



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

January 26, 2016 Government Records Council Meeting

Dennis E. Kleiner
Complainant

Complaint No. 2015-45

v.

Ventnor City (Atlantic)
Custodian of Record

At the January 26, 2016 public meeting, the Government Records Council (“Council”) considered the January 19, 2016 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 complied with the Council’s December 15, 2015 Interim Order because she responded within the prescribed time frame by certifying that she was providing to the Complainant the résumé and Certificate, with two redactions, by e-mail on December 17, 2015. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the résumé and certification, the Custodian nonetheless timely complied with the Council’s December 15, 2015 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 26th Day of January, 2016

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: January 29, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 26, 2016 Council Meeting**

Dennis E. Kleiner¹
Complainant

GRC Complaint No. 2015-45

v.

Ventnor City (Atlantic)²
Custodial Agency

Records Relevant to Complaint: Emailed copies of RFQ, RFP, résumé or any other certification of qualifications received by the city of Ventnor for Charles Sabatini in the years 2012-2014.³

Custodian of Record: Janice K. Callaghan

Request Received by Custodian: November 6, 2014

Response Made by Custodian: November 10, 2014, November 19, 2014

GRC Complaint Received: March 3, 2015

Background⁴

December 15, 2015 Council Meeting:

At its December 15, 2015 public meeting, the Council considered the December 8, 2015 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 certificates and qualifications of the government employee, received by the agency in the course of official business, are government records that are subject to disclosure because those records constitute “specific data contained in information which disclose conformity with specific experiential education or medical qualifications” of the identified former employee. N.J.S.A. 47:1A-10. Furthermore the résumé of the former employee must be disclosed because EO-26 only protects from disclosure résumés of unsuccessful candidates for employment. Dunleavy v. Jefferson Twp. Bd. of Educ. (Morris), GRC Complaint No. 2014-372 (June 2015);

¹ No legal representation listed on record.

² Represented by Amy Weintrob Esq., Hankin, Sandman, Palladino & Weintrob (Atlantic City, NJ).

³ Other records were requested that are not the subject matter of this Complaint.

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.

Wagner v. Twp. of Montclair Police Dep't, (Essex), GRC Complaint No. 2013-222 (March 2014). Therefore, the Custodian has not borne her burden of proof that she lawfully denied access to the requested résumé or any other certification of qualifications received by the City for Charles Sabatini in the years 2012-2014. The Custodian must therefore disclose same to the Complainant. Where appropriate, the Custodian might be able to redact personal information from the résumé or other responsive documents. See Woloski v. Twp. of Harding (Morris), GRC Complaint No. 2010-221 (June 2012); Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 and 2009-74 (October 2013); and N.J.S.A. 47:1A-5.

2. The Custodian has certified that there is no RFQ or RFP for the employee hired by the City, and the Complainant has proffered nothing to suggest that the certification is inaccurate or untrue. As there is no credible evidence refuting the Custodian's certification, there has been no unlawful denial of those records. Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). See also Pavlenko v. Twp. of Delran (Burlington), GRC Complaint No. 2010-325 (March 2012).
3. **The Custodian shall comply with item number one (#1) above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On December 16, 2015, the Council distributed its Interim Order to all parties. On December 17, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that she was providing the Complainant with the résumé and certification for Ventnor City Engineer Charles Sabatini.

Compliance

At its December 15, 2015, meeting, the Council ordered the Custodian to disclose the résumé or any other certification of qualifications received by the city of Ventnor for Charles Sabatini in the years 2012-2014. Additionally, the Council ordered the Custodian to submit certified confirmation of compliance to the Executive Director, in accordance with N.J. Court Rule 1:4-4. On December 16, 2015, 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 December 23, 2015.

On December 17, 2015, the first (1st) business day after receipt of the Council's Order, the Custodian responded to the Council's Order by certifying that she was providing to the

Complainant the résumé of City Engineer Charles Sabatini and the only certification the City had regarding him, that being a Certificate evidencing that Mr. Sabatini is a licensed professional engineer. The Custodian also certified that she redacted Mr. Sabatini's home address from both the résumé and the Certificate in accordance with N.J.A.C. 5:3-1.2(8)(ii) and that she redacted from the résumé a previous salary for a non-public position, citing N.J.A.C. 5:3-2.2(8) and Executive Order 26 (McGreevey, 2002). Additionally, the Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's December Interim Order because she responded within the prescribed time frame by certifying that she was providing to the Complainant the résumé and Certificate of City Engineer Charles Sabatini, with two redactions, by e-mail on December 17, 2015. Additionally, the Custodian simultaneously provided certified confirmation of compliance 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)).

