



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

August 11, 2009 Government Records Council Meeting

Christopher White
Complainant

Complaint No. 2008-216

v.

William Patterson University
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the August 4, 2009 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 Custodian has lawfully denied access to the Complainant's OPRA request for a copy of an unredacted audiotape of a disciplinary hearing held in January, 2003 because the unredacted audiotape is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and C.W. v. William Patterson University, GRC Complaint No. 2003-80 (March 2005).
2. Because the Complainant failed to submit any new evidence in support of his request for reconsideration, namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint, the Complainant's request for reconsideration of the Council's decision in C.W. v. William Patterson University, GRC Complaint No. 2003-80 (March 2005), and that the GRC reconsider all complaints dealing with any conflicts between OPRA and the Family Educational Rights and Privacy Act, is therefore denied.
3. The identity of a requestor is not a consideration when deciding whether an exemption applies to a government record requested pursuant to OPRA except for those instances set forth at N.J.S.A. 47:1A-2.2. and N.J.S.A. 47:1A-10.

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 11th Day of August, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 17, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Christopher White¹
Complainant**

GRC Complaint No. 2008-216

v.

**William Patterson University²
Custodian of Records**

Records Relevant to Complaint: To listen to the original, unredacted audiotape recording of the Complainant's disciplinary hearing held in January, 2003 in the offices of the Associate Director of Residence Life.

Request Made: October 31, 2006³

Response Made: November 9, 2006

Custodian: Ramzi Chabayta⁴

GRC Complaint Filed: September 30, 2008⁵

Background

November 1, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

November 9, 2006

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the requested unredacted audiotape is denied pursuant to C.W. v. William Patterson University, GRC Complaint No. 2003-80 (March 2005), in which the GRC held that the Custodian bore his burden of proving that redactions made to the requested audiotape were lawful pursuant to N.J.S.A. 47:1A-1.1, and that the Family Educational Rights and Privacy Act ("FERPA") is a valid preemption to the disclosure of the record requested. The Custodian states that since this issue was already resolved by the GRC, the University will not reconsider the Complainant's request because it was previously lawfully denied.

¹ No legal representation listed on record.

² Represented by DAG Cheryl Clarke, on behalf of the NJ Attorney General.

³ Although the Complainant asserts that the OPRA request was submitted November 1, 2006, the evidence of record shows that the Complainant's OPRA request was actually submitted to William Patterson University on October 31, 2006.

⁴ The original Custodian of Record is Allison Boucher, Esq.

⁵ The GRC received the Denial of Access Complaint on said date.

The Custodian states that the Complainant may view a videotape made of the disciplinary hearing at the Office of Human Resources during normal business hours. The Custodian requests that the Complainant make an appointment if he wishes to view said videotape.

September 30, 2008

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching a letter from the United States Department of Education (“USDOE”) to the Complainant dated September 9, 2008.

The Complainant states that he submitted an OPRA request to William Patterson University on October 31, 2006. The Complainant states that the Custodian responded in writing on November 9, 2006, denying access to the requested audiotape and citing to C.W., *supra*. Specifically, the Complainant states that access to the requested, unredacted audiotape was denied because the record contained a reference to another student by way of the Complainant’s testimony and that only a redacted version of the audiotape would be provided.

The Complainant contends that the ruling in that complaint was based on misinformation given by the Custodian’s Counsel. The Complainant further argues that there was no indication that the GRC initiated an independent finding of facts; instead choosing to rely on the argument provided by the Custodian’s Counsel. The Complainant contends he contacted the Family Policy Compliance Office (“FPCO”) in regards to the November 1, 2006 OPRA request and has enclosed the FPCO’s September 9, 2008 determination which rejects the GRC’s finding that the Custodian in C.W., *supra*, lawfully denied access to the requested audiotape pursuant to FERPA.

The Complainant states that OPRA places the burden of proving a lawful denial of access on the Custodian. The Complainant asserts that the Custodian did not meet her burden of proof because she failed to cite any specific exemption to disclosure contained in FERPA. Additionally, the Complainant asserts that the Custodian Counsel’s argument that preemptions in FERPA and OPRA were a valid reason to deny access to the requested record obligate the GRC to seek guidance on the issue from the FPCO.

