



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman  
ACTING COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

### FINAL DECISION

#### October 31, 2007 Government Records Council Meeting

Anthony Serrao  
Complainant

Complaint No. 2007-134

v.

Borough of Fair Lawn (Bergen)  
Custodian of Record

At the October 31, 2007 public meeting, the Government Records Council (“Council”) considered the October 24, 2007 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 records are confidential under policy promulgated pursuant to the provisions of N.J.S.A. 40A:14-181 and therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. Further, the requested records are personnel records pursuant to N.J.S.A. 47:1A-10 and the Council’s prior decision in Rick Merlino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); therefore the requested records are not government records subject to disclosure.

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 31<sup>st</sup> Day of October, 2007



Vincent P. Maltese, Chairman  
Government Records Council

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

Robin Berg Tabakin, Vice Chairman  
Government Records Council

**Decision Distribution Date: November 16, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 31, 2007 Council Meeting**

**Anthony Serrao<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-134**

v.

**Borough of Fair Lawn<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Copy of a phone call made to the Fair Lawn Police Department on December 6, 2006 at approximately 1:45 p.m. by on-duty police detective John Ietto in tape or compact disk medium.

**Request Made:** May 15, 2007

**Response Made:** May 18, 2007

**Custodian:** Joanne M. Kwasniewski, RMC

**GRC Complaint Filed:** June 6, 2007

**Background**

**May 15, 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.

**May 18, 2007**

Custodian's response to the OPRA request. The Custodian responded in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that the requested record is denied because the record sought is part of an active police department internal affairs investigation.

**June 6, 2007**

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

- Complainant's OPRA records request dated May 15, 2007
- Copy of blank Bergen County Prosecutor's Office Request for Public Records form

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

<sup>2</sup> Represented by Bruce R. Rosenberg, Esq. of Winne, Banta, Hetherington, Basralian & Kahn, P.C. (Hackensack, NJ).

- Copy of blank Bergen County Prosecutor's Office Public Records Request Response form

**June 14, 2007**

Offer of Mediation sent to both parties.

**June 14, 2007**

Facsimile transmittal from the Complainant to the GRC. The Complainant returned an executed Agreement to Mediate to the GRC.

**June 22, 2007**

Request for the Statement of Information sent to the Custodian.

**June 26, 2007**

Custodian's Statement of Information ("SOI") with the following attachments:

- Statement prepared by Fair Lawn Police Chief Erik W. Rose dated June 27, 2007 (identified in the SOI as Schedule 1)
- Attorney General's Internal Affairs Policy and Procedures Manual revised through November 2000 (identified in the SOI as Schedule 2)

The Custodian certifies that there is one (1) record identified as being responsive to the Complainant's request, which is a phone call made to the Fair Lawn Police Communication Center on December 6, 2006 by Detective John Ietto between 1345 and 1355 hours. The Custodian further certifies the Complainant was denied access to the record because it is not a government record pursuant to N.J.S.A. 47:1A-10 and because the subject document is confidential and not subject to disclosure under N.J.S.A. 47:1A-9.

**July 26, 2007**

E-mail from the GRC to the Custodian. The GRC advised the Custodian of the contact information for the new case manager assigned to the case. The GRC also noted an error in an e-mail sent to the Custodian on June 22, 2007, wherein the GRC stated the Complainant had declined mediation and requested the Custodian complete and return an SOI. In fact, the Complainant had completed and returned an Agreement to Mediate dated June 14, 2007. For this reason, the GRC offered the Custodian a five (5) business day period to decide upon mediation.

**July 26, 2007**

E-mail from the Custodian to the GRC declining mediation.

**July 26, 2007**

Facsimile transmittal from the GRC to the Custodian's Counsel. The GRC requested the statement prepared by Fair Lawn Police Chief Erik W. Rose dated June 27, 2007 and appended to the SOI as Schedule 1 be made under legal certification.

**July 31, 2007**

Facsimile transmittal from the Custodian's Counsel to the GRC. The Custodian's Counsel forwarded Chief Rose's certification in response to the GRC's July 26, 2007 request.

**August 1, 2007**

Letter from the GRC to the Custodian's Counsel. The GRC requested the Custodian provide a certification clarifying whether or not an active internal affairs investigation was in progress and if the Fair Lawn Police Department had adopted and implemented guidelines consistent with the Attorney General's *Internal Affairs Policy and Procedure*.

**August 2, 2007**

Telephone call from the Custodian's Counsel to the GRC. Counsel advised the GRC that the Custodian is on vacation until August 5, 2007 and will provide the certification requested by the GRC upon her return.

**August 14, 2007**

Custodian's Certification. The Custodian forwarded a certification in response to the GRC's August 1, 2007 request.

**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-1.1.

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.

OPRA also provides:

" ...where it shall appear that the record or records which are sought...shall pertain to an investigation in progress by any public agency, the right of access...may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest ..." N.J.S.A. 47:1A-3.a.

OPRA further provides:

“The provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...regulation promulgated under the authority of any statute...” N.J.S.A. 47:1A-9.a.

In the Custodian’s May 18, 2007 response to the Complainant’s OPRA request, the Custodian contended the record responsive to the request was not a public record because “[it] is part of an active Police Department internal affairs investigation.” An investigation in progress at the time of a Complainant’s records request is exempt from disclosure pursuant to N.J.S.A. 47:1A-3. Due to inconsistencies about the status of the investigation in the Custodian’s Statement of Information, however, the GRC requested and obtained a certification from the Custodian dated August 10, 2007 wherein the Custodian states the active investigation concluded on December 11, 2006. The date the investigation concluded predated the Complainant’s records request by approximately five (5) months. Accordingly, any exemption provided for in N.J.S.A. 47:1A-3 is not applicable to this complaint.

