

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0163-08T1

CHARLES S. SLAUGHTER,
a/k/a UMAR M. ALI KHAN,

Appellant,

v.

GOVERNMENT RECORDS COUNCIL
and CATHERINE STARGHILL, ESQ.,

Respondents.

APPROVED FOR PUBLICATION

June 4, 2010

APPELLATE DIVISION

Submitted March 23, 2010 - Decided June 4, 2010

Before Judges Skillman, Fuentes and Gilroy.

On appeal from the Government Records
Council, Complaint No. 2007-274.

Charles S. Slaughter, appellant pro se.

Trenk, DiPasquale, Webster, Della Fera &
Sodono, attorneys for respondents (Kelley J.
Lake, of counsel and on the brief; Gina R.
Orosz, on the brief).

Paula T. Dow, Attorney General, attorney for
amicus curiae Attorney General (Nancy
Kaplen, Assistant Attorney General, of
counsel; Lewis A. Scheindlin, Assistant
Attorney General, on the brief).

The opinion of the court was delivered by
SKILLMAN, P.J.A.D.

One day after the July 7, 2002 effective date of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, Governor McGreevey issued an executive order, which provided that any government record a state agency proposed to exempt from disclosure by administrative rule published after enactment of OPRA that had not yet been adopted in accordance with the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -25, would be exempt from disclosure. The issue presented by this appeal is whether that exemption remains in effect. We conclude that the part of the executive order establishing this exemption from disclosure under OPRA was intended to be temporary only, pending state agencies' determinations of whether to adopt their proposed rules providing for exemptions from OPRA, and therefore the exemption provided by the executive order is no longer in effect.

Appellant was convicted of a criminal offense in January 2004. Although the record before us does not indicate what offense appellant was found to have committed or whether he is still incarcerated, appellant's brief states that evidence of a blood test analysis conducted by a "State Forensic Scientist" was introduced into evidence at his trial. Appellant asserts

that this test was not properly performed and that an examination of documents relating to the "New Jersey State Police Forensic Science Laboratory's policies and procedures on blood test analysis for testing swabs and smears for blood, DNA comparisons, semen and saliva, specifically records concerning presumptive and confirmative testing" could be useful in exonerating him.

Appellant attempted to obtain a copy of this document by submitting a request for its production under OPRA to the Department of Law and Public Safety's custodian of records. The Department denied this request. Appellant filed a complaint with the respondent Government Records Council challenging this denial. The Department certified in its response that "there is one . . . document . . . responsive to [appellant's] request: the New Jersey Forensic Science Laboratory's Biochemistry Analysis Manual[,] . . . [which] represents the standard operating procedure for laboratory analysis of, among other things, DNA analysis of biological evidence as well as presumptive and confirmative testing."

The Council's Executive Director, respondent Catherine Starghill, recommended that the Council find that the document requested by appellant is exempt from disclosure under a rule proposed by the Department of Law and Public Safety in 2002,

which would exempt "Standard Operating Procedures" from disclosure under OPRA, and two executive orders issued by Governor McGreevey in 2002, which directed state agencies to handle requests for disclosure of government records under OPRA in accordance with administrative rules that had been proposed but not yet adopted. The Council accepted its Executive Director's recommendation and upheld the Department's denial of access to the document. Appellant appeals this administrative decision.

The appeal was originally calendared before a panel of this court last summer. However, that panel concluded that the appeal should not be heard without the participation of the Attorney General because it involved a question that could significantly impact upon consideration of OPRA requests by not only the Department of Law and Public Safety, of which the Attorney General is the department head, N.J.S.A. 52:17B-2, but also other state agencies. Accordingly, we entered an order on August 14, 2009, requesting the filing of an amicus curiae brief by the Attorney General. That brief was filed, and the parties submitted supplemental briefs responding to the Attorney General's submission.

OPRA was enacted on January 8, 2002, with an effective date of July 7, 2002. L. 2001, c. 404, § 18. In anticipation of

OPRA going into effect, a number of State agencies published rule proposals in the New Jersey Register on July 1, 2002, which identified certain government records that would be exempt from disclosure under OPRA. See, e.g., 34 N.J.R. 2267(a) (July 1, 2002) (Department of Law & Public Safety); 34 N.J.R. 2175(a) (July 1, 2002) (Department of Community Affairs); 34 N.J.R. 2169(a) (July 1, 2002) (Department of Agriculture).

