



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
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Commissioner

### FINAL DECISION

#### June 25, 2024 Government Records Council Meeting

Maria Diamonte  
Complainant

Complaint No. 2022-25

v.

Rutgers University  
Custodian of Record

At the June 25, 2024 public meeting, the Government Records Council (“Council”) considered the June 18, 2024 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian’s failure to immediately respond in writing to the Complainant’s request item number 4 for immediate access records; namely “salary,” either granting access, denying access, seeking clarification or requesting an extension of time violates N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). Moreover, the Custodian failed to provide an explanation that would reasonably justify a delay in access to the requested records.
3. The Custodian’s January 26, 2022 response to the Complainant’s January 7, 2022 OPRA request was insufficient because she failed to address each individual request item. N.J.S.A. 47:1A-5(g); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
4. The Custodian met her burden of proof that she did not unlawfully deny access to the records responsive to the Complainant’s request items number 1, 2 and 4. N.J.S.A. 47:1A-6. The Custodian certified that she disclosed all records responsive to said request items to the Complainant, and there is no credible evidence of record to refute

the Custodian's certification. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

5. Because the Complainant has failed to articulate her need for the letters of reference, and the Custodian has asserted valid reasons for denying access to said records, non-disclosure of the records is warranted. As such, the Custodian lawfully denied access to the records responsive to request item number 3 on the basis that disclosure of same would violate the reasonable expectation of privacy of those persons submitting letters of reference. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009). See also Reynolds v. N.J. Bd. of Pub. Util., GRC Complaint No. 2008-14 (August 2009).

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

Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of June 2024

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 27, 2024**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 25, 2024 Council Meeting**

**Maria Diamonte<sup>1</sup>  
Complainant**

**GRC Complaint No. 2022-25**

v.

**Rutgers University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the following records via Records Center for Rutgers University employee Ariane Chebel:

1. Résumés submitted for employment.
2. Any and all educational degrees earned and any translation for graduate degrees and undergraduate degrees.
3. References submitted at time of hire.
4. Title, position, salary, payroll record, length of service, date of separation and the reason for such separation, and the amount and type of any pension received or earned.

**Custodian of Record:** Jewell Battle

**Request Received by Custodian:** January 7, 2022

**Response Made by Custodian:** January 26, 2022

**GRC Complaint Received:** February 4, 2022

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

**Request and Response:**

On January 7, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 26, 2022, the fourteenth (14<sup>th</sup>) business day following receipt of said request, the Custodian responded to the Complainant in writing with the following three (3) files:

1. “7083\_Redacted.pdf”
2. “Chebel\_d’Appollonia\_Apr21.pdf”

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

<sup>2</sup> Represented by Elizabeth Minott, Esq. (New Brunswick, NJ).

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

### 3. “R007083.xls”

#### Denial of Access Complaint:

On February 4, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated, “I made a request for documents. I received the wrong documents. I spoke with the OPRA attorney at Rutgers. I have not received the documents.” The Complainant stated that the Custodian disclosed the wrong document in response to request item number 1. The Complainant also stated that with respect to request items numbered 2 and 4, the Custodian disclosed incomplete information. The Complainant further stated that the Custodian failed to disclose any records in response to request item number 3.

#### Statement of Information:

On February 22, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 7, 2022, and responded on January 26, 2022. The Custodian certified that with respect to request item numbers 1 and 2, she asked for responsive records from the department where Ms. Chebel works. The Custodian certified that for request item number 1 she received a copy of a *curricula vitae* (“CV”) for Ariane Chebel.<sup>4</sup> The Custodian certified that for request item number 2, she received copies of educational diplomas that Ms. Chebel earned. The Custodian certified that the diplomas are not translated into English. The Custodian further certified that records responsive to request items number 1 and 2 were provided to the Complainant. The Custodian certified that records responsive to request item number 3 are letters of reference. The Custodian certified that the University does not disclose letters of reference because they are not subject to disclosure pursuant to OPRA’s privacy exemption. The Custodian certified that for the records responsive to request item number 4, she asked for and received from Human Resources payroll record information. The Custodian certified that responsive records for this request item “as current for Ariane Chebel” were disclosed to the Complainant.<sup>5</sup>

