



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 31, 2018 Government Records Council Meeting

Matthew B. Tully
Complainant

Complaint No. 2016-101

v.

Borough of Avon-by-the-Sea (Monmouth)
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 2018 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 satisfied his burden of proof that he timely responded to the Complainant’s April 4, 2016 OPRA request. N.J.S.A. 47:1A-6. Although the Complainant asserted that he did not receive a response within the deadline the Custodian certified that he responded on the final due date and included a copy of the letter in his Statement of Information. Therefore there was no “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. The Custodian did not unlawfully deny access to the Complainant’s April 4, 2016 OPRA request. N.J.S.A. 47:1A-6. The Complainant seeks an internal affairs report, which is explicitly deemed confidential pursuant to the IAPP and not subject to access under OPRA. See O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009), and Clifford Wares v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2014-330 (June 2015).

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 31st Day of July, 2018

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: August 3, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**Mathew B. Tully¹
Complainant**

GRC Complaint No. 2016-101

v.

**Borough of Avon-by-the-Sea (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: A copy of the internal affairs report for Keith Sandull, who was arrested on or about March 22, 1996.

Custodian of Record: Timothy M. Gallagher

Requests Received by Custodian: April 4, 2016

Response Made by Custodian: April 5, 2016; April 11, 2016; April 15, 2016

GRC Complaint Received: April 14, 2016

Background³

Request and Response:

On April 4, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 5, 2016, the Custodian responded to the Complainant, acknowledging receipt of the request and that a response is due by April 11, 2016. On April 11, 2016⁴, the Custodian responded in writing, denying the access to the records per the New Jersey Attorney General’s Internal Affairs Police and Procedures (“IAPP”), which the Custodian claimed to hold internal affairs documents confidential except for annual summary reports. The Custodian also referenced Patti v. Sussex Cnty. Prosecutor’s Office, GRC Complaint No. 2009-76 (January 2010), Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-10 (Interim Decision March 2004), and O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 384-85 (App. Div. 2009).

Denial of Access Complaint:

On April 14, 2016, the Complainant filed a Denial of Access Complaint with the

¹ No representation listed on record.

² Represented by Barry A. Cooke, Esq., of Wilentz, Goldman & Spitzer, P.A. (Eatontown, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

⁴ The Complainant alleged that he did not receive the response until April 14, 2016.

Government Records Council (“GRC”). The Complainant asserted that he did not receive a response to his OPRA request within the allotted period of time, and asserted that this was an intentional denial of access.

Statement of Information:

On May 6, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 4, 2016. The Custodian certified that he responded in writing on April 11, 2016. The Custodian did not elaborate further on the reasons for denying access, only referencing his letters dated April 11, 2016, and April 15, 2016. The Custodian also referenced a letter sent to the GRC on April 27, 2015, which sought guidance on the sufficiency of a response to an unrelated OPRA request submitted by the Complainant.

Additional Submissions:

On May 12, 2016, the Custodian sent correspondence to the GRC as a supplement to his SOI.⁵ The Custodian noted that the OPRA request involves the New Jersey Expungement Act, N.J.S.A. 2C:52-1 et seq. The Custodian argued that N.J.S.A. 47:1A-9 requires OPRA’s adherence to exemptions to public access to records established and recognized by statute, court rule, or case law. The Custodian also noted the utilization of the balancing test for release of information concerning personal details. The Custodian cited Livecchia v. Borough of Mount Arlington, 42 N.J. Super. 24 (App. Div. 2011) to identify the factors weighed in the test.

The Custodian asserted that in applying the balancing test, the matter should be dismissed, since the Borough provided the defendant with the documents and information requested. The Custodian also included a copy of the decision, Paff v. Borough of Gibbsboro, No. A-3300-11T2, 2013 N.J. Super. Unpub. LEXIS 1468 (App. Div. June 17, 2013), claiming the court held that OPRA could not override the expungement order’s prohibition on access to requested records.

That same day, the Complainant responded to the Custodian’s e-mail, asserting that the expungement order relevant to the matter at hand does not pertain to the Borough’s clerk. Rather, the Complainant claimed that the expungement order pertained to the clerk for Monmouth County Superior Court, and the clerk for Howell Township Municipal Court. The Complainant also contended that the records subject to the expungement order are only for criminal justice records, and not for personnel records or other non-criminal records.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s

⁵ The correspondence was intended to also supplement Tully v. Avon-by-the-Sea (Monmouth), GRC Complaint No. 2016-100, and Tully v. Avon-by-the-Sea (Monmouth), GRC Complaint No. 2016-102, which are being adjudicated separately.

failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

Although the Custodian confirmed in his April 5, 2016 letter the response to the Complainant’s April 4, 2016 OPRA request was due by April 11, 2016, the Complainant asserted that the Custodian failed to respond within the deadline. However, in his SOI the Custodian certified that he responded on April 11, 2016 via regular mail, and attached a copy of the response to his SOI.

Therefore, the Custodian satisfied his burden of proof that he timely responded to the Complainant’s April 4, 2016 OPRA request. N.J.S.A. 47:1A-6. Although the Complainant asserted that he did not receive a response within the deadline the Custodian certified that he responded on the final due date and included a copy of the letter in his SOI. Therefore there was no “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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 Appellate Division has held that Attorney General Guidelines have the force of law for police entities. See O’Shea, 410 N.J. Super. at 382. In particular, the IAPP is bound upon all law enforcement agencies in New Jersey pursuant to statute. See N.J.S.A. 40A:14-181.

The IAPP explicitly provides that “[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information.” Internal Affairs Policy & Procedures, Office of the Attorney General, pg. 42 (2017). Thus, in Wares v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2014-330 (June 2015), the GRC held that internal affairs records are not subject to access under OPRA. See also Camarata v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2014-127 (June 2015), and Rivera v. Borough of Keansburg Police Dep’t (Monmouth), GRC Complaint No. 2007-222 (June 2010).

Therefore, the Custodian did not unlawfully deny access to the Complainant’s April 4, 2016 OPRA request. N.J.S.A. 47:1A-6. The Complainant seeks an internal affairs report, which is

⁶ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

explicitly deemed confidential pursuant to the IAPP and not subject to access under OPRA. See O’Shea, 410 N.J. Super. at 382, and Wares, GRC 2014-330.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian satisfied his burden of proof that he timely responded to the Complainant’s April 4, 2016 OPRA request. N.J.S.A. 47:1A-6. Although the Complainant asserted that he did not receive a response within the deadline the Custodian certified that he responded on the final due date and included a copy of the letter in his Statement of Information. Therefore there was no “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
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Prepared By: Samuel A. Rosado
Staff Attorney

July 24, 2018