



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Kathy L. Camarata
Complainant

Complaint No. 2014-127

v.

Essex County Prosecutor's Office
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council ("Council") considered the May 19, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian did not unlawfully deny access to responsive records because same are exempt from disclosure under the Attorney General's Internal Affairs Policy & Procedure. N.J.S.A. 47:1A-6; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); Rivera v. Borough of Keansburg Police Dep't (Monmouth), GRC Complaint No. 2007-222 (June 2010). Because the records are exempt as noted, the GRC declines to address whether the other exemptions advanced by the Custodian apply to the Complainant's OPRA requests.

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 30th Day of June, 2015

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: July 2, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting**

**Kathy L. Camarata¹
Complainant**

GRC Complaint No. 2014-127

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Copies of Lieutenant Sanabria's investigation regarding Verona Police Chief Richard Nagel and the Complainant.

Custodian of Record: Debra G. Simms, Esq.

Request Received by Custodian: March 4, 2013 and September 27, 2013

Response Made by Custodian: March 4, 2013 and October 7, 2013

GRC Complaint Received: March 24, 2014

Background³

Request and Response:

On February 13, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On March 4, 2013, the Custodian responded in writing first denying access to responsive records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1, Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Second, the Custodian stated that access is also denied to the extent that the records fit within the privacy interest exemption. N.J.S.A. 47:1A-1. Third, the Custodian stated that the Complainant's OPRA request was invalid because it was a blanket request lacking specificity. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); Reda v. Twp. of West Milford, GRC Complaint No. 2002-58 (January 2003); Asarnow v. Dep't of Labor & Workforce Dev., GRC Complaint No. 2006-24 (May 2006). Fourth, the Custodian averred that, to the extent that responsive records contain opinions, deliberative material, interpretations and/or advice about agency policy, same are exempt as "inter-agency or intra-agency advisory, consultative, or deliberative" ("ACD") material.

¹ No legal representation listed on record.

² Represented by James Paganelli, Esq. (Newark, 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.

Finally, the Custodian stated that clauses in the Attorney General’s Internal Affairs Policy & Procedure (“IAPP”) provide that “[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information . . . [and] . . . shall only be released under . . . limited circumstances.” *Id.* at 11-46. The Custodian noted that one such circumstance is “good cause.” *Id.* In the instant matter, the Custodian stated that the Complainant’s request constituted a fishing expedition without any valid reason supporting disclosure.

On September 24, 2013, the Complainant submitted a second (2nd) OPRA request to the Custodian seeking the above-mentioned records. On October 7, 2013, the Custodian responded in writing, denying access to responsive records for the reasons she cited in her denial of the Complainant’s initial OPRA request.

Denial of Access Complaint:

On March 24, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she submitted in February 2013 and again on September 24, 2013. The Complainant asserted that she was denied access on March 13, 2013 and on an unidentified date in October 2013.

Statement of Information:

On May 23, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s second (2nd) OPRA request on September 27, 2013.⁴ The Custodian certified that she conducted a search of Internal Affairs (“IA”) records related to the Complainant. The Custodian certified that she responded to the Complainant on October 7, 2013, denying access to the Complainant’s OPRA request for several reasons.

The Custodian asserted that she denied access to the Complainant’s OPRA request under N.J.S.A. 47:1A-1.1, because the requested records were criminal investigatory in nature. Further, the Custodian argued that the Complainant’s request was a blanket request lacking specificity. The Custodian also asserted that the Complainant failed to meet the “limited circumstances” requirement for disclosure of records under the IAPP. *Id.* at 11-46. Finally, the Custodian contended that the ACD exemption would also apply to any responsive records.

Additional Submissions:

On November 3, 2014, the GRC sought additional information from the Custodian. Specifically, the GRC stated that the Complainant attached a request dated either March or April 2013, noting that it was another request for the records at issue in this Denial of Access Complaint. Thus, the GRC requested that the Custodian submit a legal certification answering the following:

1. Did the Complainant submit this request to the Custodian?
2. If so, how did the Custodian respond to that request?

⁴ The Custodian did not address the Complainant’s February 13, 2013, OPRA request in the SOI.

