



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

March 29, 2011 Government Records Council Meeting

Ursula Cargill
Complainant

Complaint No. 2009-256

v.

New Jersey Department of Education
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 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. Because Equal Employment Officer Williams certified on January 18, 2011 that the requested report was not completed until January 15, 2010 and the Complainant has submitted no credible evidence to refute Equal Employment Officer Williams’s certification that the requested report did not exist at the time of the request, the Custodian has not unlawfully denied access to the Complainant’s OPRA request for the report allegedly completed on August 14, 2009 by Equal Employment Officer Williams of the New Jersey Department of Education in the OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the Complainant identifies types of government records sought (e-mails, memos, notes, letters, etc.), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) do not apply to the request portion of the request seeking “inter-/intra-office correspondence (e-mails, memos, handwritten/typed notes, letters, meeting minutes, audiotape ...) related to this matter.” The Custodian’s search is not open-ended, nor does it require research, but rather requires the Custodian to provide the records within the complaint file, which is exactly what the Custodian did in identifying records responsive included in the document index submitted with the Statement of Information.
3. Any records created as part of the Complainant’s discrimination complaint are considered “[r]ecords of complaints and investigations undertaken pursuant to the Model Procedures in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive” pursuant to Executive



Order No. 26 (McGreevey 2002). And, as such the records are confidential pursuant to Executive Order No. 26 (McGreevey 2002).

4. Because the eight (8) records responsive to the Complainant's OPRA request are exempt from access pursuant to N.J.S.A. 47:1A-9.a. and Executive Order No. 26 (McGreevey 2002), the Custodian has lawfully denied access to the requested records. Additionally, the Custodian has borne his burden pursuant to N.J.S.A. 47:1A-6 of proving a lawful denial of access.

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 29th Day of March, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: April 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2011 Council Meeting**

**Ursula Cargill¹
Complainant**

GRC Complaint No. 2009-256

v.

**New Jersey Department of Education²
Custodian of Records**

Records Relevant to Complaint: Copy of a report completed on August 14, 2009 by Ms. Mabel Williams, Equal Employment Officer (“EEO Williams”), of the New Jersey Department of Education (“DOE”) pertaining to a discrimination complaint filed by the Complainant, along with handwritten notes from interviews and copies of any inter-/intra-office correspondence (e-mails, memoranda, handwritten/typed notes, letters, meeting minutes, audio tape...) related to the investigation.

Request Made: August 25, 2009

Response Made: September 1, 2009

Custodian: Beth Auerswald³

GRC Complaint Filed: September 10, 2009⁴

Background

August 25, 2009

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. The Complainant requests that the records be provided in Microsoft Word™ and hardcopy.

September 1, 2009

Custodian’s response to the OPRA request.⁵ The Custodian responds in writing to the Complainant’s OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that access to the requested records is denied pursuant to N.J.S.A. 47:1A-1.1., which provides that the definition of a government record shall not include “information generated by or on behalf of public employers or public

¹ No legal representation listed on record.

² Represented by DAG Susan Huntley, on behalf of the NJ Attorney General.

³ The original Custodian of Record is Anthony A. D’Elia.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The evidence of record indicates that the Custodian received the Complainant’s OPRA request on August 27, 2009.

employees in connection with any sexual harassment complaint filed with a public employer.”⁶

September 10, 2009

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

- Complainant’s OPRA request dated August 25, 2009.
- E-mail from the Custodian to the Complainant dated September 1, 2009 attaching government records request receipt with the same date.

The Complainant states that she submitted an OPRA request to the DOE on August 25, 2009. The Complainant states that the Custodian responded on September 1, 2009 denying access to the requested report pursuant to N.J.S.A. 47:1A-1.1., and stating that information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer is not a government record.

The Complainant argues that the DOE is ignoring that OPRA exemptions do not apply to purely factual information. The Complainant argues that OPRA does not exclude from disclosure reports related to discrimination. The Complainant asserts that the Custodian has an obligation to redact only those portions of a government record exempt from access under OPRA. The Complainant argues that the report should have been provided with redactions for that information which falls under the exemption cited by the Custodian.

