



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 26, 2012 Government Records Council Meeting

Baruch B. Blaustein
Complainant

Complaint No. 2011-102

v.

Lakewood Police Department (Ocean)
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 2012 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 requested mobile video recorder recordings and radio transmissions for Lakewood Police Department complaint numbers 11-20298 and 11-20505 are exempt from access pursuant to the Attorney General’s Internal Affairs Policy & Procedure, which classifies these records as confidential and O’Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009), which clothes the Attorney General’s Policy with the force of law for police entities. *See also* Rivera v. Borough of Keansburg Police Department (Monmouth), GRC Complaint No. 2007-222 (June 2010). As such, the Custodian did not unlawfully deny access to said records. 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 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting Chair
Government Records Council



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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

Baruch B. Blaustein¹
Complainant

GRC Complaint No. 2011-102

v.

Lakewood Police Department (Ocean)²
Custodian of Records

Records Relevant to Complaint: Copies of mobile video recorder (“MVR”) recordings and radio transmissions for Lakewood Police Department complaint numbers 11-20298 and 11-20505.

Request Made: April 5, 2011

Response Made: April 6, 2011

Custodian: Steven Berner

GRC Complaint Filed: April 6, 2011³

Background

April 5, 2011

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.

April 5, 2011

Custodian’s response to the OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested records is denied because the records are criminal investigatory records for an internal affairs investigation pursuant to N.J.S.A. 47:1A-1.1.

April 6, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Township of Lakewood Code 2-76 dated October 2009⁴

¹ No legal representation listed on record.

² Represented by Jan L. Wouters, Esq., (Lakewood, NJ); however, there are no submissions on file from the Custodian’s Counsel to the GRC.

³ The GRC received the Denial of Access Complaint on said date.

- Lakewood Police Department police report for complaint number 11-20298 dated March 31, 2011
- Lakewood Police Department police report for complaint number 11-20505 dated April 1, 2011
- Complainant's OPRA request dated April 5, 2011
- Custodian's response to the OPRA request dated April 6, 2011
- Lakewood Police Department Internal Affairs Citizen Complaint Information Sheet, undated

The Complainant asserts that he filed his OPRA request on April 5, 2011 and that the Custodian responded to his request on April 5 or April 6, 2011.⁵ The Complainant states that he obtained a copy of the Lakewood Police Department police reports for complaint numbers 11-20298 and 11-20505 via an earlier OPRA request. The Complainant further states that he learned from reading the police reports that the reporting officer recorded certain events pertinent to the content of the police reports via the police vehicle's MVR equipment. The Complainant states that he subsequently filed the OPRA request which formed the basis for this complaint seeking MVR recordings and radio transmissions related to Lakewood Police Department complaint numbers 11-20298 and 11-20505.

The Complainant states that in response to his OPRA request, the Custodian informed him that the cost of the requested records would be \$5.00 for each CD containing the radio transmissions and \$75.00 for each DVD containing the MVR recordings.⁶ The Complainant states that after the Custodian told him the cost of the records, he asked the Custodian if he could see the ordinance which established the cost. The Complainant states that the Custodian showed him the applicable ordinance. The Complainant states that he needed to think about paying such an exorbitantly high cost for the requested records and told the Custodian he would need time to decide whether to continue pursuing his request.

The Complainant states that he subsequently decided to pay for the records and he gave the Custodian personal checks in payment of the records.⁷ The Complainant states that approximately two (2) hours later, the Custodian telephoned him to tell him that access to the records was being denied because the records he requested were part of an internal affairs investigation.

The Complainant does not agree to mediate this complaint.

⁴ This code contains a schedule of fees for copying and/or disclosure of various public records. With respect to this complaint, the code establishes the cost of duplicating videotapes at the rate of \$75.00 per CD, DVD or video tape.

⁵ The evidence of record reveals that the Custodian responded in writing to the Complainant's request on April 6, 2011.

⁶ Although the Complainant does not make it clear in his complaint, it appears that the Complainant went to the Police Department to obtain the requested records.

⁷ The Complainant's OPRA request contained a handwritten note on it which stated "checks returned to Baruch Blaustein." The note also indicated that the checks returned were sequentially numbered from 427 to 430; two (2) checks were alleged to be in the amount of \$75.00 each and two (2) checks were alleged to be in the amount of \$5.00 each.

