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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 13, 2018 Government Records Council Meeting

Alan Arthur De Smet
Complainant

Complaint No. 2016-267 and 2016-268

v.

NJ Motor Vehicle Commission
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council (“Council”) considered the November 7, 2018 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 Custodian has borne his burden of proof that the requested algorithm information was exempt from disclosure under OPRA. N.J.S.A. 47:1A-6. Specifically, the requested algorithm information would result in the ability to obtain individual’s driver license numbers, as well as result in potential civil and criminal activity. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; N.J.S.A. 39:2-3.4(a); R. 1:38-7(a)-(b). Additionally, the responsive algorithm information is exempt under Executive Order No. 21 (Gov. McGreevey, 2002) because disclosure could substantially interfere with the State’s ability to defend terrorism and could increase the risks associated with such actions. N.J.S.A. 47:1A-9.

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 13th Day of November, 2018

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: November 15, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

**Alan Arthur De Smet¹
Complainant**

**GRC Complaint Nos. 2016-267
and 2016-268²**

v.

**New Jersey Motor Vehicle Commission³
Custodial Agency**

Records Relevant to Complaint:

September 26, 2016 OPRA request: Electronic copies via e-mail of a description of the algorithm used to assign driver licenses numbers, possibly in the form of the source code used by the New Jersey Motor Vehicle Commission (“MVC”). The response should be detailed enough to allow someone to independently calculate the portion of a driver license number based on name, gender, and date of birth.

September 28, 2016, OPRA request: Electronic copies via e-mail of documents describing how an individual would calculate, by hand, a driver license number if that individual possessed a full name, gender, and birth date.

Custodian of Record: Joseph F. Bruno

Request Received by Custodian: September 26, 2016; September 28, 2016

Response Made by Custodian: September 27, 2016; September 28, 2016

GRC Complaint Received: October 3, 2016

Background⁴

Request and Response:

On September 26, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 27, 2016, the Custodian responded in writing denying the Complainant’s OPRA request under exemption for “administrative or technical information regarding computer hardware, software, and networks which, if disclosed, would jeopardize computer security.” N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² The GRC consolidated these complaints based on the commonality of parties and issues.

³ Represented by Deputy Attorney General Jennifer R. Jaremback.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

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On September 28, 2016, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing denying access to the Complainant's OPRA request under the "administrative or technical information" exemption. The Custodian added that the responsive information was exempt as "inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material" also exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On October 3, 2016, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council ("GRC").

Regarding GRC 2016-267, the Complainant disputed that disclosure of the responsive information would result in jeopardizing MVC's computer security. The Complainant noted that any individual receiving a driver's license receives the result of the algorithm for which he sought records.

Regarding GRC 2016-268, the Complainant again disputed the denial of access, arguing that he was not seeking any information that would jeopardize computer security. The Complainant asserted that to the contrary, he sought documentation that an MVC employee might receive about calculating a driver's license number. Additionally, the Complainant contended that he was not seeking any ACD information. The Complainant argued that the documents sought were for a system already implemented. Further, the Complainant asserted that the intended audience for the records sought were employees needing information on how the system worked; not for those deciding whether to implement it.

Statement of Information:⁵

On June 13, 2018, the Custodian filed a Statement of Information ("SOI") for each complaint.

Regarding GRC 2016-267, the Custodian certified that he received the Complainant's OPRA request on September 26, 2016. The Custodian certified that his/her search included obtaining an explanation from MVC's Information Technology Unit of how the algorithm was used to assign driver license numbers. The Custodian certified that he responded in writing on September 27, 2016 denying access to the OPRA request under N.J.S.A. 47:1A-1.1.

Regarding GRC 2016-268, the Custodian certified that he received the Complainant's OPRA request on September 28, 2016. The Custodian certified that his/her search included obtaining an explanation from MVC's Information Technology Unit of how the algorithm was used to assign driver license numbers. The Custodian certified that he responded in writing on September 27, 2016 denying access to the OPRA request under N.J.S.A. 47:1A-1.1.

⁵ On December 9, 2016, this consolidated complaint was referred to mediation. On January 23, 2017, this consolidated complaint was referred back to the GRC for adjudication.