The Complainant contends that the requested report includes charges of discrimination based on gender, race, sexual orientation, religion and sex, as well as an allegation of sexual harassment. The Complainant asserts that more than 90% of the requested report should be considered a government record as defined in N.J.S.A. 47:1A-1.1. The Complainant reiterates that based on the foregoing, the Custodian should have made the appropriate redactions for information pertaining to a sexual harassment complaint and disclosed the report.

Additionally, the Complainant argues that the Custodian summarily denied access to the requested report based on the Complainant’s acknowledgment in her OPRA request that one of the parties against whom the complaint is filed sexually harassed the Complainant. The Complainant avers that her OPRA request specifically sought the report pertaining to the discrimination matter; however, the Complainant acknowledged the charge of sexual harassment in the interest of full disclosure. The Complainant asserts that had the Custodian reviewed the report prior to denying access, he would have seen that sexual harassment is only one part of the complaint. The Complainant contends that the report contains more than twenty-five (25) other parts that are subject to disclosure under OPRA. The Complainant argues that a review of the report would reveal her assertion to be true. The Complainant asserts that the Custodian instead erred

⁶ The Custodian notes that the Complainant will receive a letter of determination in accordance with the applicable investigative procedures.
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in determining that the entire report pertained to sexual harassment and denied access accordingly.

The Complainant agrees to mediate this complaint.

September 15, 2009

Offer of Mediation sent to the Custodian.

September 21, 2009

The Custodian declines mediation.

September 22, 2009

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

September 29, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated August 25, 2009.
- Government records request receipt dated August 27, 2009.
- E-mail from the Custodian to the Complainant dated September 1, 2009.
- “Acknowledgement of Receipt” of the Policy and Model Procedure dated November 28, 2007.
- “Notice of Confidentiality and Prohibition Against Retaliation” dated March 16, 2009.

The Custodian certifies that no search was undertaken to satisfy the Complainant’s OPRA request; however, the records were held by EEO Williams as her internal investigation regarding the Complainant’s discrimination complaint is in the process of being completed.

The Custodian also certifies that no records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

The Custodian certifies that he received the Complainant’s OPRA request on August 27, 2009. The Custodian certifies that he responded in writing on September 1, 2009 denying access to the requested report pursuant to N.J.S.A. 47:1A-1.1., which provides that the definition of a government record shall not include “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer.”

The Custodian states that the records responsive are as follows:

Records Responsive	Records Provided	Legal Explanation for Denial of Access
Handwritten notes by EEO	No.	<u>N.J.S.A. 47:1A-1.1.</u> and Executive

Williams from the interviews completed as part of the investigation into the discrimination complaint.		Order No. 26 (McGreevey 2002)(“E.O. No. 26”), which provides that “[t]he following records shall not be considered to be government records subject to public access ... [r]ecords of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments (“Model Procedures”) in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive.” <i>Id.</i> at 4.a.
Typed transcripts of interviews conducted by EEO Williams.	No.	
Letters and memoranda from EEO Williams to those persons interviewed.	No.	
Written statements of response from two (2) individuals named in the complaint.	No.	
Copies of the Policy of Confidentiality and Prohibition Against Retaliation, signed by those interviewed.	No.	
Memo to Senior Deputy Attorney General Deborah Edwards regarding investigation.	No.	
Handwritten note to file about conversation with the Custodian’s Counsel about investigation.	No.	
E-mail from EEO Williams to the Director of the Division of Equal Employment Office/Affirmative Action regarding the investigation.	No.	

The Custodian’s Counsel submits a legal brief in support of the DOE’s position. Counsel states that the Complainant’s OPRA request sought records relating to a discrimination and sexual harassment complaint filed with the DOE’s Employment Office/Affirmative Action Office (“EEO/AA”). Counsel states that it appears that the Complainant received a letter from EEO Williams on August 6, 2009 advising that the EEO/AA’s investigation report would be completed on August 14, 2009. Counsel states that subsequent to receipt of this letter, the Complainant submitted an OPRA request for the report and accompanying records. Counsel notes that while preparing the document index for the SOI, the Custodian was informed by EEO Williams that she had not yet drafted the requested investigation report.

