



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

David Herron
Complainant

Complaint No. 2011-363

v.

NJ Department of Education
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian has borne her burden of proving a lawful denial of access to the requested records because she provided the Complainant with the specific reasons for her inability to fulfill the request and the Complainant provided no clarification. *See Moore v. Township of Old Bridge*, GRC Complaint No. 2005-80 (August 2005). Further, the requested records are exempt from public access pursuant to N.J.S.A. 47:1A-9 and N.J.S.A. 18A:6-7.4 as criminal history record information which must be kept confidential by the Commissioner of Education.

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 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 20, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**David Herron¹
Complainant**

GRC Complaint No. 2011-363

v.

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

Records Relevant to Complaint: Copies of criminal history background check forms for the following individuals:

- Steven Bell
- Michael Chiles, Jr.
- Anthony Dalbo
- Robert Denson
- Benjamin Brennan
- Laura Cella
- Charles Feiner
- Charles R. Miller
- Peter Turnamian, Jr.
- Cassandra Clark (Yarborough)

Request Made: November 21, 2011

Response Made: November 23, 2011

Custodian: Maria Casale

GRC Complaint Filed: November 23, 2011³

Background

November 21, 2011

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.

¹ No legal representation listed on record.

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

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

November 21, 2011

E-mail from Carl Carabelli of the Criminal History Review Unit to Louis A. Schopfer, Jr., of the Office of Fiscal Accountability and Compliance. Mr. Carabelli states that there are insufficient identifiers to allow him to respond to the OPRA request.

November 22, 2011

E-mail from Custodian to Mr. Carabelli. The Custodian states that she is checking on the OPRA request.

November 23, 2011

E-mail from Mr. Schopfer to Custodian. Mr. Schopfer states that there is insufficient information to provide the requested records.

November 23, 2011

E-mail from Mr. Carabelli to the Custodian. Mr. Carabelli states that there is insufficient information to respond to the request. Mr. Carabelli also states that he cannot confirm that the individual in the database is the same as the OPRA request without additional information.

November 23, 2011

E-mail from Custodian to Mr. Carabelli. The Custodian questions what additional information is needed from the requestor.

November 23, 2011

E-mail from Mr. Carabelli to the Custodian. Mr. Carabelli states that he needs dates of birth, social security numbers, or at least the last four (4) digits, addresses, or any other identifiers.

November 23, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the second (2nd) business day following receipt of such request.⁴ The Custodian states that access to the requested records is denied because the Criminal History Unit cannot identify the individuals without an additional identifier such as a date of birth, social security number or last four (4) digits of a social security number.

November 23, 2011

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

- Complainant's OPRA request dated November 21, 2011
- Custodian's response to the Complainant's request dated November 23, 2011

The Complainant states that he submitted his OPRA request on November 21, 2011 for various criminal background check forms and the Custodian denied access to said request on November 23, 2011.

⁴ The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on November 21, 2011

The Complainant does not agree to mediate this complaint.

November 28, 2011

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

December 5, 2011

E-mail from Custodian to GRC. The Custodian requests an extension of time to submit her completed SOI.

December 6, 2011

E-mail from GRC to Custodian. The GRC grants the Custodian an extension of time until December 13, 2011 to submit the completed SOI.

December 13, 2011

Custodian’s SOI with the following attachments ⁵:

- Complainant’s OPRA request dated November 21, 2011
- E-mail from Carl Carabelli of the Criminal History Review Unit to Louis A. Schopfer, Jr. of the Office of Fiscal Accountability and Compliance dated November 21, 2011
- E-mail from Mr. Schopfer to Custodian dated November 23, 2011
- E-mail from Custodian to Mr. Carabelli dated November 23, 2011
- E-mail from Mr. Carabelli to the Custodian dated November 23, 2011
- E-mail from Custodian to Mr. Carabelli dated November 23, 2011
- E-mail from Mr. Carabelli to the Custodian dated November 23, 2011
- Custodian’s response to the Complainant’s request dated November 23, 2011

The Custodian certifies that she received the Complainant’s OPRA request on November 21, 2011 and forwarded said request to the Criminal History Unit on said date. The Custodian certifies that she received an e-mail from the Criminal History Unit on November 23, 2011 indicating that the OPRA request provides insufficient information to locate responsive records. The Custodian certifies that, based on information she received from the Criminal History Unit in response to another OPRA request submitted by the Complainant, the Custodian denied the request on November 23, 2011 because in order to fulfill the Complainant’s request, the Complainant must provide dates of birth, social security numbers, or the last four (4) digits of social security numbers for the individuals named in his request.

