



State of New Jersey

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Acting Commissioner

FINAL DECISION

November 8, 2023 Government Records Council Meeting

Rashon Barkley
Complainant

Complaint No. 2022-258

v.

Essex County Prosecutor's Office
Custodian of Record

At the November 8, 2023 public meeting, the Government Records Council (“Council”) considered the October 31, 2023 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 adjudication of the common law disclosability of the requested records is outside of the GRC’s authority. See Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013). Specifically, the GRC does not have the authority to adjudicate the Complainant’s common law arguments. N.J.S.A. 47:1A-7(b); Ciesla v. N.J. Dep’t of Health and Senior Servs., 429 N.J. Super. 127, 146-148 (App. Div. 2012).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request seeking disciplinary records and Internal Affairs reports. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Internal Affairs Policy & Procedures; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004). See also Rivera v. Union Cnty. Prosecutor’s Office, 250 N.J. 124 (2022). The Custodian has also borne his burden of proof that he lawfully denied access to the portion of the Complainant’s OPRA request seeking “separation agreements [and] settlement agreement[s]” between Essex County Prosecutor’s Office and the identified special investigators. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 8th Day of November 2023

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: November 13, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 8, 2023 Council Meeting**

**Rashon Barkley¹
Complainant**

GRC Complaint No. 2022-258

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Copies of “all disciplinary records, separation agreements, settlement agreements, and internal affairs investigation reports” regarding nine (9) Essex County Prosecutor’s Office (“ECPO”) investigators.

Custodian of Record: Stephen Pogany
Request Received by Custodian: April 21, 2022
Response Made by Custodian: April 29, 2022
GRC Complaint Received: June 8, 2022

Background³

Request and Response:

On April 21, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

On April 29, 2022, the Custodian responded in writing denying the Complainant’s OPRA request. The Custodian first stated that the requested records were personnel records exempt from disclosure under N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”); and pursuant to Toscano v. N.J. Dep’t of Human Serv., Div. of Mental Health Servs., GRC Complaint No. 2010-147 (May 2011). The Custodian further stated that performance evaluations are also exempt from disclosure. Lotito v. N.J. Dep’t of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014). The Custodian finally noted that contrary to the Complainant’s reliance on Rivera v. Union Cnty. Prosecutor’s Office, 250 N.J. 124 (2022), said decision supports the instant denial.⁴

¹ No legal representation listed on record.

² Represented by Olivia Schumann, Esq. (Newark, 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.

⁴ The Custodian also addressed the Complainant’s argument that Rivera supported disclosure under the common law right of access.

Denial of Access Complaint:

On June 8, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he was unlawfully denied access to the responsive records because the public was entitled to see law enforcement disciplinary records. The Complainant thus argued that there is a public interest in requiring disclosure of the responsive records.

Statement of Information:

On July 5, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 21, 2022. The Custodian certified that he responded in writing on April 29, 2022 denying the subject OPRA request under OPRA’s personnel exemption and related case law. N.J.S.A. 47:1A-10, EO 26; Rivera, 250 N.J. 124; Lotito, GRC 2013-65. The Custodian contended that his denial was lawful for the reasons stated in his April 29, 2022 response to the Complainant.

Additional Submissions:

On October 17, 2023, the GRC sought additional information from the Custodian. N.J.A.C. 5:105-2.4(m). The GRC stated that although a portion of the Complainant’s OPRA request sought “separation and settlement agreements,” the SOI does not identify whether a search for such records was conducted and whether same existed. The GRC asked that, based on those disagreements, the Custodian submit a certification answering the following questions:

1. Did you conduct a search for separation and settlement agreements entered with the investigators identified in the OPRA request at the time of the request?
2. If a search was conducted, were any agreements located?
3. If no search was conducted, the GRC requires the agency to conduct same and certify whether any responsive agreements were located.

The GRC requested that the certification be submitted by October 20, 2023.

On October 19, 2023, the Custodian e-mailed the GRC seeking an extension of time until October 27, 2023 to submit his response to the request for additional information. The Custodian noted that potentially responsive records are stored off-site, some several decades old, and that an extension was necessary to conduct a proper search therefor. On October 20, 2023, the GRC responded granting the requested extension.

On October 27, 2023, the Custodian responded to the GRC’s request for additional information. The Custodian certified that in response to question Nos. 1 and 2, he did not conduct a search for the requested agreements because he was “operating under the assumption that N.J.S.A. 47:1A-10 did not require” disclosure of those records. The Custodian affirmed that in response to question No. 3, he contacted ECPO’s personnel liaison to conduct a search. The Custodian certified that the search revealed that no agreements existed for any of the identified special investigators: all retired or resigned “in the ordinary course without entering into any

[agreements].” The Custodian also certified that one of the identified investigators had no record of employment with the ECPO.

Analysis

Common Law Access

OPRA provides that the “[GRC] shall . . . receive, hear, review, and adjudicate a complaint filed by any person concerning a denial of access to a *government record* by a records custodian. . . .” N.J.S.A. 47:1A-7(b) (emphasis added). Additionally, OPRA provides that the GRC shall “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].” N.J.S.A. 47:1A-7(e) (emphasis added).

