



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

February 23, 2010 Government Records Council Meeting

Calvin Riggins
Complainant

Complaint No. 2009-105

v.

Borough of Jamesburg (Middlesex)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 2010 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. Because the Custodian has certified that that no records responsive to Request Item No. 1. exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the records responsive to Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the records responsive to Request Items No. 2 and 3 are disciplinary records that are classified as personnel records, said records are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10, Rick Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), and Allen v. County of Warren, GRC Complaint No. 2003-155 (March 2004). Therefore, the Custodian has not unlawfully denied the Complainant access to said records. N.J.S.A. 47:1A-6.

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 23rd Day of February, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: March 2, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

**Calvin Riggins¹
Complainant**

GRC Complaint No. 2009-105

v.

**Borough of Jamesburg (Middlesex)²
Custodian of Records**

Records Relevant to Complaint:

Copies of:

1. Rating systems and underwriting for the Middlesex County Joint Insurance Fund relating to Martin Horvath;
2. Disciplinary records of Police Officer Martin Horvath;
3. Report on the termination of Patrolman Todd Fisher.³

Request Made: December 30, 2008

Response Made: January 5, 2009

Custodian: Denise Jawidzik

GRC Complaint Filed: March 30, 2009⁴

Background

December 30, 2008

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.

January 5, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that access to Request Item No. 1 is denied because the records requested do not exist. The Complainant also states that the records responsive to Request Item No. 2 are exempt from disclosure.

March 30, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching a letter from the Custodian to the Complainant dated January 5, 2009. The Complainant states that the Custodian responded to the Complainant's request on January

¹ No legal representation listed on record.

² Represented by Frederick Raffeto, Esq., of Ansell Zaro Grimm & Aaron, PC (Ocean, NJ).

³ The Complainant requested additional records that are not the subject of this Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

5, 2009. The Complainant states that sometime thereafter he was informed that he could no longer call the Borough of Jamesburg (“Borough”), but that he was permitted to write to the Borough regarding his records request.

The Complainant does not agree to mediate this complaint.

May 5, 2009

Request for the Statement of Information (“SOI”) sent to the Custodian.

May 12, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated December 30, 2008; and
- Letter from the Custodian to the Complainant dated January 5, 2009.

The Custodian certifies that she received the Complainant’s request on January 2, 2009. The Custodian also certifies that she responded to the Complainant’s request on January 5, 2009. The Custodian further certifies that her search for the requested records involved searching the Borough’s insurance records. The Custodian contends that her response to Request Item No. 1 was proper because no records responsive exist and the Custodian was not obligated to create a record. The Custodian cites to the prior GRC case Grecco v. City of Garfield, GRC Complaint No. 2003-31 (December 2003) in support of this contention, and notes that the definition of a government record at N.J.S.A. 47:1A-1.1 requires that in order for a document to be provided under the statute, it must exist in some format, either physically or electronic.

The Custodian further certifies that the records responsive to Request Items No. 2 and 3 are exempt from disclosure as information generated by or on behalf of a public employee in connection with a grievance, as well as personnel disciplinary records pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.

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.

OPRA also provides that:

“...[a] government record shall not include the following information which is deemed confidential for the purposes of [OPRA]:...information generated by or on behalf of public employers or public employees in connection...with any grievance filed by or against an individual...including documents and statement of strategy or negotiating position...” N.J.S.A. 47:1A-1.1.

OPRA further provides:

“ ... *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, except that an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record...” (Emphasis added) N.J.S.A. 47:1A-10.

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.

The Custodian certified that she received the Complainant’s request on January 2, 2009. The Custodian also certified that she responded to the Complainant’s request on January 5, 2009. The Custodian further certified that her search for the records responsive to Request Item No. 1 involved searching the Borough’s insurance records. The Custodian contends that she lawfully denied access to Request Item No. 1 because no records responsive to Request Item No. 1 exist and the Custodian was not obligated to create a record. The Complainant has not submitted any evidence to refute the Custodian’s certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded

stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC held the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian has certified that that no records responsive to Request Item No. 1 exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the records responsive to Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Furthermore, the Custodian certified in the SOI that the records responsive to Request Items No. 2 and 3 were exempt from disclosure as information generated by or on behalf of a public employee in connection with a grievance, as well as personnel disciplinary records pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10.

The GRC has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records within the exemption from disclosure set forth at N.J.S.A. 47:1A-10. In Rick Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 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."

In Allen v. County of Warren, GRC Complaint No. 2003-155 (March 2004), the Council considered the validity of an OPRA request for a harassment complaint filed against an employee. The Council held that the complaint was a personnel record exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Council reasoned that "[a]lthough neither the custodian nor the complainant refers to the harassment complaint as a "sexual" harassment complaint, the distinction is not necessary because the remainder of the exception under N.J.S.A. 47:1A-1.1 includes "grievances" filed against an individual. The information requested by the complainant is not a valid OPRA request as it does not constitute a "government record" under the provisions of N.J.S.A. 47:1A-1.1." *Id.* The Council ultimately held that "[a] plain reading of OPRA finds that an exception exists, under the law, to deny complainant's access to the records regarding the harassment complaint filed against him." *Id.*

The disciplinary nature of the records requested in Request Items No. 2 and 3 is indisputable. Request Item No. 2 seeks access to the disciplinary record of Martin Horvath. Request Item No. 3 seeks access to a report concerning the termination of Police Officer Todd Fisher. According to Merino, supra, records of complaints or internal reprimands against a municipal police officer are classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10.

Therefore, because the records responsive to Request Items No. 2 and 3 are disciplinary records that are classified as personnel records, said records are exempt from

disclosure under OPRA pursuant to N.J.S.A. 47:1A-10, Rick Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), and Allen v. County of Warren, GRC Complaint No. 2003-155 (March 2004). Therefore, the Custodian has not unlawfully denied the Complainant access to said records. N.J.S.A. 47:1A-6.

Because the records requested are exempt from disclosure as personnel records, whether said records would also be exempt from disclosure as records pertaining to a grievance is moot.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian has certified that that no records responsive to Request Item No. 1. exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the records responsive to Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the records responsive to Request Items No. 2 and 3 are disciplinary records that are classified as personnel records, said records are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10, Rick Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), and Allen v. County of Warren, GRC Complaint No. 2003-155 (March 2004). Therefore, the Custodian has not unlawfully denied the Complainant access to said records. N.J.S.A. 47:1A-6.

Prepared By: Karyn Gordon, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010