



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Peter J. Ciarrocca
Complainant

Complaint No. 2010-155

v.

Bordentown City Police Department (Burlington)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the May 17, 2011 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 neither Ms. Childs nor Chief Simmons had issued a denial of access to the records sought pursuant to the Complainant’s OPRA request at the time the Complainant filed his Denial of Access Complaint to the GRC, the Complainant’s cause of action was not ripe at the time he verified his Denial of Access Complaint; the complaint is materially defective and therefore should be dismissed.
2. In the matter before the Council, the Complainant requested a copy of an incident report dated June 17, 2010 regarding a family matter. The Custodian certified in the Statement of Information that the requested record is a criminal investigatory record. Thus, the requested record is exempt from disclosure under OPRA as it is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1., Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005) and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Thus, Chief Simmons did not unlawfully deny access to the requested record. 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 24th Day of May, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

Peter J. Ciarrocca¹
Complainant

GRC Complaint No. 2010-155

v.

Bordentown City Police Department (Burlington)²
Custodian of Records

Records Relevant to Complaint: Copy of an incident report dated June 17, 2010 regarding a family matter.

Request Made: July 14, 2010

Response Made: July 21, 2010

Custodian: Patricia D. Ryan³

GRC Complaint Filed: July 16, 2010⁴

Background

July 14, 2010

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.

July 14, 2010

Barbara Child's, Special Officer, ("Ms. Childs"), verbally responds to the Complainant's OPRA request on the same business day as receipt thereof stating that she could not provide the Complainant with the record responsive and further stating that Matthew J. Simmons, III, Chief of Police ("Chief Simmons") has seven (7) business days to review the record responsive to see if it is disclosable.

July 16, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with no attachments.

The Complainant states that on July 14, 2010 he went to the Bordentown City Police Department to obtain an incident report dated June 17, 2010 which involved the

¹ No legal representation listed on record.

² Represented by Richard W. Hunt, Esq., of Parker McCay P.A. (Marlton, NJ).

³ Barbara Childs responded to the Complainant's OPRA request on July 14, 2010.

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

Complainant and another family member. The Complainant also states that he gave his request to Ms. Childs. The Complainant also states that Ms. Childs told him that he needed to complete an OPRA request form. The Complainant also states that Ms. Childs informed him that there are nine (9) pages of records responsive to such request and it will cost \$0.75 per page to copy such record.

The Complainant also states that while he was at the police station, Ms. Childs received a phone call from Chief of Police Matthew J. Simmons, III. The Complainant further states that Ms. Childs told Chief Simmons that the Complainant was at the police station and that Ms. Childs had made copies of the record responsive. The Complainant further states that after Ms. Childs hung up the telephone, she informed the Complainant that Chief Simmons stated that he is refusing to give the Complainant the record responsive at the present time because he has seven (7) business days to respond to the Complainant's request. The Complainant also states that he has the entire incident recorded on his telephone.

The Complainant does not agree to mediate this complaint.

July 21, 2010

Letter from Chief Simmons to the Complainant. Chief Simmons responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. Chief Simmons states that the subject matter of this complaint is currently under legal review to determine whether the release of the requested record is permitted. Chief Simmons also states that he will need an additional five (5) business days to complete the legal review.

July 23, 2010

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

July 24, 2010

E-mail from the Complainant to the GRC. The Complainant states that he received a letter from Chief Simmons dated July 21, 2010. The Complainant also states that Chief Simmons informed him that his request is currently under legal review to determine whether release of the record responsive is permitted and therefore he is requesting an additional five (5) business days to respond.

July 26, 2010

E-mail from the GRC to the Complainant. The GRC requests that the Complainant forward a copy of the letter from Chief Simmons to the Complainant dated July 21, 2010.

July 26, 2010

E-mail from the Complainant to the GRC. The Complainant attaches a copy of Chief Simmons's letter dated July 21, 2010.