Finally, the Complainant contends that after researching FERPA and receiving guidance from the FPCO, the Complainant has found no preemptions in FERPA applicable to OPRA. The Complainant asserts that C.W., *supra*, effectively sets a precedent that inspection of or copying of a student’s own complete educational record is exempt under OPRA.

The Complainant requests that the GRC reconsider all complaints dealing with any conflicts between OPRA and FERPA and asserts that the only legitimate arbiter of this conflict is the FPCO. However, pursuant to N.J.S.A. 47:1A-7.b., the GRC has the authority to rule only on such complaints involving OPRA and is required by statute to recognize exemptions found in other statutes, executive orders, etc. N.J.S.A. 47:1A-9.

November 14, 2008

E-mail from the GRC to the Complainant. The GRC requests that the Complainant provide a copy of the Complainant's November 1, 2006 OPRA request and the Custodian's November 9, 2006 response by no later than November 19, 2008.

November 14, 2008

E-mail from the Complainant to the GRC. The Complainant acknowledges receipt of the GRC's request. The Complainant states that he will provide the requested documents to the GRC. The Complainant requests that the GRC order William Patterson University to provide the requested unredacted record to the Complainant.

November 18, 2008

E-mail from the Complainant to the GRC. The Complainant states that he was unable to locate a copy of his November 1, 2006 OPRA request but was able to locate the Custodian's November 9, 2006 response. The Complainant reiterates that he believes based on the FCPO's September 9, 2008 letter that the Custodian erroneously relied on FERPA to deny access to the requested unredacted audiotape even though no actual exemption exists.

December 17, 2008

Offer of Mediation sent to both parties.

December 18, 2008

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint. The Custodian did not respond to the Offer of Mediation.

January 12, 2009

Request for the Statement of Information ("SOI") sent to the Custodian.

January 20, 2009

E-mail from the Custodian's Counsel to the GRC. The Custodian requests an extension of time until January 30, 2009 to submit the SOI.

January 20, 2009

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until January 30, 2009 to file the SOI.

January 30, 2009

Custodian's SOI attaching the Complainant's OPRA request dated September 31, 2006.

Counsel states that the Custodian received the Complainant's October 31, 2006 OPRA request on the same day and responded in writing on November 9, 2006, denying access pursuant to the GRC's decision in C.W. v. William Patterson University, GRC Complaint No. 2003-80 (March 2005). Counsel states that in that complaint, the Complainant was offered a redacted version of the audiotape with the name of another student redacted pursuant to N.J.S.A. 47:1A-1.1, which exempts "information concerning

student records or grievances or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.” Counsel states that the GRC held that the Custodian acted properly in providing a redacted version of the requested audiotape pursuant to N.J.S.A. 47:1A-1.1.

Counsel states that, in an attempt to have the GRC reconsider its decision in C.W., *supra*, the Complainant now asserts that the September 9, 2008 FPCO letter rejects the GRC’s decision in C.W., *supra*. Counsel argues that this assertion is a blatant misrepresentation of the actual content of the FPCO letter. Counsel asserts that the Complainant previously had the option of appealing or requesting reconsideration of the Council’s holding in C.W., *supra*, but failed to do so within the time limits set forth in *N.J.A.C. 5:105-2.10* and *N.J.A.C. 5:105-2.11*.

Finally, Counsel disputes the Complainant’s numerous assertions that William Patterson University violated FERPA. Counsel asserts that FERPA issues are for the USDOE to decide and not within the jurisdiction of the GRC.⁶

Analysis

Whether the Custodian unlawfully denied access to the requested audiotape?

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 ...[t]he terms shall not include... information concerning *student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA further provides:

“[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...*Executive Order* of the Governor.” (Emphasis added.) N.J.S.A. 47:1A-9.a.

⁶ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
Christopher White v. William Patterson University, 2008-216 – Findings and Recommendations of the Executive Director

FERPA provides that:

“(1) In general. Nothing in this Act or the Higher Education Act of 1965 shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records...

(2) State law regarding disclosure. *Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).*” 20 U.S.C. 1232g(i)(1)-(2).

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. 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.