April 7, 2011

Request for the Statement of Information (“SOI”) sent to the Custodian.

April 7, 2011

E-mail from the Custodian to the GRC. The Custodian informs the GRC that he is in receipt of the GRC’s request for the SOI but states that he will be out of the office until April 12, 2011.

April 7, 2011

E-mail from the GRC to the Custodian. The GRC informs the Custodian that the GRC will grant an extension of time until April 19, 2011 for the Custodian to prepare and submit the SOI. The GRC also informs the Custodian that the GRC reviewed a copy of a municipal code which the Complainant attached to his complaint. The GRC informs the Custodian that the schedule of fees for copying and/or disclosure of various public records is contrary to the provisions of OPRA. The GRC asks the Custodian if the code’s fee schedule is presently in effect.

April 18, 2011

E-mail from Township Clerk Mary Ann Del Mastro. Ms. Del Mastro informs the GRC that the municipal code the Complainant attached to his complaint is obsolete. Ms. Del Mastro further states that the Complainant had been given a copy of the ordinance which states the correct fee schedule for public records by the Clerk’s Office. Ms. Del Mastro attaches a copy of the current ordinance, 2010-79.⁸

April 18, 2011⁹

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated April 5, 2011¹⁰
- Custodian’s response to the OPRA request dated April 6, 2011

The Custodian certifies that the records responsive to the request have not been destroyed and must be retained for two (2) years in accordance with Records Destruction Schedule 0036-0003 established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he received the Complainant’s OPRA request on April 4, 2011 and responded in writing to the request on April 5, 2011, informing the Complainant that the records responsive to the request are exempt from disclosure because they are part of an ongoing internal affairs criminal investigation. The Custodian cites to N.J.S.A. 47:1A-3. which he contends allows exemptions from disclosure for internal affairs criminal investigations and he also cites to N.J.S.A. 47:1A-10.which he contends allows exemptions from disclosure for personnel files/internal affairs records.

⁸ This ordinance provides that copies of videotapes and audiotapes shall be charged based upon actual cost.

⁹ The Custodian did not certify to the search undertaken to locate the records responsive to the Complainant’s request, but rather stated that the records are part of an internal affairs investigation.

¹⁰ The Custodian also included an undated OPRA request from the Complainant marked received by the Custodian on April 4, 2011 that is not relevant to the instant complaint.

January 25, 2012

Telephone call from the Complainant to the GRC. The Complainant asks the GRC if he can add other records to his April 5, 2011 OPRA request.

January 25, 2012

E-mail from the GRC to the Complainant. The GRC informs the Complainant that he cannot add other records to his previous OPRA request and that if he wants to request additional records from the Custodian he will have to file another OPRA request.

January 26, 2012

E-mail from the Complainant to the GRC. The Complainant informs the GRC that he never received a copy of the Custodian's submission to the GRC in response to his complaint and asks the GRC if the Custodian submitted a response to the complaint.

January 27, 2012

E-mail from the GRC to the Custodian. The GRC informs the Custodian that the Complainant never received a copy of the Custodian's SOI. The GRC directs the Custodian to forward to the Complainant a copy of the SOI and send a copy of the SOI transmittal letter to the GRC.

February 1, 2012

E-mail from the Custodian to the GRC. The Custodian informs the GRC that a copy of the document requested by the Complainant does not exist.

February 2, 2012¹¹

E-mail from the GRC to the Complainant. The GRC forwards a copy of the GRC's file copy of the Custodian's SOI to the Complainant.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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*

¹¹ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
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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 also provides that:

“...where it shall appear that the record or records that are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA]...may be denied if the inspection, copying, or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.” N.J.S.A. 47:1A-3.a.

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.

OPRA further provides that:

“ ... the personnel or pension records of any individual in the possession of a public agency, *including but not limited to records relating to any grievance filed by or against an individual*, shall not be considered a government record and shall not be made available for public access, except that an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record...” (Emphasis added) N.J.S.A. 47:1A-10.

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 asserts that he provided his OPRA request to the Custodian on April 5, 2011 and that the Custodian responded to the request on April 5 or April 6, 2011. The Custodian certified that he received the Complainant’s request on April 4, 2011 and responded to the request on April 5, 2011. The evidence of record reveals that the Custodian received the OPRA request on April 5, 2011 and responded to it in writing on that same date.

