



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

May 24, 2016 Government Records Council Meeting

Stanley J. Baker
Complainant

Complaint Nos. 2015-201

v.

NJ State Parole Board
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 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 e-mail denied to the Complainant constitutes “[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 [E.O. No. 106], whether open, closed or inactive[,]” pursuant to E.O. No. 26. As such, the requested e-mail is confidential pursuant to E.O. No. 26 and N.J.A.C. 4A:7-3.2(g), and the Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 that access to such record was lawfully denied. *See also* Cargill v. N.J. Dep’t of Educ., GRC Complaint No. 2009-256 and Tietze v. New Jersey Pinelands Commission, GRC Complaint No. 2011-379 (December 2012).

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 24th Day of May, 2016

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: May 27, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting**

**Stanley J. Baker¹
Complainant**

GRC Complaint No. 2015-201

v.

**NJ State Parole Board²
Custodial Agency**

Records Relevant to Complaint: Copy of e-mail sent to Ms. Higgins describing an incident at SWSP which resulted in an ensuing complaint being filed.

Custodian of Record: Dina Rogers
Request Received by Custodian: May 14, 2015
Response Made by Custodian: May 14, 2015
GRC Complaint Received: July 7, 2015

Background³

Request and Response:

On May 14, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 14, 2015, the Custodian responded in writing, denying the request as it “is a record related to an EEO investigation, which is deemed confidential and not subject to disclosure” under OPRA and Executive Order #26 (McGreevey).

Denial of Access Complaint:

On May 15, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he received a letter on March 10, 2015, from Ms. Lise-Kirsten S. Higgins, an EEO/AA Officer at the New Jersey State Parole Board (“NJSPB”). The letter stated that he was named as a respondent in a complaint alleging a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace, based on race. The Complainant noted that the letter additionally stated “[t]he employee filing

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Christopher C. Josephson.

³ 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.

the complaint, must, however understand that his/her identity may be made known to the individual accused of the act of discrimination or harassment.”

The Complainant stated that he attended an EEO interview on May 5, 2015, during which the complainant was not identified. He stated that he sent an e-mail that same day and asked for the identity of the person filing the complaint against him. The Complainant stated that Ms. Higgins responded, stating, “I initiated the EEO complaint/investigation based on the information I received.” The Complainant advised that he wrote back, eventually inquiring, “Nobody from SWSP made any type of EEO complaint in verbal form or writing correct? Kindly respond yes or no so that I may understand.”

The Complainant stated that Ms. Higgins wrote back, saying, “I received an e-mail regarding the conversation and the content of the e-mail prompted an initiation of an EEO investigation.” The Complainant thereafter submitted an OPRA request for the referenced e-mail, where he mistakenly referred to the e-mail as a “complaint.” This request was denied on May 13, 2015, as a non-disclosable record of an EEO complaint pursuant to N.J.S.A. 47:1A-1 and Executive Order #26 (McGreevey).

On May 14, 2015, the Complainant submitted the OPRA request that is the subject of this Complaint, referencing his earlier request and arguing that Executive Order 26 (“EO-26”) applies only to actual complaints. The Complainant stated that the Custodian again denied access based on N.J.S.A. 47:1A-1, as the record he requested “is a record related to an EEO investigation, which is deemed confidential and not subject to disclosure under the Open Public Records Act,” as well as EO-26.

The Complainant argued that the GRC’s prior decision in Tietz v. NJ Pinelands Commission, GRC Complaint No. 2012-276 (September 2013), was distinguishable from his case. There, the Council held that any records created as part of a complainant’s discrimination complaint, including the investigatory report, are to be exempt from disclosure as confidential. The Complainant further argued that his particular OPRA request “clearly falls outside of the mark” for EO-26, which is “labeled as either a [r]ecord of a complaint or investigation.” The Complainant asserted that he is not seeking either a record of a complaint or an investigation but rather an e-mail “created before a complaint was filed and way before an investigation was started.” The Complainant further argued that the NJSPB is mistaken that “a record related to an EEO investigation” is exempt from disclosure because “a plain language reading of the Executive Order does not say this.”

Additionally, the Complainant cited the proposition in N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 116 A.3d 570 (App. Div. 2015), that a court of law will “assign to words their generally accepted meaning” when interpreting a statute. The Complainant thereafter argued that such interpretations should apply to readings of Executive Orders as well, and that it “should be presumed that omitted words were done so purposefully.” The Complainant then asserted that the phrase “related to” should “be treated as being deliberately omitted” from EO-26.

The Complainant additionally argued that, pursuant to Weinberg v. New Jersey Sports & Exposition Auth., 2015 N.J. Super. Unpub. LEXIS 994 (Law Div. Apr. 29, 2015), “Courts have long held that forcing a custodian to interview employees to determine what records they ‘relied upon, reviewed, or otherwise utilized’ was overbroad.” The Complainant further noted that a previous request he filed with the Parole Board, seeking time sheets for employees who worked at SWSP on the date of the incident, resulted in the Parole Board providing him the records. The Complainant suggested that the Custodian “could have easily interpreted” that request as being “related to” an EEO investigation as the Custodian could have used the time sheets “to determine who was in the office . . . and who to interview for the investigation.”