The Custodian contended that, with respect to both complaints, he lawfully denied access to a one-page printout of an explanation of the algorithm used to assign driver license numbers. N.J.S.A. 47:1A-1.1; N.J.S.A. 39:2-3.3 (classifying driver license numbers as “personal information”); N.J. Court Rules, R. 1:38-7 (includes driver license numbers as a confidential, personal identifier). The Custodian averred that the Complainant appeared to operate a website dedicated to publishing information on composing driver license numbers in New Jersey.⁶

The Custodian argued that he lawfully denied access to the responsive record because driver license information is uniformly treated as confidential in New Jersey. The Custodian noted that as cited above, OPRA, as well as the Drivers’ Privacy Protection Act (“DPPA”), and court rules all protect from the disclosure of license numbers. The Custodian argued that his denial was proper because disclosure of information regarding the algorithm would allow the Complainant to calculate anyone’s license number. The Custodian contended that giving the Complainant this ability would be tantamount to disclosing licenses numbers, which is expressly prohibited under the DPPA. N.J.S.A. 39:2-3.4(a) (“ . . . any officer employee or contractor thereof shall not knowingly disclose or otherwise make available to any person personal information about any individual . . . in connection with a motor vehicle record.”). The Custodian further argued that disclosure of algorithm information could result in various forms of criminal activity against individuals. The Custodian surmised that an individual could use the algorithm for any manner of nefarious purposes, up to and including identity theft. The Custodian argued that any such disclosure would subvert the entire purpose of the DPPA.

Finally, the Custodian argued that disclosure of the algorithm information would compromise MVC’s computer security. The Custodian affirmed that MVC’s database identifies individuals by their driver license numbers. The Custodian contended that an individual armed with the ability to calculate someone’s license number may be able to use it against the MVC to obtain additional confidential driver information from its database.

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 . . .

⁶ http://www.highprogrammer.com/alan/numbers/dl_us_nj.html (accessed July 9, 2018).

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[N.J.S.A. 47:1A-1.]

In effectuating a citizen's reasonable expectation of privacy, OPRA specifically exempts access to certain personally identifying information inclusive of "driver license number." N.J.S.A. 47:1A-1.1. OPRA also exempts access to "administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security." Id.

Additionally, the DPPA offers additional protections for driver information inclusive of driver license numbers, with limited exceptions. N.J.S.A. 39:2-3.4(a). Further, "A person who knowingly obtains or discloses personal information from a motor vehicle record for any use not permitted under [N.J.S.A. 39:2-3.4] is guilty of a crime of the fourth degree." N.J.S.A. 39:2-3.5. New Jersey's court rules also designate and exempt driver license numbers from access. R. 1:38-7(a)-(b). These exemptions are recognizable under OPRA where applicable. N.J.S.A. 47:1A-9(a).

Here, the Complainant sought access to, and subsequently a description of, the algorithm that MVC uses to develop driver license numbers. In his initial response, the Custodian denied access to both OPRA requests under the computer security exemption. In his Denial of Access Complaint filing, the Complainant argued that the computer security exemption did not apply; MVC provides the results of the algorithm to every person holding a driver's license. In the SOI, the Custodian affirmed that the responsive record was a one-page description of MVC's driver license algorithm. In defending his denial, the Custodian relied on the administrative computer security exemption, but also added multiple statutes (including OPRA) that protect the disclosure of driver license numbers. The Custodian essentially argued that disclosing a description of the algorithm would be akin to disclosing actual license numbers.

In approaching this analysis, the GRC notes that this complaint presents a novel issue: whether disclosure of the algorithm information sought here implicates the administrative computer security exemption. In reviewing the purpose of the algorithm and its use in accessing individual driver records, the GRC cannot find a connection between disclosure and jeopardizing "hardware, software and networks."

Thus, the responsive algorithm does not fall within the administrative computer security exemption. Specifically, a driver license number could be used to access certain online services through the MVC's website. The Custodian did assert the possibility that an individual could use an engineered number to obtain additional confidential driver information. While this may implicate an individual's ability to infiltrate MVC's networks, it also appears to have put in place a multiple-point authentication. For instance, the "Change Your Address" service requires applicants to enter their ZIP code and social security number in addition to a driver license number.⁷ There is no other indication in the evidence of record here that disclosure of the algorithm alone would reasonably result in a security breach of MVC's systems.

Finally, although the administrative computer security exemption does not apply to the facts of this complaint, the GRC must stress this position is not universal. To wit; there may be

⁷ https://emvc.state.nj.us/MVC_SAC/AVSSstart.jsp (accessed October 9, 2018). See also "Personalized and Specialty Plate Requests." (https://emvc.state.nj.us/MVC_VEHPP/AVSSstart.jsp).

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future instances where similar records could implicate computer security concerns warranting a denial under this exemption.

Having addressed the administrative computer security exemption, the GRC now turns to the argument that disclosure violates an individual's reasonable expectation of privacy, the plain language of OPRA, as well as result in a DPPA violation in accordance with N.J.S.A. 39:2-3.5. Interestingly, the issue turns not on the disclosure of an actual driver license number warranting non-disclosure under N.J.S.A. 47:1A-1.1. Instead, the GRC must determine whether MVC's argument that an individual, armed with the algorithm, could not only engineer real numbers, but may also use the algorithm for nefarious purposes.

