



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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FINAL DECISION

April 25, 2007 Government Records Council Meeting

Jeffrey Smith
Complainant

Complaint No. 2005-84

v.

NJ Department of Corrections
Custodian of Record

At the April 25, 2007 public meeting, the Government Records Council (“Council”) considered the April 18, 2007 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 The Council, therefore, finds that this complaint should be dismissed as the Complainant has voluntarily withdrawn his complaint in a letter to the GRC dated March 27, 2007.

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 April, 2007

Vincent P. Maltese, Chairman
Government Records Council



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

Robin Berg Tabakin, Secretary
Government Records Council

Decision Distribution Date: May 1, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 25, 2007 Council Meeting**

**Jeffrey Smith¹
Complainant**

GRC Complaint No. 2005-84

v.

**NJ Department of Corrections²
Custodian of Records**

Records Relevant to Complaint: Any government record documenting the agenda and/or schedule of New Jersey Department of Corrections Commissioner Devon Brown. This record may include, but not be limited to, a written or electronic planner, a scheduling calendar, itinerary, payroll justification, etc, for the period of January 1, 2004 through June 30, 2005.

Request Made: February 24, 2005

Response Made: March 7, 2005 and April 5, 2005

Custodian: Michelle Hammel³

GRC Complaint Filed: April 13, 2005

Background

November 15, 2006

Interim Order of the Government Records Council. At the November 15, 2006 public meeting, the Government Records Council (“Council”) considered the November 8, 2006 Executive Director’s Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. Therefore, the Council found that:

1. Pursuant to Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (July 13, 2005) and North Jersey Newspapers Company v. Passaic County Board of Freeholders, 127 N.J. 9 (1992), the requested schedule of the Commissioner may be exempt from public access on the basis that it implicates privacy interests of persons who meet with public officials. However, the general appearances of the Commissioner (which might be otherwise publicized) are not likely exempt from public access in the same manner in which the telephone numbers or the identity of persons with whom the Commissioner might have met. Therefore, an *in camera* inspection is required to verify that the executive

¹ No legal representation listed on record.

² DAG Lisa Puglisi, on behalf of the Attorney General.

³ The Custodian at the time of the Complainant’s request was Kathleen Wiechnik.

- privilege applies to exempt from disclosure the requested schedules of the Commissioner.
2. Since the Custodian did not completely and properly bear her burden of proving that the denial of access is authorized by law at the time of the denial as is required under N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i., the Custodian has unlawfully denied access to the requested records by not properly denying access within the statutorily mandated seven (7) business day timeframe.
 3. **The Custodian shall provide unredacted copies of the schedule of the Commissioner for the period requested (January 1, 2004 through June 30, 2005) to the Council within five (5) business days.**

November 21, 2006

Interim Order and *in camera* letter requesting documents sent to both parties.

March 27, 2007⁴

Letter from Complainant to GRC. The Complainant states that he no longer wishes to pursue seeking the former Commissioner's calendar and would like to withdraw his complaint.

Analysis

The Complainant voluntarily withdrew his complaint in a letter to the GRC dated March 27, 2007, therefore no analysis is needed.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed as the Complainant has voluntarily withdrawn his complaint in a letter to the GRC dated March 27, 2007.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 18, 2007

⁴ Additional records were submitted by the parties; however, as the Complainant has withdrawn his complaint, said submissions are no longer relevant to this complaint.

INTERIM ORDER

November 15, 2006 Government Records Council Meeting

Jeffrey Smith
Complainant

Complaint No. 2005-84

v.

