



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

October 28, 2014 Government Records Council Meeting

Daniel VanBree
Complainant

Complaint No. 2014-122

v.

Bridgewater Township Police Department (Somerset)
Custodian of Record

At the October 28, 2014 public meeting, the Government Records Council (“Council”) considered the October 21, 2014 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:

1. The Custodian lawfully denied access to the video recordings responsive to the Complainant’s January 22, 2014 OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.S.A. 2C:25-33. Further, because the recordings are exempt under the Prevention of Domestic Violence Act of 1991, the GRC need not address whether the records are also exempt under the “criminal investigatory” exemption found at N.J.S.A. 47:1A-1.1.
2. In the absence of detailed arguments regarding the disclosability of these policies, and because same were provided to the Complainant, the Council should decline to address the disclosability of same at this time.

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 28th Day of October, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 28, 2014 Council Meeting**

**Daniel W. VanBree¹
Complainant**

GRC Complaint No. 2014-122

v.

**Bridgewater Township Police Department (Somerset)²
Custodial Agency**

Records Relevant to Complaint:

January 22, 2014 OPRA request: Copies via pickup of the following from November 11, 2013 at 2:29 p.m. relevant to Case No. 2013-3811:

1. Video and audio from Patrolman Fischer (Patrol Unit 308D) known as video No. 137529 and No. 137530.
2. Video and audio from Sergeant Packwood (Patrol Unit 110D) known as video No. 137365 and No. 137366.
3. Video and audio from Partolman Mele (Partol Unit 309D) known as video No. 137315.
4. Video and audio from Patrolman Tennant (Patrol Unit 300E) known as video No. 137862.

March 4, 2014 OPRA request: Hardcopies via pickup of Bridgewater Township Police Department's ("BTPD") policy/procedure for search and seizure.

Custodian of Record: Linda Doyle

Request Received by Custodian: January 22, 2014 and March 4, 2014

Response Made by Custodian: January 29, 2014 and March 13, 2014

GRC Complaint Received: March 17, 2014

Background³

Request and Response:

On January 22, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 29, 2014, the

¹ No legal representation listed on record.

² Represented by Alexander G. Fisher, Esq., of Mauro, Savo, Camerino, Grant & Schalk, P.A. (Somerville, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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Custodian responded in writing denying access to the responsive videos under N.J.A.C. 2C:25-33 of the Prevention of Domestic Violence Act of 1991 (“DVA”).

On March 4, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On March 13, 2014, the Custodian responded in writing denying access to the responsive records under N.J.S.A. 47:1A-1.1, which exempts access to “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.” The Custodian stated that disclosure of the procedures would compromise investigative work conducted by the BTPD in connection with arrests, searches, seizures and the enforcement of law. The Custodian averred that disclosure would reveal BTPD surveillance, security and investigative techniques utilized in investigations. Further, the Custodian stated that the records were exempt as attorney work product. N.J.S.A. 47:1A-9(b).

Denial of Access Complaint:

On March 17, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s denial of access to his OPRA requests.

Regarding the videos, the Complainant stated that the mobile video recordings (“MVR”) were made on November 1, 2013 at approximately 2:29 p.m. as part of Case No. 2013-3811 in which he is the defendant. Further, the Complainant asserted that the requested MVRs are critical to his defense in that case and other ongoing litigation against Bridgewater Township (“Township”). The Complainant asserted that according to record retention schedules for police departments, MVRs are public and those requested concern only him (Retention Schedule M900000-006, Record Series No. 0102-0002).

Regarding the policies/procedures, the Complainant argued that this record is also critical to his defense in Case No. 2013-3811. Specifically, the policy will help him refute allegations made against him by Patrolman Fischer.

Supplemental Submissions

On April 8, 2014, in a letter to the Complainant,⁴ the Custodian acknowledged that the filing of this complaint. Regarding the MVRs, the Custodian stated that although access to same was denied under OPRA, the Complainant received the MVRs as part of a discovery request made in connection with the charges filed against him. The Custodian also noted that the Complainant received the MVRs at issue here twice prior to his January 22, 2014 OPRA request.⁵ Thus, the Custodian stated that because the Complainant previously had access to the records, it made little sense to continue to withhold access to same. The Custodian still contended that, notwithstanding voluntary disclosure, she lawfully denied access to the MVRs

⁴ The Custodian forwarded a copy of this letter to the GRC noting that because the Township was disclosing the responsive records, this complaint was moot.

⁵ The Custodian also noted that the Complainant submitted his OPRA request for the MVRs because the second (2nd) set was “[a]pparently . . . destroyed.”

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under N.J.S.A. 47:1A-1.1 as criminal investigatory records, N.J.S.A. 47:1A-9, and the DVA. The Custodian reiterated that in light of budgetary limitations, it made little sense to argue against disclosure of the MVRs.

Regarding the search and seizure policy/procedure, the Custodian maintained that she lawfully denied access to the responsive record. However, the Custodian stated that she was disclosing same based on budgetary restraints of arguing against disclosure.

On April 11, 2014, in a letter to the GRC, the Custodian confirmed that the Complainant received BTPD's search and seizure policy/procedure. However, after further review, the Custodian determined that the Township would not provide copies of the responsive MVRs. The Custodian asserted that, regardless of the fact that the Complainant received these records as part of discovery, this does not justify disclosure of same based on an OPRA request.

Statement of Information:

On May 13, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA requests on January 22, 2014 and March 4, 2014 and responded on January 29, 2014 and March 13, 2014 respectively. The Custodian further certified that she submitted supplemental responses to the Complainant and GRC on April 8, 2014 and April 11, 2014.

