



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 25, 2019 Government Records Council Meeting

Christina Moreira
Complainant

Complaint No. 2017-24

v.

Elizabeth Board of Education (Union)
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 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 May 21, 2019 Interim Order because he responded in the prescribed time frame providing records. The Custodian also simultaneously provided certified confirmation of compliance to the Council Staff.
2. Although the Custodian unlawfully denied access to the portion of the Complainant’s request seeking Mr. Arcieri’s resume and job qualifications, he lawfully denied access and provided responsive records to other portions. Further, the Custodian fully complied with the Council’s May 21, 2019 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 25th Day of June 2019

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 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Christina Moreira¹
Complainant**

GRC Complaint No. 2017-24

v.

**Elizabeth Board of Education (Union)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:
December 12, 2016 OPRA Request

1. Documentation pertaining to the separation (board meeting minutes where the action took place) for Juan Pozo-Hernandez (“Mr. Lopez”) from the Elizabeth School District (“District”).
2. Resume, job application, and any and all qualifications Antonio Arceiri (“Mr. Arceiri”), Supervisor of Construction, presented to obtain the position.
3. Resume, job application, and any and all qualifications Luis Milanes (“Mr. Milanes”), Acting Coordinator of Mechanics, presented to obtain the position.
4. Job posting for the position of Acting Coordinator of Mechanics for which Mr. Milanes was appointed.³

January 6, 2017 OPRA Request

“Copies of the billing statements or checks paid for each news outlet listed below for notices of meetings for the 2016/2016 school year . . .

The Star Ledger, MSG Network, Cablevision of Elizabeth, Luso Americano, News Record, La Tribuna Hispana, 24 Horas, La Voz, Vistazo Hispano.”

Custodian of Record: Harold E. Kennedy, Jr.

Request Received by Custodian: December 12, 2016; January 6, 2017

Response Made by Custodian: December 21, 2016; January 18, 2017

GRC Complaint Received: February 6, 2017

Background

May 21, 2019 Council Meeting:

At its May 21, 2019 public meeting, the Council considered the May 14, 2019 Findings

¹ No legal representation listed on record.

² Represented by Robert F. Varady, Esq., of La Corte, Bundy, Varady & Kinsella (Union, N.J.).

³ The Complainant requested additional records not at issue in the instant complaint.

and Recommendations of the Council Staff 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 unlawfully denied access to Mr. Arceiri's resume sought under Item No. 2 of the Complainant's December 12, 2016 OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002). The Custodian must therefore disclose the resume to the Complainant.
2. The Custodian unlawfully denied access to Mr. Arceiri's job qualifications sought under Item No. 2 of the Complainant's December 12, 2016 OPRA request. N.J.S.A. 47:1A-6; Lotito v. N.J. Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014); Guz v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2010-33 (June 2010); and Bonanno v. Garfield Bd. of Educ., Bus. Dep't, GRC Complaint No. 2006-62 (March 2007). The Custodian must therefore disclose the records containing such information to the Complainant.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Council Staff.⁶**
4. The Custodian lawfully denied access to the Complainant's request for Mr. Arceiri's job application because same is not subject to disclosure under OPRA. N.J.S.A. 47:1A-6; Toscano v. N.J. Dep't of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011); and Deutsch v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-361 (March 2013).
5. The Custodian has borne his burden of proof that he lawfully denied access to Item Nos. 1, 3, and 4 of the Complainant's December 12, 2016 OPRA request, and January 6, 2017 OPRA request. Specifically, the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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.

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

Procedural History:

On May 22, 2019, the Council distributed its Interim Order to all parties. On May 29, 2019, the Custodian responded to the Council's Interim Order. The Custodian certified that a copy of Mr. Arcieri's resume was provided to the Complainant that same day, with redactions made to Mr. Arcieri's home address and telephone number. The Custodian also certified that the District does not maintain additional records which relate to Mr. Arcieri's job qualifications.