The Custodian attached to the SOI copies of two (2) CVs. The CVs are undated; however, one is for Ms. Chebel’s appointment as an associate professor in the School of Public Affairs and Administration and the other is for her appointment as a professor in the same school. The Custodian also attached copies of two (2) academic diplomas; both diplomas are from the Institut d’Etudes Politiques de Paris. One diploma confirms that Ms. Chebel received a Ph.D. degree, and the other diploma confirms she received a post-doctoral degree in political science research management. The evidence of record reveals that an English translation

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<sup>4</sup> The Custodian also certified in the SOI that the Complainant submitted a subsequent request wherein she sought a copy of the “original CV” and provided additional details. As a result, the Custodian certified she was able to obtain a copy of the original CV and disclose it to the Complainant. The GRC notes, however, that the Complainant’s subsequent request did not form the basis of this complaint and is therefore not relevant to this complaint.

<sup>5</sup> The Custodian certified in the SOI that the Complainant submitted a subsequent request wherein she sought “a full payroll history” instead of just current payroll information. The Custodian certified that she did then provide the full payroll history to the Complainant. The GRC notes, however, that the Complainant’s subsequent request did not form the basis of this complaint and is therefore not relevant to this complaint.

accompanied each diploma. The Custodian also attached to the SOI a printout containing Ms. Chebel’s name, job title, department, start date, length of service and current status.

Additional Submissions:

On March 11, 2022, the Complainant e-mailed the GRC, concerned about when her complaint would be resolved because she stated that she had not received any of the records she requested. By reply e-mail that same date, the GRC informed the Complainant that the Custodian certified in the SOI, a copy of which was provided to her, that three (3) of the four (4) request items were disclosed to her and the only item not disclosed was a request for references that was denied for privacy reasons.

On March 11, 2022, the Complainant e-mailed a response to the GRC, wherein she stated that the résumé was not pre-employment because it contained employment at Rutgers. The Complainant also stated that she had requested graduate and undergraduate degrees which were only partially provided. The Complainant further stated that copies of a payroll record and references were never provided.

Balancing Test Questionnaires:

On February 1, 2024, the GRC e-mailed balancing test questionnaires to both the Complainant and Custodian. On February 2, 2024, the Custodian’s Counsel requested, and was granted, an extension of time until February 9, 2024, to submit the completed questionnaire.

On February 6, 2024, the Complainant submitted to the GRC the completed questionnaire containing responses to the custodian’s questionnaire (upon which the Complainant was copied). On February 7, 2024, the GRC notified the Complainant that her answers were not responsive to the questions in the complainant’s questionnaire and granted the Complainant two (2) additional business days to resubmit responsive answers to the complainant’s questionnaire.<sup>6</sup>

On February 9, 2024, the Custodian’s Counsel submitted to the GRC the completed questionnaire. The Custodian’s answers to the questionnaire are set forth in the following table:

<b>Questions</b>	<b>Custodian’s Response</b>
<b>Type of record request:</b>	“Confidential personnel records – letters of reference for an application for employment at Rutgers as a faculty member.”
<b>The type of information it does or might contain:</b>	“Confidential assessments from qualified people outside the university about the applicant’s scholarship, teaching, and other topics relevant for a faculty position.”

<sup>6</sup> The four (4) questions that are posed to the Complainant in the complainant’s questionnaire are: (1) Why do you need the requested record or information? (2) How important is the requested record or information to you? (3) Do you plan to redistribute the requested record or information? (4) Will you use the requested record or information for unsolicited contact of the individuals named on the list?