On July 8, 2002, the day after OPRA went into effect, Governor McGreevey issued Executive Order 21 for the purpose of implementing this new legislation. Executive Order 21 exempted certain specific categories of government records from disclosure under OPRA, such as documents whose disclosure would substantially interfere with the State's ability to protect against acts of terrorism. In addition, Executive Order 21 included an omnibus provision that exempted any government record a State agency had proposed to exempt from disclosure by a rule that had been published for public comment but could not be adopted in accordance with the APA prior to the effective date of OPRA. This provision, which was paragraph 4 of Executive Order 21, stated:

In light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the

Open Public Records Act, State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order. Once those regulations have been adopted, they shall govern all government records requests filed thereafter.

One of the proposed rules covered by paragraph 4 of Executive Order 21 was proposed N.J.A.C. 13:1E-3.2(a)(2), which would exempt any "Standard Operating Procedures" of the Department of Law and Public Safety from disclosure under OPRA. The Department published this proposed rule in the Register on July 1, 2002, 34 N.J.R. at 2270, but for reasons that are not disclosed by the record before us, the Department never adopted this rule.

A little more than a month after issuing Executive Order 21, Governor McGreevey issued a second Executive Order dealing with exemptions from disclosure under OPRA on August 13, 2002, Executive Order 26. This executive order modified certain of the specific exemptions from disclosure provided under Executive Order 21. Executive Order 26 also established exemptions from disclosure of a number of additional specific types of government records that had not been exempted by Executive Order 21. However, the "Standard Operating Procedures" of the Department of Law and Public Safety, which would have been

exempted from disclosure by the proposed N.J.A.C. 13:1E-3.2(a)(2), were not included in this expanded list of specific exemptions.

In addition to these modifications and additions to the exemptions from disclosure of specific categories of governmental records, Executive Order 26 included a general provision, paragraph 6, which stated:

The remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order.

The Council and Attorney General contend that the "provisions of Executive Order No. 21" that are "continued" by paragraph 6 of Executive Order 26 include paragraph 4 of Executive Order 21, which directed State agencies to apply rules for exemption from disclosure that had been proposed and published but not yet adopted when OPRA became effective in responding to requests under OPRA for disclosure of government records. We agree with this contention. However, it does not provide an answer to the question presented by this appeal, which is whether the exemption from disclosure provided by paragraph 4 of Executive Order 21 remains in effect nearly eight years after enactment of OPRA and the issuance of Executive Orders 21 and 26.

It is clear that an exemption from a right of public access to a government record can be established not only by administrative rule but also by "Executive Order of the Governor." N.J.S.A. 47:1A-9(a); see Mason v. City of Hoboken, 196 N.J. 51, 65 (2008). Therefore, the Governor could have exempted the Department of Law and Public Safety's "Standard Operating Procedures" from disclosure under OPRA by executive order. See Michelson v. Wyatt, 379 N.J. Super. 611, 619-20 (App. Div. 2005). The only question is whether paragraph 4 of Executive Order 21, which was continued in effect by paragraph 6 of Executive Order 26, created such an exemption beyond the interim period required for the Department to determine whether to adopt proposed N.J.A.C. 13:1E-3.2(a)(2).

The sections of the preamble to Executive Order 21 relevant to paragraph 4 clearly indicate that the intent of this provision was solely to preserve, on a temporary basis, the confidentiality of government records that State agencies proposed to exempt from disclosure under OPRA by administrative rules that had been published but not yet finally adopted in conformity with the requirements of the APA:

WHEREAS, the Open Public Records Act takes effect on July 7, 2002, the 180th day after its enactment and

WHEREAS, the enactment of the Open Public Records Act occurred one week before this Administration took office; and

WHEREAS, it was necessary for all State agencies to conduct a comprehensive review of all records maintained by that agency, and a thoughtful analysis of those records to determine which of those records should be exempted from disclosure in order to protect the public interest or a citizen's reasonable expectation of privacy; and

WHEREAS, that review and analysis was required to be performed during a time of shifting personnel and priorities and changing the way government does business with its citizens; and

WHEREAS, that process has been largely completed and the various agencies have identified those documents that should be exempted from public disclosure in order to protect the public interest or a citizen's reasonable expectation of privacy; and

WHEREAS, the proposed regulations of the various agencies specifying which records under their jurisdiction are not to be subject to public examination have been published in the New Jersey Register on July 1, 2002; and

WHEREAS, due to the provisions of the Administrative Procedures Act and the implementing regulations adopted pursuant to that Act, the agencies' proposed rules will not be finalized until October 1, 2002 at the earliest[.]