Counsel states that the Custodian received the Complainant’s OPRA request on August 27, 2009 and responded to the Complainant in writing on September 1, 2009 stating that access to the requested records was denied pursuant to N.J.S.A. 47:1A-1.1, which provides that:

“[a] government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA] ... information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer; or with any grievance filed by or against an individual; or in

connection with collective negotiations, including documents and statements of strategy or negotiating position.” *Id.*

Counsel states that it is the position of the Custodian that the investigation report, any handwritten notes taken by EEO Williams during interviews and all inter-/intra-agency correspondence relating to the investigation are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. because the records contain information generated by a public employer, here the DOE, in connection with a sexual harassment complaint and other grievances filed by the Complainant. Counsel states that the Complainant’s discrimination complaint alleges not only sexual harassment but also alleges that several DOE employees discriminated against her. Counsel argues that based on the foregoing, the discrimination complaint is considered a “grievance filed by an individual” as provided in OPRA.

Counsel contends that the Complainant’s arguments in the Denial of Access Complaint show the Complainant’s misunderstanding of the statutory exemption cited by the Custodian in his written response. Counsel asserts that the Complainant chose to focus on the term “sexual harassment complaint” instead of reading the exemption completely, thereby arguing that OPRA does not expressly exempt records related to discrimination complaints. Counsel argues that to the contrary, the Custodian was citing to the whole exemption and did not intend that the Complainant should assume that access to the requested records was being denied solely because they partially relate to her sexual harassment complaint.

Counsel argues that in addition to being exempt from disclosure under N.J.S.A. 47:1A-1.1., the records responsive are also exempt from disclosure pursuant to N.J.S.A. 47:1A-1 et seq. and E.O. No. 26. Counsel states that OPRA recognizes exemptions set forth under Executive Orders of the Governor. N.J.S.A. 47:1A-9.a. Counsel states that E.O. No. 26 provides that:

“[t]he following records shall not be considered to be government records subject to public access ... [r]ecords of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive.” *Id.* at 4.a.⁷

Counsel argues that exempting such records from disclosure under OPRA ensures the quality and validity of investigations of internal complaints. Counsel asserts that if people interviewed as part of an investigation knew that the public would be able to access such interviews they may not be entirely truthful with an investigator, which would hinder the investigator from obtaining all of the facts needed to analyze whether the complaint should be substantiated. Counsel asserts that the exemption also protects the privacy of all persons involved and protects them from retaliation for providing information during an investigation.

⁷ Counsel notes that the policies referred to in E.O. No. 26 can be found at *N.J.A.C. 4A:7-3.1.* and 3.2. *Ursula Cargill v. New Jersey Department of Education, 2009-256 – Findings and Recommendations of the Executive Director*

Counsel states that E.O. No. 26 upholds the guidelines in the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace, which states that investigations of harassment and discrimination complaints shall be confidential. *N.J.A.C.* 4A:7-3.1(j). Counsel states that the Model Procedures further provides that investigation reports are to be submitted to the State agency head or his or her designee, who then issues a final letter of determination to the complainant. *N.J.A.C.* 4A:7-3.2(j) and (l). Counsel notes that the Model Procedures do not provide that a complainant is entitled to receive a copy of the investigation report. Counsel argues that the Complainant should already be aware of the confidentiality of the investigation and that she is not entitled to a copy of the investigation report because she signed an “Acknowledgement of Receipt” of the Policy and Model Procedure on November 28, 2007 and a “Notice of Confidentiality and Prohibition Against Retaliation” on March 16, 2009.⁸

Counsel notes that although the Custodian maintains that the records responsive to the Complainant’s OPRA request are exempt from disclosure for the foregoing reasons, Counsel also asserts that the portion of the request seeking “any inter-/intra-office correspondence (e-mails, memos, handwritten/typed notes, letters, meeting minutes, audiotape ...) related to this matter” is invalid under OPRA as it does not identify with reasonable clarity the records being requested. Counsel states that according to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), a requestor must specifically identify a government record sought and not simply make a request requiring an open-ended search of an agency’s files; OPRA operates to make identifiable government records accessible. Counsel contends that here, the Complainant failed to identify with reasonable clarity the records sought; moreover, the breadth of this portion of the request would require an open-ended search of DOE’s files.

