



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 28, 2014 Government Records Council Meeting

Kaitlyn Schechter
Complainant

Complaint No. 2013-174

v.

Thomas Edison State College
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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 the potential for unsolicited contact of educators listed in an attendance record compiled and maintained by the College for its National Institute on the Assessment of Adult Learning warrants non-disclosure of the attendance list. Thus, the Custodian did not unlawfully deny access to the record pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy. N.J.S.A. 47:1A-6; Faulkner v. Rutgers Univ., GRC Complaint No. 2007-149 (May 28, 2008).

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 28th Day of January, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**Kaitlyn Schechter¹
Complainant**

GRC Complaint No. 2013-174

v.

**Thomas Edison State College²
Custodial Agency**

Records Relevant to Complaint: Copies of a reservation/attendance/ mailing list for the Thomas Edison State College National Institute on the Assessment of Adult Learning annual conference for 2011, 2012, and 2013.³

Custodian of Record: Ann Marie Senior, Ph.D.
Request Received by Custodian: May 23, 2013
Response Made by Custodian: June 4, 2013
GRC Complaint Received: June 7, 2013

Background⁴

Request and Response:

On May 23, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 4, 2013, seven (7) business days later, the Custodian responded to the Complainant via email that her request was denied pursuant to N.J.S.A. 47:1A-1.

Denial of Access Complaint:

On June 7, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the Custodian denied her request in error. In support of her position, the Complainant cites Burnett v. Cnty. of Bergen, 198 N.J. 408, 437, 968 A.2d 1151 (2009), wherein the New Jersey Supreme Court held that in the

¹ No legal representation listed on record.

² Represented by Barbara M. Kleva, Esq. (Trenton, NJ).

³ The Complainant had requested other documents in her OPRA request but are not at issue in this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

disclosure of public documents containing personal identifiers such as names, address, marital status, and social security numbers (“SSNs”), only the SSNs needed to be redacted.

Statement of Information:

On July 3, 2013, the Custodian submitted a certified Statement of Information (“SOI”). The Custodian states that records sought still exist. The Custodian however certifies that she denied the records under the privacy clause pursuant to N.J.S.A. 47:1A-1. Specifically, the Custodian argues that pursuant to N.J.S.A. 47:1A-1, a public entity has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy. Thus, the Custodian argues that releasing the names and addresses of citizens who attended or planned to attend the conference referenced in the OPRA request would violate their expectation of privacy.

In addition, the Custodian certifies that the record was denied on the grounds that a reservation/attendance/ mailing list for the Thomas Edison State College’s (“College”) National Institute on the Assessment of Adult Learning (“Institute”) is proprietary information and is therefore not a government record as defined under N.J.S.A. 47:1A-1.1.

In addition, the Custodian states that the College entered into a licensing agreement (“Agreement”) with an outside resource to obtain and use lists of educators, which included the educators’ names and addresses. The Custodian further argues that the Agreement contractually prohibits the College from disclosing the contact lists to outside parties.

Next, the Custodian argues that courts have found that the release of home addresses, “implicate privacy interests.” Doe v. Portiz, 142 N.J. 1, 82 (1995). The Custodian claims that the Complainant plans to contact the educators listed in the responsive record regarding a boycott of the conference the Complainant allegedly coordinated. The Custodian states that the Complainant wished to boycott the conference due to a disagreement on the conference’s choice of venue. When told that the venue could not be changed, the Complainant contacted one of the keynote speakers of the conference. Subsequently, the speaker cancelled her appearance at the conference. The Custodian cites these previous acts as evidence of the Complainant’s intent to make unsolicited contact with the educators listed in the record. She argues that there are no safeguards to prevent the Complainant from doing what she pleases with the requested record, and that the Complainant has no need for the home addresses of the educators beyond furthering her policy position through unsolicited contact.

The Custodian further argues that the requested record is “proprietary” and excluded from the definition as a government record pursuant to N.J.S.A. 47:1A-1.1, and such records are deemed confidential. CWA, ALF-CIO, NJEA v. McCormac, 417 N.J. Super. 412, 428 (Law. Div. 2008). The Custodian explains that the list the College obtained under license is proprietary and cannot be disclosed because the College utilized its own resources to compile, maintain, and update the list. Disclosure, according to the Custodian, would allow the Complainant and other parties to benefit from the College’s time and effort. Finally, the Custodian argues that disclosure

would undermine the College's education mission, and would be harmful to the public interest in higher education.

Additional Submissions:

On November 12, 2013, the GRC requested both parties complete a balancing test questionnaire. To date, the Complainant has not responded to the GRC's inquiry. On November 18, 2013, the Custodian submitted her questionnaire with the following responses:

1. The type of record requested.

Response: A reservation/attendance/ mailing list for the Thomas Edison State College National Institute on the Assessment of Adult Learning annual conference for 2011, 2012, and 2013.

