



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

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**November 9, 2021 Government Records Council Meeting**

James Brown  
Complainant

Complaint No. 2019-197

v.

NJ Department of Treasury,  
Division of Lottery  
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 2021 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 terminal transaction reports were exempt from disclosure under the “trade secret and proprietary commercial or financial information” exemption because it contained specific financial information related to Quick Chek 238’s commercial activities. N.J.S.A. 47:1A-1.1; Commc’ns Workers of America v. Rousseau, 417 N.J. Super. 341 (App. Div. 2010). Thus, the Custodian lawfully denied access to the responsive reports. 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 9<sup>th</sup> Day of November 2021

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, 2021**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 9, 2021 Council Meeting**

**James Brown<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-197**

v.

**N.J. Department of Treasury, Division of Lottery<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via -email of:<sup>3</sup>

1. “All [s]uccessful Instant Game Scratch off lottery tickets scanned on lottery terminal at NJ Lottery Retailer – Quick Chek 238 Kearney Avenue, Kearney, [NJ] 07032 on May 19, 2018.”
2. “Enterprise Series (“ES”) Reporting and [r]elated Transaction Report for” Quick Chek 238 on May 19, 2018.
3. “ES Reporting Standard Reports and Listing of Details of all [t]erminal [t]ransactions for” Quick Chek 238 on May 19, 2018.
4. “All [s]uccessful Instant Game [v]alidations [e]ntered on ES” from Quick Chek 238 on May 19, 2018.

**Custodian of Record:** Jill Dawson  
**Request Received by Custodian:** May 19, 2019  
**Response Made by Custodian:** May 29, 2019  
**GRC Complaint Received:** September 24, 2019

**Background<sup>4</sup>**

**Request and Response:**

On May 19, 2019, the Complainant submitted three (3) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On May 29, 2019, OPRA Manager Cynthia Jablonski responded in writing on behalf of the Custodian extending the response time frame through June 16, 2019 to gather data responsive to the OPRA requests. On June 16, 2019, Manager Cynthia Jablonski responded in writing on behalf of the Custodian

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

<sup>2</sup> Represented by Deputy Attorney General Victoria G. Nilsson.

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</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.

extending the response time frame through July 25, 2019 to gather data responsive to the OPRA requests. On July 25, 2019, Manager Cynthia Jablonski responded in writing on behalf of the Custodian extending the response time frame through July 29, 2019 to gather data responsive to the OPRA requests. On July 29, 2019, Manager Cynthia Jablonski responded in writing on behalf of the Custodian extending the response time frame through July 31, 2019 to gather data responsive to the OPRA requests.

On July 31, 2019, Manager Cynthia Jablonski responded in writing on behalf of the Custodian denying access to the relevant request items under the “trade secret and proprietary commercial or financial information” and “advantage to competitors and bidders” exemptions. N.J.S.A. 47:1A-1.1.

#### Denial of Access Complaint:

On September 24, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied him access to the records sought in his three (3) OPRA requests. The Complainant argued that the cited exemptions did not apply to the records sought here; the only information he sought related to ticket transactions successfully scanned, redeemed, and validated.

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

On July 12, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s three (3) OPRA requests on May 19, 2019. The Custodian certified that the Division of Lottery (“Lottery”) located responsive records, which were reviewed by Deputy Attorney General George Loeser, who determined that some were exempt from disclosure. The Custodian certified that following several extensions of time, Ms. Jablonski responded in writing on her behalf on July 31, 2019 denying access to the relevant OPRA requests under N.J.S.A. 47:1A-1.1.

The Custodian contended that she properly denied access to the record at issue here, the Transaction report and terminal transaction details for Quick Chek 238, under the proprietary and trade secret exemption. N.J.S.A. 47:1A-1.1; Comm’n Workers of Am. V. Rousseau, 417 N.J. Super. 341, 358 (App. Div. 2010). The Custodian affirmed that the records at issue here are terminal transaction reports that show sales data for a single retailer and break down the total amount of Lottery revenue and/or receipts for a specific day. The Custodian argued that these reports could be used to calculate the retailer’s annual earnings, the disclosure of which would be “as invasive” as requiring the disclosure of a personal tax return. The Custodian further argued that disclosure of these records could put the retailer at a disadvantage in seller negotiations. The Custodian also argued that these reports could be used by competitors to make financial and business decisions that would be detrimental to the retailer.

