



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**FINAL DECISION**

**July 30, 2008 Government Records Council Meeting**

Charles S. Slaughter  
Complainant

Complaint No. 2007-274

v.

NJ Department of Law & Public Safety,  
Division of Criminal Justice  
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council (“Council”) considered the July 23, 2008 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 pursuant to N.J.S.A. 47:1A-9.a., Executive Order 21, Executive Order 26, and *N.J.A.C. 13:1E-3.2(a)2*, which exempts from disclosure the Standard Operating Procedures (the document responsive to Complainant’s request), the Custodian’s denial of access to the requested records is supported by law. See also Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) and Edward Buttimore v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2005-90 (March 2006). As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

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 30<sup>th</sup> Day of July, 2008



Robin Berg Tabakin, Chairman  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: August 1, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 30, 2008 Council Meeting**

**Charles S. Slaughter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-274**

v.

**New Jersey Department of Law & Public Safety,  
Division of Criminal Justice<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** New Jersey State Police Forensic Science Laboratory's policies and procedures on blood test analysis for testing swabs and smears for blood, DNA comparisons, semen and saliva, specifically records concerning presumptive and confirmative testing.

**Request Made:** August 13, 2007

**Response Made:** August 23, 2007

**Custodian:** Dale K. Perry

**GRC Complaint Filed:** November 3, 2007

**Background**

**August 13, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant states that, although he is incarcerated in the State of New Jersey, the information he requests does not concern his victim. Because of his incarceration, the Complainant requests that any and all fees associated with this OPRA request be waived. Complainant also requests that the Custodian send him any form that is necessary to waive any fees.

**August 23, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian certifies that the Complainant's request was received on August 17, 2007. The Custodian states that access to the requested records are denied pursuant to *N.J.A.C. 13:1E-3.2(a)2*, which states that the above described records are not government records and therefore are not subject to OPRA.

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

<sup>2</sup> Represented by DAG Robbie Miller, on behalf of the NJ Attorney General.

**October 22, 2007**

Letter from the Complainant to the Government Records Council (“GRC”). The Complainant attaches a copy of *N.J.A.C. 13:1E*. The Complainant states that he is incarcerated in Avenel, New Jersey. Complainant also states that on August 13, 2007 he made a formal OPRA request in writing for the records relevant to this complaint. Complainant further states that the Custodian denied his request on August 27, 2007, citing *N.J.A.C. 13:1E-3.2(a)2* as the basis for the denial of access. The Complainant states that the statute cited by the Custodian does not exist and the section of the New Jersey Administrative Code upon which the denial of access was based is reserved. The Complainant states that he called the Custodian on September 5, 2007, to appeal the denial of his OPRA request but the Custodian did not respond. The Complainant asks the GRC to accept this letter as his formal notice of appeal to the denial of access by the Custodian.

**November 3, 2007**

Denial of Access Complaint filed with the GRC with the following attachments:

- Letter from the Complainant to the Custodian dated May 29, 2007
- Copy of envelope from the letter dated May 29, 2007
- Letter from the Custodian to the Complainant dated August 7, 2007
- Copy of envelope from the letter dated August 7, 2007
- Complainant’s OPRA request dated August 13, 2007
- Letter from the Complainant to the Custodian dated August 13, 2007
- Denial letter from the Custodian to the Complainant dated August 23, 2007
- Complainant’s signed Offer of Mediation dated November 3, 2007

Complainant certifies that on August 13, 2007 he made a formal OPRA request in writing for the records relevant to this complaint. Complainant states that the Custodian denied his request on August 27, 2007 citing *N.J.A.C. 13:1E-3.2(a)2* as the basis for the denial.

**November 20, 2007**

Offer of Mediation sent to Custodian.

**November 28, 2007**

The Custodian requests an extension of the deadline given to respond to the Offer of Mediation. (However, after the GRC granted the extension, the Custodian failed to respond to the Offer of Mediation.)

**December 14, 2007**

Request for the Statement of Information sent to the Custodian.

**December 21, 2007**

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated August 13, 2007

- Letter from the Custodian to the Complainant denying access to the requested records dated August 23, 2007
- Additional Certification by Custodian dated December 21, 2007

The Custodian provides the following background information. The Complainant, an inmate at the Adult Diagnostic and Treatment Center, submitted an OPRA request for the New Jersey State Police Forensic Science Laboratory's Policies and Procedures on blood test analysis for testing swabs and smears for blood, DNA comparisons, semen and saliva. The section the Complainant specifically seeks concerns presumptive and confirmative testing.