NJ Department of Corrections
Custodian of Record

At the November 15, 2006 public meeting, the Government Records Council (“Council”) considered the November 8, 2006 Findings and Recommendations of the Executive Director (revised at the December 14, 2006 public meeting) 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. Pursuant to Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (July 13, 2005) and North Jersey Newspapers Company v. Passaic County Board of Freeholders, 127 N.J. 9 (1992), the requested schedule of the Commissioner maybe exempt from public access on the basis that it implicates privacy interests of persons who meet with public officials. However, the general appearances of the Commissioner (which might be otherwise publicized) are not likely exempt from public access in the same manner in which the telephone numbers or the identity of persons with whom the Commissioners might have met. Therefore, an *in camera* inspection is required to verify that the executive privilege applies to exempt from disclosure the requested schedules of the Commissioner.
2. Since the Custodian did not completely and properly bear her burden of proving that the denial of access is authorized by law at the time of the denial as is required under N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i., the Custodian has unlawfully denied access to the requested records by not properly denying access within the statutorily mandated seven (7) business day timeframe.
3. **The Custodian shall provide unredacted copies of the schedule of the Commissioner for the period requested (January 1, 2004 through June 30, 2005) to the Council within five (5) business days.**

Interim Order Rendered by the
Government Records Council
On The 14th Day of December, 2006

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: December 29, 2006

**Findings and Recommendations of Executive Director
November 15, 2006 Council Meeting**

**Jeffrey Smith¹
Complainant**

GRC Complaint No. 2005-84

v.

**NJ Department of Corrections²
Custodian of Records**

Records Requested: Any government record documenting the agenda and/or schedule of New Jersey Department of Corrections Commissioner Devon Brown. This record may include, but not be limited to, a written or electronic planner, a scheduling calendar, itinerary, payroll justification, etc, for the period of January 1, 2004 through June 30, 2005.

Request Made: February 24, 2005

Response Made: March 7, 2005 and April 5, 2005

Custodian: Michelle Hammel³

GRC Complaint filed: April 13, 2005

Background

February 24, 2005

The Complainant's Open Public Records Act ("OPRA") request for the records listed above.

March 7, 2005

Letter from the Custodian to the Complainant on the seventh business day following the date of the Complainant's request. The Custodian informed the Complainant that there were three hundred and ten (310) pages of records responsive to the request. The Custodian informed the Complainant that upon receipt of payment in the amount of \$85.00, the records will be provided to him.

April 5, 2005

Letter from the Custodian to the Complainant informing him that she cannot release the requested records because the Commissioner's agenda is protected by executive privilege.

¹ Complainant represented by Mario Iavicoli, however, the Complainant requested on his Denial of Access Complaint form that his attorney not be contacted regarding this complaint.

² Custodian represented by Lisa A. Puglisi, Deputy Attorney General for the NJ Division of Law (Trenton, NJ.)

³ The Custodian at the time of the Complainant's request was Kathleen Wiechnik.

April 12, 2005

Letter from the Complainant to the Government Records Council (“GRC.”) The Complainant states that the Department of Corrections (“DOC”) has not advised him of any specific legislation, public laws, or executive orders that would exempt the records from disclosure under OPRA. The Complainant further asserts that the records he requested are not listed as records exempt from public access.

The Complainant states that Commissioner Brown is an employee of the State of New Jersey, and as a citizen of the State, he (the Complainant) is entitled to know what work is performed during the Commissioner’s normal paid work day, and what events he attends as an employee of, or in representation of, the State.

April 13, 2005

Complainant’s Denial of Access Complaint with the following attachments:

- Complainant’s OPRA request dated February 24, 2005
- Letter to the Custodian dated April 5, 2005
- Supplemental letter to the GRC dated April 12, 2005

The Complainant states that on February 24, 2005, he made an OPRA request for the records listed above. He states that he received an initial response from the Custodian stating that the DOC had three hundred and ten (310) pages of documents responsive to the request and a copy fee of \$85.00 would be required. The Complainant states that a check for the exact amount was sent as requested. He then states that on April 5, 2005, he received a letter from the Custodian stating that based on advice from the Division of Law (“DOL”), the Commissioner’s schedule is protected by executive privilege. The Complainant asserts that the DOC has not advised him of any specific legislation, public laws, or executive orders that would exempt the records from access under OPRA. He further asserts that the records he requested are not listed as records exempt from public access.

