



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

May 26, 2015 Government Records Council Meeting

Bernard Mitchell
Complainant

Complaint No. 2014-192

v.

NJ Department of Military & Veterans Affairs
Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 2015 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 bid proposals submitted by Syska Hennesy Group and Design Collaborative, as well as information on the transmission of same, are exempt from disclosure under New Jersey Department of Military & Veterans Affairs regulations because no contract for Project No. HH301 was awarded at the time of the Complainant’s OPRA request. N.J.S.A. 47:1A-9(a); N.J.A.C. 17:19-3.6(i). The Custodian lawfully denied access to the responsive records. 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 26th Day of May, 2015

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: May 28, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 26, 2015 Council Meeting**

**Bernard Mitchell¹
Complainant**

GRC Complaint No. 2014-192

v.

**New Jersey Department of
Military & Veterans Affairs²
Custodial Agency**

Records Relevant to Complaint: On-site inspection of the bid proposals submitted by Syska Hennesy Group (“SHG”) and Design Collaborative (“DC”) submitted for Project No. HH301 to include the method of mailing (by carrier), date and time of delivery.

Custodian of Record: Colonel Mark A. Preston

Request Received by Custodian: April 11, 2014

Response Made by Custodian: April 23, 2014

GRC Complaint Received: May 12, 2014

Background³

Request and Response:

On April 11, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 17, 2014, the Complainant e-mailed the Custodian, seeking an update on the status of his OPRA request. On April 21, 2014, the Custodian advised the Complainant that the final day for the New Jersey Department of Military & Veterans Affairs (“DMAVA”) to respond was April 24, 2014. The Custodian noted that his calculation was based on the fact that April 17, 2014 represented an “Alternative Work Program” off day, and the State was closed for a holiday on April 18, 2014.

On April 23, 2014, the sixth (6th) business day after receipt of the OPRA request, the Custodian responded in writing, denying access to the responsive bid proposals under DMAVA regulations providing that cost proposals and correspondence of all firms relating to a consultant selection are confidential until the relevant contract is awarded. N.J.S.A. 47:1A-9(a); N.J.A.C. 17:19-3.6(1).

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Christopher Hamner.

³ 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.

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Denial of Access Complaint:

On May 12, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he was denied access to the responsive records but provided no additional arguments.

Statement of Information:⁴

On November 24, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 11, 2014. The Custodian affirmed that he forwarded the OPRA request to the Contracting Office, which advised that Project No. HH301 had not been awarded and thus the responsive records were exempt. The Custodian certified that he responded to the Complainant in writing on April 23, 2014, denying access to the responsive records.

The Custodian contended that he lawfully denied access to the responsive records. *Citing* N.J.S.A. 47:1A-9(a); N.J.A.C. 17:19-3.6(i). The Custodian affirmed that, as of the date of this SOI, a contract for Project No. HH301 had not yet been awarded.⁵

Analysis

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 provides that:

The 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.

N.J.S.A. 47:1A-9(a)

⁴ On May 21, 2014, this complaint was referred to mediation. On November 18, 2014, this complaint was referred back to the GRC for adjudication.

⁵ The Custodian submitted additional correspondence that occurred during the mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

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Additionally, DMAVA's regulations provide that "[t]he selection evaluations, rankings, negotiations and cost proposals of all firms, as well as all discussions and correspondence, relating to a consultant selection remain confidential until the contract is awarded." N.J.A.C. 17:19-3.6(i).

Here, the Complainant challenged the Custodian's denial of access but failed to provide any additional arguments as to why he believed same was unlawful. In the SOI, the Custodian argued that his denial of access was lawful based on DMAVA's regulations. Specifically, the Custodian certified that the records were exempt because no contract had been awarded at the time of the OPRA request. N.J.A.C. 17:19-3.6(i).

OPRA recognizes exemptions contained in promulgated regulations. N.J.S.A. 47:1A-9(a); KL v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 356 (App. Div. 2011); Lackland v. New Jersey Dep't of Law & Pub. Safety, State Ethics Comm'n., GRC Complaint No. 2008-66 (August 2009); Robinson v. New Jersey Dep't of Corrections, GRC Complaint No. 2012-129 (May 2013). Here, DMAVA's regulations exempt access to cost proposals and correspondence submitted as part of a project selection. The Custodian has certified that the responsive records were submitted for Project No. HH301 and that no contract had been awarded at the time the request was made. Additionally, there is no evidence in the record to refute the Custodian's certification. The GRC is thus satisfied that the Custodian lawfully denied access to the responsive records under N.J.A.C. 17:19-3.6(i).

Accordingly, the bid proposals submitted by SHG and DC, as well as information on the transmission of same, are exempt from disclosure under DMAVA regulations because no contract for Project No. HH301 was awarded at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-9(a); N.J.A.C. 17:19-3.6(i). The Custodian has lawfully denied access to the responsive records. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the bid proposals submitted by Syska Hennesy Group and Design Collaborative, as well as information on the transmission of same, are exempt from disclosure under New Jersey Department of Military & Veterans Affairs regulations because no contract for Project No. HH301 was awarded at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-9(a); N.J.A.C. 17:19-3.6(i). The Custodian lawfully denied access to the responsive records. N.J.S.A. 47:1A-6.

Prepared By: Ernest Bongiovanni
Staff Attorney

Approved By: Dawn R. SanFilippo
Deputy Executive Director

May 19, 2015