FINAL DECISION

November 12, 2019 Government Records Council Meeting

Harry Dunleavy
Complainant
v.
High Point Regional High School (Sussex)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 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 Custodian did not unlawfully deny access to the Complainant’s March 1, 2016 OPRA request. N.J.S.A. 47:1A-6. Since the requested affidavit was submitted in response to a complaint filed with the Equal Employment Opportunity Commission, the affidavit is prohibited from disclosure pursuant to 29 C.F.R. 1640.4. See N.J.S.A. 47:1A-9(a).

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 12th Day of November 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: November 15, 2019
Harry Dunleavy\(^1\) v. High Point Regional High School (Sussex)\(^2\)
Complainant v. Custodial Agency

Records Relevant to Complaint:
“A copy of a sworn affidavit prepared by Scott Ripley supporting his position to refuse me employment at High Point Regional High School and a complaint with the Equal Employment [Opportunity] Commission (EEOC), is hereby requested.”

**Custodian of Record:** James Minkewicz  
**Request Received by Custodian:** March 1, 2016  
**Response Made by Custodian:** March 2, 2016  
**GRC Complaint Received:** February 18, 2018

**Background**\(^3\)

**Request and Response:**

On March 1, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned record. On March 2, 2016, Caroline Joseph, on behalf of the Custodian, responded in writing stating that the record was not subject to disclosure under OPRA. Ms. Joseph added that the requested record was prohibited from disclosure pursuant to 29 C.F.R., 1640.4, a federal regulation. Ms. Joseph further stated that the Complainant should contact the EEOC to obtain access to the requested record, as he filed a complaint with them.

**Denial of Access Complaint:**

On February 18, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that Dr. Ripley filed an affidavit with the EEOC allegedly containing negative information about him. The Complainant

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\(^1\) No legal representation listed on record.  
\(^2\) Represented by Douglas M. Silvestro, Esq. of The Busch Law Group, LLC (Metuchen, NJ).  
\(^3\) 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.
asserted that both Dr. Ripley and a manager at the EEOC have refused to provide him with the affidavit despite repeated written and oral requests.

**Statement of Information:**

On March 16, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 1, 2016. The Custodian certified that the records were easily identified and that no search was necessary to locate them. The Custodian certified that Ms. Joseph responded in writing on his behalf on March 2, 2016, denying access to the request.

The Custodian maintained that copies of documents sent to the EEOC are prohibited from disclosure pursuant to federal regulation 29 C.F.R. 1640.4. The Custodian also asserted that the Complainant had requested the document multiple times prior and did not dispute the arguments made in response.

**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 provides that:

The provisions of [OPRA] shall 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).]

29 C.F.R. 1640.4 states that:

(a) When a section 504 agency or a designated agency receives information obtained by the EEOC, such agency shall observe the confidentiality requirements of section 706(b) and section 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-5(b) and 2000e-8(e)), as incorporated by section 107(a) of the ADA, to the same extent as these provisions would bind the EEOC, except when the agency receives the same information from a source independent of the EEOC. Agency questions concerning the confidentiality requirements of title I shall
be directed to the Associate Legal Counsel for Legal Services [sic], Office of Legal Counsel, the EEOC.

(b) When the EEOC receives information from a section 504 or a designated agency, the EEOC shall observe any confidentiality requirements applicable to that information.

Here, the Complainant sought an affidavit submitted by an employee of High Point Regional High School in relation to an EEOC complaint filed by the Complainant. The plain language of 29 C.F.R. 1640.4 demonstrates that the affidavit is covered by this regulation. Accordingly, the affidavit is not subject to access under N.J.S.A. 47:1A-9(a).

Therefore, the Custodian did not unlawfully deny access to the Complainant’s March 1, 2016 OPRA request. N.J.S.A. 47:1A-6. Since the requested affidavit was submitted in response to a complaint filed with the EEOC, the affidavit is prohibited from disclosure pursuant to 29 C.F.R. 1640.4. See N.J.S.A. 47:1A-9(a).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to the Complainant’s March 1, 2016 OPRA request. N.J.S.A. 47:1A-6. Since the requested affidavit was submitted in response to a complaint filed with the Equal Employment Opportunity Commission, the affidavit is prohibited from disclosure pursuant to 29 C.F.R. 1640.4. See N.J.S.A. 47:1A-9(a).

Prepared By:  Samuel A. Rosado
Staff Attorney

October 30, 2019