To this end, the GRC is persuaded by the Custodian's argument that disclosure of the algorithm information is contrary to explicit driver license number exemptions contained in OPRA, the DPPA, and New Jersey Court Rules. Further, the GRC is persuaded by the Custodian's argument that disclosing the algorithm would inevitably lead to violations of OPRA, the DPPA, and other potential criminal acts including fraud and identity theft. Even the Complainant recognizes in his website the potential for unlawful use of the algorithm.⁸ The GRC agrees that the harm in requiring disclosure of the algorithm is exactly the reason why OPRA, the DPPA, and the Courts have created a specific exemption of driver's license numbers.

Moreover, the Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007)(certif. denied 193 N.J. 292 (2007)).⁹ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The Court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

The Court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given

⁸ <http://www.highprogrammer.com/alan/numbers/fakeid.html> (accessed October 9, 2018).

⁹ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

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below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (*aff'd*, 24 N.J. 139 (1957)).

To this end, the GRC finds that the responsive algorithm information is also exempt in accordance with Executive Order No. 21 (Gov. McGreevey, 2002) (“EO 21”), which exempts access to any government record the disclosure of which “would substantially interfere with the State’s ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which . . . would materially increase the risk or consequences of potential acts of sabotage or terrorism.” Id.

In support of this exemption, the GRC notes that following the September 11, 2001 attacks, the Federal and State governments took steps to secure the issuance and use of driver’s licenses. At the Federal level, President Bush signed the Real ID Act of 2005 (Pub.L. 109–13, 119 Stat. 302) which, in part, established minimum document requirements that individuals needed to adhere to for the Federal government to recognize state driver’s licenses as valid. As noted in In Re: Henshaw, 2007 N.J. Super. Unpub. LEXIS 830 (App. Div. 2007), both the Federal and State governments acknowledged that driver’s licenses were the primary form of identification in current society. Id. at 16-17. Further, the court discussed the legislative impetus as espoused by Texas Representative Peter Sessions at the commencement of the debate over the Act:

Mr. Speaker, we are here today to begin the debate on fulfilling Congress's promise to the American people made in the wake of the tragedy of September 11, 2001, that our government will do everything it can to protect them from another deadly attack on our homeland.

* * *

Implementing the driver's license reforms included in H.R. 418 will provide greater security for the American people because lax standards and loopholes in the various current State issuance processes allow terrorists to obtain a driver's license, often multiple drivers' licenses from different States, and abuse these fake identities for illegal and harmful purposes. The September 11 hijackers had within their [possession] at least 15 valid driver's licenses and numerous State-issued identification cards listing a wide variety of addresses.

[151 *Cong. Rec.* H437, H442 (daily ed. February 9, 2005)].

Within the State, MVC proposed and ultimately promulgated amendments to N.J.A.C. 13:21-8.2. As the Henshaw court noted, MVC’s Summary Statement on the changes, many of which mirrored the Real ID Act, were grounded in the belief that “the proposed amendment will help to make our State safer and will help prevent terrorists from obtaining driver licenses or identification cards.” Id. at 13-14 (citing 35 N.J.R. 4299(a)).

Considering the forgoing, disclosure of the very recipe for driver's license numbers would significantly increase the risk of potential acts of sabotage or terrorism. Further, disclosure of the algorithm explanation is contrary to the express purpose of both the Real ID Act and resulting State regulations put in place to secure the driver's license process. Armed with the responsive information, a nefarious individual would easily be able to create IDs without having to follow MVC's process. That individual would have sufficient freedom to engage in any manner of criminal act from fraud, as mentioned above, up to and including terrorism.

Accordingly, the Custodian has borne his burden of proof that the requested algorithm information was exempt from disclosure under OPRA. N.J.S.A. 47:1A-6. Specifically, the requested algorithm information would result in the ability to obtain individual's driver license numbers, as well as result in potential civil and criminal activity. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; N.J.S.A. 39:2-3.4(a); R. 1:38-7(a)-(b). Additionally, the responsive algorithm information is exempt under EO 21 because disclosure could substantially interfere with the State's ability to defend terrorism and could increase the risks associated with such actions. N.J.S.A. 47:1A-9.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Custodian has borne his burden of proof that the requested algorithm information was exempt from disclosure under OPRA. N.J.S.A. 47:1A-6. Specifically, the requested algorithm information would result in the ability to obtain individual's driver license numbers, as well as result in potential civil and criminal activity. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; N.J.S.A. 39:2-3.4(a); R. 1:38-7(a)-(b). Additionally, the responsive algorithm information is exempt under Executive Order No. 21 (Gov. McGreevey, 2002) because disclosure could substantially interfere with the State's ability to defend terrorism and could increase the risks associated with such actions. N.J.S.A. 47:1A-9.

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November 7, 2018