Counsel notes that in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 (February 2009), the Council held that the complainant’s request for “minutes, correspondence, e-mails, and phone records where members of the governing body and/or Administrator discussed ‘the checks’ as referred to in the Custodian’s letter to the Complainant ...” was invalid as it did not identify specific government records. Counsel states that the Council further held that the custodian did not unlawfully deny access to those records because the request was invalid. Counsel asserts that the Complainant’s OPRA request in this complaint is similar to the request deemed invalid by the Council in Verry; therefore, the Custodian here could not have unlawfully denied access to this portion of the Complainant’s request.

Finally, Counsel contends that based on all of the foregoing, the Custodian responded in a timely manner and properly denied access to the Complainant’s OPRA request.

⁸ The first (1st) document is a notification to employees requiring a signature that serves as an acknowledgement that they have received the most recent copy of the State Procedures and Model Procedures. The second (2nd) document is a signed acknowledgement that the complainant has been advised of and/or read the provisions of confidentiality and prohibition and understands that “this complaint investigation must be confidential ...”

September 29, 2009

The Complainant's response to the Custodian's SOI. The Complainant argues that contrary to Counsel's assertion that the Complainant honed in on the term "sexual harassment complaint," the Custodian provided this exemption as the sole basis for denying the Complainant access to the requested report. Further, the Complainant asserts that Counsel attempted to expand upon the Custodian's denial of access by including in the cited exemption matters related to grievances and hostile work environment. The Complainant argues that there is no evidence to support that the requested report is related to either a grievance or hostile work environment.

Additionally, the Complainant argues that there is no evidence that the report generated by EEO Williams was in response to a grievance: employee grievances are handled by the Human Resources Department and not the EEO/AA office. The Complainant also contends that she filed no hostile work environment complaint with EEO Williams; rather, the Complainant filed a discrimination complaint that included sexual harassment as one component. The Complainant asserts that even if Counsel were correct that the complaint dealt with a hostile work environment, this information should be redacted.

The Complainant states that all employees are required to sign the "Acknowledgement of Receipt" of the Policy and Model Procedure and "Notice of Confidentiality and Prohibition Against Retaliation" when a complaint is filed. The Complainant argues that she was complying with a personnel/administrative requirement and that her compliance with such requirement does not limit her access to the requested report under OPRA.

The Complainant contends that there is no evidence to support the Custodian's contention that the requested report meets the standards of the Model Procedures adopted by Executive Order No. 106 (Whitman 1999)("E.O. No. 106").⁹ The Complainant argues that the requested report was generated pursuant to Federal and State laws that supersede the Model Procedures.¹⁰ The Complainant argues that because neither the Custodian nor Counsel provided any evidence to support the contention that the requested report was generated in compliance with the Model Procedures, the DOE has failed to illustrate the relevance of introducing the Model Procedures into this complaint.

The Complainant asserts that part of EEO Williams's duties entail investigating discrimination complaints that are not internal in nature. The Complainant alleges that EEO Williams is obligated to refer persons to outside agencies including the Division of Civil Rights and Federal Equal Employment Opportunity Commission. The Complainant argues that the Custodian's Counsel provided no evidence indicating that the requested report was not intended to comply with both Federal and State equity laws:¹¹ equity laws

⁹ E.O. No. 26 exempts disclosure of records of complaints and investigations undertaken pursuant to the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace, which was authorized and placed in effect by E.O. No. 106.

¹⁰ The Complainant notes that this is especially true because the discrimination complaint has already been filed with an unidentified federal agency. However, there is no evidence that this fact has any bearing on the issue of access under OPRA.

