



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 30, 2023 Government Records Council Meeting

Edward J. Kaufmann, Jr.,
Complainant

Complaint No. 2022-178

v.

NJ Office of the Attorney General
Custodian of Record

At the May 30, 2023 public meeting, the Government Records Council (“Council”) considered the May 23, 2023 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:

1. The requested oaths of office are expressly exempt from access under OPRA. N.J.S.A. 47:1A-1.1. Further, the Custodian was not required to siphon non-confidential information from the oaths and disclose same, nor was she required to locate and disclose a different record containing that information. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005). Thus, the Custodian lawfully denied access to this portion of the OPRA request. N.J.S.A. 47:1A-6.
2. The Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant’s OPRA request seeking surety bonds and indemnity insurance. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no records responsive to this portion of the OPRA request. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 May 2023

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 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 30, 2023 Council Meeting**

**Edward J. Kaufmann, Jr.¹
Complainant**

GRC Complaint No. 2022-178

v.

**N.J. Office of the Attorney General²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “[t]he Surety/Indemnity Bonds and Oaths of Office for the [c]urrent Attorney General [(“AG”)] . . . and the [f]ormer Attorney General from [March] 2020 to the current hiring date.”³

Custodian of Record: Ivonnely Colon-Fung

Request Received by Custodian: April 1, 2022

Response Made by Custodian: April 11, 2022

GRC Complaint Received: May 9, 2022

Background⁴

Request and Response:

On April 1, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 11, 2022, the Custodian responded in writing denying access to oaths of office under N.J.S.A. 47:1A-1.1. On the same day, the Complainant responded disputing the denial because he found no such exemption in OPRA. The Complainant also noted that the Custodian did not address the portion of the OPRA request seeking “[b]onds, surety, and/or Indemnification policy records.” On April 18, 2022, the Custodian responded advising that the request would be reopened with a response forthcoming.

On April 20, 2022, the Custodian again responded stating that the AG is not required to bond and thus no records exist. The Custodian further cited the specific exemption for oaths of office in OPRA. On the same day, the Complainant responded disputing that no bonds exist and arguing that the AG was required by law to obtain same. The Complainant further noted that “[m]ost . . . have opted to circumvent that obligation with a blanket Insurance/Indemnity policy.”

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jessica Sampoli.

³ The Complainant sought additional records that are not at issue in this complaint.

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.

The Complainant thus requested that the Custodian confirm the status of any existing policies with supporting evidence. The Complainant also stated that the Custodian omitted the following portion of the oath exemption in her response: “except that the full name, title, and oath date of that person contained therein shall not be deemed confidential.” N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On May 9, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s denial of access for the reasons stated in his prior e-mails to the Custodian.

Statement of Information:⁵

On October 11, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 1, 2022. The Custodian certified that she responded in writing on April 11, 2022 denying the subject OPRA request for oaths of office under N.J.S.A. 47:1A-1.1. The Custodian affirmed that the Complainant disputed her denial and she again responded on April 18, 2022 stating that no bonds existed and reaffirming her denial of oaths of office under N.J.S.A. 47:1A-1.1.

The Custodian argued that she lawfully denied access to the responsive oaths of office because they are specifically exempt from access under OPRA. N.J.S.A. 47:1A-1.1. The Custodian further argued that she lawfully denied access to the portion of the request seeking surety bonds and indemnity insurance because no records exist. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 508 (App. Div. 2010) (quoting Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005)); Baily v. N.J. Dep’t of Treas., Div. of Taxation, GRC Complaint No. 2003-124 (February 2004).

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.

Oaths of Office

OPRA provides that:

A government record shall not include . . . any copy of an oath of allegiance, oath of office or any affirmation taken upon assuming the duties of any public office, or

⁵ On May 19, 2022, this complaint was referred to mediation. On September 22, 2022, this complaint was referred back to the GRC for adjudication.

that oath or affirmation, taken by a current or former officer or employee in any public office or position in this State or in any county or municipality of this State, including members of the Legislative Branch, Executive Branch, Judicial Branch, and all law enforcement entities, *except that the full name, title, and oath date of that person contained therein shall not be deemed confidential.*

[N.J.S.A. 47:1A-1.1 (emphasis added).]

In certain circumstances, OPRA identifies certain pieces of information as a “government record” subject to access. See *e.g.* N.J.S.A. 47:1A-3(b); N.J.S.A. 47:1A-10. However, longstanding precedent exists that custodians are not required to “siphon” information and create records accordingly. See MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005). Based on the dichotomy of the forgoing, the GRC has addressed OPRA requests seeking information designated as a “government record” by holding that a custodian was required to disclose certain records to the extent that they include the most comprehensive information. See *e.g.* Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008) (holding that arrest reports contain the “most comprehensive” amount of information accessible to the public under N.J.S.A. 47:1A-3(b) and are thus disclosable with redactions); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012) (holding that the custodian was required to provide the most comprehensive record containing the requested disclosable personnel information identified in N.J.S.A. 47:1A-10).

In this matter, a portion of the Complainant’s OPRA request sought oaths of office for current and former AGs from March 2020 to present. The Custodian twice denied access to this portion of the OPRA request citing N.J.S.A. 47:1A-1.1. The Complainant disputed the first response asserting that no such exemption existed, then disputed the second response asserting that the exemption included an exception listing certain information required to be disclosed. This complaint followed, wherein the Complainant reasserted his arguments against the denial. In the SOI, the Custodian maintained her position that oaths of office are specifically exempt from disclosure; however, she did not address the exception contained within the relevant exemption.

