



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

Harry Dunleavy
Complainant

Complaint No. 2018-22

v.

High Point Regional High School (Sussex)
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 Supplemental 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 Complainant has failed to establish in his request for reconsideration of the Council’s November 12, 2019 Final Decision that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake, fraud, illegality or extraordinary circumstances. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to prove that the Council made a mistake in determining that the Custodian identified an OPRA exemption applicable to his request. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 February 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: March 3, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Supplemental Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Harry Dunleavy¹
Complainant**

GRC Complaint No. 2018-22

v.

**High Point Regional High School (Sussex)²
Custodial Agency**

Records Relevant to Complaint:

“A copy of a sworn affidavit prepared by Scott Ripley supporting his position to refuse me employment at High Point Regional High School and a complaint with the Equal Employment [Opportunity] Commission (EEOC), is hereby requested.”

Custodian of Record: James Minkewicz

Request Received by Custodian: March 1, 2016

Response Made by Custodian: March 2, 2016

GRC Complaint Received: February 18, 2018

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 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, found that:

[T]he Custodian did not unlawfully deny access to the Complainant’s March 1, 2016 OPRA request. N.J.S.A. 47:1A-6. Since the requested affidavit was submitted in response to a complaint filed with the Equal Employment Opportunity Commission, the affidavit is prohibited from disclosure pursuant to 29 C.F.R. 1640.4. See N.J.S.A. 47:1A-9(a).

Procedural History:

On November 15, 2019, the Council distributed its Final Decision to all parties. On November 18, 2019, the Complainant requested additional time to submit a request for

¹ No legal representation listed on record.

² Represented by Douglas M. Silvestro, Esq. of The Busch Law Group, LLC (Metuchen, NJ).

reconsideration. On November 19, 2019, the GRC granted the Complainant's request for an extension to until December 13, 2019. On December 9, 2019, the Complainant requested a second extension of time to submit a request for reconsideration. On December 11, 2019, the GRC granted the Complainant's second extension request to until December 30, 2019.

On December 30, 2019, the Complainant filed a request for reconsideration of the Council's November 12, 2019 Final Decision based on mistake, extraordinary circumstances, fraud, and illegality. The Complainant asserted that the Council failed to show that the Custodian's denial of access was valid based on any of OPRA's exemptions. The Complainant included a copy of the GRC's list of twenty-five (25) exemptions to access under OPRA ("Complainant's Attachment No. 5") in support of his argument. The Complainant also asserted that the federal regulation cited by the Custodian, 29 C.F.R. 1640.4, was irrelevant to the record sought and did not include any listed OPRA exemption. The Complainant also contended that N.J.S.A. 47:1A-9(a) had no relevance or correlation to the current circumstances.

On December 30, 2019, the Custodian, through Counsel, submitted objections to the request for reconsideration. Counsel asserted that despite the Complainant's claims, the basis for denying access to the OPRA request had been provided and explained several times. Counsel also argued that the Complainant omitted N.J.S.A. 47:1A-9(a) as one of the twenty-five (25) valid exemptions to access under OPRA. Counsel asserted that the Complainant failed to show that the Council made a mistake, committed fraud, ruled illegally, or extraordinary circumstances to warrant reconsideration of the Council's Order.

On January 6, 2020, the Complainant submitted a rebuttal to Counsel's objections. The Complainant maintained that the Custodian did not provide a lawful basis for denial and rejected the claim that he was provided a basis on several occasions.³

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order dated November 12, 2019 on December 30, 2019, the final day of the extended deadline.

Applicable case law holds that:

³ The Complainant included discussions and claims regarding his employment with the custodial agency. However, the GRC declines to address such matters as they are not within the scope of the GRC's jurisdiction. See N.J.S.A. 47:1A-7(b).

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

After reviewing the parties’ arguments, the GRC concludes that the Complainant’s request for reconsideration should be denied. At the core of the Complainant’s request is the allegation that the Custodian’s denial of access did not fall under any of OPRA’s exemptions. However, the Complainant’s provided list of exemptions identifies N.J.S.A. 47:1A-9(a) as the twenty-third (23rd) valid exemption. See Complainant’s Attachment No. 5, pg. 4. Specifically, N.J.S.A. 47:1A-9(a) upholds exemptions from access contained in federal regulations, among other bodies of law. Additionally, the Custodian cited 29 C.F.R. 1640.4, a federal regulation, in response to the Complainant’s OPRA request as well in the Statement of Information. The Council ultimately found that N.J.S.A. 47:1A-9(a) and 29 C.F.R. 1640.4 in conjunction formed a valid basis for denying access to the Complainant’s request. See Council’s November 12, 2019 Final Decision at 3.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on a mistake, fraud, illegality or extraordinary circumstances. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria, 242 N.J. Super. at 401. Specifically, the Complainant failed to prove that the Council made a mistake in determining that the Custodian identified an OPRA exemption applicable to his request. Thus, the Complainant’s request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council’s November 12, 2019 Final

Decision that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake, fraud, illegality or extraordinary circumstances. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to prove that the Council made a mistake in determining that the Custodian identified an OPRA exemption applicable to his request. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Samuel A. Rosado
Staff Attorney

January 21, 2020⁴

⁴ This complaint was prepared for adjudication at the Council’s January 28, 2020 meeting, but could not be adjudicated due to a lack of quorum.



