



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

Jason Blum
Complainant

Complaint No. 2010-109

v.

New Jersey Department of Law & Public Safety,
New Jersey State Police
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the September 13, 2010 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 the Custodian has certified that no records responsive to the Complainant’s OPRA request exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
2. Because the evidence of record indicates that no records responsive to the Complainant’s OPRA request exist, the Council declines to address the issue of whether such records, if they existed, would be exempt from disclosure under OPRA as personnel records pursuant to 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 26th Day of October, 2010

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: November 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Jason Blum¹
Complainant**

GRC Complaint No. 2010-109

v.

**New Jersey Department of Law & Public Safety,
New Jersey State Police²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Background investigations conducted by the New Jersey State Police for the 114th and 115th recruit class.
2. Any and all documentation pertaining to Jason Blum's application with the New Jersey State Police.

Request Made: May 4, 2010

Response Made: May 6, 2010

Custodian: Christopher Nunziato

GRC Complaint Filed: May 25, 2010³

Background

May 4, 2010

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.

May 6, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested record is denied because the records requested are considered personnel records and are exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian also states that these records are exempt from disclosure pursuant to Executive Order No. 9 (Hughes, 1963) and Executive Order No. 11 (Byrne, 1974). Lastly, the Custodian states that the Complainant may obtain certain records from his personnel folder by forwarding a written request stating a specific reason for these documents to Division of State Police, Human Resource Management Bureau.

¹ No legal representation listed on record.

² Represented by DAG Jennifer Hsia, on behalf of the NJ Attorney General.

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

May 25, 2010

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

- Complainant’s OPRA request dated May 4, 2010
- Letter from the Custodian to the Complainant dated May 6, 2010

The Complainant states that he seeks his NJSP background investigation from the 114th/115th NJSP Academy classes. The Complainant argues that an accommodation should be made for the disclosure of these records because the requested records are not classified or secretive in nature, and pertain only to him 15-17 years ago. The Complainant also argues that that the United States Freedom of Information Act supersedes OPRA. In addition, the Complainant argues that he wishes to view the records on file for thoroughness, completeness, honesty and integrity of content. Lastly, the Complainant asserts that a significant amount of time has passed since the investigation and the non-criminal/non-proprietary nature of his request should mitigate any anxiety the Custodian has in releasing this information.

The Complainant agrees to mediate this complaint.

May 26, 2010

Offer of Mediation sent to the Custodian.

June 9, 2010

The Custodian does not agree to mediate this complaint.

June 9, 2010

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

June 14, 2010

E-mail from Custodian’s Counsel to the GRC. Counsel requests an extension of time to complete the SOI.

June 15, 2010

E-mail from the GRC to Custodian’s Counsel. The GRC grants a five (5) business day extension to complete the SOI.

June 21, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated May 4, 2010.
- Letter from the Custodian to the Complainant dated May 8, 2010
- State General Records Retention Schedule

The Custodian certifies that he conducted a thorough search of the Applicant File Storage Area but no responsive file was located. The Custodian certifies that the Complainant’s file might have been destroyed because a three (3) year record retention

schedule applies to these types of records pursuant to the Division of Archives and Records Management (DARM).

Additionally, the Custodian argues that disclosure of these records should be denied because they are personnel records. Furthermore, the Custodian argues that paragraph 4 of Executive Order No. 21 provides

“in light of the fact that State departments and agencies have proposed rules exempting certain government records from disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, State agencies are hereby directed to handle all government records requests in a manner proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order...”

The Custodian also argues that paragraph 6 of Executive Order No. 26 extended Executive Order No. 21. The Custodian asserts that the Department of Law and Public Safety’s proposed regulations state, “records concerning background investigations or evaluations for public employment, appointment to public office or licensing, whether open, closed or inactive...” are confidential pursuant to *N.J.A.C. 13:1E-3.2(a)(3)*, PRN 2002-2227, July 1, 2002. The Custodian also argues that these regulations are still effective regardless of the Appellate Division’s decision in *Slaughter v. Government Records Council*, 413 *N.J. Super.* 544 (App. Div. 2010), because the Court allowed the regulations to remain effective until November 5, 2010.

Furthermore, the Custodian argues that the applicant’s file should not be released because it contains highly confidential information. The Custodian argues that the “four-way” investigation principle used to determine whether these records should be released was explained in *Nero v. Hyland*, 76 *N.J.* 213, 224 (1978). The Custodian argues that in *Nero supra*, the Plaintiff was a prospective gubernatorial appointee who was not appointed because of information revealed in the four-way investigation. Furthermore, the Custodian argues that the Court decided not to release the information obtained in a State Police investigation because it would hinder future investigative techniques; the Custodian asserts that the Court held that the interest in confidentiality relates to the investigative process and less about the investigative results. The Custodian argues that although a four-way investigation was not completed for New Jersey State Police applicants, the same principles should apply. The Custodian argues that the State Police have a vital interest in obtaining accurate and truthful information and the public’s interest is in the State Police’s ability to make effective decisions.

Lastly, the Custodian argues that confidentiality of the investigation file of prospective NJSP applicants allows those candidates being interviewed to be blunt and upfront throughout the investigative process without fear that their statements will be exposed.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA 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.

The Complainant made an OPRA request for his New Jersey State Police background investigation from the 114th/115th New Jersey State Police Academy classes, as well as any and all documentation pertaining to his application with the New Jersey State Police. The Custodian responded on the first (1st) business day following receipt of Complainant’s OPRA request. The Custodian denied access to the requested records, stating that they are considered personnel records exempt from disclosure under OPRA and Executive Orders. However, the Custodian certified in the SOI that no records responsive to the request exist.

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 responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed. The GRC held the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

In the matter before the Council, the Custodian certified in the SOI that after a thorough search of the storage area of where the Complainant's file would normally be located, no records responsive to the Complainant's OPRA request were found. Additionally, the Custodian certifies that the Complainant is seeking records regarding his application to the NJSP, and the evidence of record indicates that such records date from 15-17 years ago; the Custodian has certified that DARM's retention requirement for the requested records is three (3) years.⁴

Therefore, because the Custodian has certified that no records responsive to the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Because the evidence of record indicates that no records responsive to the Complainant's OPRA request exist, the Council declines to address the issue of whether such records, if they existed, would be exempt from disclosure under OPRA as personnel records pursuant to N.J.S.A. 47:1A-10.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian has certified that no records responsive to the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
2. Because the evidence of record indicates that no records responsive to the Complainant's OPRA request exist, the Council declines to address the issue of whether such records, if they existed, would be exempt from disclosure under OPRA as personnel records pursuant to N.J.S.A. 47:1A-10.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 13, 2010

⁴ Based on the time frame of the records requested and the applicable three (3) year record retention schedule approved by NJDARM, it is likely that the requested records have been destroyed in accordance with said schedule.