The Custodian certified that on November 1, 2013, police were called to the Complainant's residence about a domestic dispute. The Custodian certified that four (4) patrolmen responded and followed procedures along with notices and reports as outlined by the DVA. The Custodian certified that, according to the police narrative, the Complainant was arrested based on his interaction with the police. The Custodian affirmed that, on March 21, 2014, a trial was conducted in municipal court and the Complainant was found guilty of "Improper Behavior."

Video Recordings

The Custodian certified that the records responsive to his January 22, 2014 OPRA request consisted of six total videos: two (2) videos each from Patrolman Fischer's and Sgt. Packwood's cars and one (1) each from Patrolman Mele's and Patrolman Tennant's cars. The Custodian certified that prior to submitting the request, as part of discovery connected with his municipal trial, the Complainant received copies of these videos on two (2) occasions that may have been misplaced, lost or destroyed.

The Custodian asserted that the issue here is whether the requested videos are exempt under N.J.S.A. 47:1A-9 and N.J.S.A. 2C:25-33 of the DVA. The Custodian stated that the DVA requires certain records to be maintained and "shall not be made available to any individual or institution . . ." Id. The Custodian certified that the recordings at issue represent those records required to be maintained under the DVA. The Custodian thus asserted that she lawfully denied access to same.

However, the Custodian argued that, even though the Complainant previously received the recordings as part of discovery, this prior disclosure did not waive the DVA exemption. The Custodian asserted that discovery and OPRA are two (2) different processes for obtaining records and that disclosure of records under one process does not affect disclosure in the other. Further, the Custodian asserted that there is no provisions in OPRA, the DVA or any other statute, regulation or judicial decision that would authorize the disclosure of records expressly exempt from access. Also, the Custodian argued that ordering disclosure of the recordings here could expose municipalities to possible litigation.

Finally, the Custodian contended that records are exempt as criminal investigatory records. N.J.S.A. 47:1A-1.1, Executive Order No. 69 (Gov. Whitman 1997)(“EO 69”). The Custodian also noted that EO 69 includes a provision “to prevent such release that would violate existing law . . . including, but not limited to domestic violence . . .” Id. at ¶5. The Custodian argued EO 69 directly relates back to the DVA. *See also* North Jersey Media Group, Inc. v. Borough of Paramus, 2012 N.J. Super. Unpub. LEXIS 1685 (App. Div. 2012).

Policies and Procedures

The Custodian certified that after initially denying access to the Complainant’s March 4, 2014 OPRA request, she later provided access to same while maintaining that she lawfully denied access. The Custodian asserted that, because the records were disclosed to the Complainant, this portion of the complaint should be dismissed.

Analysis

Unlawful Denial of Access

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.

Video Recordings

OPRA provides that:

The 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.

N.J.S.A. 47:1A-9(a)(emphasis added).

Further, the DVA provides that “[a]ll records maintained pursuant to this act shall be confidential and shall not be made available to any individual or institution except as otherwise provided by law.” N.J.S.A. 2C:25-33.

The Complainant filed this complaint arguing that he sought the responsive recordings because they were essential to his defense in criminal complaint and litigation with the Township. In the SOI, the Custodian certified that the requested recordings related to a domestic violence incident at the Complainant’s residence wherein he was arrested and that same were exempt under N.J.S.A. 47:1A-9(a) and N.J.S.A. 2C:25-33. The Custodian noted that the incident was procedurally handled in accordance with the DVA. Further, the Custodian denied that previous disclosure of the recordings in response to discovery requests affected these exemptions. The Custodian argued that, as an alternative, the records were criminal investigatory in nature and thus exempt under N.J.S.A. 47:1A-1.1 and EO 69.

The Custodian offered a compelling account of the incident that resulted in the creation of the recordings at issue here. The account effectively linked the incident and resulting recordings to a domestic violence incident, for which the DVA has been put in place to provide certain protections to the victims. These protections include the confidentiality of records maintained under the DVA. The GRC is satisfied that the videos were part of a domestic violence incident and that N.J.S.A. 2C:25-33 applies here. This is notwithstanding that the Complainant was previously provided with the videos as part of discovery. As noted by the Custodian, previous disclosure does not waive the exemption present in N.J.S.A. 2C:25-33.

Therefore, the Custodian lawfully denied access to the video recordings responsive to the Complainant’s January 22, 2014 OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.S.A. 2C:25-33. Further, because the recordings are exempt under the DVA, the GRC need not address whether the records are also exempt under the “criminal investigatory” exemption found at N.J.S.A. 47:1A-1.1.

Search and Seizure Policies/Procedures

The Custodian initially denied access to the requested records under N.J.S.A. 47:1A-1.1. In the Denial of Access Complaint, the Complainant contended that disclosure was necessary to his defense in Case No. 2013-3811. On April 8, 2014, the Custodian provided the responsive records while maintaining that she lawfully denied access. In the SOI, the Custodian asserted that this portion of the complaint should be dismissed because the record was provided. The Custodian provided no additional detailed arguments supporting why same would be exempt under OPRA.

In the absence of detailed arguments regarding the disclosability of these policies, and because same were provided to the Complainant, the Council should decline to address the disclosability of same at this time.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the video recordings responsive to the Complainant's January 22, 2014 OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.S.A. 2C:25-33. Further, because the recordings are exempt under the Prevention of Domestic Violence Act of 1991, the GRC need not address whether the records are also exempt under the "criminal investigatory" exemption found at N.J.S.A. 47:1A-1.1.
2. In the absence of detailed arguments regarding the disclosability of these policies, and because same were provided to the Complainant, the Council should decline to address the disclosability of same at this time.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

October 21, 2014