



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

March 27, 2012 Government Records Council Meeting

Saverio Squicciarini
Complainant

Complaint No. 2011-18

v.

Berkeley Township Police Department (Ocean)
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 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 because the letter at issue herein is part of the Complainant’s gun permit application investigation, it is exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 9 (Gov. Hughes, 1963) and *N.J.A.C.* 13:54-1.15. Moreover, the Custodian has lawfully denied access to the responsive letter. 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 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: April 5, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

Saverio Squicciarini¹
Complainant

GRC Complaint No. 2011-18

v.

Berkeley Township Police Department (Ocean)²
Custodian of Records

Records Relevant to Complaint: Copies of letter responses of Dr. Carl Rankl (“Dr. Rankl”) and Dr. Stewart A. Berkowitz (“Dr. Berkowitz”) of Riverview Medical Center contained within the Complainant’s gun permit application investigation file from 2008.³

Request Made: December 8, 2010

Response Made: December 16, 2010

Custodian: Beverly M. Carle

GRC Complaint Filed: January 21, 2011⁴

Background

December 8, 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.

December 16, 2010

Custodian’s response to the OPRA request. On behalf of the Custodian, the Custodian’s Counsel responds in writing via letter to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the requested records⁵ is denied because said letters constitute advisory, consultative or deliberative (“ACD”) material.

January 21, 2011

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

¹ No legal representation listed on record.

² Represented by Patrick Sheehan, Esq., of the Law Offices of Patrick Sheehan, Esq. (Toms River, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

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

⁵ The Custodian indicates that two (2) letters are being withheld from disclosure. However, the Custodian subsequently certified in the Statement of Information that she disclosed one (1) of the two (2) letters with redactions; thus, only one letter is at issue in this complaint.

- Complainant's OPRA request dated December 8, 2010.
- Letter from the Custodian's Counsel to the Complainant dated December 16, 2010.

The Complainant states that he submitted an OPRA request to the Township of Berkeley ("Township") on December 8, 2010. The Complainant states that the Custodian's Counsel responded in writing on December 16, 2010 denying access to two (2) letters pursuant to N.J.S.A. 47:1A-1.1.

The Complainant agrees to mediate this complaint.

February 25, 2011

Offer of Mediation sent to the Custodian.

March 2, 2011

The Custodian agrees to mediation.

March 4, 2011

Complaint referred to mediation.

July 21, 2011

Complaint referred back from mediation.

July 29, 2011

Letter from the GRC to the Complainant. The GRC informs the Complainant that he has the opportunity to amend this Denial of Access Complaint prior to the GRC's request for the Statement of Information ("SOI") from the Custodian. The GRC states that the Complainant's response is due by close of business on August 5, 2011.

August 8, 2011

Complainant's amended Denial of Access Complaint. The Complainant states that he is seeking Detective James A. Smit's ("Detective Smit") letter request to Dr. Rankl and Dr. Berkowitz and their replies to Detective Smit. The Complainant further disputes Custodian Counsel's denial of access to the Complainant's OPRA request. The Complainant contends there is no investigation in progress and he does not know whose safety will be jeopardized through disclosure of the responsive records.⁶

August 18, 2011

Request for the SOI sent to the Custodian.

August 23, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 8, 2010.

⁶ The Complainant further disputed the length of time it took for the Berkeley Township Police Department to complete the gun permit process. However, the GRC only has the authority to adjudicate denials of access to government records. *See N.J.S.A. 47:1A-7.*

- Letter from the Custodian’s Counsel to the Complainant dated December 16, 2010.
- Complainant’s gun permit application and investigation documentation.⁷

The Custodian certifies that her search for the requested records involved having the Berkley Township Police Department (“BTPD”) retrieve the responsive records.

The Custodian also certifies that no records responsive to the request were destroyed 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 Complainant applied for a gun permit in 2008 and the BTPD denied the application. The Custodian certifies that the Complainant submitted an OPRA request to the Township on December 8, 2010 for all the records associated with his gun permit investigation. The Custodian certifies that almost all of the responsive records were provided to the Complainant with the exception of one (1) letter from a prior physician.