Analysis

Compliance

At its May 21, 2019 meeting, the Council ordered the Custodian to disclose Mr. Arcieri's resume and any job qualifications presented for the position of Supervisor of Construction and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On May 22, 2019, 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 May 30, 2019.

On May 29, 2019, the fourth (4th) business day after receipt of the Council's Order, the Custodian responded to the Council's Interim Order, certifying that a copy of Mr. Arcieri's resume was provided to the Complainant with redactions. The Custodian included a document index providing the lawful basis for the redactions. The Custodian also certified that no additional responsive records exist as to Mr. Arcieri's job qualifications.

Therefore, the Custodian complied with the Council's May 21, 2019 Interim Order because he responded in the prescribed time frame providing records. The Custodian also simultaneously provided certified confirmation of compliance to the Council Staff.

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 portion of the Complainant’s request seeking Mr. Arcieri’s resume and job qualifications, he lawfully denied access and provided responsive records to other portions. Further, the Custodian fully complied with the Council’s May 21, 2019 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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s May 21, 2019 Interim Order because he responded in the prescribed time frame providing records. The Custodian also simultaneously provided certified confirmation of compliance to the Council Staff.
2. Although the Custodian unlawfully denied access to the portion of the Complainant’s request seeking Mr. Arcieri’s resume and job qualifications, he lawfully denied access and provided responsive records to other portions. Further, the Custodian fully complied with the Council’s May 21, 2019 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: Samuel A. Rosado
Staff Attorney

June 18, 2019



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

May 21, 2019 Government Records Council Meeting

Christina Moreira
Complainant

Complaint No. 2017-24

v.

Elizabeth Board of Education (Union)
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council ("Council") considered the May 14, 2019 Findings and Recommendations of the Council Staff 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 unlawfully denied access to Mr. Arceiri's resume sought under Item No. 2 of the Complainant's December 12, 2016 OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002). The Custodian must therefore disclose the resume to the Complainant.
2. The Custodian unlawfully denied access to Mr. Arceiri's job qualifications sought under Item No. 2 of the Complainant's December 12, 2016 OPRA request. N.J.S.A. 47:1A-6; Lotito v. N.J. Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014); Guz v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2010-33 (June 2010); and Bonanno v. Garfield Bd. of Educ., Bus. Dep't, GRC Complaint No. 2006-62 (March 2007). The Custodian must therefore disclose the records containing such information to the Complainant.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Council Staff.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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

4. The Custodian lawfully denied access to the Complainant's request for Mr. Arceiri's job application because same is not subject to disclosure under OPRA. N.J.S.A. 47:1A-6; Toscano v. N.J. Dep't of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011); and Deutsch v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-361 (March 2013).
5. The Custodian has borne his burden of proof that he lawfully denied access to Item Nos. 1, 3, and 4 of the Complainant's December 12, 2016 OPRA request, and January 6, 2017 OPRA request. Specifically, the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 21st Day of May 2019

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 22, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
May 21, 2019 Council Meeting**

**Christina Moreira¹
Complainant**

GRC Complaint No. 2017-24

v.

**Elizabeth Board of Education (Union)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

December 12, 2016 OPRA Request

1. Documentation pertaining to the separation (board meeting minutes where the action took place) for Juan Pozo-Hernandez (“Mr. Lopez”) from the Elizabeth School District (“District”).
2. Resume, job application, and any and all qualifications Antonio Arceiri (“Mr. Arceiri”), Supervisor of Construction, presented to obtain the position.
3. Resume, job application, and any and all qualifications Luis Milanes (“Mr. Milanes”), Acting Coordinator of Mechanics, presented to obtain the position.
4. Job posting for the position of Acting Coordinator of Mechanics for which Mr. Milanes was appointed.³

January 6, 2017 OPRA Request

“Copies of the billing statements or checks paid for each news outlet listed below for notices of meetings for the 2016/2016 school year . . .