The conclusion that paragraph 4 was only intended to establish a stopgap exemption from disclosure during the interim period between the effective date of OPRA and the adoption by

State agencies of proposed rules that would establish such exemptions for the full period of time allowed under the APA is confirmed by the language of paragraph 4. The introductory clause of this paragraph expressly states that the reason for establishment by executive order of this general exemption from disclosure under OPRA was the inability of State agencies to adopt proposed rules establishing exemptions in accordance with the APA before OPRA's effective date:

In light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published. . . .

[Emphasis added.]

The second sentence of paragraph 4 reinforces the conclusion that it was only intended to create an interim exemption that would expire when a State agency adopted an exemption from OPRA disclosure by administrative rule, stating: "Once those regulations have been adopted, they shall govern all government records requests filed thereafter."

A review of the specific exemptions from disclosure established by the other paragraphs of Executive Orders 21 and

26 provides additional support for the conclusion that paragraph 4 was not intended to establish permanent exemptions from disclosure under OPRA. Those specific exemptions, with one exception, apply only to the Governor's Office itself, which is not subject to the procedures contained in the APA for adoption of a rule or regulation, N.J.S.A. 52:14B-2(a), or to every "public agency," which includes not only all State agencies but also independent authorities and political subdivisions such as counties and municipalities. See N.J.S.A. 47:1A-1. The only other exemption from disclosure provided by Executive Order 26 is for "[r]ecords of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999)," which does not apply to political subdivisions but applies to every State agency. Thus, none of the specific exemptions from disclosure set forth in Executive Orders 21 and 26 apply solely to an individual State agency, and for this reason those exemptions could not have been adopted as a rule or regulation in accordance with the APA. Therefore, the distinction between those specific exemptions and the general exemption provided by paragraph 4 for government

records proposed to be exempted from disclosure by a proposed rule of an individual State agency provides additional support for the conclusion that paragraph 4 was only intended to establish an interim exemption from disclosure while State agencies decided whether to adopt those proposed rules.

We also note that if the Department of Law and Public Safety had adopted proposed N.J.A.C. 13:1E-3.2(a)(2), this rule would have expired five years after its effective date, N.J.S.A. 52:14B-5.1(b), unless renewed in accordance with N.J.S.A. 52:14B-5.1(c) or (d). Therefore, if we accepted the Attorney General's argument that, as a result of paragraph 4 of Executive Order 21, proposed N.J.A.C. 13:1E-3.2(a)(2) is now in effect even though it was never adopted in accordance with the APA, this rule not only would have become effective without the opportunity for public comment provided by the APA, see N.J.S.A. 52:14B-4, but also would be exempt from the APA's sunset provision, N.J.S.A. 52:14B-5.1, which is designed to assure that there is a periodic review of the continuing need for any administrative rule. See 37 New Jersey Practice, Administrative Law and Practice § 2.24 (Lefelt, et al.) (2nd ed. 2000 & Supp. 2009). For the reasons previously set forth, we perceive no basis for this kind of expansive interpretation of Executive Orders 21 and 26.

We reject the Attorney General's argument that even though proposed N.J.A.C. 13:1E-3.2(a)(2) was never adopted in accordance with the APA and was not included in the lists of specific exemptions from disclosure under OPRA set forth in Executive Orders 21 and 26, it nevertheless became effective as a result of its inclusion on the State of New Jersey website, which lists all records exempted from OPRA disclosure by Executive Order. See Government Records Council, Executive Orders' Exemptions from Disclosure, <http://www.nj.gov/grc/public/eoexempt/> (last visited May 20, 2010); OPRA, EO #26 Summary of State Agency Rule Changes, http://www.nj.gov/opra/eo26_rule_final.html (last visited May 20, 2010). Executive Orders 21 and 26 do not refer to this website. Therefore, there is no foundation for arguing that the exemptions listed on this website became effective as a result of their incorporation by reference in an executive order.

