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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 30, 2020 Government Records Council Meeting

David Herron
Complainant

Complaint No. 2018-126

v.

NJ Department of Education
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 2020 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 upon balancing the Custodian’s reasons for withholding Mr. D’Andrea’s transcript against the Complainant’s need for access to the denied record, non-disclosure of the record is justified. Thus, the Custodian lawfully denied access to the transcripts of Emidio D’Andrea on the basis that disclosure of same would violate the citizen’s reasonable expectation of privacy. N.J.S.A. 47:1A-1.

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 30th Day of June 2020

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: July 2, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

**David Herron ¹
Complainant**

GRC Complaint No. 2018-126

v.

**New Jersey Department of Education ²
Custodial Agency**

Records Relevant to Complaint: “Please provide information for the following individual: Emidio D’Andrea, any and all . . . transcripts used for certification.”³

Custodian of Record: Gina Bencivengo⁴

Request Received by Custodian: June 4, 2018

Response Made by Custodian: June 12, 2018 and June 27, 2018

GRC Complaint Received: July 5, 2018

Background⁵

Request and Response:

On June 4, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 12, 2018, the sixth (6th) business day following receipt of said request, the Custodian responded in writing disclosing some of the records responsive to his request (the disclosed records are not relevant to this complaint) and requesting an extension of time until June 27, 2018, to determine if other responsive records are maintained; and if so, to retrieve, review and redact such records.

On June 27, 2018, the Custodian responded in writing, informing the Complainant that the balance of his request, which are the records relevant to the complaint, “. . . are being withheld from disclosure to protect reasonable expectations of privacy relative to student identification/confidentiality rights under the Family Educational Rights and Privacy Act (“FERPA”)[.]”

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Laurie Fichera.

³ There were other records requested that are not relevant to this complaint.

⁴ Jennifer Simons was the original records custodian.

⁵ 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 June 27, 2018, the Complainant e-mailed the Custodian to inform her that she was relying on FERPA to withhold from disclosure the requested transcript; however, such federal law does not protect the privacy of staff employees' records as it does student records. The Complainant further stated that where transcripts are a requirement for employment and/or certification, the records are public and therefore subject to disclosure under OPRA. The Complainant further stated that in hundreds of prior OPRA requests for transcripts the records were provided. The Complainant asked the Custodian to disclose all of the records he had requested.

On June 27, 2018, the Custodian e-mailed the Complainant stating that, "[a]fter further review with legal counsel, the Department of Education has determined that students retain their FERPA privacy rights relative to transcripts, and we will no longer be providing such records in response to OPRA requests."

Denial of Access Complaint:

On July 5, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that, although some of the records responsive to his request were disclosed, the transcripts of Emidio D'Andrea were withheld from disclosure under FERPA.

The Complainant stated that on June 27, 2018, he e-mailed the Custodian to inform her that she was erroneously relying on FERPA to withhold from disclosure the requested transcripts because he was seeking transcripts of an employee, not a student. The Complainant stated that he informed the Custodian that he obtained such records previously from the agency. The Complainant cited Herron v. N.J. Dep't of Educ., GRC Complaint No. 2011-268, 2011-269 (December 2012).

The Complainant stated that on June 27, 2018, the Custodian e-mailed him stating that, "[a]fter further review with legal counsel, the Department of Education would no longer be providing such records in response to OPRA requests."

The Complainant stated that he is seeking college transcripts for a school business administrator, and that the position requires a master's degree or CPA license. In addition, the Complainant stated that the candidate must complete 18 semester hours of certain specific courses which are required to appear on a college or university transcript. The Complainant further stated that FERPA protects student, not employee, records. The Complainant cited 20 U.S.C. § 232g (a)(4)(A); CFR § 99.3, which the Complainant asserted excludes persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution.⁶ The Complainant argued that the Custodian cannot extend FERPA protection, which is designed to protect the privacy interests of students, to employee records. The Complainant asserted that for this reason the Custodian unlawfully denied him access to the requested transcripts.

⁶ The GRC could not find 20 U.S.C. § 232g; however, it appears from the Complainant's narrative that he was referencing 20 U.S.C.A. § 1232g.

Statement of Information:

On August 14, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 4, 2018, and responded in writing on June 12, 2018 and June 27, 2018. The Custodian certified that the record responsive to the request is Mr. D’Andrea’s college transcript from Saint Peter’s College dated October 11, 1994, and the explanation of grades. The Custodian, through Counsel, certified that the transcript and explanation of grades was withheld from disclosure to protect the reasonable expectations of privacy relative to student identification/confidentiality rights under FERPA.