The Custodian certified that he denied the Complainant access to the requested records because they are exempt from disclosure as part of an ongoing internal affairs

criminal investigation. The Custodian cites to N.J.S.A. 47:1A-3. which he contends allows exemptions from disclosure for internal affairs criminal investigations and he also cites to N.J.S.A. 47:1A-10. which he contends allows exemptions from disclosure for personnel files/internal affairs records.

The Custodian first cites N.J.S.A. 47:1A-3. as a legal reason for denying the Complainant access to the requested records. The Custodian contends this provision of OPRA allows exemptions from disclosure for internal affairs criminal investigations. The Custodian misunderstands this provision. N.J.S.A. 47:1A-3. does not allow exemptions from disclosure for internal affairs criminal investigations. In fact, it does not even mention internal affairs investigations. It does, however, address ongoing investigations, and the Custodian referenced an ongoing internal affairs investigation as a reason for denying access to the requested records. With respect to an ongoing investigation, N.J.S.A. 47:1A-3. provides that:

“...where it shall appear that the record or records that are sought to be inspected, copied, or examined shall pertain to *an investigation in progress by any public agency*, the right of *access* provided for in [OPRA]...*may be denied if the inspection, copying, or examination of such record or records shall be inimical to the public interest...*”
(Emphasis added.)

For records of an ongoing investigation to be exempt from disclosure under OPRA, such disclosure must be inimical to the public interest. Here, the Custodian failed to make an argument or present any evidence to prove that disclosure of the requested records would be inimical to the public interest. As such, the Custodian’s reliance upon N.J.S.A. 47:1A-3. as a reason for withholding the records from disclosure is not persuasive.

The Custodian also cited to N.J.S.A. 47:1A-10. which he contends allows exemptions from disclosure for personnel files/internal affairs records. This argument also fails, however, because internal affairs records are not considered personnel files pursuant to the Attorney General’s Internal Affairs Policy & Procedure (“IAPP”).¹² Specifically, the IAPP provides that “[p]ersonnel records are separate and distinct from internal affairs investigation records.”¹³

The IAPP, although not shrouded by law, carries the force of law as applicable to police departments. In O’Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009), the requestor sought a municipality’s use of force reports for a multi-year period. In upholding the trial judge’s decision to disclose the reports, the court, *inter alia*, examined whether the reports were required to be made. After determining that there were no specific statutes or administrative rules requiring the reports to be completed or maintained by a police department, the court turned to the Attorney

¹² The IAPP is contained within the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the New Jersey Department of Law and Public Safety. All GRC references to the IAPP are to the November 2000 revision of that document.

¹³ See IAPP, Internal Affairs Records, Personnel Records, Paragraph 1.

General's Guidelines on the Use of Force ("AG Guidelines"). In concluding that the AG Guidelines did require police departments to prepare use of force reports, the court stated, "[w]e hold, however, that [AG Guidelines]...*has the force of law for police entities.*" *Id.* at 382. (Emphasis added.)

However, because the Superior Court determined that Attorney General Guidelines have the force of law for police entities, the IAPP operates to exempt the requested records from disclosure. The Custodian certified that the requested records were exempt from disclosure because they are part of an internal affairs investigation. The IAPP provides that "[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information."¹⁴ See also Rivera v. Borough of Keansburg Police Department (Monmouth), GRC Complaint No. 2007-222 (June 2010), in which an Administrative Law Judge decided that internal affairs reports are confidential records.

Accordingly, the requested MVR recordings and radio transmissions for Lakewood Police Department complaint numbers 11-20298 and 11-20505 are exempt from access pursuant to the IAPP, which classifies these records as confidential and O'Shea, supra, which clothes the Attorney General's Policy with the force of law for police entities. See also Rivera, supra. As such, the Custodian did not unlawfully deny access to said records. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the requested mobile video recorder recordings and radio transmissions for Lakewood Police Department complaint numbers 11-20298 and 11-20505 are exempt from access pursuant to the Attorney General's Internal Affairs Policy & Procedure, which classifies these records as confidential and O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009), which clothes the Attorney General's Policy with the force of law for police entities. See also Rivera v. Borough of Keansburg Police Department (Monmouth), GRC Complaint No. 2007-222 (June 2010). As such, the Custodian did not unlawfully deny access to said records. N.J.S.A. 47:1A-6.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012

¹⁴ See IAPP, Internal Affairs Records, Confidentiality, Paragraph 1.