name, title, position, salary, and length of service" for Mr. Osabu on July 31, 2015. Additionally, the Custodian affirmed that Ms. Spurlock provided the Complainant the same personnel information for Mr. Larezza on October 21, 2015.

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).⁵ 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).

Here, the Custodian certified in the SOI that he received the Complainant's OPRA request on October 16, 2015, and responded to the Complainant in writing on October 27, 2015. In that response, the Custodian denied access to the Complainant's OPRA request item No. 2. However, the Custodian addressed the remaining requested items by advising that he would need approval from the SSA to disclose DDS balance sheets and that personnel information had to come from HR. Such a response did not grant access, deny access, seek clarification, or request an extension of time to the other requested items. For this reason, although the Custodian responded in writing, his failure to provide an appropriate response as set forth in Kelley, GRC

⁵ 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.

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2007-11, resulted in a “deemed” denial of the Complainant’s OPRA request item Nos. 1 and 3 through 7.

Therefore, the Custodian did not bear his 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 item Nos. 1 and 3 through 7, 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.

OPRA request Item No. 1 – Most Recent DDS Balance Sheet

The Custodian initially responded to the Complainant’s requested item, stating that he needed the SSA’s authorization to disclosure accounting sheets. The Custodian provided no additional responses prior to the filing of this complaint. In the SOI, the Custodian certified that he reviewed the requested item again and determined that DDS could provide SSA-4513 forms responsive to item No. 1. Thus, he attached the responsive forms to the SOI.

In reviewing the evidence of record, the Custodian failed to provide any lawful basis for withholding the SSA-4513 forms. Additionally, the Custodian provided no statute, regulation, executive order, *etc.*, providing that DDS could not disclose these forms without SSA approval.

Accordingly, the Custodian failed to bear his burden of proof that he lawfully denied access to the records responsive to the Complainant’s OPRA request item No. 1. N.J.S.A. 47:1A-6. However, the Council should decline to order disclosure because the Custodian included copies of these records as part of his SOI, which was copied to all parties.

OPRA request Item No. 2 – Names of Individuals Denied Disability

OPRA provides that its provisions “shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute . . . regulation promulgated under the authority of any statute or Executive Order of the Governor . . . any *federal law; federal regulation; or federal order.*” N.J.S.A. 47:1A-9(a) (emphasis added).

5 U.S.C. § 552a provides that:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant

to a written request by, or with the prior written consent of, the individual to whom the record pertains

Id. at (b).

Further, the Social Security Act provides that:

No disclosure of . . . any file, record, report, or other paper, or any information, obtained at any time by the head of the [SSA] or by any officer or employee of the [SSA] in the course of discharging the duties of the head of the applicable agency under this Act, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the head of the applicable agency or from any officer or employee of the [SSA] shall be made except as the head of the [SSA] may by regulations prescribe and except as otherwise provided by Federal law. Any person who shall violate any provision of this section shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding \$10,000 for each occurrence of a violation, or by imprisonment not exceeding 5 years, or both.

42 U.S.C. § 1306(a)(1).

Additionally, SSA’s regulations provide a process for individuals to allow for disclosure of an individual’s records:

The written consent must clearly specify to whom the information may be disclosed, the information . . . to disclose (*e.g.*, social security number, date and place of birth, monthly Social Security benefit amount, date of entitlement), and, where applicable, during which timeframe the information may be disclosed (*e.g.*, during the school year, while the subject individual is out of the country, whenever the subject individual is receiving specific services).

20 C.F.R. 401.100(b).

Regarding written consent, the Council has previously addressed a similar exception when reviewing OPRA requests seeking résumés of unsuccessful candidates. In Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2013-97 (Interim Order dated January 28, 2014), the custodian denied access to résumés of unsuccessful candidates under Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”) (providing that custodians may disclose unsuccessful candidate résumés upon written consent). In the Denial of Access Complaint, the complainant alleged that the custodian unlawfully denied access to multiple records to include résumés of unsuccessful candidates. In determining that the custodian lawfully denied access to the disputed résumés, the Council reasoned that “there is nothing in the evidence of record to indicate that any unsuccessful candidate . . . gave his/her consent to disclosure of a résumé . . .” Id. at 9.

In this complaint, the Custodian denied access to the responsive records, insinuating that DDS did not possess same. However, in the SOI, the Custodian argued that Federal and State

law prohibit the disclosure of SSA information. U.S.C. § 552a(b); 42 U.S.C. § 1306(a); 20 C.F.R. § 401.100 - 401.200. The Custodian's argument received support from Ms. Christ of the SSA in a letter dated January 28, 2016.

In reviewing the issue, especially as it goes towards written party consent, the GRC takes guidance from Inzelbuch, GRC 2013-97. Specifically, the responsive record is a list of names seeking a disability determination from DDS. Those determinations obviously affect an individual's standing to collect social security from the SSA. Further, there is no evidence of any written consent from any individual. Instead, the Custodian's certification, in tandem with Ms. Christ's letter, overwhelmingly supports nondisclosure of a responsive list.

