



Memorandum

TO: John O'Brien, NJPA

FROM: Tom Cafferty and Nomi Lowy

DATE: May 18, 2007

RE: Paff v. New Jersey Department of Labor (Docket No. A-2413-05T5 (Approved for Publication on April 24, 2007

This case involves an appeal by John Paff from two final decisions of the Government Records Council (GRC) releasing documents requested from the New Jersey Department of Labor (DOL) pursuant to the Open Public Records Act (OPRA). The relevant facts began in October of 1997 when the DOL obtained a judgment of debt against Gladys Garbin in the amount of \$1764.72 in State unemployment and disability taxes, interest and penalties. On January 26, 1999, Garbin paid \$2,150.27 (which included interest and collection fees). On January 21, 2003, Claimant John Paff requested, under OPRA, all DOL records regarding the judgment against Garbin. On January 25, 2003, the DOL filed in Superior Court a warrant of satisfaction of the debt.

The DOL first denied Paff's OPRA request, except to provide redacted copies of the judgment and warrant of satisfaction of the debt. The GRC dismissed Paff's complaint on the ground that the records requested were confidential pursuant to N.J.S.A. 43:21-11(g) because they contained confidential wage and tax information. The GRC decision was appealed and the Appellate Division reversed after it found that the GRC misapplied N.J.S.A. 43:21-11(g). The matter was remanded to the GRC "to determine whether the records included in the file fall within the proper scope of the exemption provided in N.J.S.A. 43:21-11(g) or the DOL's regulations."

On remand, the GRC conducted an in camera inspection of six unredacted documents submitted by the DOL for GRC review and on October 18, 2005, the GRC concluded that a majority of the information on the documents was confidential under N.J.S.A. 43:21-11(g) and N.J.A.C. 12:15-2.1 to 2.4. The GRC ordered the DOL to release the six documents after redacting all information found to be confidential.

After receiving the GRC's decision, the DOL noted that the GRC did not rule on a September 1, 1999 letter from Garbin to the Division of Unemployment Insurance (DUI) and a March 10, 1999 letter from the Passaic County Sheriff to the DUI and the DOL asked the GRC to consider these two letters. The DOL requested that the GRC advise whether the documents should be released under OPRA. Because the March 10, 1999 letter was a public document, the GRC released the letter. The September 1, 1999 letter was released after confidential information was redacted. The GRC then asked the DOL to determine whether there were any other documents pertaining to Garbin's account and an additional August 17, 2000 document addressed to Garbin was located. The GRC reviewed the letter and released it after redacting confidential information.

In October 2004, the State Division of Records and Archives had authorized the "Division of Employer Accounts to destroy all of its paper documents for periods prior to the third quarter of 1998." Paff argued to the Appellate Division that the DOL engaged in routine document destruction after his initial requests but failed to preserve the documents he requested and failed to provide a sworn certification listing the documents that were destroyed or stating that the requested documents were still intact. Paff sought discovery of the facts surrounding the destruction of the requested records and sought to have the DOL reconstruct all relevant records destroyed after the filing of his complaint.

The Appellate Division found that the GRC and DOL had produced all of the requested non-confidential information still in existence. The Court went on to hold:

With respect to future requests, however, the agency to which the request is made shall be required to produce sworn statements by agency personnel setting forth in detail the following information:

- (1) the search undertaken to satisfy the request;
- (2) the documents found that are responsive to the request;
- (3) the determination of whether the document or any part thereof is confidential and the source of the confidential information;
- (4) a statement of the agency's document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed.

The sworn statement shall have appended to it an index of all documents deemed by the agency to be confidential in whole or in part, with an accurate description of the documents deemed confidential.

The Court determined that an accurate index, which is essentially a "privilege log" is necessary for substantive review by the requesting party as well as the reviewing court. The index must provide sufficient information "respecting the basis of the privilege-confidentiality-exception claim vis a vis each document."

The Appellate Division then held that, after the GRC's in camera review of the documents, the GRC shall then produce the following to the requesting party:

- (1) the redacted or unredacted documents responsive to the request;
- (2) sworn statement provided by the agency with the index or “privilege log” appended thereto; and
- (3) the minutes of the meeting at which the documents were reviewed in camera reflecting its explanation for all redactions or withheld documents.

With these directives for future rulings by the GRC, the Appellate Division affirmed the decisions rendered by the GRC on this matter.