



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 29, 2015 Government Records Council Meeting

Brian R. Clancy
Complainant

Complaint No. 2014-296

v.

NJ Civil Service Commission
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 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 because the only record containing the responsive information is the “priority promotion” list created for Symbol PM5092X, and because the Decree expressly prohibits disclosure of this information, the Custodian lawfully denied access to the responsive record. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; “Second Amended Consent Decree” at ¶ 65.

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 September, 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: October 5, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting**

**Brian R. Clancy¹
Complainant**

GRC Complaint No. 2014-296

v.

**New Jersey Civil Service Commission²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the name, veteran status, and final average of all candidates for the title of Police Sergeant in the City of Elizabeth (“City”) based on the June 1, 2013, test (Symbol PM5092M, PM5092X and any other symbol associated with the position), to include all “priority promotion” candidates. The format for other municipal police sergeant lists posted to the Civil Service Commission’s (“CSC”) is an acceptable format for the responsive information.

Custodian of Record: Christopher Randazzo

Request Received by Custodian: August 9, 2014

Response Made by Custodian: August 15, 2014

GRC Complaint Received: August 20, 2014

Background³

Request and Response:

On August 9, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

On August 15, 2014, the Custodian responded in writing, stating that no list exists for Symbol PM5092M because regular lists are not issued until the appropriate number of appointments is made from the priority list. The Custodian also denied access to the list for Symbol PM5092X under N.J.S.A. 47:1A-1.1, as a record kept confidential pursuant to a court order. US v. NJ Civil Serv. Comm’n, Civil Action 10-91 (KSH)(MAS). The Custodian noted that the Complainant could find more information about the court order on the CSC’s website at <http://www.state.nj.us/csc/seekers/jobs/safety/decreed.html>.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Pamela N. Ullman.

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.

On the same day, the Complainant e-mailed the Custodian, objecting to the denial of access. Regarding Symbol PM5092M, the Complainant asserted that he is a candidate for this position in the City. The Complainant noted that he received a notification from the CSC on August 7, 2014, containing his name, veteran status, and final average. The Complainant asserted that he knows that every other candidate received similar notification; thus, responsive records must exist. The Complainant also asserted that he was not seeking access to any lists: just the name, veteran status, and final average. Regarding Symbol PM5092X, the Complainant stated that he reviewed the “Second Amended Consent Decree” (“Decree”) on the CSC’s website and only found one confidentiality clause barring the State from disclosing a candidate’s designation as a “priority promotion.” The Complainant asserted that he did not request any candidate’s designation as a “priority promotion.”

The Complainant stated that the Custodian had two (2) remaining business days to appropriately fulfill his OPRA request or he will consider the initial response to be an improper denial of access.

Denial of Access Complaint:

On August 20, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian unlawfully denied him access to the name, veteran status, and final average of all candidates for Police Sergeant in the City based on the June 1, 2013, test. The Complainant noted that he received a notification containing the responsive information and that other candidates received a similar notification; thus, CSC’s contention that no records exist is untrue. The Complainant asserted that the information is not exempt from disclosure and that the Custodian’s denial does not apply to responsive information for either symbol. The Complainant noted that he did not specifically request priority promotion information. The Complainant requested that the Council order the Custodian to disclose the responsive information.

The Complainant asserted that it is important to note that approximately 120 municipalities and two (2) counties had results of their Police Sergeant exam posted on CSC’s website on July 30, 2014. The Complainant noted that the results were based on the June 1, 2013, test and included the name, veteran status, and final average.

Statement of Information:

On September 10, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 9, 2014. The Custodian certified that he responded on August 15, 2014, denying access to the requested records.

The Custodian stated that, for background information, the United States Department of Justice (“DOJ”) filed a civil action against the State and CSC in January 2010, challenging the exam administered by CSC to select promotional candidates for the Police Sergeant position. Civil Serv. Comm’n, 10-91. The Custodian averred that the DOJ alleged, among other things, that the State’s practice of written exams and ranking candidates in descending order disparately

impacted minority candidates seeking promotion to the title of Police Sergeant resulting in a violation of Title VII. The Custodian stated that, although CSC denied the allegations, it agreed to enter into a Decree with DOJ in which the City is identified as a “priority promotion” jurisdiction. The Custodian stated that the Decree impacted the Police Sergeant exam administered over various dates in 2013 and also the release of exam results. The Custodian affirmed that, in order to comply with the Decree, CSC is releasing the results of the 2013 Police Sergeant exam in two (2) phases. In the first phase, the CSC released a “priority promotion” list, or in this case, candidates passing the exam for Symbol PM5092X. The Custodian affirmed that, in the second phase, CSC would release the list for all remaining candidates, or in this case, Symbol PM5029M.

The Custodian certified that the second phase list for Symbol PM5029M does not yet exist. The Custodian affirmed that he advised the Complainant that of this fact, stating that the appropriate number of “priority promotion” appointments had not yet been made. The Custodian averred that CSC could not provide a record that does not exist.

Further, the Custodian argued that he lawfully denied access to the name, veteran status, and final average pursuant to a court order. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; Civil Serv. Comm’n, 10-91. The Custodian argued that the Decree requires CSC to keep information on the “priority promotion” list for Symbol PM5092X confidential. The Custodian disputed the Complainant’s assertion that he was not seeking an official list because the only responsive record containing the name, veteran status, and final average is the list for Symbol PM5092X. Further, the Custodian disputed the Complainant’s argument that other records exist based on the August 7, 2014, notification because the only responsive record at this time is the list for Symbol PM5092X. The Custodian argued that, contrary to the Complainant’s argument that the Decree had no bearing on his request, same expressly prohibits disclosure of priority promotions information.

