



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

November 29, 2011 Government Records Council Meeting

Robert Edwin Kelly
Complainant

Complaint No. 2010-215

v.

New Jersey Department of Transportation
Custodian of Record

At the November 29, 2011 public meeting, the Government Records Council (“Council”) considered the November 22, 2011 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 although Executive Order No. 26 (McGreevey, 2002) does not apply to the report sought by the Complainant because workplace violence complaints are not “[r]ecords of complaints and investigations undertaken pursuant to the Model Procedures in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive,” the report is exempt from disclosure as a “... [report] ... made, maintained or kept by the Office of the Inspector General in the Department of Transportation...” pursuant to *N.J.A.C. 16:1A-4.3(9)* and applicable herein pursuant to *N.J.S.A. 47:1A-9.a*. Thus, the Custodian has lawfully denied access to the requested report. *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 29th Day of November 29, 2011

Robin Berg Tabakin, Chair
Government Records Council



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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 2, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 29, 2011 Council Meeting**

**Robert Edwin Kelly¹
Complainant**

GRC Complaint No. 2010-215

v.

**New Jersey Department of Transportation²
Custodian of Records**

Records Relevant to Complaint: Copy of the workplace violence investigation report from an incident on October 21, 2009.³

Request Made: August 8, 2010

Response Made: August 12, 2010

Custodian: Alfred J. Brenner, III

GRC Complaint Filed: August 25, 2010⁴

Background

August 8, 2010

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.⁵

August 9, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same day following receipt of such request.⁶ The Custodian states that he contacted several units within the New Jersey Department of Transportation ("DOT") for assistance in searching for and obtaining the requested report. The Custodian states that the report may not be readily available, thus, the Custodian requests an extension of time until August 31, 2010 to respond to the Complainant's OPRA request.

The Custodian states that if the Complainant wishes to receive the requested report via U.S. mail, DOT will advise the Complainant of the copying cost. The Custodian states that if the Complainant wishes to inspect the records onsite, DOT will

¹ No legal representation listed on record.

² Represented by DAG Judith Andrejko, on behalf of the NJ Attorney General.

³ The Complainant notes that he was the accused party in the investigation.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ August 8, 2010 was a Sunday.

⁶ The Custodian certified in the Statement of Information that he received the Complainant's OPRA request on August 9, 2010.

advise the Complainant whom to contact to make an appointment. The Custodian further states that DOT will impose a special service charge in addition to any copying cost if retrieval of the record takes more than four (4) hours. The Custodian states that if a special service charge is assessed, the Complainant will be required to submit a 50% deposit.

August 9, 2010

E-mail from the Complainant to the Custodian. The Complainant states that the Custodian's request for an extension of time is denied. The Complainant requests that the requested report be provided within seven (7) business days.

August 10, 2010

E-mail from the Custodian to the Complainant. The Custodian states that DOT will do its best to respond to the Complainant's OPRA request within the statutorily mandated time frame.

August 12, 2010

Letter from the Custodian to the Complainant. The Custodian states that access to the requested report is denied because said report is exempt from disclosure pursuant to *N.J.A.C. 16:1A-4.3(9)*, which exempts access to "[a]ll records that are part of any work papers, memoranda or reports that are made maintained or kept by the Office of the Inspector General in the Department of Transportation." Additionally, the Custodian states that the requested report is exempt pursuant to Executive Order No. 26 (McGreevey, 2002)("EO 26"), which exempts access to "[r]ecords of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive." *Id.* at 4.a.

August 25, 2010

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

- Complainant's OPRA request dated August 8, 2010.
- Government Records Request Receipt dated August 12, 2010.

The Complainant states that he submitted an OPRA request to DOT on August 8, 2010. The Complainant states that the Custodian responded on August 12, 2010 denying access to the requested record pursuant to *N.J.A.C. 16:1A-4.3(9)* and EO 26.

The Complainant asserts that he is a person of interest as the accused party in a Work Place Violence complaint. The Complainant argues that he has a legitimate interest in the requested report.⁷

The Complainant does not agree to mediate this complaint.

