



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 28, 2020 Government Records Council Meeting

Paul Williams
Complainant

Complaint No. 2018-268

v.

NJ Department of Treasury
Custodian of Record

At the July 28, 2020 public meeting, the Government Records Council (“Council”) considered the July 21, 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 the responsive e-mails between Airbnb and Taxation regarding their tax obligations under pending legislation are exempt from disclosure under OPRA and the State Uniform Tax Procedure Law. N.J.S.A. 47:1A-9(b); N.J.S.A. 54:50-8(a). Thus, the Custodian lawfully denied access to the responsive e-mail chains. 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 28th Day of July 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 30, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2020 Council Meeting**

**Paul Williams¹
Complainant**

GRC Complaint No. 2018-268

v.

**N.J. Department of Treasury²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Communications between the New Jersey Department of Treasury (“Treasury”) and Airbnb, Inc. (“Airbnb”) involving an agreement to collect and remit State sales tax, the State occupancy fee, and/or local taxes and fees as required per the enactment of A-1753 and A-4496³ between June 1, 2018 and October 9, 2018.
2. Communications between Treasury and Airbnb regarding Airbnb’s obligation to collect and remit State sales tax, the State occupancy fee, and/or local taxes and fees as required per the enactment of A-1753 and A-4496 between June 1, 2018 and October 9, 2018.

Custodian of Record: Gary Dallett
Request Received by Custodian: October 9, 2018
Response Made by Custodian: October 18, 2018
GRC Complaint Received: November 14, 2018

Background⁴

Request and Response:

On October 9, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 18, 2018, Government Records Access Unit Manager Cynthia Jablonski responded in writing extending the response time frame through November 9, 2018, to which the Complainant consented. On November 9, 2018, Ms. Jablonski responded in writing on behalf of the Custodian denying the Complainant’s OPRA

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Heather Lynn Anderson.

³ These bills proposed additional taxes and fees on hotel and motels, as well as on out-of-state facilitators and sellers. The bills were signed into law as P.L. 2018, c.49 in July 2018 and P.L. 2018, c.132 in October 2018 respectively. N.J.S.A. 5:10A-84; N.J.S.A. 54:32B-3.5.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

request, stating that the responsive records constituted confidential taxpayer/financial records not subject to access under OPRA. N.J.S.A. 47:1A-9(a); N.J.S.A. 54:50-8.

Denial of Access Complaint:

On November 14, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he sought communications based on Airbnb’s public statements regarding processing a tax agreement with the State. The Complainant further stated that he sought communications based on Airbnb’s public statement that it was awaiting guidance before collecting and submitting remitted taxes on October 1, 2018 as a result of A-1753 and A-4496.

The Complainant contended that his OPRA request did not seek any information protected under N.J.S.A. 54:50-8, which protects federal and State tax return information. The Complainant also argued that the requested communications did not fall within the attorney client privilege, nor did they involve trade secrets.

Statement of Information:

On December 10, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that Treasury received the Complainant’s OPRA request on October 9, 2018. The Custodian certified that Ms. Jablonski forwarded the OPRA request to him for review and response. The Custodian certified that his search included locating responsive communications and reviewing them for disclosability. The Custodian certified that after an extension, Ms. Jablonski responded in writing on his behalf on November 9, 2018 denying access to nine (9) e-mail chains under N.J.S.A. 47:1A-9(a) and N.J.S.A. 54:50-8.

The Custodian argued that he lawfully denied access to the records responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-9(a); N.J.S.A. 54:50-8; N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182, 202 (App. Div. 2016) (holding that a statutory exemption is statutorily recognizable under OPRA). The Custodian argued that the State Uniform Tax Procedure Law (“TPL”) provides that “. . . records and files of the [Division of Taxation (“Taxation”)] respecting the administration of the State [TPL] shall be considered confidential and privileged . . .” N.J.S.A. 54:50-8. The Custodian stated that the only exception to this statute was for “action[s] and proceeding[s] under the provisions of the [TPL]” or as part of an investigation and prosecution of any State tax law. Id. The Custodian noted that the TPL defined “State tax” as “any tax which is payable to or collectible by the director” and “State tax law” means “any law which levies or imposes a State tax as herein defined.” N.J.S.A. 54:48-2.

The Custodian argued that, contrary to the Complainant’s assertion, N.J.S.A. 54:50-8 does not apply to only federal and state tax returns. The Custodian asserted that this exemption also applied to “records and files of the Director,” which encompass written communications by and on behalf of taxpayers. N.J.S.A. 54:50-6.1. The Custodian thus contended that the exemption applied to non-tax return information to include e-mails between taxpayers and the Division of Taxation (“Taxation”). The Custodian argued that here, the responsive e-mails between Airbnb and Taxation regarding the taxpayer’s obligations under State tax law are confidential and not

waivable by Taxation. N.J.S.A. 54:50-8, 9; Monmouth Airlines, Inc. v. Dir., Div. of Taxation, 2 N.J. Tax 47 (Tax 1980).

