



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 28, 2021 Government Records Council Meeting

Eliyohu S. Geller
Complainant

Complaint No. 2019-200

v.

Township of Lakewood (Ocean)
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 2021 Supplemental 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 complied with the Council’s August 24, 2021 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director with an attached certification from Chief of Police Gregory Meyer dated September 2, 2021. In the certification, Chief Meyer averred that the records responsive to the Complainant’s September 18, 2019 OPRA request fall within the purview of the Attorney General’s Guidelines on Internal Affairs Policy & Procedures as confidential internal affairs investigation records, and as such, are not subject to disclosure.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

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 28th Day of September 2021

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: September 30, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 28, 2021 Council Meeting**

**Eliyohu S. Geller¹
Complainant**

GRC Complaint No. 2019-200

v.

**Township of Lakewood (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copies via e-mail of the following records:

OPRA request dated September 17, 2019 (identified further as reference no. 2019-1510)

“I would like to obtain a recording of an outgoing Lakewood Police phone call from phone number 732-363-0200 to my cellphone number [private number deleted] which took place on Friday September 13th 2019 at 2:38 p.m.”

OPRA request dated September 18, 2019 (identified further as reference no. 2019-1526)

“I’m requesting recordings of 2 phone calls I placed from my cellphone number [private number deleted] to the Lakewood Police Department’s phone number 732-363-0200 on Friday September 13th 2019 first call was at 12:20 p.m. and the second call at 12:24 p.m.”

Custodian of Record: Lauren Kirkman³

Requests Received by Custodian: September 17, 2019 and September 18, 2019

Response Made by Custodian: September 25, 2019

GRC Complaint Received: September 26, 2019

Background

August 24, 2021 Council Meeting:

At its August 24, 2021 public meeting, the Government Records Council (“Council”) considered the August 17, 2021 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, found that:

1. The Custodian’s September 25, 2019 written response was insufficient because the Custodian failed to specifically state that the requested record did not exist at the time of the Complainant’s September 17, 2019 OPRA request pursuant to N.J.S.A. 47:1A-

¹ No legal representation listed on record.

² Represented by Steven Secare, Esq., of Secare and Hensel (Toms River, NJ).

³ Original Custodian was Kathryn Hutchinson.

5(g). See Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008). See also Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009).

2. The Custodian did not unlawfully deny access to the records responsive to the Complainant's September 17, 2019 OPRA request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Because the Custodian may have unlawfully denied access to the records responsive to the Complainant's September 18, 2019 request, the Custodian shall either disclose the records **or** obtain and submit to the Complainant and the GRC a legal certification from the chief executive of the police department clearly stating that the responsive records fall within the purview of the IAPP as confidential internal affairs investigation records, and as such, are not subject to disclosure.
4. **The Custodian shall comply with paragraph #4 above within five (5) business days from receipt of the Council's Interim Order. If disclosing the records, the Custodian shall include a detailed document index explaining the lawful basis for any appropriate redaction. Further, the Custodian shall simultaneously deliver certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On August 25, 2021, the Council distributed its August 24, 2021 Interim Order to all parties. On August 25, 2021, the Custodian requested and was granted an extension of time until September 9, 2021, to consult with police department personnel and comply with the Council's Order. On September 2, 2021, the Custodian responded to the Council's Interim Order by providing certified confirmation of compliance to the Council.

Analysis

Compliance

On August 24, 2021, the Council ordered the above-referenced compliance. On August 25, 2021, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On August 25, 2021, the Custodian requested and was granted an extension of time until September 9, 2021, to comply with the Council's Order. On September 2, 2021, the Custodian forwarded certified confirmation of compliance to the Executive Director, together with a certification dated September 2, 2021, from Township of

Lakewood Chief of Police Gregory Meyer, wherein he averred that the records responsive to the Complainant's September 18, 2019 request ". . . are confidential records which fall within the purview of the Attorney General's Guidelines on Internal Affairs Policy & Procedures (IAPP) as the 'nature and source of internal allegation, the progress of the internal affairs investigations, and the resulting materials confidential information' and therefore are not subject to disclosure under the Open Public Records Act."

Therefore, the Custodian complied with the Council's August 24, 2021 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director with an attached certification from Chief of Police Gregory Meyer dated September 2, 2021. In the certification, Chief Meyer averred that the records responsive to the Complainant's September 18, 2019 OPRA request fall within the purview of the Attorney General's Guidelines on Internal Affairs Policy & Procedures as confidential internal affairs investigation records, and as such, are not subject to disclosure.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's August 24, 2021 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director with an attached certification from Chief of Police Gregory Meyer dated September 2, 2021. In the certification, Chief Meyer averred that the records responsive to the Complainant's September 18, 2019 OPRA request fall within the purview of the Attorney General's Guidelines on Internal Affairs Policy & Procedures as confidential internal affairs investigation records, and as such, are not subject to disclosure.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Prepared By: John E. Stewart
Staff Attorney

September 21, 2021



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

August 24, 2021 Government Records Council Meeting

Eliyohu S. Geller
Complainant

Complaint No. 2019-200

v.