⁷ The Complainant notes that he also requested the report under common law. However, pursuant to *N.J.S.A. 47:1A-7*, the GRC only has the authority to adjudicate requests made pursuant to OPRA. Robert Edwin Kelly v. New Jersey Department of Transportation, 2010-215 – Findings and Recommendations of the Executive Director 2

August 31, 2010

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

September 14, 2010

E-mail from Ms. Maria Jacobi (“Ms. Jacobi”), Supervisor of Records Management, to the GRC. Ms. Jacobi requests an extension of time to submit the requested SOI.

September 14, 2010

E-mail from the GRC to Ms. Jacobi. The GRC grants Ms. Jacobi an extension of time until September 21, 2010 to submit the requested SOI.

September 21, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated August 8, 2010.
- E-mail from the Custodian to the Complainant dated August 9, 2010.
- E-mail from the Complainant to the Custodian dated August 9, 2010.
- E-mail from the Custodian to the Complainant dated August 10, 2010.
- Government Records Request Receipt dated August 12, 2010.

The Custodian certifies that his search for the requested records included sending an e-mail to the Office of the Inspector General requesting the responsive report. The Custodian certifies that the report was forwarded to him on August 11, 2010.

The Custodian also certifies that whether 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 (“DARM”) is not applicable in this complaint.

The Custodian certifies that he received the Complainant’s OPRA request on August 9, 2010. The Custodian certifies that he contacted the Office of the Inspector General for a copy of any records responsive to the request and subsequently received a copy of the “New Jersey Department of Transportation – Office of the Inspector General – Report No. 2009-1282 (Issued November 12, 2009).” The Custodian certifies that he responded in writing to the Complainant on August 12, 2010 denying access to the report pursuant to *N.J.A.C. 16:1A-4.3(9)* and EO 26.⁸

The Custodian states that DOT’s regulations provide that:

“The following ... records shall be exempt from public access ... All records that are part of any work papers, memoranda or reports that are made, maintained or kept by the Office of the Inspector General in the Department of Transportation...” *N.J.A.C. 16:1A-4.3(9)*.

⁸ The Custodian certified that he also reviewed the Complainant’s request under common law and disclosed signed statements to the Complainant on September 21, 2010. The Custodian included as part of the SOI copies of his September 21, 2010 response with the signed statements. *See* FN No. 7.

The Custodian further states that EO 26 provides that:

“The following records shall not be considered to be government records subject to public access pursuant to [OPRA]: Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive.” *Id.* at 4(a).

The Custodian contends that he lawfully denied access to the responsive report based on these two exemptions. The Custodian asserts that based on the foregoing, this complaint should be dismissed.⁹

September 24, 2010

The Complainant’s response to the Custodian’s SOI. The Complainant states that his OPRA request sought a copy of the “New Jersey Department of Transportation – Office of the Inspector General – Report No. 2009-1282 (Issued November 12, 2009).” The Complainant states that the investigation at issue (of an alleged workplace violence incident that took place on July 12, 2009) was initiated on October 21, 2009.

The Complainant states that DOT’s regulations at the time of the alleged workplace violence incident provided that:

“The records listed below shall not be deemed [DOT] public records but may be made available for inspection, examination, and copying only by an individual who demonstrates to the satisfaction of the Custodian ... Director, Division of Support Services, in conjunction with the manager or higher level having custody of such records that the citizen has a legitimate beneficial interest in such record for the protection of his or her property rights or the protection of any interest the citizen may have in any matter affecting the citizen to which said record is relevant. Availability may be limited to the part of the record that is particularly relevant to the citizen.” *N.J.A.C.* 16:1A-1.8(d).

The Complainant states that shortly after the investigation commenced, *N.J.A.C.* 16:1A-1.8(d) expired on November 3, 2009. The Complainant argues that the GRC should adjudicate this complaint based on the existence of *N.J.A.C.* 16:1A-1.8(d) because it was in effect at the time the investigation commenced. The Complainant argues that it is only logical that the GRC apply the DOT regulation that existed at the onset of the investigation. The Complainant further argues that it is clear that he is a person of interest trying to protect his property and interests because he is the accused party.¹⁰

⁹ The Custodian further asserts that although the GRC does not have the authority to review common law requests for records, the GRC should consider that the Custodian provided the Complainant with copies of signed statements contained in the Inspector General’s investigation report in response to the Complainant’s common law request. *See* FN No. 7.