Therefore, the Custodian lawfully denied access to the list of names responsive to item No. 2. N.J.S.A. 47:1A-6. Such information is exempt from disclosure under Federal and State law, and there is no evidence in the record indicating that the affected individuals consented to disclosure. N.J.S.A. 47:1A-9(a); U.S.C. § 552a(b); 42 U.S.C. § 1306(a); 20 C.F.R. § 401.100 - 401.200. *See also* Inzelbuch, GRC 2013-97.

OPRA request item No. 3 – Osabu Payments for Hearing Officer Duty

Personnel records are generally exempt from public access pursuant to N.J.S.A. 47:1A-10. However, said provision of OPRA does contain exceptions to that exemption. Specifically:

- 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 duly authorized by this State or the United States, or when authorized by an individual in interest; 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, but not including any detailed medical or psychological information, shall be a government record.

Id. (emphasis added).

Thus, although N.J.S.A. 47:1A-10 begins with a presumption of nondisclosure, there is certain information that a custodian is required to provide.

Further, in Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211, *et seq.* (January 2006), the complainant filed multiple OPRA requests for the same records in each request. The custodian responded to the complainant stating, that the Borough previously disclosed records to him in 2002 and 2003 on repeated occasions. The Council held that the custodian's response constituted an unlawful denial of access. In reaching the conclusion, the

Council reasoned that “the fact that the records were previously provided to the [c]omplainant on several occasions is not a lawful basis to deny access to the records requests.” Id.⁶

However, in Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008),⁷ the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Id. at 617. The Appellate Division reasoned that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Id. at 618 (*citing Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 183 N.J. 519, 535 (2005) (*quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office*, 374 N.J. Super. 312, 329 (Law Div. 2004))).

The Appellate Division’s decision in Bart, however, turns upon the specific facts of that case. The Council’s decision noted that the custodian certified that copies of the requested record were available at the Authority’s front desk upon simple verbal request by any member of the public. Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006). Moreover, the complainant actually admitted that he was in possession of the record at the time of the OPRA request for the same record. Id.

Here, the Complainant’s OPRA request item No. 3 sought Mr. Osabu’s payroll record specific to his duty as a hearing officer. The Custodian initially responded, stating that HR would need to respond. However, in the SOI, the Custodian certified that HR previously provided the Complainant disclosable some of Mr. Osabu’s disclosable personnel information on July 31, 2015, in response to an unrelated OPRA request. The Custodian attached a copy of the response to the SOI. That response identified a dual title for Mr. Osabu under a single salary.

Applying the facts to previous case law shows that the Custodian unlawfully denied access to the requested information. As was the case in Caggiano, GRC 2005-211, *et seq.*, the Custodian contended that he already provided responsive payroll personnel information to the Complainant through Ms. Spurlock on July 31, 2015. However, contrary to the Council’s holding in Bart, 403 N.J. Super. 609, there is no evidence in the record, other than assumption, supporting that the Complainant possessed said response when he submitted the subject OPRA request.

Based on the foregoing, the Custodian unlawfully denied access to the personnel information responsive to the Complainant’s OPRA request item No 3 because his assertion that DDS already provided same in response to a prior OPRA request was not lawful. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Caggiano, GRC 2005-211. Further, there was no evidence in the record to support that the Complainant still possessed Ms. Spurlock’s July 31, 2015 response. Bart, 403 N.J. Super. 609. However, the Council should decline to order disclosure because the Custodian included Ms. Spurlock’s letter in the SOI, which was copied to all parties.
OPRA request item Nos. 4 and 7 – Osabu and Sanford Contracts

⁶ When determining what is reasonable in situations where a complainant makes multiple requests for the same record, the GRC considers the facts on a case by case basis.

⁷ Reversing Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006).

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OPRA addresses the disclosability of employment contracts in N.J.S.A. 47:1A-5(e). Therein, OPRA provides that “[i]mmediate access ordinarily shall be granted to . . . contracts, including collective negotiations agreements and *individual employment contracts*” Id. (emphasis added).⁸ Thus, notwithstanding that an individual could reasonably classify employee contracts as personnel records, OPRA specifically requires disclosure of them.

Here, the Complainant’s OPRA request item Nos. 4 and 7 sought access to employment contracts for Mr. Osabu and Ms. Sanford. In the SOI, the Custodian argued that employment contracts were exempt from disclosure under OPRA under N.J.S.A. 47:1A-10. However, OPRA is clear that employment contracts are disclosable under OPRA. N.J.S.A. 47:1A-5(e).

Accordingly, the Custodian may have unlawfully denied access to contracts responsive to the Complainant’s OPRA request item Nos. 4 and 7. N.J.S.A. 47:1A-6. The Custodian must disclose those records that exist. However, if no contracts responsive to either requested item exist, the Custodian must certify to this fact.

OPRA request Item No. 5 – Osabu Employment Application

As noted in its analysis of OPRA request item No. 2, OPRA recognizes exemptions included in other State statutes, promulgated regulations, and executive orders. N.J.S.A. 47:1A-9. To this end, EO 26 states in pertinent part that:

No public agency shall disclose the résumés, *applications for employment* or other information concerning job applicants while a recruitment search is ongoing. The résumés of successful candidates shall be disclosed once the successful candidate is hired . . .