In the matter currently before the Council, the Custodian responded to the Complainant’s OPRA request on November 9, 2006, stating that access to the requested unredacted audiotape is denied pursuant to C.W., *supra*, in which the GRC held that the Custodian bore his burden of proving that redactions, made to the audiotape now requested, were lawful pursuant to N.J.S.A. 47:1A-1.1. and that FERPA was a valid preemption to the records request.

The Complainant asserts that advice received from the FPCO rejects the GRC’s decision in C.W., *supra*, and that the Custodian in the instant complaint has failed to bear her burden of proving that FERPA was a valid preemption to the records request. Additionally, the Complainant requested that the GRC reconsider all complaints where OPRA and FERPA conflict. Finally, the Complainant asserts that the C.W., *supra*, set a precedent that a student’s own disciplinary record would be exempt from disclosure under OPRA.

Conversely, Custodian’s Counsel asserts that N.J.S.A. 47:1A-1.1., which exempts “information concerning student records or grievances or disciplinary proceedings against a student to the extent that disclosure would reveal the identity of the student”, is a lawful basis for denying access to an unredacted copy of the audiotape. Additionally,

Counsel asserts that the Complainant had ample time to request reconsideration or file an appeal of C.W., *supra*, but failed to do so.

The GRC will first examine the lawfulness of the Custodian's denial of access. The Custodian relied on the Council's decision in C.W., *supra*, because the audiotape requested in that complaint is the same as the audiotape requested in the instant complaint.

In C.W., *supra*, the Custodian provided access to the requested audiotape with a redaction pursuant to N.J.S.A. 47:1A-1.1. The Custodian identified the redaction by writing out the sentence "XXX XXXX [where XXX XXXX is the name of a specific student] got me a 40 ounce." The Custodian's Counsel later asserted that the record was protected under FERPA and the regulations promulgated thereafter at 34 CFR Part 99. The Council held that:

"the Custodian acted properly and in accordance with N.J.S.A. 47:1A-1.1. in making and explaining the redactions of the tape...the Custodian did prove the record under...OPRA..., however FERPA is a valid preemption to the records request."

The Complainant disputes what he characterizes as the GRC's holding that FERPA is a valid preemption to the records request in the instant complaint. However, FERPA clearly states that it does not supersede any provision of state law that prohibits an institution of higher education from disclosing to a parent or legal guardian of a student information regarding violations of state law, rule or policy of the institution, governing the use of or possession of alcohol. 20 U.S.C. 1232g(i)(2). Moreover, OPRA specifically exempts from the definition of a government record "information concerning ...disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student." N.J.S.A. 47:1A-1.1. Therefore, FERPA does not operate to permit the disclosure of records which are not within the definition of a government record under OPRA. 20 U.S.C. 1232(i)(1)-(2); N.J.S.A. 47:1A-1.1.

In the instant complaint, the Custodian denied access to the requested unredacted audiotape pursuant to C.W., *supra*, N.J.S.A. 47:1A-1.1. and FERPA. The facts in C.W., *supra*, relate directly to the instant complaint in that the requested audiotape, the same as requested in C.W., *supra*, involves a disciplinary hearing that contains information exempt under N.J.S.A. 47:1A-1.1. FERPA clearly states that "*Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).*" As previously stated, OPRA specifically exempts from the definition of a government record "information concerning ...disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student." N.J.S.A. 47:1A-1.1. Additionally, pursuant to N.J.S.A. 47:1A-7.b., the GRC only has the authority to rule on such complaints involving OPRA and is required by statute to recognize exemptions found in other statutes, executive orders, etc. N.J.S.A. 47:1A-9.

Therefore, the Custodian has lawfully denied access to the Complainant's OPRA request for a copy of an unredacted audiotape of a disciplinary hearing held in January,

2003 because the unredacted audiotape is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and C.W., supra.

Second, the GRC will address the Complainant's request to reconsider all complaints where there is a conflict between OPRA and FERPA.

