



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

August 11, 2009 Government Records Council Meeting

Warren J. Lackland
Complainant

Complaint No. 2008-66

v.

New Jersey Department of Law & Public Safety,
State Ethics Commission
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 because the requested record is part of the investigative file of the State Ethics Commission, and because the Commission has determined that the Complainant does not have a particularized need for the requested record, the requested record is exempt from disclosure under OPRA by the State Ethics Commission’s regulations at *N.J.A.C. 19:61-3(c)(2)* and *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 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**

**Warren J. Lackland¹
Complainant**

GRC Complaint No. 2008-66

v.

**New Jersey Department of Law & Public Safety,
State Ethics Commission²
Custodian of Records**

Records Relevant to Complaint:

Copy of the report from former Executive Director Rita L. Strmensky involving an investigation of Casino Control Commission members, Commission Case No. 82-06.

Request Made: March 1, 2008

Response Made: March 10, 2008

Custodian: Donna L. Schmitz

GRC Complaint Filed: March 26, 2008³

Background

March 1, 2008

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 submitted electronically.

March 10, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the 6th (sixth) business day following receipt of such request. The Custodian states that access to the requested record is denied because the requested report was prepared by State Ethics Commission staff in conjunction with the investigation of Commission Case No. 82-06. The Custodian states that the requested report is therefore confidential pursuant to the Commission's rules at *N.J.A.C.* 19:61-3.1(c)(2), which state in pertinent part:

No information regarding the allegation shall be made public until after the Commission action in accordance with (g) or (h) below. After the final determination of a matter before the Commission and the expiration of any time for appeal, the Commission shall consider requests for information

¹ No legal representation listed on record.

² Represented by DAG Brady Montalbano Connaughton on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

related to the completed matter. The contents of the Commission's investigative file, however, are confidential and shall not be released except upon authorization of the Commission. The Commission shall consider and determine whether the requester has a particularized need for the contents of the file and has established an inability to obtain the requested information from other sources. In its consideration, the Commission shall balance the requester's need against the public interest to maintain the confidentiality of the files.

March 26, 2008

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

- Memorandum from Complainant to Jim Hurley dated October 3, 1998
- E-mail from Commission81@aol.com to Stefanie.Brand@dol.lps.state.nj.us dated September 7, 2006 (with attachments)
- E-mail from Complainant to Executive Director Rita Strmensky dated September 28, 2006
- Reprint of internet news article, PressofAtlanticCity.com, *CCC Members Cleared in Ethics Probe*, dated February 28, 2007
- Letter from Henry Maurer, Director, New Jersey Department of Personnel, to Complainant dated June 8, 2007
- Complainant's OPRA request dated March 1, 2008
- Letter from the Custodian to the Complainant dated March 10, 2008

The Complainant alleges that as a member of the general public, he wants to be sure that an agency which is in a position to police itself did in fact complete a thorough, impartial investigation of potential misconduct by employees. The Complainant asserts that employees of the New Jersey Division of Gaming Enforcement and the New Jersey Casino Control Commission may have attended an air show at the Borgata Hotel and Casino and may have engaged in improper conduct. The Complainant asserts that the requested report may reveal such misconduct.

The Complainant also asserts that the requested report may support an ongoing CEPA⁴ case and an accusation filed by the Complainant in the Superior Court of New Jersey, Law Division.

The Complainant contends that the public has a right to know. The Complainant asserts that he does not understand how the public interest is served by maintaining the confidentiality of the requested report. The Complainant argues that full disclosure of the requested report would enable the public to rest assured that the Casino Control Commission and the Division of Gaming Enforcement conducted themselves appropriately and that no misconduct is being concealed.

⁴ The GRC understand this to be a reference to the Conscientious Employee Protection Act, N.J.S.A. 34:19-3.

The Complainant further contends that the Casino Control Commission may have violated the Open Public Records Act when all five (5) members of the Commissioner were present at the same time at the Borgata Hotel and Casino.

The Complainant asserts that he does not believe that the requested report represents inter- or intra-agency advisory, consultative or deliberative (“ACD”) material and does not fall within one of the twenty four (24) exemptions to disclosure enumeration in OPRA.

The Complainant further asserts that the need for confidentiality of the requested record does not outweigh his need for the record as a concerned member of the public. The Complainant notes that the attendance of members of the Casino Control Commission and the Division of Gaming Enforcement was noted in the newspapers and the public deserves the full truth regarding the incident.

The Complainant does not agree to mediate this complaint.

April 4, 2008

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

April 8, 2008

E-mail from the Custodian to the GRC. The Custodian requests a five (5) business day extension of time to file the SOI.