In Ciesla v. N.J. Dep’t of Health and Senior Servs., 429 N.J. Super. 127, 148 (App. Div. 2012), the Appellate Division discussed the issue of the GRC’s ability to review access to records under the common law. The court held that under OPRA, the GRC was restricted by the Legislature to review the disclosure of “government records”, rather than the more broadly termed “public records” under the common law. Id. at 146-47. The court went on to hold that the powers and limitations outlined in N.J.S.A. 47:1A-7(b-f) drew the inference that the GRC has the power to adjudicate complaints of a denial of access only to that of a “government record” under OPRA. Id. at 147-48 (citing Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 352-52 (App. Div. 2005)). See also Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013) (holding that the GRC had no jurisdiction over a common law complaint).

In the instant matter, the Complainant filed the instant complaint arguing that the public had an interest in reviewing personnel records. Such an argument is distinctly rooted in the threshold for disclosure employed through the common law right of access. However, such a common law argument raised by the Complainant is not within the GRC’s authority to adjudicate. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-7(b).

Thus, the adjudication of the common law disclosability of the requested records is outside of the GRC’s authority. See Rowan, Jr., GRC 2011-347. Specifically, the GRC does not have the authority to adjudicate the Complainant’s common law arguments. N.J.S.A. 47:1A-7(b); Ciesla, 429 N.J. Super. at 146-48.

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:

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.]

The Council has addressed whether personnel records not specifically identified in OPRA as disclosable were subject to disclosure. For instance, the Council has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004), the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10. For this reason, the Council concluded that “. . . records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access.” Id.; see also Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).

Further, the Appellate Division has held that Attorney General Guidelines have the force of law for police entities. See O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). In particular, the Internal Affairs Policy & Procedures (“IAPP”) is bound upon all law enforcement agencies in New Jersey pursuant to statute. See N.J.S.A. 40A:14-181. Further, 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.” IAPP at 9.6.1 (August 2020). Consistent with the IAPP, the Council held in Wares v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2014-330 (June 2015) that internal affairs records are not subject to access under OPRA (citing N.J.S.A. 47:1A-9). See also Rivera, 250 N.J. 124 (holding that internal affairs reports are exempt from disclosure under OPRA); Camarata v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2014-127 (June 2015); Rivera v. Borough of Keansburg Police Dep’t (Monmouth), GRC Complaint No. 2007-222 (June 2010).

Finally, prior to the submission of the subject OPRA request, the New Jersey Supreme Court reversed the Appellate Division and ordered disclosure of the settlement agreement with redactions. Libertarians for Transparent Gov’t v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022).⁵ The Court found that under OPRA, custodians were required to disclose the actual records containing the information required to be disclosed under N.J.S.A. 47:1A-10. Id. at 56. The Court thus held that because the requested settlement agreement contained Section 10 information, the defendants were obligated to disclose the record with appropriate redactions. Id. at 57.

Here, the Complainant sought disciplinary records, separation agreements, settlement agreements, and IA reports related to specific investigators from ECPO. The Custodian denied access under N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9(a) and EO 26. This complaint followed, wherein the Complainant relied largely on a common law right of access argument to refute the Custodian’s denial. In the SOI, the Custodian maintained his position that all records were exempt from disclosure for the reasons cited in his response to the Complainant. However, the SOI did not address the potential existence of separation or settlement agreements. Based on this, the GRC sought a additional information from the Custodian regarding the search and existence of agreements. On October 27, 2023, the Custodian responded certifying that he believed the agreements were exempt under N.J.S.A. 47:1A-10. The Custodian further certified that upon conducting a search, it was determined that no agreements existed.

Turning first to the disciplinary records and IA reports, prevailing statutes and precedential case law is clear that same is not disclosable under OPRA. N.J.S.A. 47:1A-10; IAPP; Merino, GRC 2003-110. See also Rivera, 250 N.J. 124. The GRC notes that the based on the forgoing, the Custodian’s denial of these items was lawful under OPRA.

Turning next to separation and settlement agreements, the GRC first notes that approximately a month prior to the Custodian’s receipt of, and response to, the Complainant’s OPRA request, the Libertarians Court held that separation and settlement agreements could be disclosed with redactions. This decision coupled with the lack of clarity as to the existence of agreements in the SOI prompted the GRC to seek additional information. Having received the Custodian’s response, the GRC can proceed with an analysis of the issue.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Custodian has certified that he did not originally perform a search because he believed that agreements were exempt from disclosure under OPRA. The Custodian further certified that upon conducting a search, no responsive agreements were

⁵ Rev’ing Libertarians for Transparent Gov’t v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020).

located. Additionally, the Complainant failed to present any evidence to refute the Custodian's certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request seeking disciplinary records and IA reports. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; IAPP; Merino, GRC 2003-110. See also Rivera, 250 N.J. 124. The Custodian has also borne his burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking "separation agreements [and] settlement agreement[s]" between ECPO and the identified special investigators. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The adjudication of the common law disclosability of the requested records is outside of the GRC's authority. See Rowan, Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013). Specifically, the GRC does not have the authority to adjudicate the Complainant's common law arguments. N.J.S.A. 47:1A-7(b); Ciesla v. N.J. Dep't of Health and Senior Servs., 429 N.J. Super. 127, 146-148 (App. Div. 2012).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request seeking disciplinary records and Internal Affairs reports. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Internal Affairs Policy & Procedures; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004). See also Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124 (2022). The Custodian has also borne his burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking "separation agreements [and] settlement agreement[s]" between Essex County Prosecutor's Office and the identified special investigators. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

October 31, 2023