



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

November 18, 2009 Government Records Council Meeting

Steven Fenichel
Complainant

Complaint No. 2009-71

v.

City of Ocean City (Cape May)
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council (“Council”) considered the November 10, 2009 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 because the requested record is a confidential internal investigation of employee conduct, it is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10, Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), Allen v. County of Warren, GRC Complaint No. 2003-155 (March 2004), and Serrao v. Borough of Fair Lawn, GRC Complaint No. 2007-134 (October 2007).

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 18th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council



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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: November 23, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 18, 2009 Council Meeting**

**Steven Fenichel¹
Complainant**

GRC Complaint No. 2009-71

v.

**City of Ocean City (Cape May)²
Custodian of Records**

Records Relevant to Complaint:

A copy of City Solicitor Gerald Corcoran's investigation presented to the Ocean City Ethics Board on September 16, 2008 in closed session.

Request Made: February 17, 2009

Response Made: February 25, 2009

Custodian: Linda MacIntyre

GRC Complaint Filed: March 2, 2009³

Background

February 17, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form.

February 25, 2009

Custodian's response to the OPRA request. The Custodian responds to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the requested record is denied because the City Solicitor has advised that the record requested is exempt from disclosure under Section 4(a) of Executive Order 26. The Custodian states that Executive Order 26 directs that confidential records of complaints and investigations of discrimination, harassment or hostile environments are not government records as defined in OPRA, N.J.S.A. 47:1A-1.

March 2, 2009

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

- Ocean City Ethics Commission Meeting public comment dated July 15, 2008;

¹ No legal representation listed on record.

² Represented by Keith Szendrey, Esq. (Ocean City, NJ).

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

- Ocean City Ethics Board closed session minutes dated September 16, 2008;
- Complainant’s OPRA request dated February 17, 2009; and
- Letter from the Custodian to the Complainant dated February 25, 2009.

The Complainant states that the Custodian unlawfully denied the Complainant access to the record requested.

The Complainant did not agree to mediate this complaint.

April 8, 2009

Request for the Statement of Information sent to the Custodian.

April 16, 2009

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

- Ocean City Ethics Board closed session minutes dated September 16, 2008;
- Complainant’s OPRA request dated February 17, 2009;
- Letter from the Custodian to the Complainant dated February 25, 2009; and
- Employee Complaint policy.

The Custodian certifies that the record responsive to the Complainant’s OPRA request is a confidential internal investigation of employee conduct conducted by Gerald Corcoran, the City Solicitor. The Custodian certifies that the retention requirement for the investigative report is six (6) years. The Custodian certifies that it is Ocean City’s policy to maintain the confidentiality of employee investigation reports. The Custodian certifies that the record requested is protected from disclosure by Executive Order 26 (McGreevey 2002). The Custodian certifies that this policy complies with New Jersey’s policy prohibiting discrimination, harassment, or hostile environment in the workplace.

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.

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.

Executive Order 26 (McGreevey 2002) states that:

“[t]he following records shall not be considered to be government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

Records 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), whether open, closed or inactive.” 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 submitted an OPRA request for an internal investigation of employee conduct conducted by the City Solicitor. The Custodian responded to the Complainant’s OPRA request on the sixth (6th) business day after receipt of said request stating that access to the requested record was denied because the record requested was exempt from disclosure under Section 4(a) of Executive Order 26. The Custodian has certified that the requested record is a confidential internal investigation of employee conduct.

The GRC has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records within the exemption from disclosure set forth at N.J.S.A. 47:1A-10. In Rick Merino 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 that “records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access.”

In Allen v. County of Warren, GRC Complaint No. 2003-155 (March 2004), the Council considered the validity of an OPRA request for a harassment complaint filed against an employee. The Council held that the complaint was a personnel record exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Council reasoned that “[a]lthough neither the custodian nor the complainant refers to the harassment complaint as a “sexual” harassment complaint, the distinction is not necessary because the remainder of the exception under N.J.S.A. 47:1A-1.1 includes “grievances” filed against an individual. The information requested by the complainant is not a valid OPRA request as it does not constitute a “government record” under the provisions of N.J.S.A. 47:1A-1.1.” *Id.* The Council ultimately held that “[a] plain reading of OPRA finds that an exception exists, under the law, to deny complainant’s access to the records regarding the harassment complaint filed against him.” *Id.*

In Serrao v. Borough of Fair Lawn, GRC Complaint No. 2007-134 (October 2007), the complainant sought access to a recording of a telephone call that related to a closed internal affairs investigation. The custodian asserted that the record responsive to the complainant’s request was not disclosable because it was part of an internal affairs investigation. The GRC found that pursuant to N.J.S.A. 47:1A-10 and Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), the record requested was exempt from disclosure as a personnel record because the record requested was a part of an internal investigation of an employee.

The Complainant in the current complaint requested a copy of an internal investigation of employee conduct conducted by the City Solicitor. The Custodian denied this request stating that it was exempt from disclosure under Executive Order 26 (McGreevey 2002). The record requested in the current complaint is comparable to the records considered in Merino, supra, Serrao, supra, and Allen, supra. As with Merino, supra, Serrao, supra, and Allen, supra, the Complainant’s employer initiated an investigation of an employee’s conduct in the course of his duties. Because such records involve disciplinary matters and/or matters concerning an employee’s alleged misconduct, such records are exempt from disclosure as personnel records pursuant to N.J.S.A. 47:1A-10, Merino, supra, Allen, supra, and Serrao, supra.

Therefore, because the requested record is a confidential internal investigation of employee conduct, it is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10, Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), Allen v. County of Warren, GRC Complaint No. 2003-155 (March 2004), and Serrao v. Borough of Fair Lawn, GRC Complaint No. 2007-134 (October 2007).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the requested record is a confidential internal investigation of employee conduct, it is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10, Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), Allen v. County of Warren, GRC Complaint No. 2003-155 (March 2004), and Serrao v. Borough of Fair Lawn, GRC Complaint No. 2007-134 (October 2007).

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 10, 2009