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

⁷ The Custodian included additional information and legal arguments defending her denial of access contained in correspondence between the parties that occurred while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C- 1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.
Saverio Squicciarini v. Berkeley Township Police Department (Ocean), 2011-18 – Findings and Recommendations of the Executive Director

“...[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 further provides that:

“The provisions of this act ... shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of... Executive Order of the Governor...*” N.J.S.A. 47:1A-9.a.

Executive Order No. 9 (Gov. Hughes, 1963)(“EO 9”) provides that:

“The head or principal executive of each principal department of State government, with respect to the records of his department and any agencies, authorities and commissions assigned or allocated to such department or under the supervision or regulation of such department, *is hereby authorized and empowered to adopt and promulgate, from time to time, regulations setting forth which records under his jurisdiction shall not be deemed to be public records*, subject to inspection and examination and available for copying ...” (Emphasis added.) *Id.*

The New Jersey Department of Law & Public Safety’s (“LPS”) regulations provide that:

“Any background investigation conducted by the chief of police ... of any applicant for a permit, firearms identification card license, or registration ... is not a public record and shall not be disclosed to any person not authorized by law or this chapter to have access to such investigation, ***including the applicant*** ... [A]ny document reflecting the issuance or denial of such permit, firearms identification card, or license ... maintained by any ... municipal governmental agency, *is not a public record and shall not be disclosed to any person* not authorized by law or this chapter to have access to such documentation, *including the applicant* ...” (Emphasis added.) *N.J.A.C.* 13:54-1.15.

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.

Notwithstanding the Custodian Counsel’s response that the responsive letter is exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1., the Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Township of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007), *cert. denied* 192

N.J. 292 (2007).⁸ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The Court held that:

“[t]he GRC has an independent obligation to ‘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...The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct.”

The Court further stated that:

“[a]side from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998)(citing Isko v. Planning Bd. Of Livingston, 51 N.J. 162, 175 (1968)(lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956)(question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957).”
Id.

The Complainant filed the instant complaint arguing that the Custodian unlawfully denied access to letters contained within his gun permit application investigation file. The Custodian certified in the SOI that the Custodian's Counsel provided to the Complainant on December 16, 2010 all records with the exception of one (1) letter at issue herein.

OPRA provides that its provisions “shall not abrogate any exemption ... made pursuant to regulation[s] promulgated under the authority of any ... Executive Order.” N.J.S.A. 47:1A-9.a. Additionally, EO 9 affords the head of each State agency to promulgate regulations exempting access to records within the department's jurisdiction under OPRA. To this end, LPS promulgated N.J.A.C. 13:54-1.15 exempting access to all background investigations and documents regarding the issuance or denial of permits, firearm identification cards or licenses on May 1, 1995. Moreover, this regulation currently remains in effect.

⁸ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).
Saverio Squicciarini v. Berkeley Township Police Department (Ocean), 2011-18 – Findings and Recommendations of the Executive Director

The evidence of record indicates that the letter at issue herein is part of the Complainant's gun permit application investigation. It is further clear that not only is the letter at issue herein exempt from disclosure pursuant to *N.J.A.C.* 13:54-1.15, but the Custodian was under no obligation to provide any records related to the Complainant's gun permit application investigation file. *Id.* Therefore, although the Township disclosed to the Complainant a majority of all of the records related to the BTPD's investigation, all records pertaining to same are exempt from disclosure. *Id.*

Therefore, because the letter at issue herein is part of the Complainant's gun permit application investigation, it is exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., EO 9 and *N.J.A.C.* 13:54-1.15. Moreover, the Custodian has lawfully denied access to the responsive letter. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the letter at issue herein is part of the Complainant's gun permit application investigation, it is exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 9 (Gov. Hughes, 1963) and *N.J.A.C.* 13:54-1.15. Moreover, the Custodian has lawfully denied access to the responsive letter. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 2012