2. The information the requested records do or might contain.

Response: The lists of attendees and mailing lists contain names and addresses of educators from around this country and around the world who have shown an academic interest in the College's National Institute.

3. The potential harm in any subsequent non-consensual disclosure of the requested records.

Response: If the College were directed to disclose the licensed mailing list purchased from Higher Education Publications, Inc., the College would be in breach of contract and subject to damages. In addition to the obvious proprietary nature of the licensed lists, the College has a proprietary interest in lists that it has compiled over the years and has invested considerable resources into their development. OPRA exempts proprietary records from disclosure.

In addition, the College charges the educators for their attendance and membership. If its ability to attract a sufficient number of educators is diminished, the College asserts that the future of the conference would be jeopardized. Disclosing the names and addresses of educators so that competing programs may employ them for their own use, would undoubtedly harm the Institute, and impede the College's educational mission.

4. The injury from disclosure to the relationship in which the requested record was generated.

Response: The College's mission is higher education, and the Institute is an important component part of that mission. Educators expect that their names and addresses will not be publicly disclosed. If educators knew that providing their names and addresses to the College would result in public disclosure, they would be less likely to do so. Educators expect to be put on a mailing list for an academic event, and that the College will not share the requested information.

The College states that the Complainant in this case has already shown that her purpose in obtaining the records is to make unsolicited contact in furtherance of the goals of Unite Here, a union organization. Marc Singer, the Vice Provost at the Center for the Assessment of Learning at the College states in his Certification that the Complainant made an unexpected visit to him prior to the conference and told him that her organization was organizing a boycott of the Revel Casino, the venue of the conference. Certification of Marc Singer, dated July 2, 2013, ¶¶6-7. One of the scheduled keynote speakers later advised Mr. Singer that the Complainant contacted her about the boycott. Id. at ¶9. Mr. Singer then certifies that the speaker cancelled her appearance because of the boycott. Id. at ¶10. The College asserts that this is evidence that the Complainant’s purpose in obtaining names and addresses of the educators is to make unsolicited contact.

5. The adequacy of safeguards to prevent unauthorized disclosure.

Response: The College does not make public or share the names and addresses of the educators on the lists requested. The Custodian states that if the educators’ names and addresses were disclosed to the Complainant, there are absolutely no safeguards preventing her from using the lists for unsolicited contact and intimidation.

6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.

Response: There is no statutory mandate, articulated public policy or other recognized public interest militating toward access. Rather, a legal analysis in accordance with Doe v. Poritz, 142 N.J. 1 (1995), shows that public policy strongly favors denying the request for disclosure.

Analysis

Unlawful Denial of Access

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.

OPRA provides that “a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy...” N.J.S.A. 47:1A-1. As privacy interests are at issue here, the GRC asked both the Complainant and the Custodian to respond to balancing test questions so the Council could employ the common law balancing test established by the New Jersey Supreme Court in Doe, 142 N.J. at 88. The New Jersey Supreme Court has explained that N.J.S.A. 47:1A-1’s safeguard against disclosure of personal information is substantive and requires “a balancing test that weighs both the public’s

strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy.” Burnett, 198 N.J. at 422-23, 427.

When “balanc[ing] OPRA’s interests in privacy and access” courts consider the following factors:

(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

Id. at 427 (quoting Doe, 142 N.J. at 88).

This test will enable the Council to weigh the College’s asserted need to protect the privacy of individuals against the Complainant’s asserted need to access the requested records.

A. Courts Have Required that Certain Personal Information Be Redacted From Records Released In Response to an OPRA Request Where OPRA’s Interest in Privacy Outweighs the Interest in Access

In Burnett, a commercial business requested approximately eight million pages of land title records extending over a twenty-two year period; the records contained names, addresses, social security numbers, and signatures of numerous individuals. Burnett, 198 N.J. at 418. After balancing the seven factors, the Court “[found] that the twin aims of public access and protection of personal information weigh in favor of redacting [social security numbers] from the requested records before releasing them” because “[i]n that way, disclosure would not violate the reasonable expectation of privacy citizens have in their personal information.” Id. at 437. The Court emphasized that the “balance [was] heavily influenced by concerns about the bulk sale and disclosure of a large amount of social security numbers—which [the commercial business] admittedly does not need, and which are not an essential part of the records sought.” Id. at 414. Moreover, “the requested records [were] not related to OPRA’s core concern of transparency in government.” Ibid.

Similarly, the Appellate Division concluded under Burnett that the identity of an individual who attempted suicide by jumping off a bridge should not be disclosed in an OPRA request seeking police and fire department reports about the incident. *See also Alfano v. Margate City*, Docket No. A-3797-11 (App. Div. September 25, 2012) (slip op. at 1-2, 8-10), <http://njlaw.rutgers.edu/collections/courts/>.