¹⁰ The Complainant includes arguments regarding the common law portion of his request. *See* FN. No. 7. Robert Edwin Kelly v. New Jersey Department of Transportation, 2010-215 – Findings and Recommendations of the Executive Director 4

September 28, 2010

Letter from the Custodian's Counsel to the GRC. Counsel states that the Complainant argued that *N.J.A.C.* 16:1A-4, promulgated April 21, 2010, does not apply to the Complainant's August 8, 2010 OPRA request. Counsel states that the Complainant instead requests that the Council apply the regulations in effect at the time of the alleged workplace violence incident took place, *i.e.*, July 12, 2009.

Counsel asserts that the Complainant's argument is erroneous. Counsel states that both *N.J.A.C.* 16:1A-4.3(9) and EO 26 cited by DOT in its SOI were also in effect on July 12, 2009; thus, access to the report was properly denied.

Counsel further argues that *N.J.A.C.* 16:1A-1.8(d) actually paralleled the common law right of access, which the GRC does not have the authority to adjudicate. N.J.S.A. 47:1A-1 et seq.¹¹

Analysis

Whether the Custodian unlawfully denied access to the requested report?

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 further provides that:

"[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.

EO 26 provides that:

¹¹ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
Robert Edwin Kelly v. New Jersey Department of Transportation, 2010-215 – Findings and Recommendations of the Executive Director 5

“The following records shall not be considered to be government records subject to public access pursuant to [OPRA]: Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive.” *Id.* at 4(a).

Moreover, DOT’s regulations provide that:

“The following ... records shall be exempt from public access ... All records that are part of any work papers, memoranda or reports that are made, maintained or kept by the Office of the Inspector General in the Department of Transportation...” *N.J.A.C. 16:1A-4.3(9)*.

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*.

The record at issue in this complaint is an investigation report issued on November 12, 2009 regarding an alleged workplace violence incident that occurred on July 12, 2009. The Custodian initially responded in writing on the same day as receipt of the Complainant’s OPRA request seeking an extension of time to respond, which was denied by the Complainant. The Custodian subsequently responded in a timely manner denying access to the responsive report pursuant to *N.J.A.C. 16:1A-4.3(9)* and EO 26.

The Complainant filed the instant complaint arguing that, as a party to the investigation, he has a legitimate interest in gaining access to the report. The Custodian argued in the SOI that access was properly denied and that the complaint should be dismissed.

The Complainant subsequently sent an e-mail to the GRC on September 24, 2010 arguing that the record should be disclosed because *N.J.A.C. 16:1A-1.8(d)* was in effect at the time that the alleged workplace violence incident occurred. The Complainant noted that although *N.J.A.C. 16:1A-1.8(d)* expired on November 3, 2009, it is reasonable to apply the expired DOT regulation because it existed at the time of the alleged incident. The Custodian’s Counsel submitted a letter to the GRC on September 28, 2010 arguing

that the Complainant's argument was erroneous because *N.J.A.C.* 16:1A-1.8(d) was not in effect at the time of the OPRA request and it paralleled the common law right of access which does not fall within the GRC's purview.

OPRA provides that its provision "shall not abrogate any exemption of a public record or government record from public access... heretofore made pursuant to ... regulation promulgated under the authority of any statute or Executive Order of the Governor [or] Executive Order of the Governor..." *N.J.S.A.* 47:1A-9.a. The Custodian here argued that the requested report is exempt from disclosure pursuant to an executive order (EO 26) and a promulgated regulation (*N.J.A.C.* 16:1A-4.3(9)).

EO 26 grants confidentiality under OPRA to records of investigations undertaken pursuant to the Model Procedures in accordance with the State's Policy Prohibiting Discrimination in the Workplace ("State's Policy"), set forth at *N.J.A.C.* 4A:7-3.1. and 3.2. Specifically, *N.J.A.C.* 4A:7-3.1. identifies those categories for which discrimination will not be tolerated to include "... race, ... sex/gender ... religion ... sexual orientation ..." *Id.* at (a). The State's Policy also prohibits "sexual (gender-based) harassment of any kind, including hostile work environment harassment, quid pro quo harassment, or same-sex categories ..." *Id.* at (c).