Although the Custodian unlawfully denied access to the résumé and certification, the Custodian nonetheless timely complied with the Council's December 15, 2015 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 complied with the Council's December 15, 2015 Interim Order because she responded within the prescribed time frame by certifying that she was providing to the Complainant the résumé and Certificate, with two redactions, by e-mail on December 17, 2015. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the résumé and certification, the Custodian nonetheless timely complied with the Council's December 15, 2015 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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: Ernest Bongiovanni
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

January 19, 2016



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

December 15, 2015 Government Records Council Meeting

Dennis E. Kleiner
Complainant

Complaint No. 2015-45

v.

Ventnor City (Atlantic)
Custodian of Record

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the December 8, 2015 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 certificates and qualifications of the government employee, received by the agency in the course of official business, are government records that are subject to disclosure because those records constitute “specific data contained in information which disclose conformity with specific experiential education or medical qualifications” of the identified former employee. N.J.S.A. 47:1A-10. Furthermore the résumé of the former employee must be disclosed because EO-26 only protects from disclosure résumés of unsuccessful candidates for employment. Dunleavy v. Jefferson Twp. Bd. of Educ. (Morris), GRC Complaint No. 2014-372 (June 2015); Wagner v. Twp. of Montclair Police Dep’t, (Essex), GRC Complaint No. 2013-222 (March 2014). Therefore, the Custodian has not borne her burden of proof that she lawfully denied access to the requested résumé or any other certification of qualifications received by the City for Charles Sabatini in the years 2012-2014. The Custodian must therefore disclose same to the Complainant. Where appropriate, the Custodian might be able to redact personal information from the résumé or other responsive documents. See Woloski v. Twp. of Harding (Morris), GRC Complaint No. 2010-221 (June 2012); Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 and 2009-74 (October 2013); and N.J.S.A. 47:1A-5.
2. The Custodian has certified that there is no RFQ or RFP for the employee hired by the City, and the Complainant has proffered nothing to suggest that the certification is inaccurate or untrue. As there is no credible evidence refuting the Custodian’s certification, there has been no unlawful denial of those records. Pusterhofer v. NJ Dept’ of Educ., GRC Complaint No. 2005-49 (July 2005). See also Pavlenko v. Twp. of Delran (Burlington), GRC Complaint No. 2010-325 (March 2012).



3. **The Custodian shall comply with items number one (#1) above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 15th Day of December, 2015

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 16, 2015

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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2015 Council Meeting**

**Dennis E. Kleiner¹
Complainant**

GRC Complaint No. 2015-45

v.

**Ventnor City (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Emailed copies of RFQ, RFP, résumé or any other certification of qualifications received by the city of Ventnor for Charles Sabatini in the years 2012-2014.³

Custodian of Record: Janice K. Callaghan

Request Received by Custodian: November 6, 2014

Response Made by Custodian: November 10, 2014, November 19, 2014

GRC Complaint Received: March 3, 2015

Background⁴

Request and Response:

On November 6, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 10, 2014, Counsel for the Custodian advised the Complainant that, owing to the volume of records requested, it would take longer than seven (7) business days to respond and offered to send the records either as they became available or all in one transmission. The Complainant chose to receive records as they became available, acknowledging that it may take longer than seven (7) business days to provide all the records. On November 19, 2014, the Custodian advised the Complainant that the RFQ and RFP do not exist. However, the Custodian denied the request for the résumé, certification, or qualifications of Charles Sabatini, an “employee” of the City of Ventnor (“City”), based on those records being part of Mr. Sabatini’s personnel file. The Custodian argued that the employee’s right to privacy outweighs Complainant’s need for access.

Denial of Access Complaint:

¹ No legal representation listed on record.

² Represented by Amy Weintrob Esq., Hankin, Sandman, Palladino & Weintrob (Atlantic City, NJ).

³ Other records were requested that are not the subject matter of this Complaint.

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.

On March 3, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records were due November 19, 2014, but had not been received. He responded to the Custodian’s denial by stating that résumés of successful candidates must be disclosed once the successful candidate is hired.

Statement of Information:

On March 17, 2015, the Custodian filed a Statement of Information (“SOI”). On October 29, 2015, the GRC required a revised SOI, as the original lacked the required document index. On November 4, 2015, the Custodian submitted a revised SOI, which included the document index. The Custodian certified that she received the Complaint on November 6, 2014. The Custodian also certified that she responded in writing to the Complainant on November 19, 2014, stating that no RFP or RFQ existed and none could therefore be supplied. The Custodian also stated that she denied access on that same day to the engineering and land surveying license of Charles Sabatini, contending that the certification or other qualifications of the employee constitute part of his personnel file and are therefore protected from OPRA disclosure. The Custodian contended that the employee’s right to privacy exceeds the requestor’s need to access.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Résumé or any other Certification of Qualifications of the City’s Employee

Executive Order No. 26 (McGreevey) (“EO-26”) provides in relevant part:

“No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. *The resumes of successful candidates shall be disclosed once the successful candidate is hired* [emphasis added]. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.”