Moreover, even though Governor McGreevey referred to this website in a press release issued around the same time as Executive Order 26, the press release reflected Governor McGreevey's expectation that the exemptions from disclosure under OPRA listed on the website would be adopted in accordance with the APA:

The full list of [the reduced number of exemptions from disclosure under OPRA] is

available on the web, . . . and citizens will be invited to comment on these changes.

This is how our process is designed to work. When government proposes regulations through the Administrative Procedures Act, those proposals are open to comment from the public. Where changes are appropriate, changes are made.¹

Moreover, consistent with this statement in the press release, paragraph 6 of Executive Order 26 "continued" the provisions of paragraph 4 of Executive Order 21, which also reflected the Governor's expectation that the proposed rules providing for exemptions from OPRA disclosure would be "adopted" in accordance with the APA and would "govern all government records requests filed thereafter." Consequently, N.J.A.C. 13:1E-3.2(a)(2) did not become effective, without its adoption in accordance with the APA, simply by its inclusion, in modified form, on the State of New Jersey website.

The record does not indicate why the Department of Law and Public Safety failed to adopt proposed N.J.A.C. 13:1E-3.2(a)(2)

¹ Significantly, the State's website contains a modified version of proposed N.J.A.C. 13:1E-3.2(a)(2). Although proposed N.J.A.C. 13:1E-3.2(a)(2) would have exempted all "Standard Operating Procedures and training materials" of the Department of Law and Public Safety from disclosure under OPRA, the modified version set forth on the website only exempts "Standard Operating Procedures and training materials that would reveal agency investigative, enforcement or litigation procedures or techniques." EO 26 Summary of State Agency Rule Changes, supra (emphasis added).

in accordance with the APA in the fall of 2002. The Department may have assumed, as the Attorney General argues in her amicus brief, that the rule proposal became effective as a result of issuance of paragraph 4 of Executive Order 21, which was continued in effect by paragraph 6 of Executive Order 26. However, it is also possible that the Department determined that this proposed OPRA exemption was unnecessary or that the proposal just fell between the cracks. But whatever the Department's reason for failing to adopt proposed N.J.A.C. 13:1E-3.2(a)(2), we conclude that even though the Department could have properly relied upon this proposed rule to deny disclosure of its Standard Operating Procedures for the interim period envisioned by Executive Orders 21 and 26, that interim period has long since expired, and therefore, those executive orders no longer authorize the Department to deny access to its Standard Operating Procedures.

Nevertheless, we are reluctant to require immediate disclosure of those procedures, without affording the Department an opportunity to consider whether to now adopt the exemption that would have been provided by N.J.A.C. 13:1E-3.2(a)(2). We note that a Law Division judge issued an unpublished decision in 2005, which seemed to indicate that paragraph 4 of Executive Order 21 provided continuing authority to State agencies to deny

access to government records they had proposed to exempt from disclosure by administrative rule published before issuance of Executive Order 21 but never adopted. In addition, the Council expressly held in a decision issued in 2006 that Executive Order 21 exempted from disclosure documents covered by another subsection of proposed N.J.A.C. 13:1E-3.2(a). The Department may have concluded, based on these decisions, that it could rely upon N.J.A.C. 13:1E-3.2(a)(2) to deny access to government records without adoption of this proposed exemption in accordance with the APA. Therefore, we conclude that the Department should be afforded an opportunity to do what it should have done in 2002 -- decide whether the exemption from disclosure of its Standard Operating Procedures is required in the public interest, and if so, adopt the exemption, in either its original or modified form, see supra, note 1, in accordance with the APA. See Home News Publ'g Co. v. State, 224 N.J. Super. 7, 13-14, 20 (App. Div. 1988).

Accordingly, we reverse the Council's final decision denying appellant's application for the disclosure under OPRA of the "New Jersey State Police Forensic Science Laboratory's policies and procedures on blood test analysis for testing swabs and smears for blood, DNA comparisons, semen, and saliva, specifically records concerning presumptive and confirmative

testing," but delay the effectiveness of this decision until November 5, 2010. In the interim, the Department may withhold disclosure of the document.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

A handwritten signature in black ink, appearing to be 'JWA', is written over the printed name of the Clerk of the Appellate Division.