B. Courts Have Not Required Redaction of Certain Personal Information from Records Released in Response to an OPRA Request Where OPRA's Interest in Access Outweighs the Interest in Privacy

In contrast, the Appellate Division has affirmed a trial court's determination that the identity of a person who called 911 complaining about illegal parking blocking his driveway should not be redacted when the owner of the car filed an OPRA request seeking a copy of the 911 call. Ponce v. Town of W. New York, Docket No. A-3475-10 (App. Div. February 27, 2013) (slip op. at 3-4, 10), <http://njlaw.rutgers.edu/collections/courts/>. The trial judge found that:

The type of information requested by [the car owner] is not particularly sensitive or confidential. When the caller made a complaint [to] the police department that someone was blocking his or her driveway he or she could reasonably expect that his name may be revealed in connection with the complaint. There has not been evidence presented to suggest that revealing the caller's identity or the call itself would result in any serious harm or confrontation between the caller and the - - [sic] and the [car owner]. It may in fact be helpful for the [car owner] to know the information in order to challenge his parking violation. [Id. at 7-8.]

The Appellate Division emphasized that the City's arguments against disclosure of the caller's identity were "predicated on the notion that if [the car owner] learns the identity of his accuser he will retaliate in some fashion, thus discouraging the average person from reporting incidents to the police via the 911 emergency system." Id. at 9. However, the City "[had] not presented any evidence of past hostility between these two individuals" and the court emphasized that "[a]bsent compelling reasons, which are conspicuously absent in this record, few can argue that in a free society an accused is not entitled to know the identity of his accuser." Id. at 9-10. Therefore, the court concluded that "[n]one of the concerns in favor of confidentiality articulated by the Court in Burnett, 198 N.J. at 427, [were] applicable" and affirmed the trial court's decision ordering disclosure of the caller's identity. Ponce, A-3475-10 at 10.

Similarly, the Appellate Division has concluded that addresses should not be redacted from a mailing list of self-identified "senior citizens" compiled by a county to contact those individuals through a newsletter. Renna v. Cnty. of Union, Docket No. A-1811-10 (App. Div. February 17, 2012) (slip op. at 1, 11-12), <http://njlaw.rutgers.edu/collections/courts/>. A website operator filed an OPRA request seeking access to that mailing list so that she could disseminate information in furtherance of non-profit activities related to monitoring county government. Id. at 2. The court applied the Burnett factors. Id. at 11. The first two factors weighed in favor of disclosure, because "the intent and spirit of OPRA are to maximize public awareness of governmental matters," and "the interest in the dissemination of information, even that unrelated to senior matters, outweighs a perceived notion of expectation of privacy." Id. at 12.

Furthermore, the Council has held that the names and town of residence of nighttime parking permit holders should not be redacted when a local citizen wished to contact them on

joining a political action committee regarding parking issues. Levitt v. Montclair Parking Auth. (Essex), GRC Complaint No. 2012-150 (August 27, 2013). The Council found that the Complainant's expressed intent to contact the permit holders weighed heavily against disclosure their addresses. Id. However, the Council found that in promoting a fair balance between minimizing unsolicited contact and maximizing public knowledge of public affairs, disclosure of the permit holders' names and town of residence was warranted. Id.

C. Application of the Burnett Factors to Balance OPRA's Interests in Privacy and Access in the Present Matter Dictates that the Responsive Attendance List Not Be Disclosed

The present matter requires application of the Burnett factors to balance OPRA's dual interests in privacy and access as applied to the release of names and addresses of persons who have attended or registered to attend a conference sponsored by the College.

i. *Burnett Factors One and Two*

The first and second Burnett factors require consideration of the records requested, and the type of information contained therein, respectively. Regarding the type of records, the Complainant requests a mailing, attendance, and/or registration list for the Thomas Edison State College Nation Institute on the Assessment of Adult Learning annual conference for 2011, 2012, and 2013.

The types of information at issue are names and addresses of educators contained in those lists.

ii. *Burnett Factors Three and Four*

The third and fourth Burnett factors address the potential for harm in subsequent nonconsensual disclosure of the names and addresses, and the injury from disclosure to the relationship in which the names and addresses were generated, respectively.

The Custodian asserted that the Complainant could use the information to directly contact the educators and attempt to lobby for their support for the union the Complainant represents. The Custodian further asserted that the College's primary concern is protection of those educators and their reasonable expectation of privacy. The Custodian also asserted that disclosure could deter future educators from joining and participating in the College's conference in the future, thus hindering the College's educational mission. In addition, the Complainant did not respond to the GRC's balancing test questionnaire, nor did she provide a rebuttal to the Custodian's responses or certifications that she already made unsolicited contact with a party involved in the conference.