Township of Lakewood (Ocean)
Custodian of Record

At the August 24, 2021 public meeting, the Government Records Council (“Council”) considered the August 17, 2021 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’s September 25, 2019 written response was insufficient because the Custodian failed to specifically state that the requested record did not exist at the time of the Complainant’s September 17, 2019 OPRA request pursuant to N.J.S.A. 47:1A-5(g). See Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008). See also Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009).
2. The Custodian did not unlawfully deny access to the records responsive to the Complainant’s September 17, 2019 OPRA request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Because the Custodian may have unlawfully denied access to the records responsive to the Complainant’s September 18, 2019 request, the Custodian shall either disclose the records **or** obtain and submit to the Complainant and the GRC a legal certification from the chief executive of the police department clearly stating that the responsive records fall within the purview of the IAPP as confidential internal affairs investigation records, and as such, are not subject to disclosure.
4. **The Custodian shall comply with paragraph #4 above within five (5) business days from receipt of the Council’s Interim Order. If disclosing the records, the Custodian shall include a detailed document index explaining the lawful basis for**

any appropriate redaction. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 24th Day of August 2021

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 25, 2021

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or by hand-delivery, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 24, 2021 Council Meeting**

**Eliyohu S. Geller¹
Complainant**

GRC Complaint No. 2019-200

v.

**Township of Lakewood (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copies via e-mail of the following records:

OPRA request dated September 17, 2019 (identified further as reference no. 2019-1510)

“I would like to obtain a recording of an outgoing Lakewood Police phone call from phone number 732-363-0200 to my cellphone number [private number deleted] which took place on Friday September 13th 2019 at 2:38 p.m.”

OPRA request dated September 18, 2019 (identified further as reference no. 2019-1526)

“I’m requesting recordings of 2 phone calls I placed from my cellphone number [private number deleted] to the Lakewood Police Department’s phone number 732-363-0200 on Friday September 13th 2019 first call was at 12:20 p.m. and the second call at 12:24 p.m.”

Custodian of Record: Kathryn Hutchinson

Requests Received by Custodian: September 17, 2019 and September 18, 2019

Response Made by Custodian: September 25, 2019

GRC Complaint Received: September 26, 2019

Background³

Requests and Response:

On September 17, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 25, 2019, the sixth (6th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the request is denied “per N.J.S.A. 47:1A-1.1, Executive Order No. 21, or Executive Order No. 26” because the incident is currently an internal investigation.

¹ No legal representation listed on record.

² Represented by Steven Secare, Esq., of Secare and Hensel (Toms River, 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.

On September 18, 2019, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On September 25, 2019, the fifth (5th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the request is denied “per N.J.S.A. 47:1A-1.1, Executive Order No. 21, or Executive Order No. 26” because the incident is currently an internal investigation.

Denial of Access Complaint:

On September 26, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian denied both of her OPRA requests for the same reason, that the incident for which the records were requested is an internal investigation. The Complainant stated that the Custodian cited N.J.S.A. 47:1A-1.1, Executive Order No. 21 (Gov. McGreevey, 2002), or Executive Order No. 26 (Gov. McGreevey, 2002) as the legal reason for denial. The Complainant stated that the Superior Court already ruled that the Custodian’s reasoning “doesn’t count” for denial of access. The Complainant cited Ganzweig v. Twp. of Lakewood, No. A-4613-14T2 (App. Div. Aug. 28, 2017).⁴

Statement of Information:

On October 17, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on September 17, 2019 and September 18, 2019, and responded in writing on September 25, 2019. The Custodian certified that no recording was made of the telephone conversation which was alleged by the Complainant to have taken place on September 13, 2019, at 2:38 p.m. The Custodian certified that, as such, no responsive record exists for the Complainant’s OPRA request dated September 17, 2019.

The Custodian certified that recordings responsive to the Complainant’s September 18, 2019 request for the September 13, 2019 telephone conversation was denied because the record is “[r]elated to an Internal Affairs investigation.” The Custodian cited N.J.S.A. 47:1A-1 as recognizing additional exemptions, which the Custodian certified were the Attorney General’s Guidelines on Internal Affairs Investigations and Executive Order 21. The Custodian certified that N.J.S.A. 47:1A-1 recognizes that records may be exempt from access based on authorities other than the exemptions set forth in OPRA. The Custodian cited “PAFF v. Bergen County 217WL957735(2017).”

⁴ This unpublished opinion is binding only on the parties in Ganzweig. Its use in other cases is limited. See R.1:36-3. Although the GRC will occasionally consider unpublished opinions as “instructive,” this case does not examine the application of the Attorney General’s Internal Affairs Policy & Procedures as grounds for denial, so it is not applicable here.

Analysis

Sufficiency of Response

OPRA provides that if a custodian is unable to comply with a request for access to government records, “the custodian shall indicate the *specific basis* thereof.” (Emphasis added) N.J.S.A. 47:1A-5(g).

