



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Ursula Cargill
Complainant

Complaint No. 2009-10

v.

State Ethics Commission
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. It was reasonable for the Custodian to rely upon *N.J.A.C. 13:1E-3.2(a)(5)* and *(a)(9)(vii)* (published in 34 N.J.R. 2270 of July 1, 2002) to deny access to the requested file because at the time of the Complainant’s October 6, 2008 OPRA request and the Custodian’s November 12, 2008 response, the New Jersey Department of Education’s proposed but not adopted regulations were in effect. *See 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). Thus, the Custodian lawfully denied access to records responsive to the Complainant’s OPRA request at that time pursuant to *N.J.S.A. 47:1A-9.a.*, Executive Order 21 (Gov. McGreevey, 2002) and Executive Order No. 26 (Gov. McGreevey, 2002). *See also Bragg v. New Jersey Department of Corrections*, GRC Complaint No. 2010-145 (March 29, 2011).
2. The Custodian’s Counsel advised the GRC in writing on April 21, 2009 that the New Jersey Department of Education’s Ethics Liaison Officer provided the Complainant with the requested file in anticipation of an upcoming hearing. The Complainant confirmed to the GRC receipt of said file in writing on April 29, 2009. Therefore, the GRC declines to determine whether access to the requested record should be granted at this time based on the Court’s holding in *Slaughter v. Government Records Council*, 413 N.J. Super. 544 (App. Div. 2010) because the Complainant was provided with the responsive record.

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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Ursula B. Cargill¹
Complainant**

GRC Complaint No. 2009-10

v.

**State Ethics Commission²
Custodian of Records**

Records Relevant to Complaint: The State Ethics Commission (“SEC”) file submitted by the New Jersey Department of Education (“DOE”), along with any related documents contained therein, pertaining to ethics allegations filed against the Complainant by Ms. Marie Barrie (“Ms. Barrie”).

Request Made: October 6, 2008

Response Made: November 12, 2008

Custodian: Donna Schmitz

GRC Complaint Filed: January 2, 2009³

Background

October 6, 2008

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.

November 12, 2008

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request.⁴ The Custodian states that access to the requested record is denied because the requested investigation file is confidential pursuant to Executive Order 21 (Gov. McGreevey, 2002)(“EO 21”) and the proposed OPRA regulations at *N.J.A.C. 13: 1E-3.2(e)* and *–(i)(7)*.⁵

January 2, 2009

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

¹ No legal representation listed on record.

² Represented by DAG Susan Huntley, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Custodian certifies in the Statement of Information that she received the Complainant’s OPRA request on October 30, 2010.

⁵ In the Statement of Information, the Custodian states that the proposed OPRA regulations were published as 13:1E-3.2(a)(5) and -3.2(a)(9)(vii). The GRC will refer to these proposed regulations as published.

- Letter from the Custodian to the Complainant dated November 12, 2008.
- E-mail from the Complainant to the Custodian dated December 4, 2008.

The Complainant asserts that the requested records are essential to lodging an effective defense against ethics charges that were filed against her. The Complainant further asserts that the Custodian denied access based on confidentiality exemptions contained in EO 21, *N.J.A.C.* 13:1E-3.2(e) and *N.J.A.C.* 13:1E-3.2(i)(7).

The Complainant agrees to mediate this complaint.

January 21, 2009

Offer of Mediation sent to the Custodian by the GRC.

January 27, 2009

The Custodian declines mediation.

February 2, 2009

Request for the Statement of Information (“SOI”) sent to the Custodian.

February 4, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated October 6, 2008.
- Letter from the Custodian to the Complainant dated November 12, 2008.
- E-mail from the Complainant to the Custodian dated December 4, 2008.

The Custodian certifies that no search was undertaken to satisfy the records request upon which the complaint is based because the records were readily available in a file at the SEC offices.

The Custodian also certifies that no records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that four (4) records responsive to the request exist and are as follows:

1. Final investigative report of DOE, Office of Fiscal Accountability and Compliance dated September 19, 2008 (16 pages).
2. Memo from SEC Executive Director Kathleen Wiechnick to all SEC members dated October 16, 2008 (2 pages).
3. Minutes of the October 20, 2008 meeting of the SEC (1 page).
4. Letter from SEC Executive Director Kathleen Wiechnick to DOE, Ethics Liaison Officer (“ELO”) Dave Corso dated October 22, 2008 (2 pages).

The Custodian states that DOE sought the approval of the SEC to take disciplinary action against the Complainant. The Custodian further states that records concerning the approval of such disciplinary action were then created by the SEC.

The Custodian asserts that her denial to the Complainant cited EO 21 and proposed OPRA regulations *N.J.A.C. 13:1E-3.2(a)(5)* and *(a)(9)(vii)* (published in 34 N.J.R. 2270 of July 1, 2002).⁶ The Custodian further asserts that both sections exempt from disclosure records relating to disciplinary actions, such as the records requested by the Complainant. Specifically, the Custodian contends that *N.J.A.C. 13:1E-3.2(a)(5)* exempts “[r]ecords relating to or which form the basis of discipline” and *N.J.A.C. 13:1E-3.2(a)(9)(vii)* exempts “records of complaints and internal investigations related to discipline.”