The Custodian certifies that the Division of Criminal Justice received the Complainant's OPRA request on August 17, 2007. The Custodian denied the release of the records requested on August 23, 2007 on the basis that the records requested were not government records subject to public access pursuant to proposed Department of Law and Public Safety regulation at *N.J.A.C. 13: 1E-3.2(a)2*, which specifically exempts Standard Operating Procedures from disclosure under OPRA.

The Custodian maintains that pursuant to OPRA, "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions." N.J.S.A. 47: 1A-1. The Custodian states that OPRA defines a "government record" as "...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." N.J.S.A. 47:1A-1.1. The Custodian also states that OPRA provides that records are subject to public access unless exempt from access pursuant to any other statute, Legislative resolution, regulation, Executive Order, Rules of Court, federal law, federal regulation or federal order. N.J.S.A. 47:1A-1.

The Custodian certifies that the Department of Law and Public Safety proposed regulations specifically declare that, among other things, Standard Operating Procedures "...shall not be considered government records subject to public access pursuant to N.J.S.A. 47: 1A-1 et seq." *N.J.A.C. 13: 1E-3.2(a)2*. The Custodian maintains that the proposed regulations have continuing viability by virtue of Executive Order 26, paragraph 14 (McGreevey 2005), and Executive Order 21, paragraph 6 (McGreevey 2002).

The Custodian further certifies that there is one (1) document which is responsive to Complainant's request: the New Jersey Forensic Science Laboratory's Biochemistry Analysis Manual. The Custodian maintains that this document represents the standard operating procedure for laboratory analysis of, among other things, DNA analysis of biological evidence as well as presumptive and confirmative testing. Because the records requested are not to be considered government records subject to public access under OPRA pursuant to *N.J.A.C. 13: 1E-3.2(a)2*, the Custodian requests that this complaint be dismissed because the request was properly denied.

## Analysis

### **Whether the Custodian unlawfully denied access to the requested record?**

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.

Additionally, OPRA defines a government record as:

“... 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.

N.J.S.A. 47:1A-9.a. states in part:

"[t]he provisions of [OPRA] shall 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..." (Emphasis added). N.J.S.A. 47:1A-9.a.

Executive Order 21, paragraph 4, provides that:

"[i]n light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, *State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published*, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order..." (Emphasis added). Executive Order 21 (McGreevey 2002).

Executive Order 26, adopted on August 13, 2002, rescinded paragraphs 2 and 3 of Executive Order 21. However, the paragraphs rescinded are not relevant for the analysis of state agencies' proposed OPRA rules. The one relevant paragraph in Executive Order 26 is paragraph 6, which states:

"[t]he remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order..." Executive Order 26 (McGreevey 2002).

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

The Complainant alleges that he was unlawfully denied access to the requested records. The Custodian asserts that these records are not subject to disclosure pursuant to *N.J.A.C.* 13:1E-3.2(a)2. The Department of Law and Public Safety proposed regulations specifically declare that, among other items, Standard Operating Procedures "...shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq." *Id.* The Custodian maintains that the proposed regulations have continuing viability by virtue of Executive Order 26, paragraph 14 (McGreevey 2002), and Executive Order 21, paragraph 6 (McGreevey 2002).

The Complainant contends that the statute cited by the Custodian to support the denial of his OPRA request does not exist and the section of New Jersey Administrative Code upon which the denial was based is reserved.

Despite its reserved nature, *N.J.A.C.* 13:1E-3.2(a)2 is still viable under Executive Order 21 (McGreevey 2002). While there are some portions of Executive Order 21 that have been rescinded, the pertinent portion which states, "state agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published" is still valid pursuant to the specific language of Executive Order 21 (McGreevey 2002).

Executive Order 26, paragraph 6 provides further support for the Custodian's denial of access to the requested records. In an unpublished opinion of the New Jersey Superior Court, it was determined that paragraph 6 of Executive Order 26 "continues to permit a department or agency within State [g]overnment to adopt rules and regulations and to permit the operation of a proposed rule or regulation prior to its final adoption. Therefore, pursuant to Paragraph 4 of Executive Order 21, State departments and agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed ..." Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) at page 11.

