



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 27, 2013 Government Records Council Meeting

Vito Sacco
Complainant

Complaint No. 2012-279

v.

New Jersey Department of Environmental Protection,
Division of Fish and Game
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“Council”) considered the August 20, 2013 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 the Custodian lawfully denied access to the page of notes concerning a complaint and its investigation by the Department of Environmental Protection’s Office of Labor Relations because it constituted a record involving employee discipline exempt from disclosure. N.J.S.A. 47:1A-10. *See also Vaughn v. City of Trenton (Mercer)*, GRC Complaint No. 2009-177 (June 2010).

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 August, 2013

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: August 29, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting**

**Vito Sacco¹
Complainant**

GRC Complaint No. 2012-279

v.

**New Jersey Department of Environmental Protection, Division of Fish and Game²
Custodial Agency**

Records Relevant to Complaint: An electronic copy via e-mail of the following:

“On or about 6/2010 I complained to asst. director Larry Herrity about F & G chief Tim Cuzzens telling members of the public of the summons that I was issued againted (sic) me. Mr. Herrity said he would investigate the matter. I would like a copy of all the records in this investigative file. For any records that you claim are exempt please identify the records so that I can understand the nature of the records that I am not being allowed to see. Thank you Mr. Vito Sacco.”

Custodian of Records: Matthew J. Coefer
Request Received by Custodian: September 7, 2012
Response Made by Custodian: September 17, 2013
GRC Complaint Received: October 18, 2012

Background³

Request and Response:

On September 7, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On September 17, 2012, the sixth (6th) business day following receipt of said request, the Custodian responded in writing to inform the Complainant that one (1) record responsive to the request was being disclosed to the Complainant. The Custodian also informed the Complainant that the balance of the records determined to be responsive to the request, which were records concerning a disciplinary action and its investigation notes, were denied because they constitute confidential personnel records exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian further informed the

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer L. Dalia.

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.

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Complainant that the records are also exempt from disclosure pursuant to Executive Order No. 11.2 (Byrne), applicable to OPRA under N.J.S.A. 47:1A-9.

Denial of Access Complaint:

On October 18, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that he provided his OPRA request to the Custodian on or about September 10, 2012.⁴ The Complainant also states that the Custodian responded to his request on October 2, 2012 and October 16, 2012.

The Complainant asserts that the Custodian disclosed a copy of a July 13, 2010 letter in response to his OPRA request, which the Complainant states he already had in his possession. The Complainant states that he is seeking a copy of the investigative report and the type of personnel action taken by the agency. The Complainant states that he is entitled to know the identity and nature of the records he is being denied, as well as the reason for denial of each record.

Statement of Information:

On December 4, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on September 7, 2012, and that he responded to the request on September 17, 2012.

The Custodian certifies that the records responsive to the request consist of a one (1) page letter dated July 13, 2010, from Debra Ewalt to the Complainant and one (1) page of notes concerning the complaint and investigation of the complaint by the agency’s Office of Labor Relations. The Custodian certifies that the former record was disclosed in its entirety and the latter record was denied as a personnel record pursuant to N.J.S.A. 47:1A-10 and Executive Order No. 11.2 (Byrne), applicable to OPRA under N.J.S.A. 47:1A-9. The Custodian certifies that the Complainant’s allegation that the Custodian refused to tell the Complainant which records were denied and the reason therefor is inaccurate. The Custodian certifies that he identified the confidential records and the reasons for denial on the OPRA request form.

Analysis⁵

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

⁴ The evidence of record reveals the request was submitted to, and received by, the Custodian on September 7, 2012. Although the Custodian in the Statement of Information addresses several OPRA requests submitted by the Complainant, the Complainant refers only to this one request as forming the basis of the complaint, which the Complainant further identifies by the agency tracking number of 127066.

⁵ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

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“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 also 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...

N.J.S.A. 47:1A-10.

The Complainant is seeking access to records that were generated as a result of an investigation that the Complainant initiated by informing the agency about a potential basis for disciplinary action against one of its employees on or about the month of June 2010. The Custodian determined that two (2) personnel records were responsive to the Complainant’s request: a one (1) page letter dated July 13, 2010, from Debra Ewalt to the Complainant and one (1) page of notes concerning a complaint and its investigation by the Department of Environmental Protection’s Office of Labor Relations. The Custodian determined that the July 13, 2010 letter could be disclosed and did disclose it to the Complainant in response to his request. However, the Custodian determined that the notes concerning the complaint and its investigation by the Office of Labor Relations constituted a record involving employee discipline which was exempt from disclosure under N.J.S.A. 47:1A-10. The Custodian informed the Complainant in the Disposition Notes section of the OPRA request form dated September 17, 2012, that a part of the request was denied because the records were concerning a disciplinary action and its investigation notes which constituted confidential personnel records exempt from disclosure pursuant to N.J.S.A. 47:1A-10.

In Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010), the Council concluded 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.”

Accordingly, the Custodian lawfully denied access to the page of notes concerning a complaint and its investigation by the Department of Environmental Protection’s Office of Labor Relations because it constituted a record involving employee discipline exempt from disclosure. N.J.S.A. 47:1A-10. *See also Vaughn, supra.*⁶

⁶ It is unnecessary for the GRC to analyze the Custodian’s second reason for denying access, that the records are also exempt from disclosure pursuant to Executive Order No. 11 (Byrne), applicable to OPRA under N.J.S.A. 47:1A-9, because the relevant sections of E.O. 11 were subsequently codified in N.J.S.A. 47:1A-10.

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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to the page of notes concerning a complaint and its investigation by the Department of Environmental Protection's Office of Labor Relations because it constituted a record involving employee discipline exempt from disclosure. N.J.S.A. 47:1A-10. *See also Vaughn v. City of Trenton (Mercer)*, GRC Complaint No. 2009-177 (June 2010).

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

August 20, 2013