The Custodian certified that FERPA, 20 U.S.C.A. § 1232g(b)(1), prohibits the disclosure of “education records” which are defined as materials which contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution, unless certain limited conditions set forth in FERPA are met. The Custodian certified that Mr. D’Andrea, as a former student of a post-secondary institution, has a federally protected interest in the privacy of his educational records. The Custodian further certified that a “student,” pursuant to 34 CFR § 99.3, is “any individual who is or has been in attendance at an educational agency or institution . . .” The Custodian also certified that FERPA does not forbid the release of information contained in an educational record; it allows for disclosure without consent of such a record as long as all personally identifying information has been removed. The Custodian certified, however, that here such redaction is not possible because the records have been requested for a named student and, as such, redaction cannot hide the identity of the student. The Custodian cited Comm’n Workers of Am. V. Rousseau, 417 N.J. Super. 341, 369 (App. Div. 2010) in support of her argument (finding that requested records were so permeated with confidential information that they could not be sufficiently redacted). The Custodian certified that she properly withheld access to the requested records pursuant to the provisions of FERPA.

The Custodian also certified that the requested records were properly denied under N.J.S.A. 47:1A-1, which provides that “. . . a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . .” The Custodian certified that when asserting privacy interest as a bar to disclosure she must first present “a colorable claim that public access to the records requested would invade a person’s objectively reasonable expectation of privacy,” citing Brennan v. Bergen Cty. Prosecutor’s Office, 233 N.J. 330, 342 (2018). The Custodian certified that the Brennan court’s test is met, because for over forty years FERPA’s requirements have made it clear that identifiable educational records are private and can be disclosed only in certain limited circumstances. The Custodian further certified that after meeting the Brennan threshold she must balance the public’s right to access against the public agency’s duty to safeguard from public access a person’s private information via the seven-factor test set forth in Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427-28 (2009). The Custodian certified that, on balance, the need to safeguard the requested record from disclosure outweighs the Complainant’s need for access.

The Custodian further certified that the Complainant asserted that he obtained such records previously from the agency, and cited Herron, GRC 2011-268; 2011-269. The Custodian

certified that in that complaint the Council relied on a case involving a request for employee personnel records.⁷ The Custodian certified that such is not the case in the instant complaint; however, because Mr. D’Andrea was not an employee of the Department of Education. Therefore, N.J.S.A. 47:1A-10 and its exception allowing disclosure of a public employee’s information is not applicable.

Additional Submissions:

On January 6, 2020, the GRC sent balancing test questionnaires to both the Complainant and the Custodian. The GRC stated in the transmittal letter that “[f]ailure to provide responses and return [the questionnaire] to our office within the required five (5) business days may result in adjudication of this complaint without consideration of your privacy arguments and need for confidentiality of the government records requested.” On January 7, 2020, and again on January 21, 2020, the Custodian’s Counsel requested extensions of time to respond to the balancing test questionnaire. The GRC granted extensions of time until January 28, 2020 for Counsel to respond to the balancing test questionnaire. On January 28, 2020, the Custodian’s Counsel returned the completed questionnaire with the following responses:

1. The type of records requested.

Response: The record is a post-secondary school transcript of a student, Emidio D’Andrea, used for the purpose of a teacher’s certification. The record is an educational record generated by the post-secondary institution that Mr. D’Andrea attended.

2. The information the requested records do or might contain.

Response: The requested transcript contains information directly related to the student, in this case only Mr. D’Andrea, as no other transcript was requested. The transcript includes information such as a list of courses he took, with corresponding grades and credits attempted as well as earned, his grade point average and his class rank.

3. The potential harm in any subsequent non-consensual disclosure of the requested records.

Response: Student transcripts contain personal information of a student, which is protected by FERPA. The potential harm would be a release of a citizen’s personal information to which he holds an objectively reasonable expectation of privacy under federal law. Public access to the records requested would invade a person’s federally protected interest in the privacy of their educational records. Mr. D’Andrea had a reasonable belief that his educational record would be kept private unless he specifically consented to disclosure.

⁷ Bonanno v. Garfield Board of Education, GRC Complaint No. 2006-62 (Interim Order dated July 2007), noting that OPRA excludes personnel records from the definition of a government record with the exception of data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to N.J.S.A. 47:1A-10.

