

FINAL DECISION
December 14, 2006 Government Records Council Meeting

Scott Fegley
Complainant

Complaint No. 2006-91

v.

NJ Department of Environmental Protection
Custodian of Record

At the December 14, 2006 public meeting, the Government Records Council (“Council”) considered the December 7, 2006 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:

1. Although access was ultimately granted by the Custodian on May 30, 2006, the Complainant was not given a written reason for a delay or a lawful basis for denial of access to the requested report of disposition of certification PS052636 pursuant to N.J.S.A. 47:1A-5.g. These documents were not provided to the Complainant within the statutorily required seven (7) business day time period for response as required under N.J.S.A. 47:1A-5.i. Therefore, pursuant to N.J.S.A. 47:1A-5.g. and 5.i., the Custodian’s actions are deemed an unlawful denial of the requested report of disposition of certification PS052636.
2. Pursuant to Executive Order 21, the proposed rule *N.J.A.C. 7:1D-4.2(a)*, and the decision in Sooy v. New Jersey Department of Corrections, GRC Complaint No. 2006-128 (October 2006), the Custodian has lawfully denied access to the requested scoring forms.

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 14th Day of December, 2006

Vincent P. Maltese, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: December 19, 2006

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 14, 2006 Council Meeting**

Scott I. Fegley, Esq.¹
Complainant

GRC Complaint No. 2006-91

v.

**New Jersey Department of Environmental Protection
Custodian of Records**

Records Relevant to Complaint:

1. Scoring forms entitled "Interview Questions for HMS Solid and Hazardous Waste Program" conducted on or about October 17, 2005, and
2. Report of disposition of certification PS052636 issued September 29, 2005 and returned December 8, 2005.

Request Made: March 10, 2006

Response Made: March 21, 2006

Custodian: Rich Yarsinsky

GRC Complaint Filed: May 5, 2006

Background

March 10, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests scoring forms for the HMS Solid and Hazardous Waste Program and a report of the disposition of certification PS052636.

March 21, 2006

Custodian's response to the OPRA request seven (7) business days after the request. The Custodian states that the requested scoring forms are not disclosable pursuant to N.J.S.A. 47:1A-1.1 and *N.J.A.C.* 7:1D-4.2(a) because test questions, scoring keys and other examination data pertaining to the administration of an examination are exempt. The Custodian also directs the Complainant to the New Jersey Department of Personnel for the report of disposition of certification PS052636.

¹ Complainant is an attorney in private practice in Yardley, PA.

May 5, 2006

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- March 10, 2006 Complainant’s OPRA request, and
- March 21, 2006 Custodian’s response to the OPRA request.

The Complainant states that the Custodian’s assertion that the requested scoring forms are exempt from access pursuant to N.J.S.A. 47:1A-1.1 and *N.J.A.C. 7:1D-4.2(a)* is incorrect. The Complainant asserts the Custodian unlawfully denied access to this record.

Additionally, the Complainant contends that the Custodian unlawfully denied access to the report of disposition of certification by directing the Complainant to another agency to obtain that record. The Complainant states that the New Jersey Department of Environmental Protection (“DEP”) holds a copy of this document within its own files and should provide access to same.

May 23, 2006

Offer of Mediation sent to both parties.

May 23, 2006

The Complainant’s e-mailed declination of mediation. The Custodian did not respond to the Offer of Mediation.

May 30, 2006

Custodian’s Statement of Information (“SOI”) with the following attachments:

- March 10, 2006 Complainant’s OPRA request, and
- March 21, 2006 Custodian’s response to the OPRA request.

The Custodian states that after further review of the Complainant’s request, the DEP has decided to provide the Complainant with the report of the disposition of certification PS052636 held by the Custodian. The Custodian states that although he originally directed the Complainant to obtain that information from the NJ Department of Personnel, the Custodian faxed this document to the Complainant on May 30, 2006.

The Custodian asserts that the scoring forms were not provided to the Complainant because these forms contain DEP’s scores of individual candidates’ answers to questions asked as part of interviews/oral examinations for a permanent position within the DEP. The Custodian states that these questions are exempt from access under DEP’s proposed regulations (*N.J.A.C. 7:1D-4.2(a)*) and OPRA.

The Custodian states that OPRA provides that government records are subject to public access unless otherwise exempt by departmental rules and regulations, Executive Orders, etc. (N.J.S.A. 47:1A-1.). The Custodian asserts that Executive Order 21 directs state agencies to handle government records requests in a manner consistent with the rules as they have been proposed. The Custodian adds that in Newark Morning Ledger Company v. DEP, GRC Complaint No. 2003-136 (March 2004), the GRC interpreted Executive Order 21 as allowing State agencies to rely on their proposed regulations when responding to OPRA requests. The Custodian indicates that the DEP’s proposed

regulation *N.J.A.C. 7:1D-4.2(a)* states that test questions, scoring keys or other examination data pertaining to the administration of an examination or an application for public employment, are not subject to disclosure. As such, the Custodian contends that the request for the scoring sheets, which were utilized during an application for public employment, was lawfully denied.

