



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 15, 2020 Government Records Council Meeting

Alexander Doctoroff
Complainant

Complaint No. 2019-113

v.

City of Plainfield Police Department (Union)
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 2020 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 bore his burden of proof that he timely responded to the Complainant’s OPRA request on the fifth (5th) business day after receipt of same. N.J.S.A. 47:1A-6. As such, there was no “deemed” denial of access to the subject OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007), and Tomkins v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2018-116 (December 2019).
2. The Custodian did not unlawfully deny access to the Complainant’s OPRA request Item No. 2 because such records are exempt from disclosure under OPRA’s personnel records exemption. N.J.S.A. 47:1A-6; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004). Additionally, to the extent the request sought internal affairs records, same are exempt under the Internal Affairs Policy & Procedures. See O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); Blaustein v. Lakewood Police Dep’t (Ocean), GRC Complaint No. 2011-102 (June 2012); Rivera v. Borough of Keansburg Police Dep’t (Monmouth), GRC Complaint No. 2007-222 (June 2010); Camarata v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2014-127 (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 15th Day of December 2020

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: December 17, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**Alexander Doctoroff¹
Complainant**

GRC Complaint No. 2019-113

v.

**City of Plainfield Police Department (Union)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. “[N]otes officer Joseph Weresow made while issuing ticket #007590 on 3/28/2019.”
2. “[I]nformation of whether any civilian complaints have been made against officer Joseph Weresow during his employment.”

Custodian of Record: David Guarino
Request Received by Custodian: June 7, 2019
Response Made by Custodian: June 14, 2019
GRC Complaint Received: June 20, 2019

Background³

Request and Response:

On June 7, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 14, 2019, the fifth (5th) business day after receipt, the Custodian responded via e-mail providing notes responsive to Item No.1 and denying access to records responsive to Item No. 2 under OPRA’s exemption for personnel records.

On June 16, 2019, the Custodian received an error message from Microsoft Outlook stating that delivery of his response failed after multiple attempts. On June 19, 2019, the Custodian re-submitted his response to the Complainant. That same day, the Custodian received a message from Microsoft Outlook stating that delivery to the recipient’s e-mail address had been delayed.

¹ No legal representation listed on record.

² Represented by Brian P. Trelease, Esq. of Rainone, Coughlin, Minchello, Attorneys at Law (Iselin, N.J.).

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.

Denial of Access Complaint:

On June 20, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his request via e-mail to the Plainfield Police Department (“PPD”). The Complainant asserted that he also sent a reminder e-mail to PPD that he was awaiting a response to his request. The Complainant asserted that he did not receive a response from the Custodian.

Statement of Information:

On July 22, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on June 7, 2019. The Custodian certified that he responded in writing on June 14, 2019 via e-mail.

The Custodian certified that on June 19, 2019, he became aware of a message dated June 16, 2019 from Microsoft Outlook stating that delivery of his response had failed after multiple attempts. The Custodian certified that he attempted to submit a response to the Complainant again that same day, but received another message stating that delivery of his e-mail had been delayed. The Custodian included copies of the e-mails submitted on June 14 and June 19, as well as the error messages received on June 16 and June 19, 2019.

The Custodian first argued that he timely responded to the Complainant’s request. The Custodian asserted that the Complainant stated that his preferred method of delivery was e-mail. The Custodian asserted that on June 14, 2019, five (5) business days after receipt, he sent a response to the Complainant in writing, but received a delivery error message on June 16, 2019. The Custodian asserted that he checked to ensure that the e-mail address was correct and tried to resubmit the request on June 19, 2019 without success. The Custodian asserted that based upon the record, he did not violate N.J.S.A. 47:1A-5(i) since he submitted a response within the seven (7) business day requirement. The Custodian argued that he should not be penalized when his response was returned as “undeliverable” despite using the specific e-mail address provided by the Complainant.

The Custodian also argued that the Complainant’s request for complaints filed against the officer were properly exempt from disclosure under the Attorney General’s Internal Affairs Policy & Procedures (“IAPP”). The Custodian asserted that the IAPP has the force of law for police entities under O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 484-85 (App. Div. 2009), and N.J.S.A. 40A:14-181. The Custodian also noted that the GRC has previously held that internal affairs records were not subject to access under OPRA. See Wares v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2014-330 (June 2015); 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).

The Custodian requested that the Council find that he timely responded to the Complainant’s OPRA request and lawfully denied access to the requested internal affairs records.

Additional Submissions:

On July 26, 2019, the Complainant e-mailed the GRC in response to the Custodian's SOI. The Complainant asserted that he did not have issues receiving e-mails from others, and therefore the onus was on the Custodian to address any server issues. The Complainant also asserted that the Custodian could have reached out by phone if the e-mails were not going through.

