



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

November 19, 2008 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2007-224

v.

Borough of Roselle Park (Union)
Custodian of Record

At the November 19, 2008 public meeting, the Government Records Council (“Council”) considered the November 13, 2008 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 failure to grant access, deny access, seek clarification or request an extension of time in writing within the statutorily mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Roselle Park Police Department complied with the provisions of N.J.S.A. 40A:14-181 by promulgating policy consistent with the Attorney General’s Internal Affairs Policy and Procedure, and because that statute is a law that contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., the confidentiality provisions of the Internal Affairs Policy and Procedure governing index reports within the Police Department’s policy restricts public access to the requested records. Accordingly, the Custodian lawfully denied the Complainant access to the index reports.
3. The Custodian’s failure to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial of said request. However, the Custodian subsequently did provide the Complainant with the records determined to be disclosable and lawfully denied the Complainant access to those records exempt from disclosure. It is therefore concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s



unlawful “deemed” denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 19th Day of November, 2008

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: November 20, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2008 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2007-224

v.

**Borough of Roselle Park (Union)²
Custodian of Records**

Records Relevant to Complaint: Police Department Internal Affairs Index Reports for each and every year 2000-2006.³

Request Made: August 6, 2007

Response Made: September 13, 2007

Custodian: Doreen Cali

GRC Complaint Filed: September 24, 2007

Background

August 6, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

September 13, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the twenty-fifth (25th) business day following receipt of such request.⁴ The Custodian discloses some of the records requested by the Complainant but denies access to the records relevant to this complaint because the Custodian contends the records contain personnel matters and are not disclosable under N.J.S.A. 47:1A-10 and the Attorney General's Internal Affairs Policy & Procedure ("IAPP") which the Custodian alleges classifies these records as confidential.⁵

¹ No legal representation listed on record.

² Represented by William V. Lane, Esq., of Johnstone, Skok, Loughlin & Lane, P.C. (Westfield, NJ).

³ The records requested in the Denial of Access Complaint are different than those set forth in the original request. The Complainant's original request also included the Internal Affairs Annual Summary Reports for the years 2000 - 2006. Although the Custodian disclosed the annual summary reports, she withheld from disclosure the requested index reports.

⁴ The Custodian certifies receiving the Complainant's OPRA request on or about August 8, 2007.

⁵ The IAPP is contained within the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the New Jersey Department of Law and Public Safety. All GRC references to the IAPP are to the November 2000 revision of that document.

September 24, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated August 6, 2007
- Custodian’s response to the Complainant’s OPRA request⁶ (undated)
- Letter from the Custodian’s Counsel to Roselle Park Police Lieutenant Paul Morrison dated August 10, 2007

The Complainant states that he was denied access to the Internal Affairs index reports, which are records that list complaints for any given year against police officers by name. The Complainant contends that the names can be easily redacted. The Complainant further states that Custodian’s Counsel, in his letter to Lieutenant Morrison dated August 10, 2007, indicates that he is awaiting a response from the Division of Criminal Justice; however, the Complainant states he was denied the information without Division of Criminal Justice clarification.

October 2, 2007

Offer of Mediation sent to both parties.

October 3, 2007

The Complainant agrees to mediation.

October 5, 2007

The Custodian agrees to mediation.

October 9, 2007

The complaint is referred for mediation.

December 6, 2007

The complaint is referred back from mediation to the GRC for adjudication.

December 7, 2007

Request for the Statement of Information sent to the Custodian.

December 19, 2007

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on December 7, 2007 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

⁶ Although the Custodian’s written response to the Complainant’s OPRA request was undated, the Complainant states he was provided with some of the records responsive to his request on September 13, 2007. The Custodian certifies that she responded to the records request “on or before” September 13, 2007. Richard Rivera v. Borough of Roselle Park (Union), 2007-224 – Findings and Recommendations of the Executive Director

December 21, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel requests that his legal argument in letter format be accepted by the GRC as the Custodian's Statement of Information. In his argument, Counsel relies upon the IAPP to argue that the requested records are confidential. Counsel also cites N.J.S.A. 47:1A-1 to argue that the Borough must safeguard from public access a citizen's personal information when disclosure would violate the citizen's reasonable expectation of privacy. Counsel asserts that the Complainant has not offered any public or private interest so significant as to overcome the public interest in keeping the requested records confidential.

