



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

September 29, 2016 Government Records Council Meeting

Joy DeSanctis
Complainant

Complaint No. 2015-87

v.

Borough of Belmar (Monmouth)
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the August 23, 2016 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 no unlawful denial of access. To the contrary, the Custodian disclosed to the Complainant a record that is not disclosable to the public under OPRA. Criminal investigatory records are exempt, not privileged, under OPRA. The Custodian’s release of the record does not undermine the statutory exemption for non-disclosure of the records. The public interest designed to be protected by OPRA can only be advanced under these facts by protecting the exemption and not compromising or undermining a criminal investigation. *See Janeczko v. NJ Dep’t of Law and Pub. Safety, Div. of Criminal Justice*, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); *Nance v. Scotch Plains Twp. Police Dep’t*, GRC Complaint No. 2003-125 (January 2005); *Dalal v. Borough of Paramus (Bergen)*, GRC Complaint No. 2015-326 (April 2016).

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 29th Day of September, 2016

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 4, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2016 Council Meeting**

**Joy DeSanctis¹
Complainant**

GRC Complaint No. 2015-87

v.

**Borough of Belmar (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: “All documents related to a Belmar incident/police report on July 15, 2014, filed by Colleen Connolly or anyone else regarding the meeting at Connolly Station held the same evening where my name is documented.”

Custodian of Record: April Claudio

Request Received by Custodian: December 15, 2014; March 17, 2015

Response Made by Custodian: December 24, 2014; March 24, 2015; March 25, 2015; March 26, 2015

GRC Complaint Received: March 27, 2015

Background³

Request and Response:

On December 15, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 24, 2014, the Custodian responded in writing, attaching a July 15, 2014 incident report from the police department and noting that “personal and confidential information has been redacted.”

On March 17, 2015, the Complainant wrote to the Custodian, noting that while she understood “personal information can be redacted in certain instances,” she disputed the redactions of “paragraphs in the body of the investigative report” which she felt was “not allowed.” She requested “a copy without blocking the investigative handling.”

On March 25, 2015, the Complainant again wrote to the Custodian, seeking an explanation as to the “guidelines you are refusing to provide the requested information that was redacted.” She further argued her belief she is “entitled to my criminal history information if any

¹ No legal representation listed on record.

² Represented by Michael Dupont, Esq. (Red Bank, 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.

is documented within the investigative report.” She additionally requested any documents explaining the “policy and procedures of the Belmar Police Department for preparing incident reports.” That same day, the Custodian responded that she would speak to Lt. Cox of the Police Department in order to furnish an explanation as to the redactions as well as the policies and procedures for preparing incident reports. On March 26, 2015, the Custodian wrote to the Complainant, advising that she had spoken to Lt. Thomas Cox. She stated that his position was that the redacted information was “necessary and permitted to be redacted. Only confidential personal and criminal information has been redacted.” She noted that he further advised that the Police Department does not have written policy and procedures for creating incident reports.

Denial of Access Complaint:

On March 26, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that upon receipt of the requested report, “large portions” were redacted. She argued that “since I do not have any record of criminal conviction there cannot be any information of a criminal nature in the report” and that “if there is any criminal information on me, I believe I am entitled to see it.” The Complainant alleged that she has previously been “intimidated and alarmed by employees and officials of the town” because of her public participation and is “consistently afraid of reprisals from the administrator and mayor.” The Complainant made no additional legal arguments.

Statement of Information:

On April 8, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s first OPRA request on December 15, 2014. The Custodian certified that she responded in writing on December 24, 2014, attaching the requested report with “personal and confidential information” redacted. With respect to the Complainant’s follow-up e-mail on March 17, 2015, the Custodian certified that she responded on March 24, 2015; March 25, 2015; and March 26, 2015, advising the Complainant that the redacted information was “criminal history information and is permitted to be redacted.”

The Custodian noted that since the filing of the Denial of Access Complaint, she had spoken further to Lt. Cox, who stated that the redacted information was “criminal background check information” regarding the Complainant and her husband and that the “personal information” pertained to individuals mentioned in the report, Colleen Connolly and her child.

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 status of records purported to fall under the criminal investigatory records exemption, pursuant to N.J.S.A. 47:1A-1.1, was examined by the GRC in Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). There, the complainant sought access to copies of records related to alleged criminal actions committed by her son, who was allegedly killed by police officers. The Council found that under OPRA, "criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed" and are not accessible under N.J.S.A. 47:1A-1.1. Consequently, the complainant's request was denied, and the Council found no violation by the Custodian, stating: "[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete . . . and the Council does not have a basis to withhold from access only currently active investigations and release those where the matter is resolved or closed."