A full review of the State's Policy reveals that it deals exclusively with discrimination and harassment in the workplace but is silent as to whether workplace violence complaints are recognized by the Policy. In fact, there is only portion of the code that very narrowly addresses activity that can be seen as violent in nature:

"Examples of behaviors that may constitute a violation of this policy include ... Engaging in threatening, intimidating, or *hostile acts toward another individual* in the workplace *because that individual belongs to, or is associated with, any of the protected categories ...*" *N.J.A.C.* 4A:7-3.1(b)(1).

This portion of the State's Policy prohibits threatening or hostile acts and sets a condition for reporting these acts. Specifically, the "threatening, intimidating, or hostile" act must be directed toward another person who belongs to or is associated with "any of the protected categories" identified in *N.J.A.C.* 4A:7-3.1.

Moreover, the Model Procedures at *N.J.A.C.* 4A:7-3.2. provide that each State agency is responsible for implementing a uniform procedure for reporting, investigation and appeals process consistent with the State's Policy, which is silent as to workplace violence.

There is no evidence in the record to indicate that the workplace violence complaint at issue herein was filed pursuant to the Model Procedures in accordance with the State's Policy. This is because the State's Policy does not address workplace violence without its association with discrimination of an individual due to his or her membership in a protected category. Based on the foregoing, it is reasonable to conclude that EO 26 does not apply to the instant matter.

However, *N.J.A.C.* 16:1A-4.3(9) does apply to the report at issue here. As previously discussed, *N.J.S.A.* 47:1A-9.a. provides that the provisions of OPRA shall not abrogate promulgated regulations. *N.J.A.C.* 16:1A-4.3(9), a DOT regulation, exempts disclosure of “any ... reports that are made, maintained or kept by the Office of the Inspector General in [DOT]...” *Id.*

Here, the Custodian certified in the SOI that he contacted the Office of the Inspector General to obtain the report sought by the Complainant. Additionally, the Custodian certified that the Office of the Inspector General provided the Custodian with the responsive report entitled, “New Jersey Department of Transportation – Office of the Inspector General – Report No. 2009-1282 (Issued November 12, 2009).” Moreover, the Complainant has offered no competent, credible evidence to refute the Custodian’s certification. Thus, because the requested report was “made, maintained, or kept on file by the Office of the Inspector General in [DOT]...,” *N.J.A.C.* 16:1A-4.3(9) applies and is a lawful basis for denying access to the requested report.

Therefore, although EO 26 does not apply to the report sought by the Complainant because workplace violence complaints are not “[r]ecords of complaints and investigations undertaken pursuant to the [Model Procedures] in accordance [State’s Policy] adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive,” the report is exempt from disclosure as a “... [report] ... made, maintained or kept by the Office of the Inspector General in [DOT]...” pursuant to *N.J.A.C.* 16:1A-4.3(9) and applicable herein pursuant to *N.J.S.A.* 47:1A-9.a.. Thus, the Custodian has lawfully denied access to the requested report. *N.J.S.A.* 47:1A-6.

Finally, the GRC agrees that *N.J.A.C.* 16:1A-1.8(d) does not apply to this complaint. Additionally, the Complainant admitted in his September 24, 2010 letter to the GRC that *N.J.A.C.* 16:1A-1.8(d) expired prior to the Complainant submitting his OPRA request. Thus, the GRC declines to address the application of *N.J.A.C.* 16:1A-1.8(d) to this complaint.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that although Executive Order No. 26 (McGreevey, 2002) does not apply to the report sought by the Complainant because workplace violence complaints are not “[r]ecords of complaints and investigations undertaken pursuant to the Model Procedures in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive,” the report is exempt from disclosure as a “... [report] ... made, maintained or kept by the Office of the Inspector General in the Department of Transportation...” pursuant to *N.J.A.C.* 16:1A-4.3(9) and applicable herein pursuant to *N.J.S.A.* 47:1A-9.a. Thus, the Custodian has lawfully denied access to the requested report. *N.J.S.A.* 47:1A-6.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 22, 2011