¹¹ The Complainant did not specifically cite to any Federal or State laws.

necessitate that investigative reports be generated for the greater public good and not solely for internal purposes. Moreover, the Complainant asserts that Counsel was never able to establish the relationship between the requested report and E.O. No. 106, which Counsel would have needed to do in order to illustrate the relevance of introducing the Model Procedures into this complaint.

The Complainant notes that the Custodian accurately asserted that N.J.S.A. 47:1A-1.1 exempts access to information concerning sexual harassment complaints; however, handwritten notes and memoranda are government records subject to OPRA. The Complainant asserts that these records should have been provided to her with redactions. Moreover, the Complainant asserts that redaction of names or substitution of names with initials would be appropriate to protect the confidentiality of individuals providing testimonials.

Finally, the Complainant states that the Custodian identified eight (8) different records in the SOI as responsive, seven (7) of which the Complainant did not know existed prior to receipt of the SOI. The Complainant states that the following records are now at issue in this complaint:

- Handwritten notes by EEO Williams from the interviews completed as part of the investigation into the discrimination complaint.
- Typed transcripts of interviews conducted by EEO Williams.
- Letters and memoranda from EEO Williams to those persons interviewed.
- Written statements of response from two (2) individuals named in the complaint.
- Memorandum to Senior Deputy Attorney General Deborah Edwards regarding investigation.
- Handwritten note to file about conversation with the Custodian's Counsel about investigation.
- E-mail from EEO Williams to the Director of the Division of Equal Employment Office/Affirmative Action regarding the investigation.

January 14, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in need of additional information. The GRC states that the Custodian's Counsel notes in the SOI that while the original Custodian was preparing the document index for the instant complaint, he was informed by EEO Williams that the requested report had not yet been drafted. The GRC requests that EEO Williams certify to the date she drafted the investigation report requested by the Complainant.

The GRC requests that the Custodian provide EEO Williams' legal certification by close of business on January 18, 2011.

January 18, 2011

EEO Williams' legal certification. EEO Williams certifies that she is the manager of the Office of Equal Employment Opportunity/Affirmative Action and serves as EEO for DOE. EEO Williams certifies that her duties include providing management and oversight of the discrimination appeals process and conducting mediation and conflict resolution. EEO Williams certifies that she also advises the Commissioner and Deputy

Commissioner of DOE on all matters related to compliance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace.

EEO Williams certifies that she investigated the Complainant's complaint alleging discrimination on the basis of sexual orientation, color, domestic partnership status, race, religion, sex/gender and retaliation for having filed a complaint. EEO Williams certifies that the investigation report is the record sought in the Complainant's OPRA request. EEO Williams certifies that she was responsible for advising the original Custodian that the records requested by the Complainant were exempt from disclosure as information generated during a discrimination complaint.

EEO Williams certifies that following the completion of the investigation, the requested investigation report was completed on January 15, 2010 and submitted to the Commissioner of DOE.

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 ... A government record shall not include the following ... *information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual ...*" (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:

"[t]he provisions of this act ... shall not abrogate any exemption of a public record or government record from public access ... 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.

Moreover, E.O. No. 26 provides that:

“[t]he following records shall not be considered to be government records subject to public access pursuant to [OPRA]: Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive.” *Id.* at 4.a.

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.

The GRC will first address whether the Custodian unlawfully denied access to the report allegedly completed on August 14, 2009 by EEO Williams of DOE.

The Custodian here initially responded in writing within the statutorily mandated time frame denying access to the requested report pursuant to N.J.S.A. 47:1A-1.1. Subsequent to the filing of this complaint, Counsel noted in the SOI that while the Custodian was preparing the document index, he was informed by EEO Williams that she had not yet drafted the investigation report requested.