Finally, the Custodian disputed the Complainant’s argument that records exist because 120 other municipalities had their exam results displayed on CSC’s website. The Custodian asserted that this argument ignored the Decree, which detailed that the City was required to have priority promotions that must remain confidential. The Custodian noted that the Complainant is not requesting records for any of the other 120 municipalities, which are not subject to the Decree, thus rendering his argument moot.

Additional Submissions:

On September 8, 2015, the GRC sought additional information from the Custodian. Specifically, the GRC noted that the Complainant spoke about a “notification” he received in the mail with the requested information on it. Further, the GRC noted that the Complainant indicated that he was not seeking a list. The GRC stated that although the Custodian argued in the SOI that no regular list was created because of pending action on the “priority promotion list,” it was unclear whether CSC kept copies of the “notifications.” Thus, the GRC requested that the Custodian submit a legal certification answering the following:

1. Does the CSC keep copies of the “notification” sent to individuals that took a promotion test (as referenced by the Complainant in his complaint)?

The GRC required the Custodian to submit his legal certification by close of business on September 11, 2015.

On September 10, 2015, the Custodian responded to the GRC’s request for additional information. Therein, the Custodian certified that CSC does not maintain the notifications sent to exam participants. The Custodian certified that the New Jersey Office of Information Technology generates one set of the notifications and sends them to the individuals. The Custodian further noted that, even if said notifications were maintained by the CSC, they would be exempt as personnel records under N.J.S.A. 47:1A-10, and also not disclosable per the Decree.

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 “[a] government record shall not include . . . information which is to be kept confidential pursuant to court order” N.J.S.A. 47:1A-1.1. The Decree provides “[t]hat the designation as a priority promotion . . . will remain confidential and will not be disclosed by the State or a local jurisdiction . . .” Id. at ¶ 65. Additionally, the Council has previously held that responding to an OPRA request for personnel information requires a custodian to provide the most comprehensive records containing the responsive information. Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012).

In the matter currently before the Council, the Complainant asserted in his Denial of Access Complaint that the requested information is not exempt pursuant to the Decree because he did not seek priority promotion information. Additionally, the Complainant noted that CSC posted test results for approximately 120 municipalities and two (2) counties on its website. Finally, the Complainant asserted that the requested information must exist within CSC because he and other candidates received notifications via mail with the name, veteran status, and final average.

Conversely, the Custodian contended in the SOI that he lawfully denied access to the requested records. The Custodian certified that the only responsive record that existed at the time of the request was the “priority promotion” list for Symbol PM5092X and that no list for Symbol PM5029M would be issued until after all priority appointments were made from the first list. The Custodian further asserted that ¶ 65 of the Decree expressly exempted access to the priority information composing the list for Symbol PM5092X. Thereafter, the GRC sought additional information from the Custodian to determine whether CSC possessed copies of the notifications to which the Complainant referred in the Denial of Access Complaint. In response to this

request, the Custodian certified that CSC did not maintain copies of the notifications similar to those sent to the Complainant.

After reviewing the submissions and evidence contained in the record, the GRC is satisfied that the Custodian lawfully denied access to the subject OPRA request. First, the Custodian certified in the SOI that the “priority promotion” list for Symbol PM5092X is the only record containing the responsive information. The Custodian thus identified the most comprehensive record containing the responsive information, which is consistent with the Council’s holding in Valdes, GRC 2011-64. *See also* Stevenson v. City of Newark (Essex), GRC Complaint No. 2013-151 (Interim Order dated November 19, 2013). Additionally, the Decree prohibits CSC from disclosing all relevant information contained on said list because same directly relates to priority promotions. Finally, on September 10, 2015, the Custodian certified that CSC did not maintain any of the notifications sent to candidates, thus negating consideration of these records for disclosure (notwithstanding the Custodian’s assertion that same would be exempt from disclosure if they existed).

Additionally, the GRC is not persuaded by the Complainant’s arguments that he was not seeking the list identified by the Custodian or priority promotion information. Specifically, the Complainant expressly stated in his OPRA request that he sought information for all candidates to include “all ‘priority promotion’ candidates.” Because the only record containing the information sought is the “priority promotion” list, such is the record the Complainant sought. Further, in the Denial of Access Complaint, the Complainant attempted to support his arguments by noting that CSC posted over 120 other lists (not subject to the Decree) to its website. This is contrary to the Complainant’s assertion in an August 15, 2014, e-mail and in the Denial of Access Complaint that he was not seeking any lists or priority promotion information.

Accordingly, because the only record containing the responsive information is the “priority promotion” list created for Symbol PM5092X, and because the Decree expressly prohibits disclosure of this information, the Custodian lawfully denied access to the responsive record. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; Decree at ¶ 65.

Conclusions and Recommendations

The Deputy Executive Director respectfully recommends the Council find that because the only record containing the responsive information is the “priority promotion” list created for Symbol PM5092X, and because the Decree expressly prohibits disclosure of this information, the Custodian lawfully denied access to the responsive record. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; “Second Amended Consent Decree” at ¶ 65.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo
Deputy Executive Director

September 22, 2015