Lastly, the Complainant contended that the Custodian's copy of his response did not include the attached notes. The Complainant requested that those notes be forwarded to him.

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 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).⁴ 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 decided during the pendency of this complaint, Tomkins v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2018-116 (December 2019) is instructive. In that case, the custodian responded in writing to the complainant, an incarcerated individual, five (5) business days after receiving the OPRA request. The custodian's response was returned by the commitment agency, and the custodian resubmitted her response via certified mail. The Council held that because the custodian initially responded to the complainant's request in a timely manner, there was no "deemed denial."

In the current matter, the Custodian received the Complainant's OPRA request on June 7, 2019. The Custodian certified that he timely responded on June 14, 2019, but received an error message from Microsoft Outlook on June 16, 2019, stating that the message was undeliverable. On June 19, 2019, the Custodian tried to resubmit the response to the Complainant but received another error message that same day. The Custodian provided copies of his e-mail responses which demonstrate that he used the correct e-mail address, and provided copies of the error messages he received. Therefore, like the custodian in Tomkins, the evidence of record supports that the Custodian responded to the Complainant's OPRA request in a timely manner.

Therefore, the Custodian bore his burden of proof that he timely responded to the Complainant's OPRA request on the fifth (5th) business day after receipt of same. N.J.S.A. 47:1A-

⁴ 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.

6. As such, there was no “deemed” denial of access to the subject OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Kelley, GRC 2007-11, and Tomkins, GRC 2018-116.

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.

OPRA provides that “[n]otwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record . . .” N.J.S.A. 47:1A-10. OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581 (2011). In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004), the Council held that:

The Complainant’s request to review the records of complaints filed against Officer Tuttle were properly denied by the Custodian. N.J.S.A. 47:1A-10 provides in pertinent [part] that “the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a public record and shall not be made available for public access” [emphasis omitted]. As a result, records of complaints filed against Officer Tuttle and/or reprimands he has received are not subject to public access.

[Id.]

Further, the personnel records exemption may apply to records that “. . . bear many of the indicia of personnel files.” North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). In Rodriguez, GRC 2013-296, the Council held that “disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA.” Id. at 5.

Additionally, the Council has previously held that the IAPP and other Attorney General Guidelines carry the force of law.⁵ See Blaustein v. Lakewood Police Dep’t (Ocean), GRC Complaint No. 2011-102 (June 2012) (citing O’Shea, 410 N.J. Super. at 484-85). Thus, because the Appellate Division determined that Attorney General Guidelines have the force of law for police entities, the IAPP operates to exempt the requested records from disclosure, providing in part: “[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information.”⁶ See also Rivera, GRC 2007-222

⁵ The IAPP was promulgated via the Division of Criminal Justice in the New Jersey Department of Law and Public Safety. All GRC references to the IAPP are to the August 2020 revision of the document.

⁶ IAPP, Internal Affairs Records, pg. 56.

(accepting an Initial Decision of the Office of Administrative Law that internal affairs reports are confidential records); and Camarata, GRC 2014-127 (holding that the custodian lawfully denied access to internal affairs investigation records).

In the instant matter, the Complainant's OPRA request Item No. 2 requested any civilian complaints filed against a specified PPD officer. Based upon the prevailing caselaw, the requested records are comparable to those at issue in Merino. Additionally, to the extent that the Complainant seeks internal affairs records regarding the officer, such records are explicitly exempt pursuant to the IAPP.

Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request Item No. 2 because such records are exempt from disclosure under OPRA's personnel records exemption. N.J.S.A. 47:1A-6; Merino, GRC 2003-110. Additionally, to the extent the request sought internal affairs records, same are exempt under the IAPP. See O'Shea, 410 N.J. Super. 371; Blaustein, GRC 2011-102; Rivera, GRC 2007-222; Camarata, GRC 2014-127.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian bore his burden of proof that he timely responded to the Complainant's OPRA request on the fifth (5th) business day after receipt of same. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial of access to the subject OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007), and Tomkins v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2018-116 (December 2019).
2. The Custodian did not unlawfully deny access to the Complainant's OPRA request Item No. 2 because such records are exempt from disclosure under OPRA's personnel records exemption. N.J.S.A. 47:1A-6; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004). Additionally, to the extent the request sought internal affairs records, same are exempt under the Internal Affairs Policy & Procedures. See O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); Blaustein v. Lakewood Police Dep't (Ocean), GRC Complaint No. 2011-102 (June 2012); Rivera v. Borough of Keansburg Police Dep't (Monmouth), GRC Complaint No. 2007-222 (June 2010); Camarata v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2014-127 (June 2015).

Prepared By: Samuel A. Rosado
Staff Attorney

December 8, 2020