In Dunleavy v. Jefferson Twp. Bd. of Educ. (Morris), GRC Complaint No. 2014-372 (June 2015), the complainant sought “the license and qualifications of the individual hired to replace” an employee of the Jefferson Board of Education. The custodian denied access because the individual whose qualifications and license were sought had ceased being an employee of the

Board and that as a non-employee the individual had to consent to the release of such information from his personnel file, *citing Inzelbuch v. Lakewood Bd. of Educ. (Ocean)*, GRC Complaint No. 2013-97 (March 2014). The GRC, however, determined that the documents sought were government records, *citing N.J.S.A. 47:1A-10*, which characterizes as government records disclosable under OPRA such items as “data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment. . . .” Therefore, the custodian in that matter was required to release the résumé, licenses, and other qualifications of the former employee.

In *Wagner v. Twp. of Montclair Police Dep’t, (Essex)*, GRC Complaint No. 2013-222 (March 2014), the GRC ordered disclosure of all “specific data contained in information which disclose conformity with specific experiential educational or medical qualifications required for employment” of certain named police officers. The GRC noted that it had previously ordered disclosure of employees’ certificates, transcripts, and diplomas, because such documents evidence conformity with specific educational requirements for employment within a school district, *citing Bonanno v. Garfield Bd. of Educ. Bus. Dep’t*, GRC Complaint No. 2006-62 (March 2007).

Likewise in the instant matter, the certificates and qualifications of the government employee, received by the agency in the course of official business, are government records that are subject to disclosure because those records constitute “specific data contained in information which disclose conformity with specific experiential education or medical qualifications” of the identified former employee. *N.J.S.A. 47:1A-10*. Furthermore the résumé of the former employee must be disclosed because EO-26 only protects from disclosure résumés of unsuccessful candidates for employment. *Dunleavy*, GRC 2014-372; *Wagner*, GRC 2013-222. Therefore, the Custodian has not borne her burden of proof that she lawfully denied access to the requested résumé or any other certification of qualifications received by the City for Charles Sabatini in the years 2012-2014. The Custodian must therefore disclose same to the Complainant. Where appropriate, the Custodian might be able to redact personal information from the résumé or other responsive documents. *See Woloski v. Twp. of Harding (Morris)*, GRC Complaint No. 2010-221 (June 2012); *Gettler v. Twp. of Wantage (Sussex)*, GRC Complaint Nos. 2009-73 and -74 (October 2013); and *N.J.S.A. 47:1A-5*.

The RFQ and RFP of the City’s Employee

The Custodian certified that there is no RFQ or RFP for the employee hired by the City, and the Complainant has proffered nothing to suggest that the certification is inaccurate or untrue. As there is no credible evidence refuting the Custodian’s certification, there has been no unlawful denial of those records. *Pusterhofer v. NJ Dept’ of Educ.*, GRC Complaint No. 2005-49 (July 2005). *See also Pavlenko v. Twp. of Delran (Burlington)*, GRC Complaint No. 2010-325 (March 2012).

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 certificates and qualifications of the government employee, received by the agency in the course of official business, are government records that are subject to disclosure because those records constitute "specific data contained in information which disclose conformity with specific experiential education or medical qualifications" of the identified former employee. N.J.S.A. 47:1A-10. Furthermore the résumé of the former employee must be disclosed because EO-26 only protects from disclosure résumés of unsuccessful candidates for employment. Dunleavy v. Jefferson Twp. Bd. of Educ. (Morris), GRC Complaint No. 2014-372 (June 2015); Wagner v. Twp. of Montclair Police Dep't, (Essex), GRC Complaint No. 2013-222 (March 2014). Therefore, the Custodian has not borne her burden of proof that she lawfully denied access to the requested résumé or any other certification of qualifications received by the City for Charles Sabatini in the years 2012-2014. The Custodian must therefore disclose same to the Complainant. Where appropriate, the Custodian might be able to redact personal information from the résumé or other responsive documents. See Woloski v. Twp. of Harding (Morris), GRC Complaint No. 2010-221 (June 2012); Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 and 2009-74 (October 2013); and N.J.S.A. 47:1A-5.
2. The Custodian has certified that there is no RFQ or RFP for the employee hired by the City, and the Complainant has proffered nothing to suggest that the certification is inaccurate or untrue. As there is no credible evidence refuting the Custodian's certification, there has been no unlawful denial of those records. Pusterhofer v. NJ Dept' of Educ., GRC Complaint No. 2005-49 (July 2005). See also Pavlenko v. Twp. of Delran (Burlington), GRC Complaint No. 2010-325 (March 2012).
3. **The Custodian shall comply with items number one (#1) above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.⁶**

⁵ "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."

⁶ 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.

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

Prepared By: Ernest Bongiovanni
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

December 8, 2015