In addition, the Custodian asserts that paragraph 4 of EO 21 directed State agencies to handle all government records requests in accordance with these proposed regulations. The Custodian states that 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), an unpublished opinion of the New Jersey Superior Court and the sole legal authority on the validity of this directive, the Court held that pursuant to EO 21, agencies are permitted to handle records requests in accordance with the proposed rules. The Custodian further states that in a similar matter where a custodian denied access to records pursuant to EO 21 and a proposed OPRA regulation, the GRC agreed with the Newark Morning Ledger decision and found that the records custodian rightfully denied access to the requested documents.⁷

Finally, the Custodian further asserts that the investigative file submitted to the SEC by DOE is confidential pursuant to *N.J.A.C. 19:61-3.1(a)(3)* because the file is part of a preliminary investigation done at the request of DOE’s ELO. The Custodian contends that this regulation protects the sensitive nature of the material contained in an ethics investigation. Without such protections, the Custodian asserts ELOs would have a difficult time performing their duties. The Custodian requests that the GRC consider the denial justified because the requested file is confidential under *N.J.A.C. 19:61-3.1(a)(3)*.

April 21, 2009

Letter from Custodian’s Counsel to the GRC. Counsel states that DOE’s ELO provided a copy of its investigative file to the Complainant on or about February 20, 2009 in anticipation of an upcoming disciplinary hearing. Counsel contends that at the time of the denial, the record was exempt from disclosure for the reasons asserted in the SOI. Therefore, Counsel asserts that the GRC should dismiss this complaint because the Complainant was provided with the requested record.

⁶ The GRC notes that the Custodian Counsel’s citation to the New Jersey Register is inaccurate. The accurate citation is 34 N.J.R. 2267(a).

⁷ Deluca v. NJ Department of Community Affairs, GRC Complaint No. 2005-61 (April 2006).

April 27, 2009

E-mail from the GRC to the Complainant. The GRC asks the Complainant if she received a copy of the requested investigative file from DOE's ELO. The GRC also asks the Complainant if she would like to withdraw this complaint at this time.

April 29, 2009

E-mail from the Complainant to the GRC. The Complainant states that the matter is only partially resolved because after she reviewed the original OPRA request and Denial of Access Complaint she noted that she also requested copies of minutes from the meeting that was called by the DOE – Office of Compliance in September 2008 which have not yet been provided. The Complainant further states that she looks forward to seeing this matter through to its completion.⁸

Analysis

Whether the Custodian unlawfully denied access to the ethics investigative file requested by the Complainant?

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.

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.) *Id.*

⁸ The GRC notes that Complainant's original OPRA request form and Denial of Access Complaint form both list the investigative file, and any records contained therein, as the requested records. The records specifically pertaining to a September 2008 meeting are not mentioned.

Paragraph 4 of EO 21 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.) *Id.*

Executive Order No. 26 (Gov. McGreevey, 2002)("EO 26"), adopted on August 13, 2002, rescinded paragraphs 2 and 3 of EO 21. However, the paragraphs rescinded are not relevant for the analysis of state agencies' proposed OPRA rules. The one relevant paragraph in EO 26 is paragraph 6, which states:

"[t]he remaining provisions of [EO 21] are hereby continued to the extent that they are not inconsistent with this Executive Order..." *Id.*

N.J.A.C. 13:1E-3.2(a)(5) provides that:

"... the following records shall not be considered government records subject to public access pursuant to [OPRA]: ... [r]ecords relating to or which form the basis of discipline, discharge, promotion, transfer, employee performance, employee evaluation or other related activities, whether open, closed or inactive ..."

N.J.A.C. 13:1E-3.2(a)(9)(vii) provides that:

"... the following records shall not be considered government records subject to public access pursuant to [OPRA]: ... [e]mployment related documents and information related to the employment of any individual, whether employed by a private employer or government body, including, but not limited to, ... records of complaints and internal investigations related to discipline, discharge, promotion, transfer, employee performance and employee evaluation ..."

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 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.

In this complaint, the Complainant submitted her OPRA request on October 6, 2008 and the Custodian responded on November 12, 2008 (the seventh (7) business day after receipt of such request) stating that the requested file was exempt from disclosure pursuant to EO 21 and the SEC's proposed OPRA regulations at *N.J.A.C.* 13:1E-3.2(a)(5) and (a)(9)(vii) as "records relating to or which form the basis of discipline" and "records of complaints and internal investigations related to discipline." Specifically, the Custodian asserted that EO 21 directs State agencies to handle all government records requests in accordance with these proposed regulations and that the Superior Court held that pursuant to EO 21, State agencies are still directed to handle records requests in accordance with the proposed regulations.

