



State of New Jersey  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**November 14, 2017 Government Records Council Meeting**

Shaquan Thompson  
Complainant

Complaint No. 2016-300

v.

NJ Department of Corrections  
Custodian of Record

At the November 14, 2017 public meeting, the Government Records Council (“Council”) considered the November 8, 2017 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 because the requested background check report constitutes advisory, consultative, or deliberative material, it is exempt from access under N.J.S.A. 47:1A-1.1, and the Custodian did not unlawfully deny access to said record. *See Kahn v. NJ Dep’t of Law and Public Safety*, GRC Complaint No. 2005-254 (October 2006).

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 14<sup>th</sup> Day of November, 2017

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 17, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 14, 2017 Council Meeting**

**Shaquan Thompson**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2016-300**

v.

**New Jersey Department of Corrections**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:** “[T]he complete and exact copy of the background check report, including all its results, for (teaching employment) candidate Shaquan M. Thompson, conducted by the New Jersey Department of Corrections (Internal Affairs or Human Resources Divisions) between July 1, 2016 and August 31, 2016.”

**Custodian of Record:** John Falvey

**Request Received by Custodian:** November 9, 2016

**Responses Made by Custodian:** November 15, 2016, and November 18, 2016

**GRC Complaint Received:** November 22, 2016

**Background**<sup>3</sup>

**Request and Responses:**

On November 9, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 15, 2016, the third (3<sup>rd</sup>) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that he required clarification. The Complainant replied, providing such clarification on that same date. On November 18, 2016, the third (3<sup>rd</sup>) business day following receipt of the clarification, the Custodian responded in writing to the Complainant, denying the requested record because: (1) it contains personal identifying information pursuant to N.J.S.A. 47:1A-1.1; (2) it contains exempt inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1; and (3) it constitutes a comprehensive criminal history pursuant to N.J.A.C. 10A:22-2.3(a)(6).

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Nicole Adams.

<sup>3</sup> 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.

### Denial of Access Complaint:

On November 22, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he filed the OPRA request with the Custodian on November 9, 2016, and that the Custodian responded to his request on November 15, 2016, seeking additional information. The Complainant states that he provided the additional information via e-mail on November 15, 2016. The Complainant states that the Custodian denied his request on November 18, 2017, pursuant to N.J.S.A. 47:1A-1.1 and N.J.A.C. 10A:22-2.3(a)(6).

The Complainant contends that the requested record should be disclosed to him because he is the person who provided the information to the New Jersey Department of Corrections, and, as such, there will be no disclosure of personal identifying information. The Complainant also states that:

**“The requested record may contain false arrest and/or conviction information, which maybe [sic] evidence of my being an unwitting victim of identity theft for an as yet unknown amount of time (years possibly), and of which the potential financial impact and professional impact could be devastating, and more directly, the NJ Department of Corrections could or may have used this information to erroneously attribute criminality to me, use it as a negative evaluation factor, and therefore suspend or dismiss my employment candidacy, resulting in the unnecessary impedance and denial of my lawful opportunity to compete for the position I applied for.”** (Emphasis in original).

### Statement of Information:

On December 8, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 9, 2016, and responded in writing on November 15, 2016, and November 18, 2016.

The Custodian’s Counsel first argues that the requested record is exempt from access as ACD material pursuant to N.J.S.A. 47:1A-1.1, because the record includes the results of an investigation and comments of the investigator that performed the background check. Counsel states that the document is exempt from disclosure because disclosure could impede agency functions by discouraging open and frank discussion and recommendations.

Counsel states that the requested record is also exempt from access pursuant to N.J.S.A. 47:1A-1.1, which exempts from access personal identifying information. Moreover, Counsel states that the Supreme Court has addressed the issue of background check results, concluding that “the public interest is best served when background checks of potential public employees obtain as much information as possible and this statutory goal would be undermined if the sources of such information could not be guaranteed anonymity.” Nero v. Hyland, 76 N.J. 213 (1978) at 222. The Custodian’s Counsel asserts that the GRC relied on Nero in Kahn v. NJ Dep’t of Law and Public Safety, GRC Complaint No. 2005-254 (October 2006), to find that documents related to a New Jersey State Police application should be denied.

The Custodian's Counsel also argues that the requested record is exempt from access pursuant to N.J.A.C. 10A:22-2.3(a)(6), which orders that "comprehensive criminal history information (rap sheet)" shall not be considered government records subject to disclosure.<sup>4</sup>

#### Additional Submissions:

By e-mail dated January 11, 2017, the Complainant demanded to know the basis for the extension of time granted to the Custodian for completion and submission of the SOI.<sup>5</sup> The Complainant contends that an advantage was provided to the Custodian because the Custodian received such an extension of time. The Complainant also expressed displeasure because he was not sent a copy of the SOI via e-mail. The Complainant demanded to know the reason why he was not notified via e-mail. The Complainant also wanted to know what the GRC's policy was with respect to submissions by the Custodian.

