



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Albert N. Sedges
Complainant

Complaint No. 2014-312

v.

Morris County Prosecutor's Office
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council ("Council") considered the May 19, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's written response is insufficient because the Custodian failed to provide a specific lawful basis for denying the requested records. N.J.S.A. 47:1A-5(g). See also Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008) and Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).
2. The Custodian did not unlawfully deny access to the requested records because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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 30th Day of June, 2015

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: July 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting**

**Albert N. Sedges¹
Complainant**

GRC Complaint No. 2014-312

v.

**Morris County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Copy for pick-up of “[t]wo police officers found guilty of violating my curtilage rights by Morris County Prosecutors (sic) Office Sgt. Distasio and Ptl. Shallop of the Mount Arlington P.D. N.J.”³

Custodian of Record: Michelle Rhinesmith
Request Received by Custodian: August 18, 2014
Response Made by Custodian: August 27, 2014
GRC Complaint Received: September 4, 2014

Background⁴

Request and Response:

On August 18, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian, seeking an internal affairs investigative report dated July 8, 2014, concerning Mount Arlington Police Department officers James Distasio and Gregory Shallop. On August 27, 2014, the seventh (7th) business day following receipt of said request, the Custodian responded in writing to inform the Complainant that the request is denied pursuant to N.J.S.A. 47:1A-1.1 et seq.

Denial of Access Complaint:

On September 4, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he submitted a request to

¹ No legal representation listed on record.

² Represented by Daniel O’Mullan, Esq., (Morristown, NJ).

³ The records relevant to the complaint are substantially different from the requested records. The OPRA request states: “internal affairs investigative report concernig (sic) two officers from the Mount Arlington P.D. Sgt. James Distasio and Ptl. Gregory Shallop on 7/08/2014 date of the offense as to my curtilage rights under the 4th Amendment. Lt. LaBruno of the M.A.P.D. is the contact and I.A. Officer in Charge of thier (sic) Department.”

⁴ 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.

the Custodian on August 18, 2014, and the Custodian denied the records relevant to the complaint on August 27, 2014, citing “N.J.S.A.47;1.1” (sic).

Statement of Information:

On September 19, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 18, 2014, and that she responded in writing on August 27, 2014. The Custodian certifies that she determined that if the requested records existed they were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 et seq. because investigatory records are exempt from disclosure. The Custodian certifies that the records would also be exempt from disclosure pursuant to the Attorney General’s Internal Affairs Policy & Procedure (“IAPP”). In support of the denial the Custodian cites Rivera v. Borough of Roselle Park (Union), GRC Complaint No. 2007-224 (November 2008), wherein the Council held that:

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.

The Custodian asserts that the Complainant’s request sought an internal affairs investigation report involving two Mount Arlington Police Department officers and that such a report would be similarly exempt as an internal affairs investigatory document pursuant to the confidentiality provisions of the IAPP. For these reasons, the Custodian certifies that she denied the Complainant’s request.

The Custodian further certifies that after she received the Denial of Access Complaint she conducted a more thorough review of the internal affairs files and determined that no record exists relating to the Complainant’s request.⁵ The Custodian also certifies that the Complainant modified the description of the records denied when he submitted the complaint to include “two police officers found guilty.” The Custodian certifies that the revised description is incorrect with respect to “two police officers found guilty.” The Custodian concludes that no records exist responsive to the Complainant’s request.

⁵ The Custodian attached copies of internal e-mails to the SOI, which indicated that employee Steven Murzenski ran the Complainant’s name and the names of the two officers in *Infoshare* with negative results. Mr. Murzenski also stated that he did a manual search in the agency’s internal affairs log with negative results. The e-mails revealed that the Custodian thereafter asked that an employee named Gina also conduct a search of the files. A subsequent e-mail indicated that Gina also ran a search with negative results for the requested records.

Analysis

Sufficiency of Response

In Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008), the complainant requested several records. The custodian, without further elaboration, stated that access to the requested records was denied. The Council, in finding that the custodian violated OPRA, stated "...the Custodian's failure to supply the requester with a detailed lawful basis for denial violates N.J.S.A. 47:1A-5(g)." Subsequently, in Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008), the Council, upon finding that the custodian's written response was insufficient, noted that, "...N.J.S.A. 47:1A-5(g) provides that if a custodian is 'unable to comply with a request for access, then the custodian shall indicate the specific basis' for noncompliance."

Here, the Custodian duplicated a description of the requested records on the response but thereafter merely stated the request was denied pursuant to N.J.S.A. 47:1A-1.1 et seq. Although there are numerous exemptions, as well as exceptions, set forth in N.J.S.A. 47:1A-1.1 et seq., the Custodian did not cite to any specific provision of OPRA, another State statute, executive order, or regulation as authority for lawfully denying the Complainant's request.

Therefore, the Custodian's written response is insufficient because the Custodian failed to provide a specific lawful basis for denying the requested records. N.J.S.A. 47:1A-5(g). *See also* Morris, GRC 2007-160 and Rader, GRC 2007-239.

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 "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.

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that a comprehensive search was conducted by members of her staff for records responsive to the Complainant's request; however, no such records could be found.

Accordingly, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that such records do not exist and the Complainant failed to

submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's written response is insufficient because the Custodian failed to provide a specific lawful basis for denying the requested records. N.J.S.A. 47:1A-5(g). See also Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008) and Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).
2. The Custodian did not unlawfully deny access to the requested records because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart

Approved By: Dawn R. SanFilippo
Deputy Executive Director

May 19, 2015⁶

⁶ This complaint was prepared for adjudication for the Council's May 26, 2015 meeting, but could not be adjudicated due to lack of quorum.