There are significant concerns about the potential harm from disclosure of the attendance list in this matter. In light of the substantive evidence provided by the Custodian, coupled with the lack of any response from the Complainant, the GRC finds that the College's privacy

interests and potential harm and injury resulting from disclosure outweigh the Complainant's need for access.

iii. *Burnett Factor Five*

The fifth Burnett factor requires consideration of the adequacy of safeguards to prevent unauthorized disclosure of the attendance list. The Custodian asserts that they do not make public or share the names and addresses of the educators on the lists requested. The Custodian asserts that the Complainant appears to have a single narrow interest in obtaining the lists and has already made unsolicited contact with individuals connected with the conference to implement a boycott of the Revel Casino. The Custodian claims that if the educators' names and addresses were provided to the Complainant, there are absolutely no safeguards preventing her from using the lists for unsolicited contact. The Complainant did not submit a balancing test questionnaire and does not state whether she intends to redistribute the list. Nevertheless, the Complainant's prior actions suggest that the responsive information cannot be adequately safeguarded if disclosed. There are no reasonable safeguards in place to protect from unauthorized dissemination of the information, which exposes individuals to a number of risks to their person or property.

iv. *Burnett Factor Six*

The sixth Burnett factor addresses the degree of need for access to the attendance list. The Complainant did not provide a response to the balancing test questionnaire, and therefore it is unknown from the Complainant's perspective of the degree of need for access to the names and addresses of the educators. Because the Complainant did not submit a balancing test questionnaire, the Council relies upon the Custodian's submissions, in which she asserts that the Complainant would use the information to contact the listed educators in furtherance of her organization's policy agenda. The Complainant's endeavor would necessarily cause unsolicited contact with certain individuals that go against the College's obligation to safeguard the educators' reasonable expectation of privacy. The educators volunteered their information to the College to receive information on the College's National Institute, not public policy positions from the College or elsewhere.

Because the Complainant offers no rebuttal or contrary evidence expressing her need for access, the GRC finds in favor of withholding disclosure of the attendance list.

v. *Burnett Factor Seven*

The seventh Burnett factor requires consideration as to whether an express statutory mandate, articulated public policy, or other recognized public interest militating toward access to the attendance list exists.

The Custodian asserted that its legal analysis in accordance with Doe shows that public policy favors denying the request for disclosure.

vi. *Balancing of the Burnett Factors*

On balancing the Burnett factors, OPRA's dual objectives to provide both public access and protection of personal information weigh in favor of not disclosing the responsive names and addresses of educators in their entirety. Particularly, there are concerns regarding security and unwanted solicitations. Because the Complainant did not submit a complete balancing test questionnaire, it is unknown of what her intentions will be if she receives the information. Therefore, the Council relies on the assertions from the Custodian, who claims the Complainant would use the information to contact educators listed and solicit support for her organization. Thus, the potential harm to the individuals outweighs the degree of need for access to the names and addresses.

In Faulkner v. Rutgers Univ., GRC Complaint No. 2007-149 (May 28, 2008), the Council found that the requested records should not be disclosed in their entirety. In that case, the Complainant requested the names and addresses of season ticket holders for Rutgers University's football program. The Complainant's stated need for the record was to conduct a study of the geographic locations of those season ticket holders. There was no evidence to suggest that the Complainant would disseminate the record or make any unsolicited contact with season ticket holders. Nonetheless, the Custodian responded by stating that the risk of unsolicited contact weighed against the Complainant's need for access. The Council found in favor of the Custodian, stating that release of the names and addresses of the season ticket holders may result in unsolicited contact between the Complainant and the individuals listed.

Similar to Faulkner, the evidence in in this matter weighs heavily in favor of the Custodian. In the absence of the Complainant's balancing test and/or rebuttal to the Custodian's submissions and certifications, the evidence suggests that the primary reason the Complainant seeks the attendance list is to make unsolicited contact with the individuals listed.

Therefore, the potential for unsolicited contact of educators listed in an attendance record compiled and maintained by the College for its National Institute on the Assessment of Adult Learning warrants non-disclosure of the attendance list. Thus, the Custodian did not unlawfully deny access to the record pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. N.J.S.A. 47:1A-6; Faulkner, GRC 2007-149.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the potential for unsolicited contact of educators listed in an attendance record compiled and maintained by the College for its National Institute on the Assessment of Adult Learning warrants non-disclosure of the attendance list. Thus, the Custodian did not unlawfully deny access to the record pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted

when disclosure thereof would violate the citizen's reasonable expectation of privacy. N.J.S.A. 47:1A-6; Faulkner v. Rutgers Univ., GRC Complaint No. 2007-149 (May 28, 2008).

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Senior Counsel

January 21, 2014