CLERK OF THE APPELLATE DIVISION



State of New Jersey
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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

July 30, 2008 Government Records Council Meeting

Charles S. Slaughter
Complainant

Complaint No. 2007-274

v.

NJ Department of Law & Public Safety,
Division of Criminal Justice
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council (“Council”) considered the July 23, 2008 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 pursuant to N.J.S.A. 47:1A-9.a., Executive Order 21, Executive Order 26, and N.J.A.C. 13:1E-3.2(a)2, which exempts from disclosure the Standard Operating Procedures (the document responsive to Complainant’s request), the Custodian’s denial of access to the requested records is supported by law. See also Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) and Edward Buttimore v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2005-90 (March 2006). As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to 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 30th Day of July, 2008



Robin Berg Tabakin, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: August 1, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 30, 2008 Council Meeting**

**Charles S. Slaughter¹
Complainant**

GRC Complaint No. 2007-274

v.

**New Jersey Department of Law & Public Safety,
Division of Criminal Justice²
Custodian of Records**

Records Relevant to Complaint: New Jersey State Police Forensic Science Laboratory's policies and procedures on blood test analysis for testing swabs and smears for blood, DNA comparisons, semen and saliva, specifically records concerning presumptive and confirmative testing.

Request Made: August 13, 2007

Response Made: August 23, 2007

Custodian: Dale K. Perry

GRC Complaint Filed: November 3, 2007

Background

August 13, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant states that, although he is incarcerated in the State of New Jersey, the information he requests does not concern his victim. Because of his incarceration, the Complainant requests that any and all fees associated with this OPRA request be waived. Complainant also requests that the Custodian send him any form that is necessary to waive any fees.

August 23, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian certifies that the Complainant's request was received on August 17, 2007. The Custodian states that access to the requested records are denied pursuant to *N.J.A.C. 13:1E-3.2(a)2*, which states that the above described records are not government records and therefore are not subject to OPRA.

¹ No legal representation listed on record.

² Represented by DAG Robbie Miller, on behalf of the NJ Attorney General.

October 22, 2007

Letter from the Complainant to the Government Records Council (“GRC”). The Complainant attaches a copy of *N.J.A.C. 13:1E*. The Complainant states that he is incarcerated in Avenel, New Jersey. Complainant also states that on August 13, 2007 he made a formal OPRA request in writing for the records relevant to this complaint. Complainant further states that the Custodian denied his request on August 27, 2007, citing *N.J.A.C. 13:1E-3.2(a)2* as the basis for the denial of access. The Complainant states that the statute cited by the Custodian does not exist and the section of the New Jersey Administrative Code upon which the denial of access was based is reserved. The Complainant states that he called the Custodian on September 5, 2007, to appeal the denial of his OPRA request but the Custodian did not respond. The Complainant asks the GRC to accept this letter as his formal notice of appeal to the denial of access by the Custodian.

November 3, 2007

Denial of Access Complaint filed with the GRC with the following attachments:

- Letter from the Complainant to the Custodian dated May 29, 2007
- Copy of envelope from the letter dated May 29, 2007
- Letter from the Custodian to the Complainant dated August 7, 2007
- Copy of envelope from the letter dated August 7, 2007
- Complainant’s OPRA request dated August 13, 2007
- Letter from the Complainant to the Custodian dated August 13, 2007
- Denial letter from the Custodian to the Complainant dated August 23, 2007
- Complainant’s signed Offer of Mediation dated November 3, 2007

Complainant certifies that on August 13, 2007 he made a formal OPRA request in writing for the records relevant to this complaint. Complainant states that the Custodian denied his request on August 27, 2007 citing *N.J.A.C. 13:1E-3.2(a)2* as the basis for the denial.

November 20, 2007

Offer of Mediation sent to Custodian.

November 28, 2007

The Custodian requests an extension of the deadline given to respond to the Offer of Mediation. (However, after the GRC granted the extension, the Custodian failed to respond to the Offer of Mediation.)

December 14, 2007

Request for the Statement of Information sent to the Custodian.

December 21, 2007

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated August 13, 2007

- Letter from the Custodian to the Complainant denying access to the requested records dated August 23, 2007
- Additional Certification by Custodian dated December 21, 2007

The Custodian provides the following background information. The Complainant, an inmate at the Adult Diagnostic and Treatment Center, submitted an OPRA request for the New Jersey State Police Forensic Science Laboratory's Policies and Procedures on blood test analysis for testing swabs and smears for blood, DNA comparisons, semen and saliva. The section the Complainant specifically seeks concerns presumptive and confirmative testing.