By e-mail dated January 12, 2017, the GRC replied to the Complainant's demands as follows:

- The GRC explained that because the Custodian's legal counsel had to be selected and assigned, a five business day extension of time to prepare and submit the SOI was not unreasonable; therefore the extension was granted.
- The GRC informed the Complainant that the GRC did not understand the basis for his belief that the Custodian had an advantage in this matter. The GRC advised the Complainant that if he wished to submit a rebuttal to the SOI, the GRC would allow him eight business days to do so.
- In response to the Complainant's demand to know the reason why he was not sent a copy of the SOI via e-mail, the GRC informed him that at the time the SOI was due the GRC did not have an e-mail address listed for him on the GRC's contact sheet. The GRC informed the Complainant that the contact sheet has since been corrected.
- In reply to the Complainant's query regarding the GRC's policy with respect to submissions by the Custodian, the GRC forwarded the Complainant a copy of N.J.A.C. 5:105-2.4.

### Analysis

#### Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a

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<sup>4</sup> Counsel also argued that the Complainant's request for records that he had personally submitted to the agency should be denied, citing Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008); however, although such records may be incorporated within the background check report, they were not separately identified in the complaint as "Records Denied" and therefore will not be addressed herein.

<sup>5</sup> The Custodian's Counsel requested, and was granted, a five business day extension of time for the Custodian to prepare/submit the SOI.

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 excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms . . . “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations, and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. NJ Dep’t of Educ., 198 N.J. 274 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in Integrity, 165 N.J. 75. There, the Court addressed the question of whether the Commissioner of Insurance, acting in the capacity of liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations, or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege based upon the holding of McClain v. Coll. Hosp., 99 N.J. 346 (1985). Id. at 88. In doing so, the Court noted that:

A document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. . . . Second, the document

must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. . . . Purely factual material that does not reflect deliberative processes is not protected. . . . Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the “preponderating policy” and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.

Id. at 84-85 (citations omitted).

The Court further set out procedural guidelines based upon those discussed in McClain:

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.

Integrity, 165 N.J. at 88 (citing McClain, 99 N.J. at 361-62).

The GRC has previously held that a background investigation report for a potential public employee is exempt from disclosure. In Kahn v. NJ Dep't of Law and Public Safety, GRC Complaint No. 2005-254 (October 2006), the complainant requested documents prepared by the New Jersey Department of Law and Public Safety relating to the complainant's application for employment as a New Jersey State Trooper, which, *inter alia*, contained a background investigation report. Like the Complainant in the instant complaint, the complainant in Kahn argued that the requested records pertained to him personally and that he was seeking the records for his personal use. The Council held that “based on the decision in Nero v. Hyland, 76 N.J. 213, 222 (1978) . . . and pursuant to the definition of a government record as defined in N.J.S.A. 47:1A-1.1, which excludes advisory, consultative and deliberative materials, the Custodian has lawfully denied access to the requested documents.”

Here, it is unclear whether the position sought by the Complainant that requires a background investigation is one of public employment. However, the Council made it clear in Kahn, GRC 2005-254, that a background investigation report may be exempt from access as ACD material under N.J.S.A. 47:1A-1.1. Further, for the requested record here to qualify as ACD material, it must satisfy both prongs of a two-prong test: (1) it must be pre-decisional, and (2) it must contain opinions, recommendations, or advice.

The record requested is a “background check report, including all its results” on the Complainant. A background check report is used for screening someone.<sup>6</sup> As such, a background

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<sup>6</sup> <https://www.backgroundchecks.com/learningcenter>. Accessed October 30, 2017.

check report by definition is a pre-decisional document and therefore satisfies the first prong of the test. The Custodian's Counsel stated that the record contains results of an investigation and comments of the investigator, which, if disclosed, could discourage open and frank discussion and recommendations. Accordingly, "comments of the investigator" used for recommendations satisfies the second prong, which requires the record to contain opinions, recommendations, or advice. The requested background check report therefore constitutes ACD material, and the Complainant failed to show a compelling or substantial need for the record which outweighs the Custodian's interest in non-disclosure of the record.

Therefore, because the requested background check report constitutes ACD material, it is exempt from access under N.J.S.A. 47:1A-1.1, and the Custodian did not unlawfully deny access to said record. *See Kahn*, GRC 2005-254.

Because the requested record is exempt from access in its entirety as ACD material under N.J.S.A. 47:1A-1.1, it is unnecessary for the GRC to determine whether the record, or part thereof, is also exempt because it contains personal identifying information and/or constitutes a comprehensive criminal history.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the requested background check report constitutes advisory, consultative, or deliberative material, it is exempt from access under N.J.S.A. 47:1A-1.1, and the Custodian did not unlawfully deny access to said record. *See Kahn v. NJ Dep't of Law and Public Safety*, GRC Complaint No. 2005-254 (October 2006).

Prepared By: John E. Stewart

November 8, 2017