April 28, 2005

Mediation sent to both parties. Neither party agreed to mediate this case.

May 26, 2005

Custodian’s Statement of Information with the following attachments:

- Tracking receipt from Complainant’s OPRA request dated February 24, 2005
- Letter from the Custodian to the Complainant dated March 7, 2005
- Letter from the Custodian to the Complainant dated April 5, 2005

The Custodian states that after originally informing the Complainant that upon payment of \$85.00 for the documents responsive to his request (as stated above) she subsequently discussed the matter with Counsel from the DOL and it was determined that the Commissioner’s schedule is protected under the executive privilege pursuant to North Jersey Newspapers Company v. Passaic County Board of Freeholders, 127 N.J. 9, 16-18 (1992).

Custodian’s Counsel states that after consulting the DOL, it was determined that the documents requested were protected pursuant to the executive privilege and the advisory, consultative and deliberative (“ACD”) exemption. Counsel cites N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-9.b. in defending its position. Counsel also cites N.J.S.A. 47:1A-9.a. which provides that government records may be exempted from access by Executive Order of the Governor. Custodian’s Counsel states that pursuant to this authority, Executive Order No. 26 (“EO 26”) shields from disclosure under OPRA those documents that contain ACD information or other records protected by a recognized privilege which would include the executive privilege.

Custodian’s Counsel states that New Jersey case law also acknowledges the existence of an executive privilege belonging to the Governor. Counsel states, in Nero v.

Hyland, 76 N.J. 213 (1978), the Supreme Court rejected a request for disclosure of personal background investigatory materials received by the Governor from the Attorney General concerning a potential candidate for appointment to the State Lottery Commission. Counsel states that the Court determined that the “governor, as chief executive, must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function...This executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the governor which can only be discharged freely and effectively under a mantle of privacy and security.” *Id.* at 225.

Custodian’s Counsel also cites In re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000) and states that in addition to the executive privilege, both OPRA and EO 26 recognize the ACD privilege. Custodian’s Counsel goes on to state that while both privileges are designed to protect executive branch decision making, the deliberative process privilege is based upon the common law principal of the need to protect governmental deliberative processes. Counsel also cites Atlantic City Convention Center Authority v. South Jersey Pub. Co., Inc., 135 N.J. 53, 62 (1994) and states that the deliberative process privilege permits the government to withhold documents containing advisory opinions and recommendations or reflecting deliberations compromising the process by which government policy is formulated.

October 17, 2006

Letter from GRC staff to Custodian. Staff states that the Custodian’s May 26, 2005 Statement of Information was signed by legal counsel and requests that the Custodian return the enclosed signature page as the SOI is required to be signed by the Records Custodian.

October 18, 2006

E-mail from Custodian’s Counsel to GRC staff. Counsel states that the current Custodian of Records was not the Custodian at the time of the Complainant’s OPRA request.

October 19, 2006

Custodian’s signed Statement of Information.

Analysis

Whether the Custodian unlawfully denied access to the schedule or agenda of Commissioner Devon Brown?

OPRA provides that:

“... *government records shall be readily accessible* for inspection, copying, or examination by the citizens of this State, with certain exceptions ...” (Emphasis added.) N.J.S.A. 47:1A-1.

OPRA defines a government record as follows:

“ ... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* ... or that has been *received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA states that its provisions:

“shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]...any other statute...or...Executive Order of the Governor...” N.J.S.A. 47:1A-9.a.

OPRA also states that its provisions:

“shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” N.J.S.A. 47:1A-9.b.

