



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 24, 2013 Government Records Council Meeting

Deborah A. Tietze
Complainant

Complaint No. 2012-276

v.

New Jersey Pinelands Commission
Custodian of Record

At the September 24, 2103 public meeting, the Government Records Council (“Council”) considered the September 17, 2013 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 the files denied to the Complainant are “[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[,]” pursuant to Executive Order No. 26 (McGreevey 2002). As such, the Complainant’s EEO files are confidential pursuant to Executive Order No. 26 (McGreevey 2002), and the Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 that access to such records were lawfully denied. *See Cargill v. N.J. Dep’t of Educ.*, GRC Complaint No. 2009-256; Deborah A. Tietze v. N.J. Pinelands Comm’n, GRC Complaint No. 2011-379.

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 24th Day of September, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: September 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 24, 2013 Council Meeting**

**Deborah A. Tietze¹
Complainant**

GRC Complaint No. 2012-276

v.

**New Jersey Pinelands Commission²
Custodial Agency**

Records Relevant to Complaint: A copy of the items in the Equal Employment Opportunity (“EEO”) file for Deborah Tietze.³

Custodian of Record: Paul Leakan
Request Received by Custodian: September 26, 2012
Response Made by Custodian: October 5, 2012
GRC Complaint Received: October 12, 2012

Background⁴

Request and Response:

On September 26, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 5, 2012, seven (7) business days later, the Custodian responded in writing denying the Complainant’s request because the requested file contains “confidential information.”

Denial of Access Complaint:

On October 12, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant simply asserts that her request was “denied via letter by [the] Custodian.”

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Kristen Hein.

³ The Complainant requested additional records which are not relevant to this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Statement of Information:

On October 23, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on September 26, 2012. The Custodian additionally certifies that he responded, in writing, on October 5, 2012, and withheld the production of the files requested by the Complainant because they are confidential. The Custodian further certifies that the EEO files sought by the Complainant include “investigatory fact-finding materials” and the “Investigatory Report,” which represent the culmination of the EEO investigation into the Complainant’s March 2007 and March 2011 complaints alleging violations of the New Jersey State Policy Prohibiting Discrimination in the Workplace.

The Custodian certifies that, for both the Complainant’s 2007 and 2011 discrimination complaints, the New Jersey Pinelands Commission (“the Commission”) followed the New Jersey Model Procedures for Processing Internal Complaints Alleging Discrimination in the Workplace (“Model Procedures”). See N.J.A.C. 4A:7-3.2. The Custodian additionally certifies that the Commission investigated both claims and, ultimately, found each to be unsubstantiated. The Custodian further certifies that he has previously denied the Complainant access to the Investigatory Report encompassed by the current request.⁵

The Custodian indicates that all of the EEO files requested by the Complainant consist of records of the discrimination complaints filed by the Complainant and of the Commission’s investigation “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) (“E.O. No. 106”).” The Custodian further contends that the EEO file is therefore confidential and not subject to disclosure pursuant to N.J.S.A. 47:1A-9 and Executive Order No. 26 (McGreevey 2002) (“E.O. No. 26”).

Analysis⁶

Unlawful Denial of Access

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

OPRA also recognizes exemptions to disclosure found in any Executive Order of the Governor, or any regulation promulgated under the authority of any Executive Order of the Governor. See N.J.S.A. 47:1A-9(a). In turn, E.O. No. 26 provides that:

⁵ The GRC upheld this denial. See Deborah A. Tietze v. N.J. Pinelands Comm’n, GRC Complaint No. 2011-379 (Final Decision December 18, 2012).

⁶ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

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 [E.O. No. 106], whether open, closed, or inactive.⁷

The GRC has held that records created as part of a state employee's discrimination complaint, and during an EEO officer's ensuing investigation, fall within the Model Procedures referenced in E.O. No. 106. *See Cargill v. N.J. Dep't of Educ.*, GRC Complaint No. 2009-256 (finding that state employees filing complaints for discrimination do so in accordance with the Model Procedures); *see also N.J.A.C. 4A:7-3.1; N.J.A.C. 4A:7-3.2* (setting forth model procedures for internal complaints alleging discrimination in the workplace). Such records, therefore, are considered confidential under E.O. No. 26. *See Cargill*, GRC 2009-256 (finding records from discrimination complaint exempt for disclosure under *N.J.S.A. 47:1A-9(a)* and Executive Order No. 26); *see also Tietze*, GRC 2011-379 (finding that any records created as part of Complainant's discrimination complaint, including investigatory report, are to be exempt from disclosure as confidential).

In the present complaint, the record supports the conclusion that the EEO files requested by the Complainant fall under the Model Procedures. Specifically, the Complainant is a state employee at the Commission who filed a complaint regarding discrimination in the workplace as defined in *N.J.A.C. 4A:7-3.1*. In accordance with *N.J.A.C. 4A:7-3.2*, the Complainant's 2007 and 2011 complaints were investigated by the Commission's EEO/AA officers, an investigatory file was prepared, and the Commission's Executive Director issued a final determination that the Complainant's allegations of discrimination were unsubstantiated.

Therefore, the files denied to the Complainant are "[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 [E.O. No. 106], whether open, closed or inactive[,]" pursuant to E.O. No. 26. As such, the Complainant's EEO files are confidential pursuant to E.O. No. 26, and the Custodian has borne his burden of proof under *N.J.S.A. 47:1A-6* that access to such records were lawfully denied. *See Cargill*, GRC 2009-256; *Tietze*, GRC 2011-379.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the files denied to the Complainant are "[r]ecords of complaints and investigations undertaken pursuant to the

⁷ *N.J.A.C. 4A:7-3.1*, Policy Prohibiting Discrimination, Harassment or Hostile Work Environments in the Workplace; Complaint Procedure, and Appeals, was renamed Policy Prohibiting Discrimination in the Workplace; Complaint Procedure, and Appeals, by R.2007 d.244, effective August 20, 2007. *See 39 N.J.R. 1340(a); 39 N.J.R. 3499(a)*.

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[,]” pursuant to Executive Order No. 26 (McGreevey 2002). As such, the Complainant’s EEO files are confidential pursuant to Executive Order No. 26 (McGreevey 2002), and the Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 that access to such records were lawfully denied. *See Cargill v. N.J. Dep’t of Educ.*, GRC Complaint No. 2009-256; Deborah A. Tietze v. N.J. Pinelands Comm’n, GRC Complaint No. 2011-379.

Prepared By: Dawn SanFilippo
Senior Counsel

Approved By: Brandon D. Minde, Esq.
Executive Director

September 17, 2013