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<sup>5</sup> On November 18, 2020, this complaint was referred to mediation. On May 28, 2021, this complaint was referred back to the GRC for adjudication.

## 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 government record shall not include . . . trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure (emphasis added).

[N.J.S.A. 47:1A-1.1.]

In Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011), the Appellate Division elaborated on defining trade secret and proprietary information and its application to OPRA’s proprietary and trade secret exemption:

Relying on the Court’s guidance set forth in Lamorte Burns & Co. v. Walters, 167 N.J. 285, 299-301, 770 A.2d 1158 (2001), we considered “the key elements” to determine when commercial financial information was proprietary. [CWA, 417 N.J. Super. at 356,]. Lamorte suggested we must analyze “the relationship of the parties at the time of disclosure[,] . . . the intended use of the information[,]” and “the expectations of the parties.” Ibid. (citing Lamorte, supra, 167 N.J. at 299-300, 770 A.2d 1158). “[U]nder OPRA, if the document contains commercial or proprietary information it is not considered a government record and not subject to disclosure.” Id. at 358, 9 A.3d 1064. We concluded the investment agreements sought by the plaintiffs were proprietary as their content was not intended for wide dissemination, the “[d]efendants’ expectation of confidentiality [was] manifest” and the agreements delineated the specific terms and specific persons who may review the information. Id. at 359, 9 A.3d 1064. Further,

[e]ach agreement contains specific information about the capitalization of the partnership, its commencement and termination date, and other information pertinent to the operational fortunes of the partnership. Finally, each agreement is a complex document. Each reflects years of experience and expertise by trained legal and financial professionals. Id. at 359-60, 9 A.3d 1064.

In analyzing whether information qualifies as “trade-secrets,” a term not defined by OPRA, Id. at 360, 9 A.3d 1064, we considered the Court’s prior reliance on

Comment b of the Restatement of Torts § 757 (1939). Id. at 361, 9 A.3d 1064 (citing Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 384, 662 A.2d 546 (1995)). The comment provides: “[a] trade secret may consist of any . . . compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” Ibid. (quoting Restatement of Torts § 757 cmt. b (1939)). Other considerations include the extent to which the information is known outside of the owner’s business, the extent to which it is known by employees of the owner, the measures taken to guard the secrecy of the information, the value of the information to the owner and competitors, the effort expended to develop the information, and the ease or difficulty by which the information can be duplicated. Ibid. (citing Hoffmann-LaRoche, 142 N.J. at 384, 662 A.2d 546).

“Trade secrets are a peculiar kind of property. Their only value consists in their being kept private. If they are disclosed or revealed, they are destroyed.” Trump's Castle Assocs. v. Tallone, 275 N.J. Super. 159, 163, 645 A.2d 1207 (App. Div. 1994) (quoting In re Iowa Freedom of Info. Council, 724 F.2d 658, 662 (8th Cir. 1983)).

[Newark Morning Ledger, 423 N.J. Super. at 169.]

In the matter before the Council, the Complainant sought access to Lottery transaction reports for Quik Check 238 specific to May 19, 2018. The Custodian denied access to the responsive Transaction report and terminal transaction details under the trade secrets and proprietary information, and competitors and bidders, exemptions. This complaint ensued, where the Complainant contended that the cited exemptions did not apply; he only sought access to instant lottery game information on the date in question. In the SOI, the Custodian maintained her position that responsive transaction reports were trade secret and proprietary in nature (citing Newark Morning Ledger, 423 N.J. Super. 140).