<p><b>The potential for harm in any subsequent nonconsensual disclosure:</b></p>	<p>The people writing the references expect that their letters are confidential. They likely would not be willing to write such letters if they knew they could be made public or that they would be available to the candidate about whom the evaluation was written. If they did still write letters, they would write less candid or substantive letters. In addition, the applicant has a privacy interest in these evaluations and if these evaluations were made public it could be embarrassing or damaging to their career and to the professional relationships of the applicant and the person writing the reference. Finally, the university has an interest in protecting the confidentiality of these records since it wishes to receive candid and substantive evaluations of applicants. If these records could be made public (non-consensually) the university would likely receive more guarded evaluations. The university takes the confidentiality of these letters very seriously since it wants free and frank evaluations which simply would not be possible without confidentiality.</p>
<p><b>The injury from disclosure to the relationship in which the record was generated:</b></p>	<p>As noted above, people writing references for job applicants understand that their references will be kept confidential and for the university to breach this understanding would damage the university's ability to receive honest and detailed evaluations of job candidates.</p>
<p><b>The adequacy of safeguards to prevent unauthorized disclosure:</b></p>	<p>These records are kept in the successful applicant's personnel file and no one has access except the higher administrative officers of the unit (e.g. Chair or Dean).</p>
<p><b>Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access:</b></p>	<p>On the contrary, there is an express exemption for personnel records. EO 26 requires that we make resumes public for successful candidates, but there is no mandate to make professional references public. Even outside of OPRA, many, if not most, faculty make their CVs available on their websites. In addition, their publications (and reviews of those publications) are available either on the internet or in libraries. Confidential letters of reference are a long-standing convention in academia and such confidential evaluations are a standard and necessary part of the faculty hiring process.</p>

On February 9, 2024, the Complainant submitted to the GRC a completed amended questionnaire. The Complainant resubmitted the same non-responsive answers as she submitted on February 6, 2024, with slight modifications.

## Analysis

### Timeliness

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

Here, the Custodian's response was due no later than January 16, 2022; however, the Custodian failed to respond to the request until January 26, 2022.<sup>8</sup> There is nothing in the evidence of record to indicate the Custodian sought clarification or requested an extension of time within the statutorily mandated time frame.

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

### Immediate Access

Barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).<sup>9</sup> See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February

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

<sup>8</sup> February 26, 2022 was a Saturday, which is not a traditional "business day." February 25, 2024, the fourteenth (14th) business day following receipt of the request, was the last business day of the week. The GRC notes that according to Rutgers' 2021-22 Academic Year Calendar, classes were in session during the February 21, 2022 state holiday.

<sup>9</sup> OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A.

2007) (holding that the custodian was obligated to notify the complainant immediately as to the status of “immediate access” records). See also Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012).

In the instant complaint, the Complainant’s request item number 4 sought “immediate access” records, namely “salary.” Records concerning salary are immediate access records pursuant to N.J.S.A. 47:1A-5(e). The Custodian ignored the immediate access nature of this request item and did not respond until the fourteenth (14th) business day, addressing the Complainant’s entire OPRA request on that date. As such, the Custodian violated OPRA’s immediate access provision.

Therefore, the Custodian’s failure to immediately respond in writing to the Complainant’s request item number 4 for immediate access records; namely “salary,” either granting access, denying access, seeking clarification or requesting an extension of time violates N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i); Herron, GRC 2006-178; Harris, GRC 2011-65. Moreover, the Custodian failed to provide an explanation that would reasonably justify a delay in access to the requested records.

### **Sufficiency of Response**

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added). In Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that “. . . [t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).” See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Here, the Custodian responded to the Complainant’s January 7, 2022 OPRA request on January 26, 2022, by listing three (3) files. However, the response failed to address each individual request item or otherwise correlate the listed files with a specific request item. Thus, the Custodian’s response, as in Paff, GRC 2007-272, was insufficient.

Therefore, the Custodian’s January 26, 2022 response to the Complainant’s January 7, 2022 OPRA request was insufficient because she failed to address each individual request item. N.J.S.A. 47:1A-5(g); Paff, GRC 2007-272.

### **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

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47:1A-5(e). The Council has also determined that invoices are “immediate access” records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).