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DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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LT. GOVERNOR SHEILA Y. OLIVER
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FINAL DECISION

November 12, 2019 Government Records Council Meeting

Harry Dunleavy
Complainant

Complaint No. 2018-22

v.

High Point Regional High School (Sussex)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 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 Custodian did not unlawfully deny access to the Complainant’s March 1, 2016 OPRA request. N.J.S.A. 47:1A-6. Since the requested affidavit was submitted in response to a complaint filed with the Equal Employment Opportunity Commission, the affidavit is prohibited from disclosure pursuant to 29 C.F.R. 1640.4. See N.J.S.A. 47:1A-9(a).

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 12th Day of November 2019

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: November 15, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Harry Dunleavy¹
Complainant**

GRC Complaint No. 2018-22

v.

**High Point Regional High School (Sussex)²
Custodial Agency**

Records Relevant to Complaint:

“A copy of a sworn affidavit prepared by Scott Ripley supporting his position to refuse me employment at High Point Regional High School and a complaint with the Equal Employment [Opportunity] Commission (EEOC), is hereby requested.”

Custodian of Record: James Minkewicz

Request Received by Custodian: March 1, 2016

Response Made by Custodian: March 2, 2016

GRC Complaint Received: February 18, 2018

Background³

Request and Response:

On March 1, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned record. On March 2, 2016, Caroline Joseph, on behalf of the Custodian, responded in writing stating that the record was not subject to disclosure under OPRA. Ms. Joseph added that the requested record was prohibited from disclosure pursuant to 29 C.F.R. 1640.4, a federal regulation. Ms. Joseph further stated that the Complainant should contact the EEOC to obtain access to the requested record, as he filed a complaint with them.

Denial of Access Complaint:

On February 18, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that Dr. Ripley filed an affidavit with the EEOC allegedly containing negative information about him. The Complainant

¹ No legal representation listed on record.

² Represented by Douglas M. Silvestro, Esq. of The Busch Law Group, LLC (Metuchen, NJ).

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.

asserted that both Dr. Ripley and a manager at the EEOC have refused to provide him with the affidavit despite repeated written and oral requests.

Statement of Information:

On March 16, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 1, 2016. The Custodian certified that the records were easily identified and that no search was necessary to locate them. The Custodian certified that Ms. Joseph responded in writing on his behalf on March 2, 2016, denying access to the request.

The Custodian maintained that copies of documents sent to the EEOC are prohibited from disclosure pursuant to federal regulation 29 C.F.R. 1640.4. The Custodian also asserted that the Complainant had requested the document multiple times prior and did not dispute the arguments made in response.

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 also 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) (emphasis added).]

29 C.F.R. 1640.4 states that:

(a) When a section 504 agency or a designated agency receives information obtained by the EEOC, such agency shall observe the confidentiality requirements of section 706(b) and section 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-5(b) and 2000e-8(e)), as incorporated by section 107(a) of the ADA, to the same extent as these provisions would bind the EEOC, except when the agency receives the same information from a source independent of the EEOC. Agency questions concerning the confidentiality requirements of title I shall

be directed to the Associate Legal Counsel for Legal Services [sic], Office of Legal Counsel, the EEOC.

(b) When the EEOC receives information from a section 504 or a designated agency, the EEOC shall observe any confidentiality requirements applicable to that information.

Here, the Complainant sought an affidavit submitted by an employee of High Point Regional High School in relation to an EEOC complaint filed by the Complainant. The plain language of 29 C.F.R. 1640.4 demonstrates that the affidavit is covered by this regulation. Accordingly, the affidavit is not subject to access under N.J.S.A. 47:1A-9(a).

Therefore, the Custodian did not unlawfully deny access to the Complainant's March 1, 2016 OPRA request. N.J.S.A. 47:1A-6. Since the requested affidavit was submitted in response to a complaint filed with the EEOC, the affidavit is prohibited from disclosure pursuant to 29 C.F.R. 1640.4. See N.J.S.A. 47:1A-9(a).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to the Complainant's March 1, 2016 OPRA request. N.J.S.A. 47:1A-6. Since the requested affidavit was submitted in response to a complaint filed with the Equal Employment Opportunity Commission, the affidavit is prohibited from disclosure pursuant to 29 C.F.R. 1640.4. See N.J.S.A. 47:1A-9(a).

Prepared By: Samuel A. Rosado
Staff Attorney

October 30, 2019