December 21, 2007

Telephone call from the GRC to the Custodian's Counsel.⁷ Counsel was advised that Counsel's letter dated December 21, 2007 was not a satisfactory substitute for the Custodian's Statement of Information. Counsel stated the Custodian was not available and requested a five (5) business day extension of time to complete and return the Statement of Information.

December 24, 2007

Letter from the GRC to Custodian's Counsel. The GRC confirms its telephone conversation with Counsel on December 21, 2007 and grants a five (5) business day extension of time for the Custodian to complete and return the Statement of Information.

December 27, 2007

Telephone call from the Custodian to the GRC. The Custodian states that she needs another copy of the request dated December 7, 2007 for the Statement of Information along with a blank Statement of Information form faxed to her office.

December 27, 2007

Facsimile transmission from the GRC to the Custodian. The GRC forwards a copy of the request dated December 7, 2007 for the Statement of Information along with a blank Statement of Information to the Custodian. The GRC also informs the Custodian that she must forward to the GRC a copy of the Police Department's policy consistent with the AG Policy because the Custodian relied in part on said Guidelines to deny the Complainant access to the record he requested.

December 28, 2007

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated August 6, 2007
- Custodian's response to the Complainant's OPRA request⁸
- Counsel's letter to the GRC dated December 21, 2007 and marked "Item 12"
- Roselle Park Police Department Internal Affairs Standard Operating Procedure Volume 1, Number 113 dated October 22, 1996

⁷ Custodian's Counsel was unavailable and a law firm associate, Peter McGregor, Esq., took the GRC's phone call.

⁸ See footnote 6.

The Custodian certifies that her search for the requested records involved a good faith and complete search of the files. The Custodian also certifies that the requested records were not destroyed. The Custodian certifies that all requested records were retained in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that the date on which she received the records request upon which this complaint is based was on or about August 8, 2007. The Custodian also certifies that she responded to the OPRA request on or before September 13, 2007.

The Custodian certifies that the records relevant to this complaint are the following:

ITEM NUMBER	RECORD DEEMED RESPONSIVE TO THE COMPLAINANT'S REQUEST	YEAR	NUMBER OF PAGES	LEGAL EXPLANATION AND STATUTORY CITATION FOR DENIAL OF ACCESS
1	Internal Affairs Case Log	2000	1	<u>N.J.S.A. 47:1A-1.1</u> . indicates information for use by any law enforcement agency in the State of New Jersey, or any other state or federal law enforcement agency; criminal investigation records. ⁹
2	Same as Item #1	2001	1	Same as Item #1 explanation.
3	Same as Item #1	2002	1	Same as Item #1 explanation.
4	Same as Item #1	2003	1	Same as Item #1 explanation.
5	Same as Item #1	2004	1	Same as Item #1 explanation.
6	Same as Item #1	2005	2	Same as Item #1 explanation.
7	Same as Item #1	2006	2	Same as Item #1 explanation.

⁹The Custodian misconstrues OPRA and cites the law enforcement exception to the OPRA exclusion of autopsy photographs and reproductions coupled with the criminal investigatory records exception. Richard Rivera v. Borough of Roselle Park (Union), 2007-224 – Findings and Recommendations of the Executive Director

The Custodian argues that “[OPRA] delineates those documents which are considered ‘public records’ for purposes of disclosure to the public.” The Custodian goes on to cite N.J.S.A. 47:1A-1.1, which the Custodian asserts contains two of the clearly defined exceptions to OPRA applicable to the instant complaint. The Custodian argues that those exceptions are “[records] for use by any law enforcement agency in the State of New Jersey, or any other state or federal law enforcement agency; criminal investigation records.” The Custodian argues that the OPRA definition of a criminal investigatory record applies to the requested records because they are not kept pursuant to any legislative act or statute, but rather pursuant to the policies of the Roselle Park Internal Investigation Division. Accordingly, the Custodian argues that the requested records should not be considered “public documents” under OPRA and therefore should not be disclosed.

