



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 26, 2018 Government Records Council Meeting

Jonathan Stevens
Complainant

Complaint No. 2016-249

v.

Rutgers University
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 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 the requested information regarding Professor Liroy’s research conducted on World Trade Center remnants while at Rutgers University is exempt from disclosure as research conducted under the auspices of a public higher education institution in New Jersey. N.J.S.A. 47:1A-1.1. The Custodian has thus borne his burden of proof that the denial of access was lawful. 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 June, 2018

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: June 29, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Jonathan Stevens¹
Complainant**

GRC Complaint No. 2016-249

v.

**Rutgers University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail or compact disc of records concerning the collection of World Trade Center (“WTC”) remains by Professor Paul Lioy of the Environmental and Occupational Health Sciences Institute (“Institute”). Specifically, “the raw data that was collected, as well as the interpretation(s) or the results of the analyses.”

Custodian of Record: Daniel E. Faltas³
Request Received by Custodian: July 22, 2016
Response Made by Custodian: August 2, 2016
GRC Complaint Received: September 6, 2016

Background⁴

Request and Response:

On July 22, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 2, 2016, the Custodian responded in writing denying access to the responsive information under the academic research exemption. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On September 6, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied access to his OPRA request based on an exception to the academic research exemption at N.J.S.A. 47:1A-1.1. The Complainant argued that there had to be some type of final report detailing “funding sources and expenditures.” The Complainant asserted that Custodian should

¹ No legal representation listed on record.

² Represented by Elizabeth Minott, Esq. (New Brunswick, NJ).

³ The current Custodian of Record is Casey Woods.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

have disclosed a “final report” to the extent that it included the “. . . name, title, expenditures, source and amounts of funding, and date when the final project summary of any research will be provided.” Id.

Statement of Information:

On October 2, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 22, 2016. The Custodian certified that he did not conduct a search because the responsive records were exempt from disclosure. The Custodian certified that he responded in writing on August 2, 2016 denying the Complainant’s OPRA request under N.J.S.A. 47:1A-1.1.

The Custodian certified that in late August, he received a phone call from an individual who identified himself as an attorney calling on behalf of the Complainant. The Custodian affirmed that although the attorney did not claim to represent the Complainant officially, he sought further explanation for the denial of access. The Custodian affirmed that he advised the attorney of the exemption and stated that the OPRA request did not seek information identified in the exception. The Custodian certified that he advised the attorney that the Complainant could submit a new OPRA request for the excepted information as it pertained to Professor Lioy’s research. The Custodian certified that instead of submitting a new OPRA request, the Complainant filed this complaint.

The Custodian contended that there was a dichotomy between the Complainant’s actual OPRA request and what was being sought in the Denial of Access Complaint. The Custodian argued that the actual OPRA request sought “raw data” and “interpretation(s) or the results of the analyses” and not “records detailing the funding sources and expenditures.” The Custodian argued that although the Complainant requested that records be disclosed “according to [his] original request,” it is clear that he conflated distinct sections of the academic research exemption. The Custodian further argued that he already advised the attorney that the Complainant could submit a revised request. The Custodian thus argued that the Complainant could not now argue in good faith that his OPRA request sought any excepted information for the research.

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 exempts access to:

Pedagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education

institution in New Jersey, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available.

[N.J.S.A. 47:1A-1.1.]

Here, the Complainant's OPRA request sought access to Professor Lioy's research of WTC remnants. Specifically, the Complainant specifically sought "raw data" and "interpretation(s) or the results of the analyses." However, the Complainant asserted in the Denial of Access Complaint that he only sought excepted information in N.J.S.A. 47:1A-1.1. The Complainant further argued that there had to be some type of final report detailing "funding sources and expenditures." In the SOI, the Custodian argued that he properly denied the subject OPRA request because the Complainant did not seek any excepted information or a "final report."

In order for the academic research exemption to apply, the request must seek "pedagogical, scholarly, or academic research" conducted "under the auspices of a public higher education institution in New Jersey . . ." N.J.S.A. 47:1A-1.1. Thus, the GRC must establish whether the information sought consisted of research conducted by an individual under the auspices of a public higher education institution in New Jersey.

Regarding the "research" portion of the exemption, Professor Lioy was an "an internationally recognized researcher in environmental and occupational exposure and health."⁵ Professor Lioy was serving as a professor and Vice Chair of the Department of Environmental and Occupational Medicine at University of Medicine & Dentistry of New Jersey ("UMDNJ") at the time he was tasked with collecting and analyzing WTC remnants. Professor Lioy also served as the Director of Exposure Science at the Environmental and Occupational Health Sciences Institute of Rutgers ("EOHSI") at that time. As confirmed by EOHSI's website, Professor Lioy directly conducted research on the WTC project, the results of which were featured in multiple media platforms and culminated in his publishing a book with some of the findings.⁶ Thus, one can logically conclude that Professor Lioy was conducting research falling within the perimeters of the academic research exemption.

Regarding the "public higher education institution" question, Rutgers' authority to operate as a New Jersey university is codified at N.J.S.A. 18A:65-2. See also N.J.S.A. 18A:64M-2(c). UMDNJ was consolidated with the former Rutgers Medical School and brought under the Rutgers umbrella in accordance with the "Medical and Dental Education Act of 1970." N.J.S.A. 18A:64G-1.⁷ Indeed, both Rutgers and, at the time of the WTC project, UMDNJ qualified as a "public higher education institution."

⁵ <https://news.rutgers.edu/news/paul-j-lioy-writes-book-dust-aftermath-september-11-and-homeland-security/20100325> (accessed May 30, 2018).

⁶ Ibid.; http://eohsi-internal.rutgers.edu/about_research_on_WTCT_research.html (accessed May 30, 2018).

⁷ This Act was repealed as part of the "New Jersey Medical and Health Sciences Education Restructuring Act" in 2012. N.J.S.A. 18A:64M-1, et seq.

In applying the forgoing to the facts of this complaint, the GRC is satisfied that the Custodian lawfully denied access to the requested raw data and analyses interpretations or results. Professor Liroy's positions both within UMDNJ and Rutgers adequately prove that he conducted WTC project "research . . . under the auspices of a public higher education institution in New Jersey." Thus, the GRC has established that the information sought fell squarely within the high education research exemption at N.J.S.A. 47:1A-1.1.

Accordingly, the requested information regarding Professor Liroy's research conducted on WTC remnants while at Rutgers is exempt from disclosure as research conducted under the auspices of a public higher education institution in New Jersey. N.J.S.A. 47:1A-1.1. The Custodian has thus borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-6.

Finally, the GRC briefly addresses the discrepancy between the original OPRA request and the Complainant's Denial of Access Complaint assertions. The Complainant's OPRA request identified raw data and interpretations or results and that could not reasonably be construed as any of the excepted information or a final report. N.J.S.A. 47:1A-1.1. The OPRA request also did not specifically seek a "final report" or any of the excepted information as asserted by the Complainant in the Denial of Access Complaint. For this reason, the GRC is persuaded that any issue involving the existence or disclosability of a final report in the Denial of Access Complaint was not at issue here.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the requested information regarding Professor Liroy's research conducted on World Trade Center remnants while at Rutgers University is exempt from disclosure as research conducted under the auspices of a public higher education institution in New Jersey. N.J.S.A. 47:1A-1.1. The Custodian has thus borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-6.

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

June 19, 2018