



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**July 30, 2019 Government Records Council Meeting**

Philip E. Shapiro  
Complainant

Complaint No. 2017-212

v.

NJ Civil Service Commission  
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 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 responsive “list of applicants” is exempt from disclosure under OPRA, Civil Service Commission’s regulations, and Executive Order No. 26 (Gov. McGreevey 2002). N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9(a); N.J.A.C. 4A:4-2.16(b); Toscano v. N.J. Dep’t of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011). Based on this, the Custodian did not unlawfully deny access to said list. N.J.S.A. 47:1A-6.

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 30<sup>th</sup> Day of July 2019

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: August 2, 2019**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
July 30, 2019 Council Meeting**

**Philip E. Shapiro<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-212**

v.

**NJ Civil Service Commission<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of “a list of applicants for the most recent promotional list for the Accountant 2 position in the New Jersey Department of Labor and Workforce Development (“LWD”), Division of Finance and Accounting.”

**Custodian of Record:** Eugene F. Lanzoni  
**Request Received by Custodian:** October 20, 2017  
**Response Made by Custodian:** October 30, 2017  
**GRC Complaint Received:** November 1, 2017

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

**Request and Response:**

On October 20, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.<sup>4</sup> On October 30, 2017, the Custodian responded in writing denying the request as seeking examination records exempt from access under N.J.S.A. 47:1A-10, N.J.A.C. 4A:4-2.16(b)(1), and Executive Order No. 26 (Gov. McGreevey 2002) (“EO 26”).

**Denial of Access Complaint:**

On November 1, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s denial of access based on language present in N.J.A.C. 4A:4-2.16(a). The Complainant averred that his request sought a list of eligible, which was expressly disclosable pursuant to N.J.A.C. 4A:4-2.16(a)(5) and N.J.A.C. 4A:4-2.16(b).

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

<sup>2</sup> Represented by Deputy Attorney General Pamela N. Ullman.

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

<sup>4</sup> The Complainant noted in his OPRA request that there was no exam or list since the posting was cancelled and all candidates received refunds.

## Statement of Information:<sup>5</sup>

On January 17, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 20, 2017. The Custodian certified that he responded in writing on October 30, 2017 denying the Complainant’s OPRA request.

The Custodian maintained that he properly denied access to the responsive record under OPRA. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-10. The Custodian argued that denying access was appropriate to protect public employees from others’ attempts to pry into personnel matters. The Custodian argued that applications for employment were clearly personnel records and are thus not considered disclosable under OPRA.

The Custodian also maintained that CSC’s regulations do not allow for disclosure of examination records with limited exceptions, including the list of eligible. N.J.A.C. 4A:4-2.16(b). The Custodian maintained that the Complainant sought a “list of all applicants,” which was not within the exceptions. See also N.J.A.C. 4A:4-2.1(h); N.J.A.C. 4A:4-2.16 (prohibiting the disclosure of applications for employment and any other pertinent information). The Custodian noted that an “eligible list” is governed by N.J.A.C. 4A:1-1.3; the term “applicant” is not synonymous with an “eligible” party. The Custodian argued that a “list of applicants” should be considered “part and parcel of ‘applications’ as set forth” by CSC regulations.

Finally, the Custodian argued that the responsive list was exempt under EO 26, which exempts access to application information during the recruitment process. The Custodian noted that, as indicated in the Complainant’s original OPRA request, the title was cancelled, and no exam occurred. The Custodian thus argued that CSC never “promulgated” an “eligible list.”

## 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 “[n]otwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record . . .” N.J.S.A. 47:1A-10. OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581 (2011). These include “an individual’s name, title, position, salary [and] payroll record.” Id.

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<sup>5</sup> On November 15, 2017, this complaint was referred to mediation. On December 19, 2017, this complaint was referred back to the GRC for adjudication.

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order of the Governor*; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

CSC's regulations provide that:

The following examination records shall be retained until the expiration of the eligible list:

2. All applications;
5. The list of eligibles;

All examination records listed in (a)1, 4, and 5 above shall be open to public inspection. Examination records listed in (a)2 above shall not be open to public inspection . . .

[N.J.A.C. 4A:4-2.16(a)(1)-(b)(1).]

Further, EO 26 provides that:

No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

[Id.]

EO 26 is clear on the disclosability of resumes at the conclusion of the recruitment process: successful candidate resumes must be disclosed. Id. However, EO 26 is less clear on applications and "other information concerning job applicants." To this end, in Toscano v. N.J. Dep't of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011), the Council held that employment applications were not disclosable, reasoning that EO 26 made no mention of employment applications being disclosed after the completion of the recruitment search. The Council further equated applications to "personnel records" not among the enumerated list of releasable records set forth at N.J.S.A. 47:1A-10 (allowing for limited disclosure of certain personnel information). See also Deutsch v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-361 (March 2013).