“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 also provides that “. . . a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy . . .” N.J.S.A. 47:1A-1.

Request item number 1 - Résumés submitted for employment.

Request item number 2 - Any and all educational degrees earned and any translation for graduate degrees and undergraduate degrees.

Request item number 4 - Title, position, salary, payroll record, length of service, date of separation and the reason for such separation, and the amount and type of any pension received or earned.

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian’s certification that all such records were provided to the complainant. The Council held that the custodian’s certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian’s burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

With respect to request item number 1, the Custodian certified that she disclosed to the Complainant a CV for Ariane Chebel for the position of associate professor and professor, which are the records responsive to this request item that were delivered to her from the department where Ms. Chebel works. Because a CV is customarily used to apply for positions in academia, as here, the GRC is satisfied that its disclosure is responsive to the Complainant’s request for a résumé.

With respect to request item number 2, the Custodian certified that she disclosed to the Complainant “certified true copies” of two (2) diplomas for Ariane Chebel. One diploma confers a Ph.D. degree and the second is for completion of post-doctoral studies.<sup>10</sup> Although Ariane Chebel indicated in both of the disclosed CVs that she also holds a “MA” from the Institut d’Etudes Politiques de Paris, the Custodian certified in the SOI that she provided to the Complainant all records responsive to request item number 2. Moreover, there is nothing in the evidence of record to indicate that there are any other records memorializing academic degrees received except the copies of the diplomas that the Custodian disclosed.

The Custodian certified that she disclosed all records responsive to request item number 4 “as current for Ariane Chebel.” Although the Complainant stated that the Custodian disclosed

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<sup>10</sup> Although the Custodian certified in the SOI that the degrees are not translated, the GRC notes that in the attachments to the SOI an English translation accompanies each degree.

incomplete information for this request item, the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification.

Thus, as in Danis, GRC 2009-156, *et seq.*, the Custodian certified that all records responsive to request items number 1, 2 and 4 were provided to the Complainant on January 26, 2022. Furthermore, there is no credible evidence in the record to refute the Custodian's certification.

Therefore, the Custodian met her burden of proof that she did not unlawfully deny access to the records responsive to the Complainant's request items number 1, 2 and 4. N.J.S.A. 47:1A-6. The Custodian certified that she disclosed all records responsive to said request items to the Complainant, and there is no credible evidence of record to refute the Custodian's certification. See Danis, GRC 2009-156, *et seq.*; Burns, GRC 2005-68.

Request item number 3 - References submitted at time of hire.

OPRA provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . ." N.J.S.A. 47:1A-1. As privacy interests are at issue here, the GRC asked both the Complainant and the Custodian to respond to balancing test questions so the Council could employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995). The New Jersey Supreme Court has explained that N.J.S.A. 47:1A-1's safeguard against disclosure of personal information is substantive and requires "a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy." Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009).

When "balanc[ing] OPRA's interests in privacy and access" courts consider the following factors ("Doe factors"):

- (1) the type of record requested;
- (2) the information it does or might contain;
- (3) the potential for harm in any subsequent nonconsensual disclosure;
- (4) the injury from disclosure to the relationship in which the record was generated;
- (5) the adequacy of safeguards to prevent unauthorized disclosure;
- (6) the degree of need for access; and
- (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

[Id. at 427 (quoting Doe v. Poritz, 142 N.J. 1, 88 (1995).]

In Burnett, 198 N.J. 408, a commercial business requested approximately eight million pages of land title records extending over a twenty-two year period; the records contained names, addresses, social security numbers, and signatures of numerous individuals. Id. at 418. After balancing the seven Doe factors, the Court "f[ou]nd that the twin aims of public access and protection of personal information weigh in favor of redacting [social security numbers] from the requested records before releasing them" because "[i]n that way, disclosure would not violate the

reasonable expectation of privacy citizens have in their personal information.” Id. at 437. The Court emphasized that the “balance [wa]s heavily influenced by concerns about the bulk sale and disclosure of a large amount of social security numbers—which [the commercial business] admittedly does not need, and which are not an essential part of the records sought.” Id. at 414. Moreover, “the requested records [we]re not related to OPRA’s core concern of transparency in government.” Ibid.