The GRC subsequently requested that EEO Williams certify to the date that she drafted the requested investigation report. EEO Williams subsequently certified on January 18, 2011 that the requested report was completed on January 15, 2010 and submitted to the Commissioner of DOE, thus no record responsive existed at the time of the Complainant’s OPRA request.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant’s request existed. The complainant did not submit any evidence to refute the custodian’s certification. The GRC determined that, because the custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Therefore, because EEO Williams certified on January 18, 2011 that the requested report was not completed until January 15, 2010 and the Complainant has submitted no credible evidence to refute EEO Williams's certification that the requested report did not exist at the time of the request, the Custodian has not unlawfully denied access to the Complainant's OPRA request for the report allegedly completed on August 14, 2009 by EEO Williams of DOE in the OPRA request pursuant to Pusterhofer, *supra*.

The Council will next address whether the portion of the Complainant's OPRA request seeking "inter-/intra-office correspondence (e-mails, memos, handwritten/typed notes, letters, meeting minutes, audiotape ...) related to this matter" is invalid under OPRA.

Counsel argued in the SOI that the portion of the Complainant's request seeking "inter-/intra-office correspondence (e-mails, memos, handwritten/typed notes, letters, meeting minutes, audiotape ...) related to this matter" is invalid pursuant to MAG, *supra*, and Bent, *supra* because this portion of the Complainant's request would require an open-ended search of DOE's files. Counsel noted that this portion of the request is similar to a request made in Verry v. v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 (February 2009) which the Council deemed to be invalid.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.*" (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹² the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."¹³

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that

¹² Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹³ As stated in Bent, *supra*.

accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

The Custodian’s Counsel argued that the portion of the Complainant’s OPRA request seeking “inter-/intra-office correspondence (e-mails, memos, handwritten/typed notes, letters, meeting minutes, audiotape ...) related to this matter” is similar to the complainant’s request in Verry, where the complainant sought “access to minutes, correspondence, e-mails and phone records where members of the governing body and/or Administrator discussed “the checks” as referred to in the Custodian’s letter to the Complainant dated February 29, 2008.” *Id.* at pg. 6. The Council held that, “Item [No.] 2 fails to identify any specific records and requires an open-ended search of the agency’s files;” therefore, the request item was deemed to be “invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, and Schuler, *supra*.” *Id.* at pg. 7.

However, the complainant’s request in Verry is not similar to the portion of the request at issue in this complaint. There, the complainant sought access to records based on a statement made in a letter, which would have forced the custodian to inspect all of his records to determine whether any referred to “the checks.”

Here, the Complainant sought access to specific records (e-mails, memos, notes, letters, etc.) related directly to her discrimination complaint, and such records were more than likely contained within the file created upon the reporting of the discrimination complaint. Moreover, the Custodian would likely not have needed to conduct research to find those records pertaining directly to the Complainant’s discrimination complaint because these records would be located within the complaint file. Thus, no research would be needed to locate those records responsive to the portion of the Complainant’s OPRA request seeking “inter-/intra-office correspondence (e-mails, memos, handwritten/typed notes, letters, meeting minutes, audiotape ...) related to this matter.” This is supported by the fact that the Custodian did identify the records responsive to this portion of the Complainant’s request and included them in the document index submitted with the SOI.

Therefore, because the Complainant identified in her OPRA request types of government records sought (e-mails, memos, notes, letters, etc.), MAG and Bent do not apply to the portion of the request seeking “inter-/intra-office correspondence (e-mails, memos, handwritten/typed notes, letters, meeting minutes, audiotape ...) related to this matter.” The Custodian’s search is not open-ended, nor does it require research, but

rather requires the Custodian to provide the records found within the complaint file, which is exactly what the Custodian did in identifying records responsive included in the document index submitted with the SOI.

Next, in order to determine whether the Custodian unlawfully denied access to the eight (8) records identified in the SOI as responsive to the Complainant's OPRA request, the GRC must first determine whether said records are considered "[r]ecords of complaints and investigations undertaken pursuant to the Model Procedures in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive" pursuant to E.O. No. 26.

The Complainant argued in the Denial of Access Complaint that the Custodian unlawfully denied access to the requested report based solely on the sexual harassment portion of the complaint. The Complainant argued that the Custodian should have provided access to a redacted version of the requested report instead of denying access outright.