April 8, 2008

E-mail from the GRC to the Custodian. The GRC grants the Custodian’s request for a five (5) business day extension of time to file the SOI.

April 9, 2008

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 1, 2008
- Letter from the Custodian to the Complainant dated March 10, 2008
- Copy of *N.J.A.C.* 19:61.3.1

The Custodian certifies that her search for the requested records included retrieving the case file which contained the requested record. The Custodian certifies that the retention requirement for the requested record is sixty (60) years; however, no documents have been destroyed in accordance with the Records Destruction Schedule established and approved by the New Jersey Department of State, Division of Archives and Records Management (“DARM”).

The Custodian asserts that the requested record is a memorandum addressed to all State Ethics Commission members from former Executive Director Rita L. Strmensky involving an investigation of Casino Control Commission members, Commission Case No. 82-06. The Custodian argues that this memorandum is part of the investigative file in that matter and as such falls under the purview of the confidentiality requirement set forth at *N.J.A.C.* 19:61-3.1(c)(2).

The Custodian argues that the regulation establishes a presumption in favor of confidentiality of the Commission's investigative files. The Custodian notes that the Complainant has claimed that he needs the requested record in order that he, as a member of the public, can be assured that the Commission conducted a thorough, complete and impartial investigation. The Custodian also notes that the Complainant stated that the report may support an ongoing CEPA case in which the Complainant is a party. The Custodian argues that these arguments fail to demonstrate that the Complainant has a particularized need for the records. The Custodian also argues that the Complainant has failed to establish that he is unable to obtain the requested record from other sources. The Custodian asserts that the Complainant has failed to meet the burden of showing that his need for the file outweighs the public interest in maintaining the confidentiality of the Commission's investigation. The Custodian further asserts that the Commission's denial of access was therefore justified and should be upheld.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

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 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.

N.J.S.A. 47:1A-9.a. states in pertinent part that:

“[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 [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.” (Emphasis added.) N.J.S.A. 47:1A-9.a.

N.J.A.C. 19:61-3.1(c)(2) states in pertinent part:

“[n]o information regarding the allegation shall be made public until after the Commission action in accordance with (g) or (h) below. After the final determination of a matter before the Commission and the expiration of any time for appeal, the Commission shall consider requests for information related to the completed matter. The contents of the Commission’s investigative file, however, are confidential and shall not be released except upon authorization of the Commission. The Commission shall consider and determine whether the requester has a particularized need for the contents of the file and has established an inability to obtain the requested information from other sources. In its consideration, the Commission shall balance the requester’s need against the public interest to maintain the confidentiality of the files.” *N.J.A.C.* 19:61-3.1(c)(2).

In this case, the Complainant asserts that, as a concerned member of the public, he is entitled to disclosure of the requested record, a memorandum prepared by the former Executive Director of the State Ethics Commission regarding the investigation of possible misconduct by members of the New Jersey Casino Control Commission. The Custodian asserts that the requested record is exempt from disclosure because it is part of an investigatory file maintained by the State Ethics Commission; the contents of such files are confidential pursuant to the Commission’s regulations at *N.J.A.C.* 19:61-3(c)(2) and may only be disclosed with the authorization of the Commission.

OPRA specifically provides that its provisions shall not abrogate any exemption of a government record from public access made pursuant to a duly promulgated regulation. N.J.S.A. 47:1A-9.a. The Custodian has certified that the requested record, a memorandum prepared by the then-Executive Director of the State Ethics Commission as part of an investigation into possible misconduct by New Jersey State officials, is contained within the investigative file maintained by the State Ethics Commission in that matter. The Custodian has also certified that the State Ethics Commission has determined that the Complainant in this matter failed to establish that he had a particularized need for the memorandum and, moreover, that the Complainant failed to establish that he was unable to obtain the requested record from other sources.

Because the requested record is part of the investigative file of the State Ethics Commission, and because the Commission has determined that the Complainant does not have a particularized need for the requested record, the requested record is exempt from disclosure under OPRA by the State Ethics Commission’s regulations at *N.J.A.C.* 19:61-3(c)(2) and N.J.S.A. 47:1A-9.a.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the requested record is part of the investigative file of the State Ethics Commission, and because the Commission has determined that the Complainant does not have a particularized need for the requested record, the requested record is exempt from disclosure under OPRA by the State Ethics Commission's regulations at *N.J.A.C.* 19:61-3(c)(2) and N.J.S.A. 47:1A-9.a.

Prepared By: Karyn G. Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009