The Custodian also asserts that Executive Order 26 also exempts the requested scoring sheets from disclosure in that it states that test questions, scoring keys, and other examination data shall not be considered disclosable. The Custodian states that because these scoring sheets were utilized during an examination for public employment, they are not disclosable pursuant to OPRA and Executive Order 26.

Additionally, the Custodian states that the DEP's denial of the request for scoring forms is further supported by the proposed regulations of the Department of Personnel *N.J.A.C. 4A:1-2.11(a)(4)*, which the Custodian asserts exempts selection and appointment materials, including but not limited to examination papers, assessors ratings and notes, and scoring information.

November 2, 2006

Custodian's letter to the GRC. The Custodian states that this case involves a denial of access to scoring forms from employment interviews. The Custodian asks that the GRC consider, in this case, the decision in *Sooy v. New Jersey Department of Corrections*, GRC Complaint No. 2006-128 (October 2006) in which the interviewers' notes and scoring forms were not disclosable because they were advisory, consultative and deliberative material and do not fall under the definition of a government record pursuant to OPRA. The Custodian contends that for the reasons set forth in the *Sooy* case, the scoring forms requested in the case at hand are also not disclosable.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) *N.J.S.A. 47:1A-1*.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) *N.J.S.A. 47:1A-1.1*.

OPRA also states that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L. 1963, c. 73 (*C. 47:1A-1 et seq.*); 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.

EO 21 paragraph 4 provides that:

"[i]n light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order..." (Executive Order 21, Governor James E. McGreevey, July 8, 2002).

EO 26, adopted on August 13, 2002, rescinded paragraphs 2 and 3 of EO 21. However, EO 26 (paragraph 6) provides that:

"[t]he remaining provisions of Executive Order 21 are hereby continued to the extent that they are not inconsistent with this Executive Order." (Executive Order 26, Governor James E. McGreevey, August 13, 2002).

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

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. 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.

Report of Disposition of Certification PS052636

The Complainant contends that the Custodian unlawfully denied access to the report of disposition of certification by directing the Complainant to another agency to obtain that record. The Complainant states that the New Jersey Department of Environmental Protection (“DEP”) holds a copy of this document within its own files and should provide access to same.

The Custodian directed the Complainant to the New Jersey Department of Personnel for the report of disposition of certification PS052636. The Custodian states

that after further review of the Complainant's request, the DEP decided to provide the Complainant with the report of the disposition of certification PS052636, which was held by the Custodian. The Custodian states that although he originally directed the Complainant to obtain the report of disposition of certification PS052636 from the NJ Department of Personnel, this document was faxed to the Complainant by the Custodian on May 30, 2006.

In Gannett New Jersey v. Pemberton, 2005 N.J. Super. 227, the court held that "government records" under OPRA's expansive definition of this term, includes "not only documents 'made, maintained or kept on file in the course of [a public agency's] official business,' but also any document 'received in the course of [the agency's] official business.' *N.J.S.A. 47:1A-1.1*." The Custodian in the case at hand was in possession of the requested document at the time of the Complainant's OPRA request. Therefore, the Custodian was responsible for providing the requested report of disposition of certification PS052636 in response to the Complainant's OPRA request and should not have directed the Complainant to another agency for a copy of this record.

The Custodian was responsible for providing the requested report of disposition of certification PS052636 in response to the Complainant's OPRA request and should not have directed the Complainant to another agency for a copy of this record. Although access was ultimately granted by the Custodian on May 30, 2006, the Complainant was not given a written reason for a delay or a lawful basis for denial of access to the requested report of disposition of certification PS052636 pursuant to N.J.S.A. 47:1A-5.g. These documents were not provided to the Complainant within the statutorily required seven (7) business day time period for response as required under N.J.S.A. 47:1A-5.i. Therefore, pursuant to N.J.S.A. 47:1A-5.g and 5.i, the Custodian's actions are deemed an unlawful denial of the requested report of disposition of certification PS052636.

Scoring Forms

The Complainant states that the Custodian's assertion that the requested scoring forms are exempt from access pursuant to N.J.S.A. 47:1A-1.1 and *N.J.A.C. 7:1D-4.2(a)* is incorrect. The Complainant asserts the Custodian unlawfully denied access to this record.

The Custodian asserts that the scoring forms were not provided to the Complainant because these forms contain DEP's scores of individual candidates' answers to questions asked as part of interviews/oral examinations for a permanent position within the DEP. The Custodian states that these questions are exempt from access under DEP's proposed regulations (*N.J.A.C. 7:1D-4.2(a)*) and OPRA.

The Custodian asserts that Executive Order 21 directs state agencies to handle government records requests in a manner consistent with the rules as they have been proposed and that Executive Order 26 continues this instruction. The Custodian adds that in Newark Morning Ledger Company v. DEP, GRC Complaint No. 2003-136 (March 2004), the GRC interpreted Executive Order 21 as allowing State agencies to rely on their proposed regulations when responding to OPRA requests. The Custodian indicates that the DEP's proposed regulation *N.J.A.C. 7:1D-4.2(a)* states that test questions, scoring keys or other examination data pertaining to the administration of an examination or an *Fegley v. NJ Department of Environmental Protection, 2006-91* – Findings and Recommendations of the Executive Director

application for public employment, are not subject to disclosure. As such, the Custodian contends that the request for the scoring sheets, which were utilized during an application for public employment, was lawfully denied. The Custodian states that the DEP's denial of the request for scoring forms is further supported by the proposed regulations of the Department of Personnel *N.J.A.C. 4A:1-2.11(a)(4)*, which the Custodian asserts exempts selection and appointment materials, including but not limited to examination papers, assessors ratings and notes, and scoring information.