The GRC required the Custodian to submit his legal certification by close of business on November 7, 2014.

On November 6, 2014, the Custodian responded to the GRC's request for additional information. Therein, the Custodian certified that she reviewed all OPRA requests and responses received by the Essex County Prosecutor's Office ("ECPO") and was unable to locate the request attached to the Denial of Access Complaint.

The Custodian certified that on March 4, 2013, she received the Complainant's first (1st) OPRA request and responded on the same day. The Custodian affirmed that she never received the other request, which appeared to indicate that the Complainant did not receive the Custodian's March 4, 2013, response. The Custodian affirmed that she had no prior knowledge of the April/May request until she received same from the GRC. The Custodian noted that had she received that request, she would have responded to the Complainant by providing a copy of the March 4, 2013, response.

On May 1, 2015, the GRC again sought additional information from the Custodian. Specifically, the GRC stated that the responsive records appear to pertain to an investigation that the ECPO conducted based on the Complainant's allegations against Chief Nagel. However, it is unclear whether these types of investigations are handled as IA issues or as criminal complaints. Thus, the GRC requested that the Custodian submit a legal certification answering the following:

1. When an individual files a complaint against a police officer at the ECPO, how does it classify its investigation of the complaint?

The GRC required the Custodian to submit his legal certification by close of business on May 6, 2015.

On May 4, 2015, the Custodian responded to the GRC's request for additional information. The Custodian certified that she consulted with the Chief Assistant Prosecutor that supervises the ECPO's Professional Standards Bureau and has determined that misconduct allegations filed against local police officers are handled as IA investigations.

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.

The IAPP effectively carries the force of law as applicable to police departments. In O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009), the plaintiff 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 Appellate Division 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 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] . . . [have] 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. To this end, 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."⁵ See also Rivera v. Borough of Keansburg Police Dep't (Monmouth), GRC Complaint No. 2007-222 (June 2010)(accepting an Initial Decision of the Office of Administrative Law that internal affairs reports are confidential records).

Here, the Complainant sought IA investigation records based on an allegation of misconduct that she reported to the ECPO. The Custodian denied access to said records on two (2) occasions pursuant to, among other statutes and case law, the IAPP. The Custodian subsequently certified that allegations reported to the ECPO are handled as internal affairs investigations. Based on the forgoing, the evidence of record supports that: 1) the Complainant filed a complaint with the ECPO regarding Chief Nagel; 2) this complaint was handled as an IA investigation; and 3) the Complainant requested records pertaining to the IA investigation. The GRC is thus satisfied that the records are exempt from disclosure because the responsive records fall squarely within the IAPP's confidentiality clause.

Accordingly, the Custodian did not unlawfully deny access to responsive records because same are exempt from disclosure under the IAPP. N.J.S.A. 47:1A-6; O'Shea, 410 N.J. Super. 371; Rivera, GRC 2007-222. Because the records are exempt as noted, the GRC declines to address whether the other exemptions advanced by the Custodian apply to the Complainant's OPRA requests.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to responsive records because same are exempt from disclosure under the Attorney General's Internal Affairs Policy & Procedure. N.J.S.A. 47:1A-6; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); Rivera v. Borough of Keansburg Police Dep't (Monmouth), GRC Complaint No. 2007-222 (June 2010). Because the records are exempt as noted, the GRC declines to address whether the other exemptions advanced by the Custodian apply to the Complainant's OPRA requests.

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

⁵ See IAPP, Internal Affairs Records, Confidentiality, Paragraph 1.

Reviewed By: Joseph D. Glover
Executive Director

May 19, 2015⁶

⁶ This complaint was prepared for adjudication at the Council's May 26, 2015 meeting, but could not be adjudicated due to lack of quorum.