The Complainant states that he submitted his OPRA request for the schedule or agenda of Commissioner Devon Brown on February 24, 2005. He states that he initially received a response from the Custodian, dated March 7, 2005, in which the Custodian indicated that the documents requested amount to three hundred and ten (310) pages and that a copy fee of \$85.00 is required. The Complainant states that after having sent the Custodian a check for the amount requested, he received an additional letter from the Custodian dated April 5, 2005 in which she advised that pursuant to advice from the DOL, the Commissioner’s schedule is protected by executive privilege and would not be released. He asserts that the Custodian did not list any specific statute regarding the matter.

The Custodian states that after she originally informed the Complainant that the requested documents would be released upon payment of \$85.00, the DOL advised the Custodian that the Commissioner’s schedule was protected under executive privilege pursuant to North Jersey Newspapers Company v. Passaic County Board of Freeholders, 127 N.J. 9, 16-18 (1992). Additionally, the Custodian’s Counsel asserts that besides being exempt under executive privilege, the Commissioner’s schedules also fall under the advisory, consultative, and deliberative (“ACD”) exemption provided for under OPRA.

Counsel cites N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-9.b. in defending its position. Counsel also cites N.J.S.A. 47:1A-9.a. which provides that government records may be exempted from access by Executive Order of the Governor. Custodian's Counsel states that pursuant to this authority, Executive Order No. 26 ("EO 26") shields from disclosure under OPRA those documents that contain advisory, consultative or deliberative information or other records protected by a recognized privilege which would include the executive privilege.

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. 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.

Further, OPRA provides that government records may be exempted from access by Executive Order of the Governor. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-9.a. Executive Order No. 26 (August 13, 2002), Paragraph 2a, shields from disclosure those documents in the Governor's office which are "subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this state, statute, court rules or judicial case law." It also exempts "[a]ll portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege." Para.2b.

New Jersey case law acknowledges the existence of an executive privilege belonging to the Governor. In Nero v. Hyland, 76 *N.J.* 213 (1978), the Supreme Court rejected a request for disclosure of personal background investigatory materials received by the Governor from the Attorney General concerning a potential candidate for appointment to the State Lottery Commission. The Court determined that the "governor, as chief executive, must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function...This executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the governor which can only be discharged freely and effectively under a mantle of privacy and security." Id. at 225.

In reaching this conclusion, the Court relied upon what it characterized as the "constitutionally based executive privilege" accorded the President of the United States described in United States v. Nixon, 418 *U.S.* 683 (1974). Nero, at 225. The Court quoted Nixon with approval, stating that the executive privilege was "fundamental to the operation of government and inextricable related to the separation of powers..." Ibid. The Court also observed that the privilege ensured those assisting the executive freely explored alternatives in shaping of policies and permitted them to do so "in a way many would be unwilling to express except privately." [Id. at 226, quoting 418 U.S. at 708] The executive privilege is presumptive and applies when invoked by the executive. Nixon, 418 *U.S.* at 708. The privilege applies to documents in their entirety and covers final and post-decisional materials as well as pre-deliberative ones. In Re Sealed case, 121 *F.3d* 729, 745 (D.C.Cir.1997).

Standing apart from the executive privilege is the deliberative process privilege. While both privileges are designed to protect executive branch decision making, the deliberative process privilege is based upon the common law principle of the need to protect governmental deliberative processes. In Re Liq. Of Integrity Ins.Co., 165 *N.J.* 75,

83-85 (2000). OPRA incorporates the deliberative process privilege in N.J.S.A. 47:1A-1.1 by exempting “advisory, consultative or deliberative material” from access.

The New Jersey Supreme Court has held that the deliberative process privilege protects “the integrity of [agency] deliberations.” *Id.* at 86. The privilege permits the government to withhold documents containing advisory opinions and recommendations or reflecting deliberations comprising the process by which government policy is formulated. Atlantic City Convention Center Authority v. South Jersey Pub. Co., Inc., 135 *N.J.* 53, 62 (1994). A federal court explained:

[The privilege] serves to assure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action. [Coastal States Gas Corp. v. Department of Energy, 617 *F.2d* 854, 866 (D.C.Cir., 1980)].