In contrast, the Appellate Division has affirmed a trial court’s determination that the identity of a person who called 911 complaining about illegal parking blocking his driveway should not be redacted when the owner of the car filed an OPRA request seeking a copy of the 911 call under Burnett. Ponce v. Town of W. New York, 2013 N.J. Super. Unpub. LEXIS 436 (App. Div. 2013). The trial judge explained that:

[t]he type of information requested by [the car owner] is not particularly sensitive or confidential. When the caller made a complaint [to] the police department that someone was blocking his or her driveway he or she could reasonably expect that his name may be revealed in connection with the complaint. There has not been evidence presented to suggest that revealing the caller's identity or the call itself would result in any serious harm or confrontation between the caller and the - - [sic] and the [car owner]. It may in fact be helpful for the [car owner] to know the information in order to challenge his parking violation.

[Id. at 7-8.]

The Appellate Division emphasized that the city’s arguments against disclosure of the caller’s identity were “predicated on the notion that if [the car owner] learns the identity of his accuser he will retaliate in some fashion, thus discouraging the average person from reporting incidents to the police via the 911 emergency system.” Id. at 9. However, the city “ha[d] not presented any evidence of past hostility between these two individuals” and the court emphasized that “[a]bsent compelling reasons, which are conspicuously absent in this record, few can argue that in a free society an accused is not entitled to know the identity of his accuser.” Id. at 9-10. Therefore, the court concluded that “[n]one of the concerns in favor of confidentiality articulated by the Court in Burnett, supra, 198 N.J. at 427, [we]re applicable” and affirmed the trial court’s decision ordering disclosure of the caller’s identity. Ponce, A-3475-10 at 10.

In a prior GRC decision, Reynolds v. N.J. Bd. of Pub. Util., GRC Complaint No. 2008-14 (August 2009), the complainant requested information about customers with solar systems funded through the New Jersey Clean Energy Program. The custodian disclosed responsive records but redacted customer addresses, asserting that disclosure would violate the customers’ reasonable expectation of privacy. Although the GRC distributed questionnaires to the complainant and the custodian to conduct a balancing test, the complainant never returned the questionnaire to the GRC. Without the complainant’s input on the questionnaire, the Council did not know how the complainant intended to use the address information if it was provided to him. Thus, the Council found that the custodian did not unlawfully deny access to the redacted addresses because, on balance, the potential harm of disclosure outweighed the complainant’s need for access.

Since privacy interests are at issue in request item number 3, the GRC asked the Complainant and the Custodian to respond to balancing test questions incorporating the Doe factors so the Council could employ the balancing test established by the Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995). The test enables the Council to balance Rutgers' asserted need to protect the privacy of the letters of reference submitted for Ariane Chebel against the Complainant's asserted need to access the records.

The GRC received completed balancing test questionnaires from the Custodian and the Complainant. The results of the balancing test are as follows:

The first and second factors require consideration of the records requested, and the type of information contained therein, respectively. The Custodian indicated that the requested records are letters of reference for an application for employment at Rutgers as a faculty member. The Custodian stated that the letters of reference contain assessments and evaluations from people outside the university about the applicant's scholarship, teaching, and other topics relevant to a faculty position at Rutgers.

The third and fourth factors address the potential for harm in subsequent nonconsensual disclosure of the redacted names, and the injury from disclosure to the relationship in which the record was generated, respectively. The Custodian asserted that the people writing the references have an expectation that their letters will remain confidential. The Custodian believes that they likely would not be willing to write such letters if they knew the letters could be made public or that they would be available to the candidate about whom the evaluation was written. Additionally, the Custodian stated that the candidate has a privacy interest in the evaluations, and if the evaluations were to be made public, such disclosure could be embarrassing or damaging to both the applicant's career and her professional relationships. Further, the Custodian stated that Rutgers has an interest in protecting the confidentiality of the letters of reference since it wishes to receive candid and substantive evaluations of applicants, and if the letters of reference were made public the university would likely receive more guarded evaluations. Moreover, the Custodian stated that the people writing references understand that their references will be kept confidential and if Rutgers was to breach such understanding, it would damage Rutgers' ability to receive future honest and detailed evaluations of job candidates.