In her Statement of Information, the Custodian refers to the confidentiality provision in Section 11-46 of the Attorney General’s *Internal Affairs Policy and Procedure* (rev. 2000) which she appended thereto as Schedule 2. The language pertinent to confidentiality of internal affairs records specifically set forth by the Custodian provides:

The nature and source of internal allegations, the progress of internal affairs investigations, and the *resulting materials* are confidential information. The contents of the internal investigation case files shall be retained in the internal affairs unit and clearly marked as *confidential*. (Emphasis added).

The Custodian asserts, “[m]aterials related to internal affairs investigations are entitled to the protections afforded under N.J.S.A. 47:1A-9 as a regulation promulgated pursuant to the authority of the [New Jersey] Attorney General...as the State’s chief law enforcement officer.”<sup>3</sup>

The Custodian’s assertion is incorrect. The Office of the Attorney General did not promulgate an internal affairs regulation for compliance by law enforcement agencies. Rather, it drafted the *Internal Affairs Policy and Procedure* as guidelines for New Jersey law enforcement agencies. Each law enforcement agency has an affirmative duty to adopt and implement guidelines consistent with this policy and procedure pursuant to N.J.S.A. 40A:14-181. If confidentiality provisions of internal affairs investigations not inconsistent with the guidelines are adopted and implemented by a police department, then those provisions comply with the mandates of N.J.S.A. 40A:14-181, and, pursuant to N.J.S.A. 47:1A-9.a., such grant of confidentiality may be claimed by the Custodian to restrict public access to the requested record.

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<sup>3</sup> Statement of Information Item 10.

The evidence presented in the instant complaint reveals that the Fair Lawn Police Department did adopt and implement guidelines consistent with the Attorney General's *Internal Affairs Policy and Procedure*; specifically, Department Rules and Regulations/Policies and Procedures Volume I, Chapter 9 titled "Internal Affairs" and Volume I, Chapter 9i titled "Internal Affairs Guidelines for Investigating Officers." Both of these policies have an effective date of August 1, 2000. The latter specifically names the Attorney General's *Internal Affairs Policy and Procedure* as a source of reference. With respect to confidentiality of internal investigation reports and information, Volume I, Chapter 9, IV.H provides, "[b]ecause of the sensitive and confidential nature of internal affairs investigations all reports and information regarding same will be secured in a location as designated by the Chief of Police." The same section also provides, "[a]ccess shall be controlled by the Chief of Police..." The internal affairs policy promulgated by the Fair Lawn Police Department is not inconsistent with the Attorney General's *Internal Affairs Policy and Procedure* which provides for the law enforcement executive officer to control access to internal affairs records. Fair Lawn Police Chief Erik Rose certified that the record responsive to the request is material that is part of an internal affairs investigation and recommends the Custodian not release it.

Because the Fair Lawn Police Department complied with the provisions of N.J.S.A. 40A:14-181 by promulgating policy consistent with the Attorney General's *Internal Affairs Policy and Procedure*, under N.J.S.A. 47:1A-9.a. that statute is a law that contains provisions not abrogated by OPRA; therefore, the confidentiality provisions within the police department's internal affairs policy promulgated pursuant to N.J.S.A. 40A:14-181 restricts public access to the requested record.

The Custodian also asserts that the record responsive to the Complainant's request is part of an internal affairs investigation which was concluded on December 11, 2006 and subsequently filed as an employee personnel record; therefore, the Custodian argues the Complainant was denied access to the record because it is not a government record pursuant to N.J.S.A. 47:1A-10.

OPRA provides:

"... 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.

The GRC has previously determined that the work product of an internal affairs investigation is properly classified as a personnel record. In Rick Merlino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10.

For this reason the Council concluded, “records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access.”

It should be noted that N.J.S.A. 47:1A-10 also contains certain exemptions from disclosure for personal information which are considered government records; to wit, 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. If personal information from an employee’s personnel file was being sought, one or more of these exceptions might apply, requiring release of the information to the Complainant.

Here, the Complainant is not seeking personal information from an individual’s personnel file, but rather *materials pertinent to an investigation* subsequently made a part of an employee’s personnel file. In this complaint then, the personal information exemptions provided for in N.J.S.A. 47:1A-10 are not applicable.

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

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

In this complaint, the evidence reveals the Custodian has met that burden. There was no unlawful denial of access because the requested records are confidential under policy promulgated pursuant to the provisions of N.J.S.A. 40A:14-181 (recognized by OPRA under N.J.S.A. 47:1A-9.a.), and as personnel records pursuant to N.J.S.A. 47:1A-10 and the GRC’s prior decision in Rick Merlino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004) and as such, they are exempt from disclosure.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council find that the requested records are confidential under policy promulgated pursuant to the provisions of N.J.S.A. 40A:14-181 and therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. Further, the requested records are personnel records pursuant to N.J.S.A. 47:1A-10 and the Council’s prior decision in Rick Merlino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); therefore the requested records are not government records subject to disclosure.

Prepared By:

John Stewart  
Case Manager/*In Camera* Attorney

Approved By:

Catherine Starghill, Esq.  
Executive Director



October 24, 2007