



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

October 27, 2015 Government Records Council Meeting

Susan Barker
Complainant

Complaint No. 2014-318

v.

Borough of Lakehurst (Ocean)
Custodian of Record

At the October 27, 2015 public meeting, the Government Records Council (“Council”) considered the October 20, 2015 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 records sought are personnel records that would disclose a disciplinary record, the attendant reasons, and details regarding the disposition of same. The requested records, which would “bear many of the indicia of personnel files,” N. Jersey Media Group v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super 486, 490 (App. Div. 2009), and involve a disciplinary suspension with a subsequent return to work, are not specifically identified as personnel records subject to disclosure under OPRA. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011). Rodriguez v. Kean University, GRC Complaint No. 2013-296 (June 2014). Thus, the Custodian lawfully denied access. 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 27th Day of October, 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: October 29, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 27, 2015 Council Meeting**

**Susan Barker¹
Complainant**

GRC Complaint No. 2014-318

v.

**Borough of Lakehurst (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Memorializing agreement between the Lakehurst Borough Personnel Committee, AFSCME Council 71 union representatives, and a specifically named employee to permit the employee's return to work following a suspension.

Custodian of Record: Bernadette Dugan
Request Received by Custodian: July 21, 2014
Response Made by Custodian: July 23, 2014
GRC Complaint Received: September 15, 2014

Background³

Request and Response:

On July 21, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above listed records. On July 23, 2014, two (2) business days following receipt of the request, the Custodian denied access to the requested record, stating that the record is "not subject to the Open Public Records Act under N.J.S.A. 47:1A-1.1 12 b and N.J.S.A. 47:1A-10."

Denial of Access Complaint:

On September 15, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that the Lakehurst Borough Council ("the Borough") introduced and passed a Resolution on July 17, 2014. The Complainant believes that the Resolution memorialized an agreement between the Borough and a specifically named employee ("the employee") to permit the employee's return to work following a suspension. The Complainant objected to the denial of access, claiming that she was not seeking

¹ No legal representation listed on record.

² Represented by Sean D. Gertner, Esq., of Gertner, Mandel, Peslak, LLC (Lakewood, 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.

information about a grievance and that she did not seek any “personnel or pension records relating to salary, service pension performance of official duties etc.” Instead, she merely wanted to know the terms of the agreement. She argued that once a Resolution is passed, it becomes public record.⁴

Statement of Information:

On October 2, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that her attorney recommended denying the request due to the personal nature of the information contained in the record, which includes health information, and because the record is a personnel record that is exempt under N.J.S.A. 47:1A-10. She also certified that her attorney advised her that the record falls under the exemption for records connected to a grievance.

In the SOI, the Custodian’s Counsel asserts *inter alia* that “OPRA, as it relates to personnel records, begins with the presumption of non-disclosure and proceeds with a few narrow exceptions that would need to be considered,” *citing* Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). The Custodian’s Counsel also added that the record sought by the Complainant was exempt, as it included “detailed medical or psychological information” that is exempt pursuant to N.J.S.A. 47:1A-10.

Counsel elaborated that the agreement in question was “predicated on the subject employee’s health and treatment” and that the agreement addresses his employment “in the context of his health and treatment.” Therefore, he argued, the information contained in the agreement is a personnel record that is not subject to disclosure. He further states that the Courts have determined that “while some documents may not be personnel records by name, they bear many of the indicia of personnel files. They pertain to the general subject matter of one’s employment, are proffered in furtherance thereof, and are made pursuant to the employee manual.” *Citing* North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super 486 (App. Div. 2009), and Milner v. Dep’t. of the Navy, 179 L. Ed., 2nd 268 (2011).

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 GRC first notes that neither party presented evidence to suggest that the requested agreement was adjudicated or completed by New Jersey’s courts. Absent information to the contrary, the GRC will assume that the Borough generated the agreement internally.

⁴ The GRC takes notice that the Complainant requested the agreement, not the Resolution.

With certain exceptions that are listed at N.J.S.A. 47:1A-10, OPRA provides that the personnel or pension records of any individual, including but not limited to records relating to any grievance filed by or against an individual, are not considered government records and are not subject to disclosure. In 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 that are encompassed within the provisions of N.J.S.A. 47:1A-10. For that 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.” Id.

Further, the Council has addressed whether personnel records, which are not specifically identified in OPRA, are subject to disclosure. Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011). The complainant in Guerrero sought, among other records, “[a]ny known felony charges.” Id. In the SOI, the custodian argued that he was precluded from acknowledging the existence of felony charges because such information is not included within the excepted personnel information under OPRA. The Council agreed, determining that “even if records of any felony charges were contained within [the] personnel file, such records are not disclosable under OPRA” Id. at 8. The Council reasoned that “OPRA clearly identifies certain [personnel] information that is subject to disclosure These exceptions do not include any possible felony or criminal charges Thus, OPRA implies that personnel records referencing felony charges are not subject to disclosure” Id.

In Rodriguez v. Kean University, GRC Complaint No. 2013-296 (June 2014), the complainant sought information concerning the reimbursement of a professor at Kean University for an alleged ethics violation. The Complainant argued in his Denial of Access Complaint that disciplinary actions are not part of the personnel record because they do not pertain to employee relations, human resources issues, or the professor’s employment. In turn, the Custodian argued in the SOI that even acknowledging that the professor was disciplined would be in contravention to OPRA’s presumption that personnel records, with certain exceptions, are exempt from disclosure. Based on the facts of that case, the GRC found that any disciplinary record stemming from the alleged ethics violation was not disclosable under OPRA, stating:

Based on the [c]omplainant’s description in his OPRA request, the records sought appear to relate to a possible disciplinary action. Thus, if [the professor] was disciplined for an ethics violation, it is reasonable that the documented discipline action would “bear many of the indicia of personnel files.” See NJMG, 405 N.J. Super. at 390. Further, as was the case in both Merino and Guerrero, disclosure of the requested records, or even acknowledgment of their very existence, would violate OPRA’s presumption that personnel records are exempt from disclosure. N.J.S.A. 47:1A-10.

Id. at 5.

Here, it is manifestly clear that the records sought would disclose a disciplinary record, the attendant reasons, and details regarding the disposition of same. Therefore, the requested records, which would, “bear many of the indicia of personnel files,” NJMG, 406 N.J. Super. at

390, and involve a disciplinary suspension with a subsequent return to work, are not specifically identified as records subject to disclosure under OPRA. N.J.S.A. 47:1A-10; Merino, GRC 2003-110; Guerrero, GRC 2010-216. Rodriguez, GRC 2013-296. Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the records sought are personnel records that would disclose a disciplinary record, the attendant reasons, and details regarding the disposition of same. The requested records, which would “bear many of the indicia of personnel files,” N. Jersey Media Group v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super 486, 490 (App. Div. 2009), and involve a disciplinary suspension with a subsequent return to work, are not specifically identified as personnel records subject to disclosure under OPRA. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011). Rodriguez v. Kean University, GRC Complaint No. 2013-296 (June 2014). Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

Prepared By: Ernest Bongiovanni
Staff Attorney

Reviewed By: Joseph Glover
Executive Director

October 20, 2015