The GRC begins by briefly describing the relationship between the Lottery and retailers engaging in lottery ticket sales. The Lottery was created, and its duties set forth, by N.J.S.A. 5:9-7. The Lottery is empowered with licensing individual retailers (or agents) to sell lottery tickets and maintains the authority to suspend or revoke licenses based on statutory and regulatory violations. Id. at (f)-(g). Additionally, the Lottery has promulgated regulations setting forth the licensing process, prohibited actions resulting in suspension or revocation of an issued license, and a code of ethics. N.J.A.C. 17:20-4, *et seq.*; N.J.A.C. 17:20-5, *et seq.*; N.J.A.C. 17:20-8. Further, the Lottery’s regulations set forth how an agent collects and separates ticket money from other payments, reports it the Lottery, and remits payments. N.J.A.C. 17:20-6. Also, the Lottery’s regulations provide that “[a]ll agent lottery operations, reports, and records shall be subject, upon demand, to inspection and audit by representatives of the Lottery, but such reports and records shall remain confidential for all other purposes except income tax reporting required by law.” Id. at 6.3(e). Thus, agents clearly enter into a commercial agreement with the Lottery to sell a product on its behalf and the agents must meet reporting requirements to maintain said relationship.

The GRC has carefully considered the record at issue here, the facts of this complaint, as well as the relationship of Quick Chek 238 to the Lottery, applicable regulations, and prevailing case law. Based on this review, the GRC must reject the Custodian’s application of the “competitive advantage” exemption to the responsive records for reasons like those identified in Newark Morning Ledger. Specifically, the exemption cannot be applied based on a presumption of “. . . the mere potential for future negotiations, without a strong showing that negotiations are probable.” Id. at 164 (citing Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 379 (App. Div. 2010)). Here, the Custodian relied on the presumption that disclosure would give potential buyers an advantage in acquiring the business. However, the Custodian does not provide a strong showing that such negotiations were probable.

However, the GRC is persuaded that the responsive reports are exempt under the “trade secret and proprietary” information exemption. In reaching this conclusion, the GRC looks to the CWA court’s discussion of this exemption and applies it here accordingly. Specifically, the CWA court stated that:

Notably, if a document falls *within one of these categories*, it is not a government record and not subject to disclosure pursuant to OPRA. See [Tractenberg, 416 N.J. Super. at 366.] . . . When we encounter a term in a statute that is not defined, we should assume the Legislature meant to “ascribe to the statutory words their ordinary meaning and significance . . . .” DiProspero v. Penn, 183 N.J. 477, 492 (2005). If the ordinary meaning of a word or phrase reveals the legislative intent, we apply the plain meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008).

*Commercial information relates to commerce or business. See American Heritage Dictionary. The plain meaning of financial information is information relating to the management of money, banking, investments, and credit.*

[Id. 417 N.J. Super. 341, 355-356.]

The court’s discussion highlights that the exemption should not be read in whole; rather, the trade secret and proprietary exemption contains specific sub-part exemptions. To wit, the “commercial or financial information” portion of the exemption can be read separately from the “trade secret” portion at least in certain instances. Further, the court’s discussion supports that information relating to “commerce or business . . . [and] the management of money” should generally be held as exempt under OPRA.

Here, there is a clear “commercial” relationship between Lottery and Quick Chek 238 under N.J.S.A. 5:9-7 wherein the latter profits from selling the former’s product to the public. Additionally, the responsive terminal transaction reports show “financial information” in sales data for a single retailer and break down the total amount of Lottery revenue and/or receipts for a specific day. Also, there is no express requirement that a licensee’s sales data is subject to public review; instead, Lottery’s regulations subject them to audit while maintaining an express confidentiality to the applicable records and reports. N.J.A.C. 17:20-6.3(e). Thus, a plain application of the discussion in CWA, 417 N.J. Super. 341 to the facts here support the Custodian’s denial of access.

Accordingly, the terminal transaction reports were exempt from disclosure under the “trade secret and proprietary commercial or financial information” exemption because it contained specific financial information related to Quick Chek 238’s commercial activities. N.J.S.A. 47:1A-1.1; CWA, 417 N.J. Super. 341. Thus, the Custodian lawfully denied access to the responsive reports. N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the terminal transaction reports were exempt from disclosure under the “trade secret and proprietary commercial or financial information” exemption because it contained specific financial information related to Quick Chek 238’s commercial activities. N.J.S.A. 47:1A-1.1; Commc’ns Workers of America v. Rousseau, 417 N.J. Super. 341 (App. Div. 2010). Thus, the Custodian lawfully denied access to the responsive reports. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso  
Executive Director

October 26, 2021