July 28, 2010

Letter from Chief Simmons to the Complainant. On the tenth (10th) business day after receipt of the request, Chief Simmons denies the Complainant access to the record responsive to the OPRA request stating that the record sought is not a public record. Chief Simmons states that the record responsive is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. Chief Simmons also states that the GRC concluded that “criminal investigatory record includes records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed or unconfirmed.” Janeczko v. New Jersey Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

July 29, 2010

E-mail from the Complainant to the GRC. The Complainant attaches a copy of the letter from Chief Simmons dated July 28, 2010 in which Chief Simmons states that the record requested is not disclosable. The Complainant states that he disagrees with Chief Simmons because Chief Simmons and the Mayor were quoted in a recent article in the *Trenton Times* as stating that they read the incident reports and released them to the press, thus the requested record must be public. The Complainant attaches a copy of the *Trenton Times* article.

July 30, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated July 14, 2010
- Letter from the Custodian to the Complainant dated July 21, 2010
- Letter from the Custodian to the Complainant dated July 28, 2010

The Custodian certifies that no records responsive to the Complainant’s request were destroyed. Furthermore, the Custodian certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”) the Custodian must keep the requested incident report for one (1) year.

The Custodian certifies that on or about July 14, 2010, the Complainant visited the Bordentown City Police Department and requested a copy of an incident report from June 17, 2010. The Custodian also certifies that the record responsive involved the Complainant and two of his family members. The Custodian certifies that Ms. Childs requested that the Complainant complete an OPRA request form. The Custodian further certifies that the Complainant filled out the OPRA request form. The Custodian also certifies that Ms. Childs printed out the record responsive, then spoke to her supervisor - Chief Simmons. The Custodian certifies that Chief Simmons advised Ms. Childs not to release the requested incident report until he reviewed such record. The Custodian further certifies that Chief Simmons did not want to release the record responsive until he spoke with the Solicitor’s Office. The Custodian also certifies that the Complainant was not informed at the time of his request that additional time was needed to review the requested record.

The Custodian also certifies that Chief Simmons contacted the Solicitor's Office and after a preliminary review of OPRA, it was determined that the requested incident report was potentially a criminal investigatory record. The Custodian certifies that because the record responsive is potentially a criminal investigatory record, Chief Simmons sent a letter to the Complainant requesting an additional five (5) business days for attorney review of the record responsive. The Custodian also certifies that Chief Simmons was told by the Solicitor's Office that the requested incident report was a confidential record and was an exception to the definition of a government record. The Custodian further certifies that Chief Simmons was informed by the City Attorney that more than one GRC decision has concluded that incident reports constitute criminal investigatory records. Lastly, the Custodian certifies that Chief Simmons denied the Complainant's OPRA request on July 28, 2010 stating that the record responsive is a criminal investigatory record and thus not considered public under OPRA.

The Custodian argues that Chief Simmons was within his legal rights not to provide copies of the record responsive to the Complainant. The Custodian argues that OPRA provides, "...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions..." N.J.S.A. 47:1A-1.1. The Custodian also argues that the record responsive is a criminal investigatory record. The Custodian further argues that the GRC concluded that "criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed or unconfirmed." Janeczko v. New Jersey Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004). The Custodian also argues that in Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125, (January 2005) the GRC concluded that investigative reports are not required by law to be made, maintained or kept on file, and therefore are exempt. Furthermore, the Custodian argues that pursuant to Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), the GRC concluded that continuation reports and incident reports "...were part of a 1989 investigation, it is important to note that the criminal investigatory records exemption continued to survive the conclusion of the investigation." The Custodian also argues that Feggans v. City of Newark, GRC Complaint No. 2007-238 (June 2008), reiterates the findings in the previous GRC cases and provides, "...regarding police incident reports, the Council held in Nance supra...that incident reports are exempt from disclosure under N.J.S.A. 47:1A-1.1 as criminal investigatory records. Lastly, the Custodian argues that the City of Bordentown properly denied access to the requested record because incident reports are clearly exempt from disclosure under OPRA.