In the SOI, the Custodian argued that the eight (8) records identified as responsive are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and E.O. No. 26. In a legal brief submitted in support of the DOE, Custodian's Counsel expanded on the Custodian's denial of access by adding that OPRA excludes from the definition of a government record "information generated by or on behalf of public employers or public employees in connection ... any grievance filed by or against an individual." N.J.S.A. 47:1A-1.1. Counsel acknowledged that the complaint involved sexual harassment, but also that the discrimination portion of the complaint can be reasonably classified as a "grievance" under OPRA.

Further, Counsel argued that E.O. No. 26 upholds the confidentiality of the requested records provided for in the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace, which states that investigations of harassment and discrimination complaints shall be confidential. *N.J.A.C.* 4A:7-3.1(j). Counsel contended that the Complainant should have been aware of the confidentiality of the investigation and that she is not entitled to a copy of the investigation report because she signed an "Acknowledgement of Receipt" of the Policy and Model Procedure on November 28, 2007 and a "Notice of Confidentiality and Prohibition Against Retaliation" on March 16, 2009.

The Complainant subsequently disputed the DOE's expansion of its reasons for denying access to the requested report. The Complainant argued that her complaint involved discrimination and there was no evidence to indicate that the complaint was filed based on a grievance or hostile work environment. Additionally, the Complainant asserted that Counsel provided no evidence supporting the contention that the requested report was generated in compliance with the Model Procedures. The Complainant further asserted that the report should have been provided with redactions.

The State's EEO/AA regulations can be found at *N.J.A.C.* 4A:7-1 et seq. A State agency is charged with a duty to "appoint at least one person as the [EEO/AA] who shall

report to the State agency head ...” *N.J.A.C. 4A:7-2.3(b)(2)*. A State agency is also required to “[a]dopt and implement the [Model Procedures] ...” *N.J.A.C. 4A:7-2.3(b)(8)*.

The State’s Policy Prohibiting Discrimination in the Workplace is set forth in *N.J.A.C. 4A:7-3.1* and *3.2*. Specifically, *N.J.A.C. 4A:7-3.1* identifies those categories for which discrimination will not be tolerated to include “... race, ... sex/gender ... religion, ... sexual orientation ...” *Id.* at (a). The State’s policy also prohibits “sexual (gender-based) harassment of any kind, including hostile work environment harassment, quid pro quo harassment, or same-sex categories ...” *Id.* at (c). Further, the State’s policy provides that:

“(d) Any employee who believes that she or he has been subjected to any form of prohibited discrimination/harassment ... is encouraged to promptly report the incident(s) to a supervisor or directly to the State agency’s [EEO/AA] Officer or to any person designated by the State agency to receive workplace discrimination complaints.

(g) Each State agency shall follow the State ... [Model Procedures] with regard to reporting, investigating, and where appropriate, remediating claims of discrimination/harassment. *See N.J.A.C. 4A:7-3.2.” Id.*

The Model Procedures at *N.J.A.C. 4A:7-3.2* provide that each State agency is responsible for implementing a uniform procedure for reporting, investigation and appeals process consistent with the State’s policy. This regulation also provides that:

“(a) All employees (and applicants for employment) have the right and are encouraged to immediately report suspected violations of the State Policy Prohibiting Discrimination in the Workplace, *N.J.A.C. 4A:7-3.1*.

(g) Each State agency shall maintain a written record of the discrimination/harassment complaints received. Written records shall be maintained as confidential records to the extent practicable and appropriate.” *N.J.A.C. 4A:7-3.2*.

A combined reading of the State’s EEO/AA regulations found at *N.J.A.C. 4A:7-1* et seq. supports the conclusion that State employees filing a complaint regarding either discrimination or sexual harassment as defined in *N.J.A.C. 4A:7-3.1* do so in accordance with the Model Procedure provided in *N.J.A.C. 4A:7-3.2*. Thus, employee complaints, whether for discrimination based on any of the categories identified *N.J.A.C. 4A:7-3.1* or sexual harassment should be maintained as confidential records to the extent practicable.