The Complainant asserted in the Denial of Access Complaint that the Custodian unlawfully denied access to the requested file submitted to the SEC by DOE, along with any related documents contained therein, pertaining to ethics allegations against the Complainant filed by Ms. Barrie. Conversely, the Custodian argued in the SOI that pursuant to Newark Morning Ledger and consistent with GRC case law, she lawfully denied access to the responsive file pursuant to EO 21, *N.J.A.C.* 13:1E-3.2(a)(5) and (a)(9)(vii).

However, in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010), the complainant appealed a final decision of the Council which upheld the Division of Criminal Justice's ("DCJ") asserted exemption of the requested record contained within their proposed regulations. DCJ denied access to the complainant's OPRA request pursuant to N.J.S.A. 47:1A-9.a., EO 21, EO 26, and *N.J.A.C.* 13:1E-3.2(a)2. The complainant contacted the GRC prior to filing a Denial of Access Complaint alleging that he could not find the cited regulation in the New Jersey Administrative Code because said section was reserved.

On appeal, the Appellate Division, tasked with deciding whether DCJ's proposed regulations remained in effect even after years of not being promulgated, discussed the impetus for DCJ's denial of access. Although the Court agreed with DCJ's contention that EO 26 directed State agencies to apply exemptions contained in proposed regulations to OPRA requests, the Court stated that the contention did not answer the issue raised by claimant: whether a State agency's proposed rules are still in effect nearly eight (8) years after the enactment of OPRA and the issuance of the enabling Executive Order.

The Court held that although DCJ could have properly relied upon proposed rule *N.J.A.C.* 13:1E-3.2(a)2 to deny the disclosure of records for the interim period established by EO 21 and EO 26, that interim period had since expired and therefore, EO 21 and EO 26 were no longer in effect.⁹

At the time of the Complainant's October 6, 2008 OPRA request and the Custodian's November 12, 2008 response, no rescinding or modifying order had been issued, although these Executive Orders were issued over six (6) years prior. *See Newark*

⁹ The Court also delayed the effectiveness of its decision to November 5, 2010 to permit DCJ time to propose and adopt new regulations regarding the disclosure of government records and held that in the interim, DCJ could withhold disclosure of the records. *Id.* at 555-556.

Morning Ledger. The Appellate Division decided Slaughter, *supra*, on June 4, 2010, nearly two (2) years after the Custodian's response to the Complainant's OPRA request.

Therefore, it was reasonable for the Custodian to rely upon *N.J.A.C.* 13:1E-3.2(a)(5) and (a)(9)(vii) to deny access to the requested file because at the time of the Complainant's October 6, 2008 OPRA request and the Custodian's November 12, 2008 response, DOE's proposed but not adopted regulations were in effect. *See Newark Morning Ledger*. Thus, the Custodian lawfully denied access to records responsive to the Complainant's OPRA request at that time pursuant to N.J.S.A. 47:1A-9.a., EO 21 and EO 26. *See also Bragg v. New Jersey Department of Corrections*, GRC Complaint No. 2010-145 (March 29, 2011).

Additionally, the Custodian's Counsel advised the GRC in writing on April 21, 2009 that DOE's ELO provided the Complainant with the requested file in anticipation of an upcoming hearing. The Complainant confirmed to the GRC receipt of said file in writing on April 29, 2009. Therefore, the GRC declines to determine whether access to the requested record should be granted at this time based on the Court's holding in Slaughter because the Complainant was provided with the responsive record.

Finally, the GRC also declines to address whether the Complainant received the September 2008 meeting minutes because said records were not specifically identified in either her OPRA request or subsequent Denial of Access Complaint.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. It was reasonable for the Custodian to rely upon *N.J.A.C.* 13:1E-3.2(a)(5) and (a)(9)(vii)(published in 34 N.J.R. 2270 of July 1, 2002) to deny access to the requested file because at the time of the Complainant's October 6, 2008 OPRA request and the Custodian's November 12, 2008 response, the New Jersey Department of Education's proposed but not adopted regulations were in effect. *See 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). Thus, the Custodian lawfully denied access to records responsive to the Complainant's OPRA request at that time pursuant to N.J.S.A. 47:1A-9.a., Executive Order 21 (Gov. McGreevey, 2002) and Executive Order No. 26 (Gov. McGreevey, 2002). *See also Bragg v. New Jersey Department of Corrections*, GRC Complaint No. 2010-145 (March 29, 2011).
2. The Custodian's Counsel advised the GRC in writing on April 21, 2009 that the New Jersey Department of Education's Ethics Liaison Officer provided the Complainant with the requested file in anticipation of an upcoming hearing. The Complainant confirmed to the GRC receipt of said file in writing on April 29, 2009. Therefore, the GRC declines to determine whether access to the requested record should be granted at this time based on the Court's holding in Slaughter v.

Government Records Council, 413 N.J. Super. 544 (App. Div. 2010) because the Complainant was provided with the responsive record.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012¹⁰

¹⁰ This complaint was prepared for adjudication on August 4, 2009; however, said complaint was not adjudicated due to the Council's lack of quorum.
Ursula Cargill v. State Ethics Commission, 2009-10 – Findings and Recommendations of the Executive Director