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.

“A *government record shall not include* the following information which is deemed to be confidential... *criminal investigatory records...* ‘Criminal investigatory record’ means 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.” (Emphasis added.) N.J.S.A. 47:1A- 1.1.

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.

As one means of challenging denial of access to a government record, OPRA provides for the filing of a complaint with the GRC. In order for such a complaint to be ripe, the complainant must have been denied access to a government record. In the instant matter, however, the Complainant verified his complaint *before* he was denied access to any of the records responsive to his request.

The evidence of record indicates that the Complainant went to the Bordentown Police Department to obtain the records responsive to his OPRA request. The evidence of record also indicates that Ms. Childs received his request and informed him that there were nine (9) pages of records responsive. The evidence of record further indicates that Ms. Childs received a telephone call from Chief Simmons and Ms. Childs stated that the Complainant was at the police station and she had made copies of the records responsive. The evidence of record also indicates that after Ms. Childs hung up the telephone she told the Complainant that Chief Simmons stated that he is refusing to give the records at the present time because he has seven (7) business days to respond to the Complainant’s request.

In Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-226 (April 2009), the Complainant stated in his Denial of Access Complaint that he filed an OPRA request on September 5, 2007 and as of September 10, 2007 he still did not receive a response. The Complainant further stated that by the time the GRC receives his complaint, the minimum seven (7) days will have passed. The GRC concluded that since the seven (7) business days had not passed before the Complainant filed his Denial of Access Complaint, his claim was not ripe for adjudication and should be dismissed.

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. 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).

However, in the instant complaint, Ms. Childs verbally informed the Complainant on the same business day as receipt of the Complainant's OPRA request that Chief Simmons had seven (7) business days to respond to the OPRA request. Furthermore, Chief Simmons responded to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request, stating that he will need an additional five (5) business days to complete the legal review of the Complainant's OPRA request.

Accordingly, because neither Ms. Childs nor Chief Simmons had issued a denial of access to the records sought pursuant to the Complainant's OPRA request at the time the Complainant filed his Denial of Access Complaint with the GRC, the Complainant's cause of action was not ripe at the time he verified his Denial of Access Complaint; the complaint is materially defective and therefore should be dismissed.

In his response to the Complainant's OPRA request, Chief Simmons requested an additional five (5) days to respond to the request. Furthermore, Chief Simmons sent a follow-up letter within the extended time period for a response stating that the record responsive is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. Although the Complainant disagrees with Chief Simmons's denial of access and has stated that the requested record must be public because Chief Simmons and the Mayor were quoted in a recent article in the *Trenton Times* as stating that they read the incident reports and released them to the press, the Complainant's assertion in this regard is in error.

In Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005), the Council determined that police incident reports are criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-

80 (June 2004), affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004. The Council found that under OPRA “criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed.”

In the matter before the Council, the Complainant requested a copy of an incident report dated June 17, 2010 regarding a family matter. The Custodian certified in the SOI that the requested record is a criminal investigatory record. Thus, the requested record is exempt from disclosure under OPRA as it is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1., Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005) and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Thus, Chief Simmons did not unlawfully deny access to the requested record. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because neither Ms. Childs nor Chief Simmons had issued a denial of access to the records sought pursuant to the Complainant’s OPRA request at the time the Complainant filed his Denial of Access Complaint to the GRC, the Complainant’s cause of action was not ripe at the time he verified his Denial of Access Complaint; the complaint is materially defective and therefore should be dismissed.
2. In the matter before the Council, the Complainant requested a copy of an incident report dated June 17, 2010 regarding a family matter. The Custodian certified in the Statement of Information that the requested record is a criminal investigatory record. Thus, the requested record is exempt from disclosure under OPRA as it is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1., Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005) and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Thus, Chief Simmons did not unlawfully deny access to the requested record. N.J.S.A. 47:1A-6.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 17, 2011