The Custodian’s legal argument also posits two additional reasons why the requested records should not be disclosed:

First, the Custodian asserts that the Internal Affairs Records Confidentiality section of the IAPP proscribes release of the requested records. This section provides, “[t]he contents of the internal investigation case files shall be retained in the internal affairs unit and clearly marked as confidential.” Although the IAPP provides for four (4) limited circumstances under which records shall be released, the Custodian argues that none of the circumstances apply in the instant complaint.

Second, the Custodian cites N.J.S.A. 47:1A-1 to argue that the Borough must safeguard from public access a citizen’s personal information when disclosure would violate the citizen’s reasonable expectation of privacy. The Custodian cites Loigman v. Kimmelman, 102 N.J. 98 (1986), wherein the Custodian asserts the court held that more than a showing of good faith and citizen status will be required to overcome the public interest in confidentiality of police investigative files and that the judge must be convinced of a clear showing of advancement of public interest to warrant disclosure. The Custodian concludes that full release of all information on investigations of officers in the past six (6) years would seriously undermine the public interest in the Police Department. The Custodian further asserts that the Complainant has not offered any public or private interest so significant as to overcome the public interest in keeping confidential the investigation of officers.

January 14, 2008¹⁰

The Complainant’s response to the Custodian’s SOI. The Complainant states that the Custodian failed to respond to his OPRA request until five (5) weeks had elapsed from the date of his request in violation of OPRA.

The Complainant states that he is seeking disclosure of the requested records because of the need for public participation in policing and to perform a proper review and analysis of the records. The Complainant asserts that, contrary to the contention of the Custodian, the case tracking indexes are government records because they pertain to investigations that have been closed. Further, the Complainant states that the case

¹⁰ Other correspondence was received from the parties which is not relevant to this complaint or restates the facts/assertions already presented to the GRC.
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tracking indexes are required to be filed in accordance with the IAPP and therefore they fall under OPRA.

The Complainant contends that the Custodian has not cited any relevant law that would bar release of the indexes and that, further, the Custodian made a flawed argument because the criminal investigatory records exemption is not relevant in this matter.

The Complainant states that “[t]he IAPP addresses who may retrieve index information from Internal Affairs case files and [the IAPP] clearly states that ‘[a]ccess to these records must be specifically addressed with department policy and procedures.’” (Emphasis added by the Complainant.) The Complainant contends that the Roselle Park Police Department policy does not address who may access internal affairs records, in contravention of the IAPP. The Complainant further contends that there is no law or precedent that would bar the indexes from being released with redactions of officers’ names and therefore the indexes, without officer names, are government records.

The Complainant attaches several examples of redacted case indexes from other law enforcement agencies in support of his position.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

Further, OPRA provides:

“A government record shall not include ... *criminal investigatory records...*” (Emphasis added) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the

form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ... *The requestor shall be advised by the custodian when the record can be made available.* If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA further provides that:

“[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...regulation promulgated under the authority of any statute...” N.J.S.A. 47:1A-9.a.

New Jersey law governing municipalities and counties provides:

“*Every law enforcement agency shall adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements.*” (Emphasis added.) N.J.S.A. 40A:14-181.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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 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. As also prescribed under 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. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹¹ 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this complaint, the Complainant states that he submitted his OPRA request on August 6, 2007. The Custodian certifies that she received the Complainant’s OPRA request on or about August 8, 2007. The Custodian also certifies that she provided the Complainant with a written response to his OPRA request on September 13, 2007 disclosing some of the records requested by the Complainant and denying the balance of the requested records. It is undisputed that the Custodian failed to respond to the Complainant’s OPRA request until the twenty-fifth (25th) business day following receipt of the Complainant’s request.

The Custodian’s failure to respond in writing to the 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Notwithstanding the Custodian’s deemed denial, the Custodian expressly denied the Complainant access to the Police Department Internal Affairs Index Reports for the years 2000 through 2006 on the grounds that they were personnel records and not disclosable under N.J.S.A. 47:1A-10 and the IAPP.

