



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**April 27, 2021 Government Records Council Meeting**

Carl Moore  
Complainant  
v.  
NJ State Police  
Custodian of Record

Complaint No. 2020-79

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 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 the requested records are exempt from disclosure under N.J.A.C. 13:1E-3.2(a)(4) because they pertain to disciplinary actions regarding an individual employee. N.J.S.A. 47:1A-9. Thus, the Custodian bore his burden of proof that he lawfully denied access under OPRA. N.J.S.A. 47:1A-6. Finally, because the record is exempt under New Jersey Department of Law & Public Safety’s regulations, the GRC declines to address whether any other asserted exemptions apply.

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 27<sup>th</sup> Day of April 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: April 29, 2021**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 27, 2021 Council Meeting**

**Carl Moore<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-79**

v.

**N.J. State Police<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via U.S. mail of “records of misconduct for [N.J. State Police (“NJSP”)] Detective Blair Astbury.”

**Custodian of Record:** Lt. David Robbins

**Request Received by Custodian:** February 7, 2020

**Response Made by Custodian:** February 10, 2020

**GRC Complaint Received:** April 22, 2020

**Background<sup>3</sup>**

**Request and Response:**

On February 3, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 10, 2020, the Custodian responded in writing denying the subject OPRA request as exempt personnel records under N.J.S.A. 47:1A-1, et seq.; Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”); and N.J.A.C. 13:1E-3.2(a)(5).

**Denial of Access Complaint:**

On April 22, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the denial of access but did not provide any further arguments as to the reason for that disagreement.

**Statement of Information:**

On August 5, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Suzanne Davies.

<sup>3</sup> 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.

certified that he received the Complainant's OPRA request on February 7, 2020. The Custodian certified that he responded in writing on February 10, 2020 denying access to the subject OPRA request under applicable personnel exemptions.

The Custodian argued that to the extent that records exist, they are clearly exempt under OPRA's personnel exemption. N.J.S.A. 47:1A-10; Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 591 (2011); McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010). The Custodian further argued that the New Jersey Department of Law & Public Safety ("LPS") promulgated regulations exempt access to employee records regarding "discipline, discharge, promotion, transfer, employee performance, employee evaluation, or other related activities, whether open, closed or inactive . . ." N.J.S.A. 47:1A-9(a); N.J.A.C. 13:1E-3.2(a)(4). The Custodian further contended that the GRC has previously held that complaints filed against police officers were exempt from access under OPRA. Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010). See also Wares v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2014-330 (May 2015).<sup>4</sup>

The Custodian further contended that because any responsive records are *per se* exempt under OPRA, he could neither confirm nor deny their existence. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182, 204 (App. Div. 2016). The Custodian additionally argued that any responsive records were exempt under the Attorney General's Internal Affairs Policy & Procedures ("IAPP"). The Custodian argued that the IAPP provides that internal affairs ("IA") records are subject to a high degree of confidentiality. See IAPP Director No. 2019-05. The Custodian argued that this confidentiality is well recognized by both the courts and GRC. See *e.g.* State v. Marshall, 148 N.J. 89, 273 (1997) (certif. denied 522 U.S. 859 (1997)); Rivera v. Borough of Keansburg Police Dep't (Monmouth), GRC Complaint No. 2007-222 (June 2010) (citing O'Shea v. West Milford Twp., 410 N.J. Super. 371, 382 (App. Div. 2009)); Wares, GRC 2014-330.

## 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.

OPRA provides that:

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<sup>4</sup> The Custodian noted that Attorney General Law Enforcement Directive No. 2020-05 (June 15, 2020) required the State Police to add names of individual officers concerning "serious discipline" to annual reports released by the Office of Profession Standards. The Custodian averred that any information concerning Detective Astbury would be publicly available through that report. However, it should be noted that the Directive post-dated this complaint by two (2) months and does not impact the disclosability of the records sought at the time of the subject OPRA request.

Notwithstanding 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, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access . . .

[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, 594 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[Id.]

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order of the Governor*; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

Further, LPS’s regulations, wherein the NJSP is a division, provide that:

In addition to records designated as confidential pursuant to the provisions of [OPRA] . . . the following records shall not be considered government records subject to public access . . . [*r*]ecords, *specific to an individual employee* or employees . . . *relating to or which form the basis of discipline*, discharge, promotion, transfer, employee performance, employee evaluation, or other related

activities, whether open, closed, or inactive, except for the final agency determination.

[N.J.A.C. 13:1E-3.2(a)(4) (emphasis added).]

Here, the Complainant sought access to “records of misconduct” for Detective Astbury.<sup>5</sup> The Custodian denied access to the responsive record under multiple exemptions, to include N.J.S.A. 13:1E-3.2(a)(5), which actually reflected the language present in N.J.A.C. 13:1E-3.2(a)(4). The Complainant subsequently filed this complaint. In the SOI, the Custodian reasserted his position that the requested records were exempt from disclosure pursuant to LPS’s regulations.

In reviewing the Complainant’s OPRA request, as well a plain reading of LPS’s regulations, the GRC is satisfied that the Custodian lawfully denied access to the subject OPRA request. Specifically, the Complainant is clearly seeking records about Detective Astbury that are of a disciplinary nature. LPS’s regulation plainly exempts access to these types of individual personnel records and OPRA personnel exemption supports said denial. N.J.S.A. 47:1A-10; N.J.A.C. 13:1E-3.2(a)(4). Based on the forgoing, the GRC is persuaded that any responsive records are exempt from disclosure.

Accordingly, the requested records are exempt from disclosure under N.J.A.C. 13:1E-3.2(a)(4) because they pertain to disciplinary actions regarding an individual employee. N.J.S.A. 47:1A-9. Thus, the Custodian bore his burden of proof that he lawfully denied access under OPRA. N.J.S.A. 47:1A-6. Finally, because the record is exempt under LPS’s regulations, the GRC declines to address whether any other asserted exemptions apply.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the requested records are exempt from disclosure under N.J.A.C. 13:1E-3.2(a)(4) because they pertain to disciplinary actions regarding an individual employee. N.J.S.A. 47:1A-9. Thus, the Custodian bore his burden of proof that he lawfully denied access under OPRA. N.J.S.A. 47:1A-6. Finally, because the record is exempt under New Jersey Department of Law & Public Safety’s regulations, the GRC declines to address whether any other asserted exemptions apply.

Prepared By: Frank F. Caruso  
Executive Director

April 20, 2021

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<sup>5</sup> The GRC notes that the Complainant’s OPRA request nonetheless is invalid on its face because it seeks generic “records.” MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008).