The Star Ledger, MSG Network, Cablevision of Elizabeth, Luso Americano, News Record, La Tribuna Hispana, 24 Horas, La Voz, Vistazo Hispano.”

Custodian of Record: Harold E. Kennedy, Jr.

Request Received by Custodian: December 12, 2016; January 6, 2017

Response Made by Custodian: December 21, 2016; January 18, 2017

GRC Complaint Received: February 6, 2017

¹ No legal representation listed on record.

² Represented by Robert F. Varady, Esq., of La Corte, Bundy, Varady & Kinsella (Union, N.J.).

³ The Complainant requested additional records not at issue in the instant complaint.

Background⁴

Request and Response:

December 12, 2016 OPRA Request

On December 12, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 21, 2016, the Custodian responded in writing denying access to Item Nos. 1, 3, and 4, stating that the District does not maintain responsive records. As to Item No. 2, the Custodian stated that request item sought personnel records that are exempt under N.J.S.A. 47:1A-10.

January 6, 2017 OPRA Request

On January 6, 2017, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 18, 2017, the Custodian responded in writing stating that the District did not maintain retrievable records. The Custodian added that compiling and creating the information fell outside the controlling authority under OPRA. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 514 (App. Div. 2010).

On January 19, 2017, the Complainant replied to the Custodian via e-mail, asking whether the Custodian is stating that there was no paperwork for payments made to the newspapers listed in the request. The Complainant also stated that she requested a copy of contracts or agreements for cost with the District for advertising with the newspapers listed in the OPRA request.⁵

Denial of Access Complaint:

On February 6, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that regarding her December 12, 2016 OPRA request, she was denied access without any follow-up assistance from the Custodian. As to her January 6, 2017 OPRA request, the Complainant stated that she was also denied without any guidance on how she could access the records. The Complainant also noted her follow up correspondence dated January 19, 2017.

Statement of Information:

On March 13, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA requests on December 12, 2016 and January 6, 2017, respectively. The Custodian certified that he conducted a search of the Board’s files for responsive records. The Custodian certified that he responded in writing on December 21, 2016 and January 18, 2017 respectively.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

⁵ The Complainant appears to have attached a copy of an OPRA request dated January 19, 2017, however the contents are unrelated to the instant complaint, and was unmentioned by the Complainant.

December 12, 2016 OPRA Request

The Custodian asserted that the District did not maintain retrievable records responsive to Item No. 1. Regarding Item Nos. 3 and 4, the Custodian also contended that the District did not maintain retrievable records regarding Mr. Milanes' position and qualifications. The Custodian added that the District does not have a job posting for an "acting" position.

Regarding Item No. 2, the Custodian asserted that the request for the job qualifications for Mr. Arceiri was denied as it related to information contained in with the District's personnel records and was therefore not subject to access under N.J.S.A. 47:1A-10.

January 6, 2017 OPRA Request

The Custodian asserted that the Complainant's request for billing statements and checks paid to various news outlets was denied as seeking records the District did not maintain. The Custodian added that compiling and creating a record containing the requested information falls outside a custodian's obligations under OPRA. Burnett, 415 N.J. Super. at 514.

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.

December 12, 2016 OPRA Request No. 2

Regarding personnel records, OPRA begins with a presumption against disclosure and "proceeds with a few narrow exceptions that . . . need to be considered." Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). In the Complainant's OPRA request, he sought the "resume, job application, and any and all qualifications" regarding Mr. Arceiri. The Custodian denied access, asserting the personnel records exemption for all identified records.

For resumes, OPRA provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”) provides that:

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. 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.

[Id.]

To briefly address the resume issue, EO 26 expressly provides that under OPRA, resumes of successful candidates must be disclosed at the end of the recruitment process. Therefore, the evidence of record supports a finding that the Custodian unlawfully denied access to the requested resume.