Additionally, the Custodian contends that the criminal history background check forms are confidential pursuant to N.J.S.A. 18A:6-7.4 and are thus exempt from public access pursuant to N.J.S.A. 47:1A-9.

⁵ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

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.

Further, OPRA states that it:

“... shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by...statute...which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” N.J.S.A. 47:1A-9.b.

New Jersey’s Education Statute provides that:

“The Commissioner of Education may maintain the criminal record and application documents on a candidate for no longer than three years from the date of determination as to the candidate's qualification or disqualification for employment with an employer. The three-year retention limitation shall not apply to statistical data on crimes and any other offenses or an ongoing list of candidates who are qualified or disqualified. *All documents submitted by a candidate and all criminal history record information shall be maintained by the commissioner in a confidential manner.*” (Emphasis added). N.J.S.A. 18A:6-7.4

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.

Further, a custodian’s response to an OPRA request must either grant access, deny access, seek clarification or request an extension of time. *See* Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In this instant complaint, the Custodian certified that she received the Complainant’s OPRA request on November 21, 2011. The Custodian also certified that she denied the request on November 23, 2011 because in order to fulfill the Complainant’s request, the Complainant must provide dates of birth, social security numbers or the last four (4) digits of social security numbers for the individuals named in his request. Moreover, in the Custodian’s SOI, the Custodian asserted that the requested records are exempt from public access pursuant to N.J.S.A. 47:1A-9 and N.J.S.A. 18A:6-7.4. The Complainant did not provide any additional information regarding his OPRA request to the Custodian, nor did the Complainant make any arguments in his Denial of Access Complaint other than stating that the Custodian denied him access to the requested records.

In Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005), the custodian sought clarification of the complainant’s OPRA request. The complainant never provided clarification to the custodian. As such, the Council held that:

“the Custodian has met the burden of proving that the denial of access was proper under OPRA since she provided the Complainant with the specific reasons for her inability to fulfill the request and the Complainant provided no clarification.”

The Council’s holding in Moore is applicable in this instant matter. The Custodian provided the Complainant with the specific reasons for her inability to fulfill the request, namely that the Complainant must provide dates of birth, social security numbers or the last four (4) digits of social security numbers for the individuals named in his request. The Complainant failed to provide any such information to the Custodian, but rather immediately filed this instant Denial of Access Complaint.

Additionally, the Custodian argues in her SOI that the requested records are also exempt from public access pursuant to N.J.S.A. 47:1A-9 and N.J.S.A. 18A:6-7.4. OPRA at N.J.S.A. 47:1A-9.b. upholds exemptions contained in other State statutes. N.J.S.A. 18A:6-7.4 is a State statute which mandates that “[a]ll documents submitted by a candidate and all criminal history record information shall be maintained by the commissioner [of the NJ Department of Education] in a confidential manner.” Because the Complainant sought access to criminal history background check forms maintained by the NJ Department of Education, N.J.S.A. 18A:6-7.4 is applicable and said records are confidential.

Therefore, the Custodian has borne her burden of proving a lawful denial of access to the requested records because she provided the Complainant with the specific

reasons for her inability to fulfill the request and the Complainant provided no clarification. See Moore, *supra*. Further, the requested records are exempt from public access pursuant to N.J.S.A. 47:1A-9 and N.J.S.A. 18A:6-7.4 as criminal history record information which must be kept confidential by the Commissioner of Education.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proving a lawful denial of access to the requested records because she provided the Complainant with the specific reasons for her inability to fulfill the request and the Complainant provided no clarification. See Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005). Further, the requested records are exempt from public access pursuant to N.J.S.A. 47:1A-9 and N.J.S.A. 18A:6-7.4 as criminal history record information which must be kept confidential by the Commissioner of Education.

Prepared By: Dara L. Barry
Communications Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2011⁶

⁶ This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.