The GRC's promulgated regulations, which were adopted on May 5, 2008, set forth the process by which a party may request a reconsideration of a Council decision. Specifically, "requests for reconsideration must be filed within ten (10) business days following receipt of a Council decision." N.J.A.C. 5:105-2.10(a). However, these regulations were not in effect at the time the GRC issued its decision in C.W. v. William Patterson University, GRC Complaint No. 2003-80 (March 2005). Applicable case law holds that:

"[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, supra, 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 South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his request for reconsideration, the Complainant asserts that the Custodian did not meet her burden of proof because she failed to cite any specific exemption to disclosure contained in FERPA. Additionally, the Complainant asserts that the Custodian Counsel's argument that preemptions in FERPA and OPRA were a valid reason to deny access to the requested record obligate the GRC to seek guidance on the issue from the FPCO. Finally, the Complainant contends that after researching FERPA and receiving guidance from the FPCO, the Complainant has found no preemptions in FERPA applicable to OPRA. The Complainant asserts that C.W., supra, effectively sets a precedent that inspection of or copying of a student's own complete educational record is exempt under OPRA.

The Complainant failed to submit any new evidence in support of his request. As the requesting party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Complainant

failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint. See D’Atria, supra. The Complainant’s request for reconsideration of the Council’s decision in C.W., supra, and that the GRC reconsider all complaints dealing with any conflicts between OPRA and FERPA, is therefore denied.

Moreover, the Complainant had a full and fair opportunity to appeal the GRC’s decision in C.W., supra. Pursuant to New Jersey Court Rule 2:4-1(b):⁷

“Appeals from final decisions or actions of state administrative agencies...shall be taken with 45 days from the date of service of the decision or notice of the action taken.” R. 2:4-1(b).

The Complainant’s time to appeal the Council’s decision in C.W., supra, has elapsed pursuant to R. 2:4-1(b).

Finally, the GRC will address the Complainant’s assertion that OPRA prohibits a student from gaining access to his or her complete education records. OPRA identifies two (2) situations in which the identity of the requestor has an effect on access to government records.

N.J.S.A. 47:1A-2.2. provides that “where it shall appear that a person who is convicted of any indictable offense...is seeking government records containing personal information pertaining to the person’s victim or the victim’s family...shall be denied.” Additionally, N.J.S.A. 47:1A-10 provides that an individual may obtain personnel or pension records when authorized by an individual in interest. In Hewitt v. Borough of Longport Police Department, GRC Complaint No. 2004-148 (March 2005), the GRC establishes that: “

“N.J.S.A. 47:1A-10 is a codified version of Executive Order 11 (1974) and has been applied and understood that only individuals who have access to personnel and pension records are specific public officials and the person who is the subject of the personnel file. An “*individual in interest*” is to mean the *person who is the subject of the personnel file*, furthermore, that person may accept to waive their privacy right and authorize the disclosure of their personnel records. In considering N.J.S.A. 47:1A-10 in its entirety, the term “individual” refers to the person who is the subject of the personnel or pension record.”

Apart from the two (2) provisions listed above which give effect to a requestor’s identity with regard to an OPRA request, OPRA is silent as to whether a student may obtain his or her complete education record pursuant to OPRA. Therefore, the identity of a requestor is not a consideration when deciding whether an exemption applies to a government record requested pursuant to OPRA except for those instances set forth at N.J.S.A. 47:1A-2.2. and N.J.S.A. 47:1A-10.

⁷ Source – R.R.1:3-1, 4:88-15(a), 4:88-15(b) (7); paragraph (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended June 20, 1979 to be effective July 1, 1979; paragraphs (a) and (b) amended July 16, 1981 to be effective September 14, 1981.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has lawfully denied access to the Complainant's OPRA request for a copy of an unredacted audiotape of a disciplinary hearing held in January, 2003 because the unredacted audiotape is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and C.W. v. William Patterson University, GRC Complaint No. 2003-80 (March 2005).
2. Because the Complainant failed to submit any new evidence in support of his request for reconsideration, namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint, the Complainant's request for reconsideration of the Council's decision in C.W. v. William Patterson University, GRC Complaint No. 2003-80 (March 2005), and that the GRC reconsider all complaints dealing with any conflicts between OPRA and the Family Educational Rights and Privacy Act, is therefore denied.
3. The identity of a requestor is not a consideration when deciding whether an exemption applies to a government record requested pursuant to OPRA except for those instances set forth at N.J.S.A. 47:1A-2.2. and N.J.S.A. 47:1A-10.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009