Subsequently, in the SOI the Custodian does not aver that the records relevant to the complaint should be denied as personnel records pursuant to N.J.S.A. 47:1A-10. The Custodian has correctly abandoned her reliance on this OPRA provision to deny the Complainant access to the records. A custodian cannot congruously assert both the personnel records exemption and the confidentiality provisions of IAPP to deny access because IAPP also provides that “[p]ersonnel records are separate and distinct from internal affairs investigation records.”¹²

In the SOI, the Custodian certifies that there are three (3) reasons for denying the Complainant access to the records relevant to the complaint:

1. The records are exempt from disclosure under the law enforcement exception to the OPRA exclusion of autopsy photographs and

¹¹ It is the GRC’s position that 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.

¹² See IAPP, Internal Affairs Records, Personnel Records, Paragraph 1.

reproductions and the criminal investigatory records exception pursuant to N.J.S.A. 47:1A-1.1.

2. Disclosure of the records would be inimical to the public interest.
3. The records are confidential and therefore exempt from access pursuant to the IAPP.

The Custodian cites N.J.S.A. 47:1A-1.1 as the legal explanation for denial of access. Specifically, the Custodian cites (a) the law enforcement exception to the OPRA exclusion of autopsy photographs and reproductions and (b) the criminal investigatory records exception.¹³

Clearly, the law enforcement exception to the OPRA exclusion of autopsy photographs and reproductions is not relevant to the request made in this matter; the Custodian has misconstrued this section of OPRA. With respect to the criminal investigatory records exception, OPRA defines a criminal investigatory record as "... a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding..." N.J.S.A. 47:1A-1.1. Although some police internal investigations may result in criminal prosecution, the vast majority are not criminal or quasi criminal in nature; they are investigations of alleged infractions of the police department's rules and regulations. Moreover, as the Complainant points out, the IAPP *requires* an internal affairs index file. The IAPP states that "[a]ll internal affairs complaints shall be recorded in the index file."¹⁴ Although the IAPP leaves the index file design up to each agency, it does provide an exemplar of such an index.¹⁵

Pursuant to N.J.S.A. 40A:14-181, each New Jersey law enforcement agency has an affirmative duty to adopt and implement guidelines consistent with the IAPP. The evidence presented in the instant complaint reveals that the Roselle Park Police Department did adopt and implement guidelines pursuant to the IAPP; specifically, the Roselle Park Police Department Internal Affairs Standard Operating Procedure, Volume 1, Number 113, effective October 22, 1996, which names the IAPP as a source of reference. Accordingly, because an internal affairs index file is a record which is required by the IAPP to be made, and because the Roselle Park Police Department adopted guidelines not inconsistent with the IAPP pursuant to N.J.S.A. 40A:14-181, an index file *cannot* be a criminal investigatory record pursuant to the definition of a criminal investigatory record in N.J.S.A. 47:1A-1.1, because this provision provides, *inter alia*, that a criminal investigatory record is "... a record which is *not required* by law to be made..." (Emphasis added.) N.J.S.A. 47:1A-1.1. For this reason, the Custodian cannot lawfully deny the Complainant access to the requested records based upon the criminal investigatory records exception in OPRA.

¹³ The document index is provided by the Custodian pursuant to the Superior Court's decision in John Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007) and is provided as Attachment Item #9 of the SOI.

¹⁴ See IAPP, Internal Affairs Records, Internal Affairs Index File, Paragraph 2.

¹⁵ See IAPP, Appendix Q

The Custodian's Counsel contends that the records responsive to the Complainant's request are not government records that OPRA requires to be released. Counsel argues that disclosure of the records responsive to the Complainant's request would be inimical to the public interest. In support of this position, Counsel cites Loigman v. Kimmelman, 102 N.J. 98 (1986) wherein he asserts the court held that more than a showing of good faith and citizen status will be required to overcome the public interest in confidentiality of police investigative files. The heightened level of confidentiality militating against disclosure in Loigman, however, can be distinguished from the facts of the instant complaint because police investigative records were at issue in Loigman, whereas in the instant complaint the records do not comprise criminal investigatory material. Further, in Loigman, the records at issue were highly restricted law enforcement trust accounts and the court found that there was a "...legislative determination that such confidential accounts would ordinarily be subjected only to the scrutiny of the Attorney General..." *Id.* at 108. Therefore Counsel's argument that the index reports should be held to the same high standard of confidentiality that the Loigman court found was applicable to law enforcement trust accounts is not persuasive.