The Custodian certifies that the Division of Criminal Justice received the Complainant's OPRA request on August 17, 2007. The Custodian denied the release of the records requested on August 23, 2007 on the basis that the records requested were not government records subject to public access pursuant to proposed Department of Law and Public Safety regulation at *N.J.A.C. 13: 1E-3.2(a)2*, which specifically exempts Standard Operating Procedures from disclosure under OPRA.

The Custodian maintains that pursuant to OPRA, "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions." N.J.S.A. 47: 1A-1. The Custodian states that OPRA defines a "government record" as "...any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof; that has been made, maintained or kept on file... or that has been received in the course of his or its official business." N.J.S.A. 47:1A-1.1. The Custodian also states that OPRA provides that records are subject to public access unless exempt from access pursuant to any other statute, Legislative resolution, regulation, Executive Order, Rules of Court, federal law, federal regulation or federal order. N.J.S.A. 47:1A-1.

The Custodian certifies that the Department of Law and Public Safety proposed regulations specifically declare that, among other things, Standard Operating Procedures "...shall not be considered government records subject to public access pursuant to N.J.S.A. 47: 1A-1 et seq." *N.J.A.C. 13: 1E-3.2(a)2*. The Custodian maintains that the proposed regulations have continuing viability by virtue of Executive Order 26, paragraph 14 (McGreevey 2005), and Executive Order 21, paragraph 6 (McGreevey 2002).

The Custodian further certifies that there is one (1) document which is responsive to Complainant's request: the New Jersey Forensic Science Laboratory's Biochemistry Analysis Manual. The Custodian maintains that this document represents the standard operating procedure for laboratory analysis of, among other things, DNA analysis of biological evidence as well as presumptive and confirmative testing. Because the records requested are not to be considered government records subject to public access under OPRA pursuant to *N.J.A.C. 13: 1E-3.2(a)2*, the Custodian requests that this complaint be dismissed because the request was properly denied.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added). N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added). N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

N.J.S.A. 47:1A-9.a. states in part:

"[t]he 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..." (Emphasis added). N.J.S.A. 47:1A-9.a.

Executive Order 21, paragraph 4, provides that:

"[i]n light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, *State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published*, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order..." (Emphasis added). Executive Order 21 (McGreevey 2002).

Executive Order 26, adopted on August 13, 2002, rescinded paragraphs 2 and 3 of Executive Order 21. However, the paragraphs rescinded are not relevant for the analysis of state agencies' proposed OPRA rules. The one relevant paragraph in Executive Order 26 is paragraph 6, which states:

"[t]he remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order..." Executive Order 26 (McGreevey 2002).

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.

The Complainant alleges that he was unlawfully denied access to the requested records. The Custodian asserts that these records are not subject to disclosure pursuant to *N.J.A.C.* 13:1E-3.2(a)2. The Department of Law and Public Safety proposed regulations specifically declare that, among other items, Standard Operating Procedures "...shall not be considered government records subject to public access pursuant to N.J.S.A. 47: 1A-1 et seq." *Id.* The Custodian maintains that the proposed regulations have continuing viability by virtue of Executive Order 26, paragraph 14 (McGreevey 2002), and Executive Order 21, paragraph 6 (McGreevey 2002).

The Complainant contends that the statute cited by the Custodian to support the denial of his OPRA request does not exist and the section of New Jersey Administrative Code upon which the denial was based is reserved.

Despite its reserved nature, *N.J.A.C.* 13: 1E-3.2(a)2 is still viable under Executive Order 21 (McGreevey 2002). While there are some portions of Executive Order 21 that have been rescinded, the pertinent portion which states, "state agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published" is still valid pursuant to the specific language of Executive Order 21 (McGreevey 2002).

Executive Order 26, paragraph 6 provides further support for the Custodian's denial of access to the requested records. In an unpublished opinion of the New Jersey Superior Court, it was determined that paragraph 6 of Executive Order 26 "continues to permit a department or agency within State [g]overnment to adopt rules and regulations and to permit the operation of a proposed rule or regulation prior to its final adoption. Therefore, pursuant to Paragraph 4 of Executive Order 21, State departments and agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed ..." Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) at page 11.