The New Jersey Supreme Court has acknowledged there is a legitimate public interest in keeping confidential the identity of persons consulted by executive branch officials. In North Jersey Newspapers v. Passaic County, 127 *N.J.* 9 (1992), the Supreme Court held that the telephone numbers called by members of the county Board of Chosen Freeholders were not records under the Right To Know Law (OPRA’s predecessor). Noting that there was not, at that time, compelling reason on record to reveal the numbers and, thus, the identity of the persons called, the court noted a variety of reasons why it was desirable to keep such information confidential, including critical times--when a government official will have to make a telephone call that has an arguable claim to confidentiality--times when, for example, a mayor might need to call a city council member from an opposing political party on a most highly sensitive community issue to enlist that person's support; or times when a mayor might need to call a community activist to calm troubled waters, without causing disruption that might result from appearing to negotiate with a dissident who may, at the moment, be perceived as a lawbreaker. *Id.* at 17.

Here, the Custodian and Counsel mostly rely on the decision in North Jersey Newspapers Company v. Passaic County Board of Freeholders, 127 *N.J.* 9, 16-18 (1992) regarding access to a public official’s telephone bills. In a similar case, Gannett N.J. Partners, LP v. County of Middlesex, 379 *N.J.* Super. 205 (July 13, 2005), the courts deal with an issue of releasing County Counsel’s appointment book. The court held that “[a]lthough County Counsel’s appointment book does not contain telephone numbers, it reveals the identity of persons with whom County Counsel planned to meet and the purpose of the meetings. Such information implicates privacy interests of persons who meet with public officials similar to the identity of persons who call and are called by public officials. Consequently, we conclude that the rationale in *North Jersey Newspapers* extends to the information contained in County Counsel’s appointment book...”

Therefore, pursuant to Gannett N.J. Partners, LP v. County of Middlesex, 379 *N.J.* Super. 205 (July 13, 2005) and North Jersey Newspapers Company v. Passaic County Board of Freeholders, 127 *N.J.* 9, 16-18 (1992), the requested schedules of the

Commissioner maybe exempt from public access on the basis that it implicates privacy interests of persons who meet with public officials. However, the general appearances of the Commissioner (which might be otherwise publicized) is not likely exempt from public access in the same manner in which the telephone numbers or the identity of persons with whom the Commissioners might have met. Therefore, an *in camera* inspection is required to verify that the executive privilege applies to exempt from disclosure the requested schedules of the Commissioner.

Additionally, since the Custodian did not completely and properly bear her burden of proving that the denial of access is authorized by law at the time of the denial as is required under N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i., the Custodian has unlawfully denied access to the requested records by not properly denying access within the statutorily mandated seven (7) business day timeframe.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

4. Pursuant to Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (July 13, 2005) and North Jersey Newspapers Company v. Passaic County Board of Freeholders, 127 N.J. 9 (1992), the requested schedules of the Commissioner maybe exempt from public access on the basis that it implicates privacy interests of persons who meet with public officials. However, the general appearances of the Commissioner (which might be otherwise publicized) are not likely exempt from public access in the same manner in which the telephone numbers or the identity of persons with whom the Commissioners might have met. Therefore, an *in camera* inspection is required to verify that the executive privilege applies to exempt from disclosure the requested schedules of the Commissioner.
5. Since the Custodian did not completely and properly bear her burden of proving that the denial of access is authorized by law at the time of the denial as is required under N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i., the Custodian has unlawfully denied access to the requested records by not properly denying access within the statutorily mandated seven (7) business day timeframe.
6. **The Custodian shall provide unredacted copies of the daily agenda/schedule of the Commissioner for the period requested (January 1, 2004 through June 30, 2005) to the Council within five (5) business days.**

Prepared By:

Dara Lownie
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

November 8, 2006