The fifth factor requires consideration of the adequacy of safeguards to prevent unauthorized disclosure of the letters of reference. The Custodian stated that the records are kept in the successful applicant's personnel file, and no one has access except the higher administrative officers of the unit such as the Chair or Dean.

The sixth factor addresses the degree of need for access to the redacted names. This factor cannot be evaluated since the Complainant did not provide responsive answers to the questionnaire.

The seventh factor requires consideration as to whether an express statutory mandate, articulated public policy, or other recognized public interest militating toward access to the names exists. The Custodian stated that there is an express exemption for personnel records

under OPRA. The Custodian further stated the there is a long-standing convention in academia that such confidential evaluations are a standard and necessary part of the faculty hiring process and that there is no mandate to make such professional references public.

The GRC considered the Custodian's answers to the balancing test questionnaire, specifically of importance, her assertion that persons writing the requested letters of reference have an expectation that their letters will remain confidential and that they likely would not be willing to write such letters if they knew the letters could be made public or that they would be available to the candidate about whom the evaluation was written. The GRC also considered the Custodian's assertion that there is a potential for harm to the professional relationships between persons submitting letters of reference and the applicant, if the records were made public. The GRC could not consider the Complainant's need for access to the records because, although provided with two (2) opportunities to do so, the Complainant failed to submit responsive answers to the questionnaire. Thus, on balancing the Doe factors, OPRA's dual object to provide both public access and protection of personal information, weigh in favor of not disclosing the letters of reference.<sup>11</sup>

Therefore, because the Complainant has failed to articulate her need for the letters of reference, and the Custodian has asserted valid reasons for denying access to said records, non-disclosure of the records is warranted. As such, the Custodian lawfully denied access to the records responsive to request item number 3 on the basis that disclosure of same would violate the reasonable expectation of privacy of those persons submitting letters of reference. N.J.S.A. 47:1A-1; Burnett, 198 N.J. 408. See also Reynolds, GRC 2008-14.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian's failure to immediately respond in writing to the Complainant's request item number 4 for immediate access records; namely "salary," either granting access, denying access, seeking clarification or requesting an extension of time violates N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Harris v. N.J.

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<sup>11</sup> Given the Custodian's answers in response to the 5<sup>th</sup> and 7<sup>th</sup> factors, the requested letters of reference also appear to be exempt from disclosure as personnel records pursuant to N.J.S.A. 47:1A-10; however, the Custodian did not assert that provision of OPRA as grounds for denial of access.

Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). Moreover, the Custodian failed to provide an explanation that would reasonably justify a delay in access to the requested records.

3. The Custodian's January 26, 2022 response to the Complainant's January 7, 2022 OPRA request was insufficient because she failed to address each individual request item. N.J.S.A. 47:1A-5(g); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
4. The Custodian met her burden of proof that she did not unlawfully deny access to the records responsive to the Complainant's request items number 1, 2 and 4. N.J.S.A. 47:1A-6. The Custodian certified that she disclosed all records responsive to said request items to the Complainant, and there is no credible evidence of record to refute the Custodian's certification. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
5. Because the Complainant has failed to articulate her need for the letters of reference, and the Custodian has asserted valid reasons for denying access to said records, non-disclosure of the records is warranted. As such, the Custodian lawfully denied access to the records responsive to request item number 3 on the basis that disclosure of same would violate the reasonable expectation of privacy of those persons submitting letters of reference. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009). See also Reynolds v. N.J. Bd. of Pub. Util., GRC Complaint No. 2008-14 (August 2009).

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