4. The injury from disclosure to the relationship in which the requested record was generated.

Response: The Complainant seeks a record of a specific student. This type of record contains exactly what FERPA protects. Thus, disclosure would violate an individual's privacy interest in his own student records.

5. The adequacy of safeguards to prevent unauthorized disclosure.

Response: There are no safeguards to prevent unauthorized disclosure. The Complainant is seeking only one individual's transcript. Any redaction of personally identifiable information would be fruitless as only Mr. D'Andrea's transcripts would be responsive to the request. If Mr. D'Andrea's student records are disclosed under OPRA, there are no restrictions on what the recipient can do with the information. Thus, there are no safeguards to prevent unauthorized access by the public.

6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating for or against access.

Response: FERPA, and the regulations implementing it, have established a national standard for educational rights and privacy.

The Complainant failed to return the Completed balancing test questionnaire to the GRC. As such, the GRC had no responses from the Complainant to weigh against the responses submitted by the Custodian's Counsel.

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.

The Custodian certified that FERPA prohibited the disclosure of the requested transcript as an education record, defined in FERPA as "materials which contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution." The Custodian further certified that Mr. D'Andrea is deemed to be a student because he is an individual who is or has been in attendance at an educational agency or institution pursuant to 34 CFR § 99.3. As such, the Custodian certified that the denial of access was lawful.⁸ However, the Custodian did not address whether the Department of Education is an educational agency or institution under FERPA.

⁸ The provisions of FERPA would apply to OPRA through operation of N.J.S.A. 47:1A-9.

20 U.S.C.A. § 1232g(a)(3) defines an “educational agency or institution” as “any public or private agency or institution which is the recipient of funds under any applicable program.” The Custodian did not clarify whether the Department of Education falls into this category. However, 34 CFR § 99.1 provides “(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if . . . (2) The educational agency *is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.* (Emphasis added.) Therefore, it is reasonable that the Department of Education is an “educational agency or institution” under FERPA, but the GRC received no definitive statement to this effect from the Custodian.

The GRC need not analyze the Custodian’s denial of access under the provisions of FERPA because the Custodian also certified that the record was denied under OPRA on privacy grounds. N.J.S.A. 47:1A-1 provides that a public agency “. . . has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . .”

Therefore, because privacy interests under OPRA are also at issue here, the GRC asked both the Complainant and the Custodian to respond to balancing test questions so the Council could employ the balancing test established by the Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995). This test enables the Council to balance the agency’s asserted need to protect the privacy of individuals against the Complainant’s asserted need to access the denied record.

In responding to the balancing test questionnaire, the Custodian stated that the requested transcript contains Mr. D’Andrea’s personal information, and that access to the records would invade Mr. D’Andrea’s interest in the privacy of his educational records. The Custodian further asserted that Mr. D’Andrea had a reasonable belief that his educational record would be kept private unless he specifically consented to its disclosure. The Custodian further stated that if Mr. D’Andrea’s student records are disclosed under OPRA, there are no restrictions on what the recipient can do with the information. Thus, there will be no safeguards to prevent unauthorized access by the public.

The Complainant failed to respond to the GRC’s request for the completed balancing test questionnaire. As such, the GRC had no responses from the Complainant to weigh against the responses submitted by the Custodian; thus, the complaint adjudication proceeds without those arguments. The GRC notes that the Complainant stated in the complaint that the Department of Education mandates certain educational requirements for school business administrator certification. However, because the Complainant failed to complete and return the questionnaire, the GRC cannot determine why the Complainant needed the requested transcript; if the Complainant intended to redistribute the requested transcript; and/or whether he would use the requested record to contact Mr. D’Andrea.

Therefore, upon balancing the Custodian’s reasons for withholding Mr. D’Andrea’s transcript against the Complainant’s need for access to the denied record, non-disclosure of the record is justified. Thus, the Custodian lawfully denied access to the transcript of Emidio

D'Andrea on the basis that disclosure of same would violate the citizen's reasonable expectation of privacy. N.J.S.A. 47:1A-1.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that upon balancing the Custodian's reasons for withholding Mr. D'Andrea's transcript against the Complainant's need for access to the denied record, non-disclosure of the record is justified. Thus, the Custodian lawfully denied access to the transcripts of Emidio D'Andrea on the basis that disclosure of same would violate the citizen's reasonable expectation of privacy. N.J.S.A. 47:1A-1.

Prepared By: John E. Stewart
Staff Attorney

June 23, 2020