In the instant complaint, the Custodian responded to the Complainant’s September 17, 2019 OPRA request by informing the Complainant that the requested records are exempt from access because they are related to an internal investigation. Subsequently, in the SOI the Custodian certified that the requested records do not exist.

In O’Shea v. Twp. of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the GRC determined that N.J.S.A. 47:1A-5(g) states that if a custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for the inability to comply. In that complaint, the Council applied N.J.S.A. 47:1A-5(g) to the custodian’s failure to address the complainant’s choice of delivery method and held that “the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records.”

The GRC also applied N.J.S.A. 47:1A-5(g) to a Custodian’s failure to provide an adequate response when denying access to a request for government records or failure to respond to each request individually. See Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)(holding that the Custodian’s response was insufficient because she failed to specifically state that the requested executive session minutes were not yet approved by the governing body at the time of the Complainant’s request pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008)(holding that the Custodian’s response was legally insufficient because he failed to respond to each request item individually)). See also Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009)(holding that the custodian’s response was insufficient because he failed to specifically state that the requested record did not exist at the time of the complainant’s request pursuant to N.J.S.A. 47:1A-5(g)).

Therefore, the Custodian’s September 25, 2019 written response was insufficient because the Custodian failed to specifically state that the requested record did not exist at the time of the Complainant’s September 17, 2019 OPRA request pursuant to N.J.S.A. 47:1A-5(g). See Paff, GRC 2007-271. See also Shanker, GRC 2007-245.

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 request dated September 17, 2019

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that no recording was made of the requested telephone conversation. Because no recording was made, the Custodian certified that the records responsive to the Complainant's September 17, 2019 request do not exist.

As such, the Custodian did not unlawfully deny access to the records responsive to the Complainant's September 17, 2019 OPRA request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

OPRA request dated September 18, 2019

In the SOI, the Custodian certified that the requested recordings of calls made on September 13, 2019, from the Complainant's cell phone number to the Lakewood Police Department are part of an internal affairs investigation and not subject to disclosure under N.J.S.A. 47:1A-1, which recognizes the Attorney General's Guidelines on Internal Affairs Investigations and Executive Order 21 (McGreevey). The Custodian certified that these provisions exempt internal affairs records from access.

Executive Order 21 (McGreevey) does not provide that police internal investigation records are exempt from disclosure. However, the GRC has held that the Attorney General's Internal Affairs Policy & Procedures ("IAPP") and other Attorney General Guidelines carry the force of law for police agencies.⁵ See O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009).

Thus, because the Appellate Division determined that the Attorney General's Guidelines have the force of law for police entities, the IAPP operates to exempt most internal affairs 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 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); Camarata v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2014-127 (June 2015) (holding that the custodian lawfully denied access to internal affairs investigation records).

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 June 2021 revision of the document.

⁶ IAPP § 9.6.1.

It is often clear from an OPRA request that the requested records are those that fall within the IAPP's confidentiality provisions and are thus not subject to disclosure.⁷ Such is not the case here. The GRC recognizes that a records custodian is not privy to a police department's internal investigative process; therefore, the custodian cannot certify based upon personal knowledge that a particular record is a confidential internal investigation record. The Council is obligated 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 . . ." N.J.S.A. 47:1A-7(e). However here, the Council cannot conduct an *in camera* examination of the denied records to determine if they may be related to an internal affairs investigation.⁸

Therefore, because the Custodian may have unlawfully denied access to the records responsive to the Complainant's September 18, 2019 request, the Custodian shall either disclose the records **or** obtain and submit to the Complainant and the GRC a legal certification from the chief executive of the police department clearly stating that the responsive records fall within the purview of the IAPP as confidential internal affairs investigation records, and as such, are not subject to disclosure.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's September 25, 2019 written response was insufficient because the Custodian failed to specifically state that the requested record did not exist at the time of the Complainant's September 17, 2019 OPRA request pursuant to N.J.S.A. 47:1A-5(g). See Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008). See also Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009).
2. The Custodian did not unlawfully deny access to the records responsive to the Complainant's September 17, 2019 OPRA request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Because the Custodian may have unlawfully denied access to the records responsive to the Complainant's September 18, 2019 request, the Custodian shall either disclose the records **or** obtain and submit to the Complainant and the GRC a legal certification from the chief executive of the police department clearly stating that the responsive

⁷ For example, a request specifically seeking internal affairs investigation records.

⁸ See IAPP §9.6.1(a) through (d).

records fall within the purview of the IAPP as confidential internal affairs investigation records, and as such, are not subject to disclosure.

4. **The Custodian shall comply with paragraph #4 above within five (5) business days from receipt of the Council's Interim Order. If disclosing the records, the Custodian shall include a detailed document index explaining the lawful basis for any appropriate redaction. Further, the Custodian shall simultaneously deliver⁹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ to the Executive Director.¹¹**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart
Staff Attorney

August 17, 2021

⁹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or by hand-delivery, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.