Id. (emphasis added).

Further, in Toscano v. NJ Dep’t of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011), the Council held in that “the employment application sought . . . is not disclosable . . . because it is a personnel record which is exempt from disclosure pursuant to N.J.S.A. 47:1A-10, and [EO 26]. See N.J.S.A. 47:1A-9(a).” Id. at 6. See also Deutsch v. NJ Civil Serv. Comm’n, GRC Complaint No. 2011-361 (March 2013).

Here, the Complainant’s OPRA request item No. 5 sought access to Mr. Osabu’s employment application. In the SOI, the Custodian argued that employment applications were not disclosable under N.J.S.A. 47:1A-10. Both OPRA and EO 26 support the Custodian’s position, as does the Council’s decision in Toscano, GRC 2010-147.

Therefore, the Custodian lawfully denied access to the Complainant’s OPRA request item No. 5, which sought Mr. Osabu’s employment application, because same is exempt from public

⁸ The GRC notes that it did not address whether the Custodian violated OPRA by failing to respond immediately to the requested items because the Complainant did not raise the issue in his Denial of Access Complaint. James Keenan v. New Jersey Department of Labor & Workforce Development, Division of Disability Determination Services, 2015-388 – Findings and Recommendations of the Executive Director

access pursuant to N.J.S.A. 47:1A-10, EO 26, and Toscano, GRC 2010-147. *See also* Deutsch, GRC 2011-361.

OPRA request Item No. 6 – Larezza Personnel Information

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian certified that the record provided to the complainant was the only record responsive to the request. Id. The Council found that there had thus been no unlawful denial of access. Id. *See also* Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2009-203 & 2009-211 (January 2011) (holding custodian did not unlawfully deny access when he certified that he provided all responsive records to complainant, and there existed no credible evidence in record to refute such certification).

Here, the Complainant sought disclosable personnel information for Mr. Larezza as identified in N.J.S.A. 47:1A-10. Ms. Spurlock responded to the Complainant on behalf of the Custodian on October 21, 2015, disclosing Mr. Larezza's title, position, salary, and length of service. The GRC is satisfied that the Custodian, through Ms. Spurlock, provided all responsive records. Further, there is no evidence in the record to refute the Custodian's certification.

Accordingly, because the Custodian, through Ms. Spurlock, provided all information responsive to the Complainant's OPRA request item No. 6 on October 21, 2015, subsequently certified to the disclosure in the SOI, and there is no competent, credible evidence to refute the Custodian's certification, he has met his burden of proving that there was no unlawful denial of access. Burns, GRC 2005-68.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his 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 item Nos. 1 and 3 through 7, 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 failed to bear his burden of proof that he lawfully denied access to the records responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6. However, the Council should decline to order disclosure because the Custodian

included copies of these records as part of the Statement of Information, which was copied to all parties.

3. The Custodian lawfully denied access to the list of names responsive to item No. 2. N.J.S.A. 47:1A-6. Such information is exempt from disclosure under Federal and State law, and there is no evidence in the record indicating that the affected individuals consented to disclosure. N.J.S.A. 47:1A-9(a); U.S.C. § 552a(b); 42 U.S.C. § 1306(a); 20 C.F.R. § 401.100 - 401.200. *See also Inzelbuch v. Lakewood Bd. of Educ. (Ocean)*, GRC Complaint No. 2013-97 (Interim Order dated January 28, 2014).
4. The Custodian unlawfully denied access to the personnel information responsive to the Complainant's OPRA request item No 3 because his assertion that DDS already provided same in response to a prior OPRA request was not lawful. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2005-211, *et seq.* (January 2006). Further, there was no evidence in the record to support that the Complainant still possessed Ms. Spurlock's July 31, 2015 response. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008). However, the Council should decline to order disclosure because the Custodian included Ms. Spurlock's letter in the SOI, which was copied to all parties.
5. The Custodian may have unlawfully denied access to contracts responsive to the Complainant's OPRA request item Nos. 4 and 7. N.J.S.A. 47:1A-6. The Custodian must disclose those records that exist. However, if no contracts responsive to either request item exist, the Custodian must certify to this fact.
6. **The Custodian shall comply with conclusion No. 5 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 1:4-4,⁹ to the Executive Director.¹⁰**
7. The Custodian lawfully denied access to the Complainant's OPRA request item No. 5, which sought Mr. Osabu's employment application, because same is exempt from public access pursuant to N.J.S.A. 47:1A-10, Executive Order 26 (McGreevey 2002), and Toscano v. NJ Dep't of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011). *See also Deutsch v. NJ Civil Serv. Comm'n*, GRC Complaint No. 2011-361 (March 2013).
8. Because the Custodian, through Ms. Spurlock, provided all information responsive to the Complainant's OPRA request item No. 6 on October 21, 2015, subsequently

⁹ "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."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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certified to this disclosure in the SOI, and there is no competent, credible evidence to refute the Custodian's certification, he has met his burden of proving that there was no unlawful denial of access. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

9. 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.

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