This complaint represents the first instance that the GRC has had to address OPRA’s oath of office exemption since its inclusion in 2015. However, the exemption presents a quandary because of the bright line exemption for oaths of office coupled with the identification of certain basic information deemed not confidential. In solving this issue, and given the absence of prior case law on the issue, the GRC must adhere to the principles of statutory construction in determining the Legislature’s intent. Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 540-41 (2012) (holding that when interpreting OPRA’s provisions, the Court had an “obligation . . . to determine and carry out the Legislature’s intent” by first looking at the plain language of the statute.”) (Internal citations omitted).

A plain reading of OPRA supports that actual oaths of office are exempt from disclosure in their entirety and are not disclosable in redacted form. N.J.S.A. 47:1A-1.1. For additional context on this position, the GRC reviewed the legislative history for A2481 (substituted for S2106), which resulted in the passage of P.L. 2015, c.59 on May 11, 2015 and inclusion of the

applicable exemption in OPRA. In reporting the relevant bill out of committee on March 9, 2015, the Senate addressed the proposed OPRA amendment by stating that it “makes confidential certain public documents that are sometimes used against certain public officers and employees in the filing of fraudulent financing statements.” Sponsor’s Statement to S. 2106, SCM 3/9/2015 SCS. This statement mirrored similar statements made in relation to A2481 on September 18, 2014. Sponsor’s Statement to A. 2481, AFI 9/18/14 ACS. The Legislature clearly intended to ensure that a physical oath of office document not be disclosed under OPRA to avoid usage in fraudulent financial statements. Further, the Legislature did not contemplate disclosure of the non-confidential information through disclosure of a redacted oath anywhere in the remainder of the applicable bills or statements thereon. Finally, a different interpretation of the exemption would effectively render it useless, especially because oaths of office are largely *pro forma* documents.

However, as noted above, the exemption identifies certain specific information contained within that record: the “the full name, title, and oath date . . . shall not be deemed confidential.” Id. Thus, the exception raises the issue of whether a custodian is required to disclose the “non-confidential” information contained within a physical oath of office in response to an OPRA request for same. Again, the GRC must rely on statutory construction to determine the Legislature’s intent on codifying an apparent exception for this limited oath information. Specifically, the Legislature did not classify the “full name, title, and oath date” as a “government record” in the same manner as the specific pieces of personnel information contained in N.J.S.A. 47:1A-10. This distinction is important because it does not imply an affirmative obligation to disclose a substitute record for the oaths of office that contains the most comprehensive information. Instead, the oath of office exception contemplates only the disclosability of that information if it exists elsewhere in a requested record like meeting minutes memorializing the oath or a roster of individuals required to take an oath. Thus, the exception simply operates to alert a custodian to the fact that the “full name, title, and oath date” cannot be redacted if it exists in a record separate from an oath of office.

Based on the forgoing, the GRC finds that the Custodian applied a reasonable interpretation to the oath portion of the OPRA request and lawfully denied access to those oaths requested. N.J.S.A. 47:1A-1.1. Further, while the exemption identifies limited information contained therein as “not confidential,” the Custodian was under no obligation to siphon it from the record and disclose same. MAG, 375 N.J. Super. at 549. Thus, because the only records sought were oaths of office, the relevant exemption and legislative history supports that the Custodian was only required to proffer a denial of access. Further, the Custodian was not required to attempt to locate the non-confidential information in some other record not requested by the Complainant.

Accordingly, the requested oaths of office are expressly exempt from access under OPRA. N.J.S.A. 47:1A-1.1. Further, the Custodian was not required to siphon non-confidential information from the oaths and disclose same, nor was she required to locate and disclose a different record containing that information. MAG, 375 N.J. Super. at 549. Thus, the Custodian lawfully denied access to this portion of the OPRA request. N.J.S.A. 47:1A-6.

Surety Bonds & Indemnity Insurance

The Council has previously found that, where a custodian certified that no responsive

records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, a portion of the Complainant's OPRA request surety bonds or indemnity insurance for AGs from March 2020 to present; the Custodian responded stating that no records existed. The Complainant disputed that response by arguing that the AG is required to be bonded, but that "[m]ost . . . have opted to circumvent that obligation with a blanket Insurance/Indemnity policy." Following the filing of this complaint, the Custodian certified in the SOI that no records existed.

Upon review, the GRC is persuaded that no unlawful denial of access has occurred. The evidence of record supports the Custodian's position that no responsive records exist. Further, the Complainant's assertion that AGs are required to obtain a surety bond or indemnity insurance is unsupported and fails to refute the Custodian's certification. Based on the forgoing, a conclusion in line with Pusterhofer is appropriate here.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request seeking surety bonds and indemnity insurance. Specifically, the Custodian certified in the SOI, and the record reflects, that no records responsive to this portion of the OPRA request. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The requested oaths of office are expressly exempt from access under OPRA. N.J.S.A. 47:1A-1.1. Further, the Custodian was not required to siphon non-confidential information from the oaths and disclose same, nor was she required to locate and disclose a different record containing that information. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005). Thus, the Custodian lawfully denied access to this portion of the OPRA request. N.J.S.A. 47:1A-6.
2. The Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request seeking surety bonds and indemnity insurance. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no records responsive to this portion of the OPRA request. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

May 23, 2023