The Custodian's Counsel also contends that the index reports are confidential pursuant to the IAPP, and therefore exempt from access. Counsel states that the IAPP provides that "the contents of the internal investigation case files shall be...marked as confidential."

The Complainant asserts that he is not seeking pending internal investigation files but rather case tracking indexes which are for investigations that are closed. For this reason, the Complainant asserts that Counsel's argument is not applicable to the facts of this complaint. It is, however, unnecessary to draw a distinction between an open or closed investigation in this matter because the index reports are confidential pursuant to the IAPP.

The IAPP provides, "[t]he purpose of the internal affairs index file is to serve as a record control device. It will maintain an inventory of internal affairs case files and summarize the status of each case for *authorized personnel*." (Emphasis added). In fact, the Complainant underscores this restricted aspect of the index reports in his response to the Custodian's SOI wherein he states that the IAPP "...addresses who may retrieve index information from Internal Affairs case files and clearly states that '[a]ccess to these records must be specifically addressed with department policy and procedures.'" (Emphasis added by the Complainant).

The IAPP also addresses the confidential nature of index reports in Requirement 8 of the Internal Affairs Records subsection, which provides:

"The Agency must establish and maintain an internal affairs records system consisting of, at least, an internal affairs index system and a filing system for all documents and records. ***Access to these records shall be restricted.***" (Emphasis added).

Although the Complainant contends that Roselle Park Police Department policy does not address the IAPP requirement with respect to the establishment of index reports,

such reports are in fact specifically addressed, as well as their confidential nature, in the confidentiality subsection of the Department's Internal Affairs Standard Operating Procedure, Volume 1, Number 113 on page 14.

Further, it is important to take notice that the IAPP made an express provision for releasing internal investigation material to the public. The reporting subsection of the IAPP provides:

“An annual report summarizing the types of complaints received and the dispositions of the complaints shall be made available to the public. The names of complainants and subject officers shall not be published in this report.”

Therefore, the IAPP contemplates disclosure of a report designed specifically for the public. The fact that the IAPP expressly provided for police departments to disclose certain internal investigation information to the public in the form of an annual report lends credence to the conclusion that the intent of the IAPP is to protect from disclosure other records contained among internal affairs files.

Pursuant to N.J.S.A. 40A:14-181, every law enforcement agency has an affirmative duty to adopt and implement guidelines consistent with the IAPP. If confidentiality provisions of internal affairs investigations not inconsistent with the guidelines are adopted and implemented by a police department, as here, then those provisions comply with the mandates of N.J.S.A. 40A:14-181. Pursuant to N.J.S.A. 47:1A-9.a., OPRA does not abrogate such grant of confidentiality, which may be claimed by the Custodian to restrict public access to the requested record.

Because the Roselle Park Police Department complied with the provisions of N.J.S.A. 40A:14-181 by promulgating policy consistent with the Attorney General's Internal Affairs Policy and Procedure, and because that statute is a law that contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., the confidentiality provisions of the IAPP governing index reports within the Police Department's policy restricts public access to the requested records. Accordingly, the Custodian lawfully denied the Complainant access to the index reports.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

The Custodian’s failure to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial of said request. However, the Custodian subsequently did provide the Complainant with the records determined to be disclosable and lawfully denied the Complainant access to those records exempt from disclosure. It is therefore concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to grant access, deny access, seek clarification or request an extension of time in writing within the statutorily mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Roselle Park Police Department complied with the provisions of N.J.S.A. 40A:14-181 by promulgating policy consistent with the Attorney General’s Internal Affairs Policy and Procedure, and because that statute is a law that contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., the confidentiality provisions of the IAPP governing index reports within the Police Department’s policy restricts public access to the requested records. Accordingly, the Custodian lawfully denied the Complainant access to the index reports.

3. The Custodian's failure to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial of said request. However, the Custodian subsequently did provide the Complainant with the records determined to be disclosable and lawfully denied the Complainant access to those records exempt from disclosure. It is therefore concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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Executive Director

November 13, 2008