The Custodian finally contended that should the Council determine he unlawfully denied access here, said denial did not amount to a knowing and willful violation of OPRA. The Custodian argued that he timely responded and made a “dutiful attempt . . . to provide only records” he believed were disclosable. See O’Shea v. Twp. of West Milford, GRC Complaint No. 2004-87 (September 2005). The Custodian further argued that his actions were neither negligent nor heedless.

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 its provisions:

[S]hall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

[N.J.S.A. 47:1A-9(b) (emphasis added).]

To this end, the TPL provides that:

The records and files of the director respecting the administration of the [TPL] or of any State tax law shall be considered confidential and privileged and neither the director nor any employee engaged in the administration thereof or charged with the custody of any such records or files, nor any former officer or employee, nor any person who may have secured information therefrom under [the TPL] or any other provision of State law, shall divulge, disclose, use for their own personal advantage, or examine for any reason other than a reason necessitated by the performance of official duties any information obtained from the said records or files or from any examination or inspection of the premises or property of any person.

[N.J.S.A. 54:50-8(a).]

Further, in Monmouth Airlines, Inc., 2 N.J. Tax 47, while addressing the disclosure of tax returns in a tax dispute, the New Jersey Tax Court provided detailed insight into the TPL’s confidentiality provisions:

The exception language of N.J.S.A. 54:50-8 was used deliberately by the Legislature. The Legislature has provided a limited exception to the statute and the court cannot interfere with the judgment of the Legislature by broadening the exception . . . We hold that the court has no discretion to breach the confidentiality of tax records protected by the statute. In strictly limiting access to tax records the court is mindful not only of the administrative necessity of protecting such records to promote our system of voluntary reporting, but also of the growth of legal protection of the right of privacy.

[Id. at 54.]

In the matter before the Council, the Complainant sought access to communications between Airbnb and Taxation regarding taxes payable as a result of enacted legislation. The Custodian denied access under N.J.S.A. 47:1A-9(b) and N.J.S.A. 54:50-8(a). In the Denial of Access Complaint, the Complainant argued that the exemption only covered federal and State tax return information and not the communications sought.⁵ In the SOI, the Custodian maintained their position, arguing that the responsive e-mails were exempt Taxation records under the TPL. See Monmouth Airlines, Inc., 2 N.J. Tax 47. The Custodian noted that this exemption included communications that taxpayers engaged in with Taxation per N.J.S.A. 54:48-2.

In reviewing the asserted exemption and the records at issue here, the GRC is persuaded that a lawful denial of access occurred. While the Complainant correctly argued that he was not seeking tax return information, the TPL exemption is not limited in its application to shield only this information from access. Instead, the TPL generally exempts “records and files . . . respecting the administration of the [TPL] or of any State tax law” which “*shall specifically include . . . the divulgence or examination of any information from or any copy of a federal return or federal return information required by New Jersey law to be attached to or included in any New Jersey return.*” N.J.S.A. 54:48-8(a), (b) (emphasis added). Further, the TPL allows taxpayers to communicate with Taxation regarding:

1. the State tax implications of any specific situation;
2. the amount of any State tax liability and how it has been determined;
3. any notice of underpayment or overpayment sent by the Division; and
4. their responsibilities and rights as taxpayers.

[N.J.S.A. 54:50-6.1.]

When read together, the TPL encompasses clear protections against the disclosure of taxpayer communications with Taxation. This interpretation is consistent with the Monmouth Airlines, Inc. Court’s reading of the TPL’s confidentiality provision. Also, the Complainant

⁵ The GRC notes that the Complainant also argued that other exemptions under OPRA did not apply. However, these exemptions were not raised in the instant complaint.

provided no evidence to prove that he qualified under the limited exceptions provided for in the TPL at N.J.S.A. 54:50-9.

Accordingly, the responsive e-mails between Airbnb and Taxation regarding their tax obligations under pending legislation are exempt from disclosure under OPRA and the TPL. N.J.S.A. 47:1A-9(b); N.J.S.A. 54:50-8(a). Thus, the Custodian lawfully denied access to the responsive e-mail chains. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the responsive e-mails between Airbnb and Taxation regarding their tax obligations under pending legislation are exempt from disclosure under OPRA and the State Uniform Tax Procedure Law. N.J.S.A. 47:1A-9(b); N.J.S.A. 54:50-8(a). Thus, the Custodian lawfully denied access to the responsive e-mail chains. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

July 21, 2020