The evidence of record here supports the conclusion that the records requested by the Complainant would fall under the Model Procedures. Specifically, the Complainant is a State employee at DOE who filed a complaint regarding discrimination and sexual harassment in the workplace as defined in *N.J.A.C. 4A:7-3.1*. This complaint was investigated by DOE’s EEO/AA officer, as is encouraged in *N.J.A.C. 4A:7-3.1(d)*. Further, the Complainant signed a “Notice of Confidentiality and Prohibition Against Retaliation,” indicating that the Complainant was aware that the complaint was being

investigated based on the provisions of the State Policy Prohibiting Discrimination in the Workplace and that all related complaints and investigations would be handled on a confidential basis. The evidence of record thus supports the conclusion that the records at issue here are “[r]ecords of complaints and investigations undertaken pursuant to the Model Procedures in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive” pursuant to E.O. No. 26.

Therefore, based on all of the foregoing evidence, any records created as part of the Complainant’s discrimination complaint are considered “[r]ecords of complaints and investigations undertaken pursuant to the Model Procedures in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive” pursuant to E.O. No. 26. And, as such the records are confidential pursuant to E.O. No. 26.

The GRC now turns to whether the Custodian unlawfully denied access to the eight (8) records identified in the SOI as responsive to the Complainant’s OPRA request.

The Custodian initially responded to the Complainant’s OPRA request in a timely manner denying access to the requested records pursuant to N.J.S.A. 47:1A-1.1. In said response, the Custodian stated that the definition of a government record shall not include “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer.” In the SOI, the Custodian further cited to E.O. No. 26. Counsel also argued that the Custodian was citing to the entire portion of N.J.S.A. 47:1A-1.1, exempting access to “... information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer; or with any grievance filed by or against an individual” and did not intend that the Complainant should assume that the records were being denied solely because they partially relate to her sexual harassment complaint.

OPRA recognizes exemptions found in “... 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*,” (Emphasis added.) N.J.S.A. 47:1A-9.a. As previously discussed, E.O. No. 26 applies to the records responsive because they were created pursuant to the Model Procedures in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace. As such, those records responsive to the Complainant’s OPRA request are exempt from disclosure.

Therefore, because the eight (8) records responsive to the Complainant’s OPRA request are exempt from access pursuant to N.J.S.A. 47:1A-9.a and E.O. No. 26, the Custodian has lawfully denied access to the requested records. Additionally, the Custodian has borne his burden pursuant to N.J.S.A. 47:1A-6 of proving a lawful denial of access.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because Equal Employment Officer Williams certified on January 18, 2011 that the requested report was not completed until January 15, 2010 and the Complainant has submitted no credible evidence to refute Equal Employment Officer Williams's certification that the requested report did not exist at the time of the request, the Custodian has not unlawfully denied access to the Complainant's OPRA request for the report allegedly completed on August 14, 2009 by Equal Employment Officer Williams of the New Jersey Department of Education in the OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the Complainant identifies types of government records sought (e-mails, memos, notes, letters, etc.), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) do not apply to the request portion of the request seeking "inter-/intra-office correspondence (e-mails, memos, handwritten/typed notes, letters, meeting minutes, audiotape ...) related to this matter." The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to provide the records within the complaint file, which is exactly what the Custodian did in identifying records responsive included in the document index submitted with the Statement of Information.
3. Any records created as part of the Complainant's discrimination complaint are considered "[r]ecords of complaints and investigations undertaken pursuant to the Model Procedures in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive" pursuant to Executive Order No. 26 (McGreevey 2002). And, as such the records are confidential pursuant to Executive Order No. 26 (McGreevey 2002).
4. Because the eight (8) records responsive to the Complainant's OPRA request are exempt from access pursuant to N.J.S.A. 47:1A-9.a. and Executive Order No. 26 (McGreevey 2002), the Custodian has lawfully denied access to the requested records. Additionally, the Custodian has borne his burden pursuant to N.J.S.A. 47:1A-6 of proving a lawful denial of access.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 22, 2011