In that case, the court went on to state that:

"[i]t appears, from the language of both Executive Orders, that these provisions were added to provide sufficient time for departments and agencies within State government to evaluate their records, propose regulations and withhold certain documents from public inspection pending the adoption of the proposed rules. While this process may be at variance with the normal regulatory process, one can only conclude that the Executive Branch, understanding the broad scope of OPRA, felt it was appropriate to have agencies and departments, within State government, undertake a careful review and analysis of its records to determine, for purposes of security and safety, those records to be considered confidential." *Id.* at 12.

The court further held that:

"[r]ecognizing the time delay inherent in the normal rule adoption process, Executive Order 21 and Executive Order 26 included language to permit custodians of records to deny access, based on the proposed rule, pending final adoption. Now, three years after the passage of OPRA, for the court, the continued efficacy of that practice raises some concerns." *Id.*

The court concluded, however, that "[w]hile [it] does not know the status of this proposed regulation, under Executive Order 21 paragraph 4 and Executive Order 26, paragraph 6, resolution of that issue is not required. ... the court assumes that the proposed rule change is still pending." *Id.* at 13.

In the unpublished opinion discussed above, the court determined that paragraph 6 of Executive Order 26 "continues to permit a department or agency within State Government to adopt rules and regulations and to permit the operation of a proposed rules or regulations prior to its final adoption. Therefore, pursuant to Paragraph 4 of Executive Order 21, public 'agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed..."

Moreover, in Edward Buttimore v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2005-90 (March 2006), the GRC considered this very issue. The complainant in Buttimore alleged that he was unlawfully denied access to the requested records. *Id.* The custodian asserted that the records were confidential and not subject to disclosure pursuant to *N.J.A.C. 13:1E-3.2(a)1* (proposed regulation). The complainant asserted that the proposed rule was not valid because Executive Order 26 rescinded the mandate of Executive Order 21. *Id.* The custodian's counsel asserted that while there are some portions of Executive Order 21 that have been rescinded, the portion utilized as the basis for the denial was not. *Id.* The custodian further alleged that Executive Order 26, paragraph 6 further upheld the denial of access. The Council found that pursuant to N.J.S.A. 47:1A-9.a, *N.J.A.C. 13:1E-3.2(a)1* and the unpublished decision in Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-

1090-05 (Decided July 5, 2005), the proposed rule exempting the records sought by the Complainant from being disclosed pursuant to OPRA applied. *Id.* The Council therefore determined that the requested records were exempt from disclosure and the custodian did not unlawfully deny access to the requested records. *Id.*

In the matter before the Council, the Custodian denied the Complainant access to the requested records based upon the proposed regulation *N.J.A.C.* 13:1E-3.2(a)2. OPRA specifically provides that “[t]he provisions of OPRA shall not abrogate any exemptions made by regulations promulgated under the authority of any ... Executive Order of the Governor.” N.J.S.A. 47:1A-9.a. Executive Order 21 (McGreevey 2002) “directed [state agencies] to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order.” Executive Order 26 (McGreevey 2002) continues the effectiveness of this mandate from Executive Order 21 (McGreevey 2002) pursuant to Newark Morning Ledger, *supra*. As such, the proposed regulation asserted by the Custodian which states that the requested records are not government record subject to OPRA is a lawful basis for the Custodian’s denial of access.

Therefore, pursuant to N.J.S.A. 47:1A-9.a., Executive Order 21, Executive Order 26, and *N.J.A.C.* 13:1E-3.2(a)2, which exempts from disclosure the Standard Operating Procedures (the document responsive to Complainant’s request), the Custodian’s denial of access to the requested records is supported by law. See also Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) and Edward Buttimore v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2005-90 (March 2006). As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

Conclusions and Recommendation

The Executive Director respectfully recommends the Council find that pursuant to N.J.S.A. 47:1A-9.a., Executive Order 21, Executive Order 26, and *N.J.A.C.* 13:1E-3.2(a)2, which exempts from disclosure the Standard Operating Procedures (the document responsive to Complainant’s request), the Custodian’s denial of access to the requested records is supported by law. See also Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) and Edward Buttimore v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2005-90 (March 2006). As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

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Executive Director

July 23, 2008