In the matter before the Council, the Complainant initially sought access to “a list of all applicants” from a promotional list for a position within LWD. The Complainant noted that “there was no exam or *list* since the posting was cancelled.” (Emphasis added). The Custodian responded denying access pursuant to OPRA, CSC regulations, and EO 26. In the Denial of Access Complaint, the Complainant disputed the denial arguing that he actually sought a “list of eligibles” that CSC’s regulations provided were “open to public inspection.” N.J.A.C. 4A:4-2.16(b).

In the SOI, the Custodian argued multiple bases for his denial. Among them, the Custodian argued that CSC’s regulations prohibited access to examination records, with limited exceptions as set forth in N.J.A.C. 4A:4-2.16(b). The Custodian argued that because CSC’s regulations prohibited disclosure of applications, the requested list should be considered “part and parcel of ‘applications’ . . .” Further, the Custodian averred that a “list of eligibles,” defined in N.J.A.C. 4A:1-1.3, is not synonymous with a “list of applicants.” The Custodian finally argued that because the title was cancelled, CSC did not promulgate a “list of eligibles” and there were no candidates.

The crux of this complaint is two-fold. First, the GRC must determine whether the Complainant reasonably sought a “list of eligibles,” as he argued in the Denial of Access Complaint. Second, the GRC must determine whether the Custodian unlawfully denied access to said list.

Regarding the first issue, the Complainant clearly used the term “applicants” in his initial OPRA request. Following receipt of the denial, the Complainant filed the instant complaint arguing that he sought a “[l]ist of eligibles (applicants),” to which the Custodian unlawfully denied access. However, it appears that the Complainant may have chosen the “list of eligibles” term for one of two reasons. First, the Complainant may have utilized the term from CSC’s regulations because it was identified as disclosable. Second, the Complainant may have surmised that “applicants” and “eligibles” was an interchangeable term. The second reason was directly addressed by the Custodian in the SOI, where he affirmed that both terms were not interchangeable.<sup>6</sup>

Notwithstanding, the GRC questions whether the Complainant actually sought a “list of eligibles.” This is due to the Complainant’s OPRA request acknowledgement that the position was cancelled; thus, “[t]here was no exam or list . . .” This statement belies the Complainant’s Denial of Access Complaint allegation that he sought the official list of individuals eligible for the defunct position. The GRC is thus persuaded that the Complainant did not seek a “list of eligibles;” rather, he sought to identify all individuals that applied for the position before its cancellation.

Having determined that the list sought here was a “list of applicants,” the GRC now turns to second issue: whether the Custodian lawfully denied access to any responsive records. Initially, the GRC notes that CSC identified in its SOI that a “list of symbol PS4388N applicants” was responsive to the Complainant’s OPRA request. The Custodian argued that the list was exempt from disclosure under OPRA, CSC regulations, and EO 26. The Custodian also posited that said

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<sup>6</sup> Support for the Custodian’s affirmation can be found on the CSC website describing the application process. <https://www.nj.gov/csc/seekers/about/steps/step1.html> (accessed July 3, 2019). Therein, the viewer is given a step-by-step guide on how to apply for a civil service job. Interested parties are required to submit an application and pass an exam before being placed on an “eligible list.”

list should be considered “part and parcel” of the applications, which are expressly exempt from disclosure.

The GRC is persuaded that N.J.S.A. 47:1A-10, N.J.A.C. 4A:4-2.16(b), and EO 26 support the Custodian’s denial of the requested list. First, N.J.S.A. 47:1A-10 and Toscano, GRC 2010-147 support that applications are personnel records exempt from disclosure. Second, EO 26 equally exempts applications and “other information concerning job applicants while a recruitment search is ongoing.” Id. Third, CSC’s regulations clearly exempt the public from accessing “all applications.” Taken together, the list of applicants sought here cannot be subject to disclosure under OPRA. Specifically, the requested list was a personnel record created during a recruitment process that identifies applicants for a CSC title prior to the administration of an exam and creation of a “list of eligibles.” Thus, the list touches on each exemption cited by the Custodian in his denial letter to the Complainant and SOI submission.

The GRC also notes that the exception regarding the disclosability of a “list of eligibles” in N.J.A.C. 4A:4-2.16(b) does not apply here for two (2) reasons. First, and as already established, the Complainant did not initially seek access to a “list of eligibles;” rather, he sought a list of those that applied for the position. Second, no “list of eligibles” ever existed because the position was cancelled and no “list of eligibles” was created. Both parties have agreed to this fact.

Accordingly, the responsive “list of applicants” is exempt from disclosure under OPRA, CSC’s regulations, and EO 26. N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9(a); N.J.A.C. 4A:4-2.16(b); Toscano, GRC 2010-147. Based on this, the Custodian did not unlawfully deny access to said list. N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that the responsive “list of applicants” is exempt from disclosure under OPRA, Civil Service Commission’s regulations, and Executive Order No. 26 (Gov. McGreevey 2002). N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9(a); N.J.A.C. 4A:4-2.16(b); Toscano v. N.J. Dep’t of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011). Based on this, the Custodian did not unlawfully deny access to said list. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso  
Acting Executive Director

July 23, 2019