In that case, the court went on to state that:

"[i]t appears, from the language of both Executive Orders, that these provisions were added to provide sufficient time for departments and agencies within State government to evaluate their records, propose regulations and withhold certain documents from public inspection pending the adoption of the proposed rules. While this process may be at variance with the normal regulatory process, one can only conclude that the Executive Branch, understanding the broad scope of OPRA, felt it was appropriate to have agencies and departments, within State government, undertake a careful review and analysis of its records to determine, for purposes of security and safety, those records to be considered confidential." *Id.* at 12.

The court further held that:

"[r]ecognizing the time delay inherent in the normal rule adoption process, Executive Order 21 and Executive Order 26 included language to permit custodians of records to deny access, based on the proposed rule, pending final adoption. Now, three years after the passage of OPRA, for the court, the continued efficacy of that practice raises some concerns." *Id.*

The court concluded, however, that "[w]hile [it] does not know the status of this proposed regulation, under Executive Order 21 paragraph 4 and Executive Order 26, paragraph 6, resolution of that issue is not required. ... the court assumes that the proposed rule change is still pending." *Id.* at 13.

In the unpublished opinion discussed above, the court determined that paragraph 6 of Executive Order 26 "continues to permit a department or agency within State Government to adopt rules and regulations and to permit the operation of a proposed rules or regulations prior to its final adoption. Therefore, pursuant to Paragraph 4 of Executive Order 21, public 'agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed..."

Moreover, in Edward Buttimore v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2005-90 (March 2006), the GRC considered this very issue. The complainant in Buttimore alleged that he was unlawfully denied access to the requested records. *Id.* The custodian asserted that the records were confidential and not subject to disclosure pursuant to *N.J.A.C. 13:1E-3.2(a)1* (proposed regulation). The complainant asserted that the proposed rule was not valid because Executive Order 26 rescinded the mandate of Executive Order 21. *Id.* The custodian's counsel asserted that while there are some portions of Executive Order 21 that have been rescinded, the portion utilized as the basis for the denial was not. *Id.* The custodian further alleged that Executive Order 26, paragraph 6 further upheld the denial of access. The Council found that pursuant to N.J.S.A. 47:1A-9.a, *N.J.A.C. 13:1E-3.2(a)1* and the unpublished decision in Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-



1090-05 (Decided July 5, 2005), the proposed rule exempting the records sought by the Complainant from being disclosed pursuant to OPRA applied. *Id.* The Council therefore determined that the requested records were exempt from disclosure and the custodian did not unlawfully deny access to the requested records. *Id.*

In the matter before the Council, the Custodian denied the Complainant access to the requested records based upon the proposed regulation *N.J.A.C.* 13:1E-3.2(a)2. OPRA specifically provides that “[t]he provisions of OPRA shall not abrogate any exemptions made by regulations promulgated under the authority of any ... Executive Order of the Governor.” N.J.S.A. 47:1A-9.a. Executive Order 21 (McGreevey 2002) “directed [state agencies] to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order.” Executive Order 26 (McGreevey 2002) continues the effectiveness of this mandate from Executive Order 21 (McGreevey 2002) pursuant to Newark Morning Ledger, *supra*. As such, the proposed regulation asserted by the Custodian which states that the requested records are not government record subject to OPRA is a lawful basis for the Custodian’s denial of access.

Therefore, pursuant to N.J.S.A. 47:1A-9.a., Executive Order 21, Executive Order 26, and *N.J.A.C.* 13:1E-3.2(a)2, which exempts from disclosure the Standard Operating Procedures (the document responsive to Complainant’s request), the Custodian’s denial of access to the requested records is supported by law. See also Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) and Edward Buttimore v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2005-90 (March 2006). As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

### **Conclusions and Recommendation**

The Executive Director respectfully recommends the Council find that pursuant to N.J.S.A. 47:1A-9.a., Executive Order 21, Executive Order 26, and *N.J.A.C.* 13:1E-3.2(a)2, which exempts from disclosure the Standard Operating Procedures (the document responsive to Complainant’s request), the Custodian’s denial of access to the requested records is supported by law. See also Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) and Edward Buttimore v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2005-90 (March 2006). As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

Prepared By Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

July 23, 2008