Accordingly, the Custodian unlawfully denied access to Mr. Arceiri’s resume sought under Item No. 2 of the Complainant’s December 12, 2016 OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); EO 26. The Custodian must therefore disclose the resume to the Complainant.

Regarding employee qualifications, those narrow exceptions for the personnel records exemption include “*data contained in information which disclose conformity with specific experiential [and] educational . . . qualifications required for government employment . . .*” N.J.S.A. 47:1A-10 (emphasis added). The Council has previously ordered disclosure of different types of records sought that disclose such information. See Lotito v. N.J. Dep’t of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014); Guz v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2010-33 (June 2010); and Bonanno v. Garfield Bd. of Educ., Bus. Dep’t, GRC Complaint No. 2006-62 (March 2007).

Accordingly, the Custodian unlawfully denied access to Mr. Arceiri’s job qualifications sought under Item No. 2 of the Complainant’s December 12, 2016 OPRA request. N.J.S.A. 47:1A-6; Lotito, GRC 2013-65; Guz, GRC 2010-33; and Bonanno, GRC 2006-62. The Custodian must therefore disclose the records containing such information to the Complainant.

EO 26 is clear on the disclosability of resumes at the conclusion of the recruitment process: successful candidate resumes must be disclosed. Id. However, EO 26 is less clear on applications and “other information concerning job applicants.” To this end, the Council has previously held that employment applications were not disclosable, reasoning that EO 26 made no mention of employment applications being disclosed after the completion of the recruitment search. See Toscano v. N.J. Dep’t of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011). The Council further equated applications to “personnel records” not among the enumerated list of releasable records set forth at N.J.S.A. 47:1A-10 (allowing for limited disclosure of certain personnel information). See also Deutsch v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2011-361 (March 2013).

Therefore, the Custodian lawfully denied access to the Complainant's request for Mr. Arceiri's job application because same is not subject to disclosure under OPRA. N.J.S.A. 47:1A-6; Toscano, GRC 2010-147; and Deutsch, GRC 2011-361.

December 12, 2016 OPRA Request Item Nos. 1, 3, and 4; January 6, 2017 OPRA Request

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, Item Nos. 1, 3, and 4 of the Complainant's December 12, 2016 OPRA request sought resume and job qualifications for Mr. Milanese. The Complainant also sought the billing statements and checks from the District paid to newspapers for the 2016 school year in her January 6, 2017 OPRA request. The Custodian denied access, stating that the District did not maintain retrievable responsive records for those documents. In the SOI, the Custodian certified to this fact. Further, there is no evidence in the record to refute that the Custodian did not possess the responsive record plea agreement.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to Item Nos. 1, 3, and 4 of the Complainant's December 12, 2016 OPRA request, and January 6, 2017 OPRA request. Specifically, the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Knowing & Willful

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

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to Mr. Arceiri's resume sought under Item No. 2 of the Complainant's December 12, 2016 OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002). The Custodian must therefore disclose the resume to the Complainant.
2. The Custodian unlawfully denied access to Mr. Arceiri's job qualifications sought under Item No. 2 of the Complainant's December 12, 2016 OPRA request. N.J.S.A. 47:1A-6; Lotito v. N.J. Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014); Guz v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2010-33 (June 2010); and Bonanno v. Garfield Bd. of Educ., Bus. Dep't, GRC Complaint No. 2006-62 (March 2007). The Custodian must therefore disclose the records containing such information to the Complainant.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate**

redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Council Staff.⁸

4. The Custodian lawfully denied access to the Complainant's request for Mr. Arceiri's job application because same is not subject to disclosure under OPRA. N.J.S.A. 47:1A-6; Toscano v. N.J. Dep't of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011); and Deutsch v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-361 (March 2013).
5. The Custodian has borne his burden of proof that he lawfully denied access to Item Nos. 1, 3, and 4 of the Complainant's December 12, 2016 OPRA request, and January 6, 2017 OPRA request. Specifically, the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

May 14, 2019

⁶ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the 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.