The Complainant thereafter argued that his request in the instant matter sought a specific e-mail and “not a complaint which was filed by another state employee.” He suggested that “the fact that the document is later moved to, related to or reviewed as part of an EEO complaint or investigation does not change the fact that the e-mail is subject to disclosure.”

Statement of Information:

On August 3, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 14, 2015, and that she responded in writing that same day. The Custodian certified that one responsive record was located, an e-mail received by Lise-Kirsten Higgins dated January 9, 2015. The Custodian stated that, as indicated by Ms. Higgins, the requested e-mail pertains to an EEO investigation. The Custodian thereafter argued that N.J.S.A. 47:1A-9 and Executive Order #26 (McGreevey) specifically exempt from disclosure all records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in the Workplace, adopted by Executive Order #106 (Whitman 1999), whether open, closed, or inactive. The Custodian argued that access to the requested record was therefore appropriately denied.

Additional Submissions:

On August 10, 2015, the Complainant wrote to the GRC in response to the Custodian’s SOI. The Complainant reiterated that he found the Custodian’s argument, that the requested e-mail was a “record related to an EEO investigation” and therefore not subject to disclosure, to be “flawed.” The Complainant further alleged that the agency had “changed the argument on why the e-mail should not be disclosed” because the Custodian’s Counsel stated in the SOI that the requested e-mail “pertains” to an EEO investigation. The Complainant again argued that Ms. Higgins’ response to his earlier queries indicated that the e-mail in question “is not a complaint issued by another state employee.”

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 also recognizes exemptions to disclosure found in any Executive Order of the Governor, or any regulation promulgated under the authority of any Executive Order of the Governor. *See* N.J.S.A. 47:1A-9(a). In turn, EO-26 provides that:

The 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 [E.O. No. 106], whether open, closed, or inactive.⁴

The GRC has held that records created as part of a state employee’s discrimination complaint and during an EEO officer’s ensuing investigation, fall within the Model Procedures referenced in E.O. No. 106. *See* Cargill v. N.J. Dep’t of Educ., GRC Complaint No. 2009-256 (finding that state employees filing complaints for discrimination do so in accordance with the Model Procedures); *see also* N.J.A.C. 4A:7-3.1; N.J.A.C. 4A:7-3.2 (setting forth model procedures for internal complaints alleging discrimination in the workplace). Such records, therefore, are considered confidential under EO-26. *See* Cargill, GRC 2009-256 (finding records from discrimination complaint exempt for disclosure under N.J.S.A. 47:1A-9(a) and EO-26); *see also* Tietze, GRC 2011-379 (finding that any records created as part of Complainant’s discrimination complaint, including investigatory report, are to be exempt from disclosure as confidential).

In the present complaint, the record supports the conclusion that the e-mail requested by the Complainant falls under the Model Procedures. Specifically, Ms. Higgins’ May 5, 2015 e-mail to the Complainant advised him that the “content” of the requested e-mail “prompted the initiation of an EEO investigation. Pursuant to N.J.A.C. 4A:7-3.2(g), which outlines the Model Procedures:

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 . . . If a written complaint has not been filed, the EEO/AA Officer must submit to the Division of EEO/AA a brief summary of the allegations that have been made.

⁴ N.J.A.C. 4A:7-3.1, Policy Prohibiting Discrimination, Harassment or Hostile Work Environments in the Workplace; Complaint Procedure, and Appeals, was renamed Policy Prohibiting Discrimination in the Workplace; Complaint Procedure, and Appeals, by R. 2007 d. 244, effective August 20, 2007. *See* 39 N.J.R. 1340(a); 39 N.J.R. 3499(a).

In the instant matter, Ms. Higgins' response indicates that the e-mail in dispute led to the initiation of an EEO investigation. While, as the Complainant argues, the e-mail is not a "complaint" per se, it is a written record, the content of which led to the EEO investigation and therefore must be maintained as confidential, pursuant to N.J.A.C. 4A:7-3.2(g).

Therefore, the e-mail denied to the Complainant constitutes "[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 [E.O. No. 106], whether open, closed or inactive[,]" pursuant to E.O. No. 26. As such, the requested e-mail is confidential pursuant to E.O. No. 26 and N.J.A.C. 4A:7-3.2(g), and the Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 that access to such record was lawfully denied. *See also* Cargill v. N.J. Dep't of Educ., GRC Complaint No. 2009-256 and Tietze, GRC 2011-379

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the e-mail denied to the Complainant constitutes "[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 [E.O. No. 106], whether open, closed or inactive[,]" pursuant to E.O. No. 26. As such, the requested e-mail is confidential pursuant to E.O. No. 26 and N.J.A.C. 4A:7-3.2(g), and the Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 that access to such record was lawfully denied. *See also* Cargill v. N.J. Dep't of Educ., GRC Complaint No. 2009-256 and Tietze v. New Jersey Pinelands Commission, GRC Complaint No. 2011-379 (December 2012).

Prepared By: Husna Kazmir
Staff Attorney

May 17, 2016