Further, in Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013), the complainant requested reports made for case number BCP0-1002349 regarding the September 20, 2010 arrest of Hwang and a codefendant. The complainant also requested all police logs for September 20, 2010. The custodian agreed to disclose the requested arrest report because it merely recorded the basic factual data for the arrest, which required only a 35 cents copy fee; however, he refused to disclose the "narrative" police logs as they pertained to an open and ongoing criminal investigation. The complainant disagreed with the proposition that police reports constitute exempt criminal investigatory records. The complainant asserted that the case resulted in his arrest and had since been closed.

Relying on the holding in Janeczko, the GRC stated that:

the Custodian has certified that Item No. 1 of the Complainant's request constitutes criminal investigatory files. The Complainant has not provided any competent evidence to refute this certification. Therefore, because the requested law enforcement reports . . . constitute criminal investigatory files, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. [citations omitted].

Id.

However, the instant case is somewhat unique in that the Custodian disclosed a record described as an incident report, with certain redactions to "confidential" and "personal" information. The Police Department's Lieutenant later specified that the redacted information was "criminal background check information" regarding the Complainant and her husband and that the "personal information" pertained to individuals mentioned in the report, Colleen Connolly and her child. In short, the Custodian disclosed the records by mistake, a subject of infrequent review and a defense which the Custodian did not raise.

The Appellate Division has ruled that the Council is permitted to raise additional defenses regarding the disclosure of records. Paff v. Twp. of Plainsboro, Docket No. A-2122-

05T2 (App. Div. 2007).⁴ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. On its own initiative, the Council determined that the Open Public Meetings Act ("OPMA") prohibited the disclosure of the redacted portions of the requested executive session minutes. The Council affirmed the custodian's denial of portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. In rejecting Mr. Paff's argument, the Court held that:

[t]he GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to" OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct.

Id.

The Court further stated that:

[a]side from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998)(citing Isko v. Planning Bd. Of Livingston, 51 N.J. 162, 175 (1968)(lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956)(question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957).

Id.

In Dalal v. Borough of Paramus (Bergen), GRC Complaint No. 2015-326 (April 2016), the complainant disclosed two responsive incident reports in redacted form. The complainant filed a Denial of Access Complaint, arguing that the Borough was required to bear the burden of demonstrating that the records he requested pertained to a criminal investigation and were not required to be made or maintained by law. In that case, the GRC found that the custodian did not unlawfully deny access to said records in whole or part because, notwithstanding the custodian's certification that he disclosed the two incident reports in redacted form, the responsive reports were exempt from access pursuant to N.J.S.A. 47:1-1.1, Janeczko, GRC 2002-79, 2002-80, and Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005) (holding that police incident reports, continuation reports, and property and evidence reports are criminal investigatory records as defined by N.J.S.A. 47:1-1.1, and are therefore exempt from disclosure). The facts here are similar to the situation in Dalal.

⁴ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

In the instant matter, the GRC finds no unlawful denial of access. To the contrary, the Custodian disclosed to the Complainant a record that is not disclosable to the public under OPRA. Criminal investigatory records are exempt, not privileged, under OPRA. The Custodian's release of the record does not undermine the statutory exemption for non-disclosure of the records. The public interest designed to be protected by OPRA can only be advanced under these facts by protecting the exemption and not compromising or undermining a criminal investigation. *See Janeczko*, GRC 2002-79, 2002-80; *Nance*, GRC 2003-125; *Dalal*, 2015-326.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find no unlawful denial of access. To the contrary, the Custodian disclosed to the Complainant a record that is not disclosable to the public under OPRA. Criminal investigatory records are exempt, not privileged, under OPRA. The Custodian's release of the record does not undermine the statutory exemption for non-disclosure of the records. The public interest designed to be protected by OPRA can only be advanced under these facts by protecting the exemption and not compromising or undermining a criminal investigation. *See Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice*, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); *Nance v. Scotch Plains Twp. Police Dep't*, GRC Complaint No. 2003-125 (January 2005); *Dalal v. Borough of Paramus (Bergen)*, GRC Complaint No. 2015-326 (April 2016).

Prepared By: Husna Kazmir
Staff Attorney

August 23, 2016⁵

⁵ This complaint could not be adjudicated at the Council's August 30, 2016 meeting due to lack of a quorum.