EO 26, adopted on August 13, 2002, rescinded paragraphs 2 and 3 of EO 21. The paragraphs rescinded are not relevant for the analysis of the applicability of the proposed OPRA rules of a state department or agency. However, the relevant portion of EO 26 (paragraph 6) presumably continues the viability of the proposed OPRA rules.

In an unpublished opinion of the New Jersey Superior Court (the only legal authority on point in this matter), it has been determined that paragraph 6 of EO 26 "continues to permit a department or agency within State [g]overnment to adopt rules and regulations and to permit the operation of a proposed rule or regulation prior to its final adoption. Therefore, pursuant to Paragraph 4 of EO 21, State departments and 'agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed ..." Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) at page 11.

In that case, the court went on to state that "[i]t appears, from the language of both Executive Orders, that these provisions were added to provide sufficient time for departments and agencies within State government to evaluate their records, propose regulations and withhold certain documents from public inspection pending the adoption of the proposed rules. While this process may be at variance with the normal regulatory process, one can only conclude that the Executive Branch, understanding the broad scope of OPRA, felt it was appropriate to have agencies and departments, within State government, undertake a careful review and analysis of its records to determine, for purposes of security and safety, those records to be considered confidential." *Id.* at 12. The court further held that "[r]ecognizing the time delay inherent in the normal rule adoption process, EO 21 and EO 26 included language to permit custodians of records to deny access, based on the proposed rule, pending final adoption. Now, three years after the passage of OPRA, for the court, the continued efficacy of that practice raises some concerns." *Id.*

The court concluded, however, that "[w]hile [it] does not know the status of this proposed regulation, under EO 21, paragraph 4 and EO 26, paragraph 6, resolution of that issue is not required. ... the court assumes that the proposed rule change is still pending." *Id.* at 13.

The provisions of OPRA may be superseded by "regulations promulgated under the authority of any ... Executive Order of the Governor" pursuant to N.J.S.A. 47:1A-9.a. The Custodian cites *N.J.A.C. 7:1D-4.2(a)* as a lawful basis for denying access to the requested scoring sheets. *N.J.A.C. 7:1D-4.2(a)* states that "employment related

documents and information related to the employment of an individual... including but not limited to information related to and individual's employment history...; information comprising a personal recommendation or evaluation; and information contained in or derived from personnel records or files" are not disclosable. This regulation also states that test questions and scoring keys are exempt from access. Thus, the proposed rules, *N.J.A.C. 7:1D-4.2(a)*, "is still pending" and state departments and agencies are "directed to handle all government records requests in a manner consistent with the rules as they have been proposed."

Additionally, the Custodian asks that the GRC to consider, in this case, the decision in *Sooy v. New Jersey Department of Corrections*, GRC Complaint No. 2006-128 (October 2006) in which the interviewers' notes and scoring forms were not disclosable because they were advisory, consultative and deliberative material and do not fall under the definition of a government record pursuant to OPRA. The Custodian contends that for the reasons set forth in the *Sooy* case, the scoring forms requested in the case at hand are also not disclosable.

In *Sooy*, the GRC found that based on the decision in *In re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000), which defines advisory, consultative and deliberative materials, score sheets are advisory, consultative and deliberative in content and do not fall under the definition of a government record pursuant to *N.J.S.A. 47:1A-1.1*. Hence, the score sheets in this case fall under the same exemption.

Therefore, pursuant to Executive Order 21, the proposed rule *N.J.A.C. 7:1D-4.2(a)* and the decision in *Sooy v. New Jersey Department of Corrections*, GRC Complaint No. 2006-128 (October 2006), the Custodian has lawfully denied access to the requested scoring forms.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

3. Although access was ultimately granted by the Custodian on May 30, 2006, the Complainant was not given a written reason for a delay or a lawful basis for denial of access to the requested report of disposition of certification PS052636 pursuant to *N.J.S.A. 47:1A-5.g*. These documents were not provided to the Complainant within the statutorily required seven (7) business day time period for response as required under *N.J.S.A. 47:1A-5.i*. Therefore, pursuant to *N.J.S.A. 47:1A-5.g* and *5.i*, the Custodian's actions are deemed an unlawful denial of the requested report of disposition of certification PS052636.
4. Pursuant to Executive Order 21, the proposed rule *N.J.A.C. 7:1D-4.2(a)*, and the decision in *Sooy v. New Jersey Department of Corrections*, GRC Complaint No. 2006-128 (October 2006), the Custodian has lawfully denied access to the requested scoring forms.

Prepared By:

Colleen C. McGann
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Approved By:

Catherine Starghill, Esq.
Executive Director

December 7, 2006