



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 17, 2015 Government Records Council Meeting

Carmelo Lio
Complainant

Complaint No. 2014-431

v.

Borough of Fairview (Bergen)
Custodian of Record

At the November 17, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 2015 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. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian did not unlawfully deny access to the Complainant’s request for personnel records, including internal affairs complaints, because such records are exempt from public access pursuant to the IAPP, which classifies these records as confidential. See Wares v. Township of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015), Blaustein v. Lakewood Police Dep’t (Ocean), GRC Complaint No. 2011-102 (June 2012), and Rivera v. Borough of Keansburg Police Dep’t (Monmouth), GRC Complaint No. 2007-222 (June 2010). N.J.S.A. 47:A1-6.

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 17th Day of November, 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: November 19, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 17, 2015 Council Meeting**

**Carmelo Lio¹
Complainant**

GRC Complaint No. 2014-431

v.

**Borough of Fairview (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Any and all public records relating to the current employment status of Police Officer Berk Karcoglu, including disciplinary record.

Custodian of Record: Diane T. Testa

Request Received by Custodian: October 30, 2014

Response Made by Custodian: December 2, 2014

GRC Complaint Received: December 11, 2014

Background³

Request and Response:

On October 30, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 2, 2014, the Custodian telephoned the Complainant to advise that a written denial was prepared. The Complainant later went to Borough Hall to pick up the written response.⁴

Denial of Access Complaint:

On December 18, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he had submitted two separate OPRA requests and that while he received documents for his other request on November 10, 2014, an employee⁵ informed him that the Borough Attorney was still reviewing the request that is the subject of the instant complaint. The Complainant further asserted that he received a call from that same employee on December 2, 2014, informing him that his request

¹ No legal representation listed on record.

² Represented by John L. Schettino, Esq.

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.

⁴ Both the Custodian and the Complainant submitted additional certifications to the GRC clarifying that the Complainant did, in fact, pick up the denial.

⁵ Identified only as “Ms. Soto.”

was denied and that he could “pick up the written denial.” The Complainant stated that he had no further interaction regarding his request.

The Complainant argued that this denial violated OPRA, as his request “went past the allowed time frame.” The Complainant also argued that this denial is “not covered by one of the 24 exemptions.”

Statement of Information:

On February 18, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 30, 2014. The Custodian certified that she responded on December 2, 2014, denying access to the Complainant’s request as exempt from disclosure pursuant to N.J.S.A. 47:1A-10.

The Custodian argued that the employee at the center of the request had a reasonable expectation of privacy with respect to disciplinary actions taken against him and that the acknowledgement of the existence of the records would be a violation of that privacy. The Custodian additionally cited to the relevant portion of OPRA, N.J.S.A. 47:1A-10, stating that, “[n]otwithstanding the provisions or any other law to the contrary, 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....”

The Custodian further argued that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian additionally noted that pursuant to Attorney General Guidelines, “the nature and source of internal allegations, progress of internal affairs investigations and the resulting materials are confidential information.”

The Custodian further noted that the matter with respect to the employee named in the request has now concluded and the employee resigned from his position. The Custodian stated that this information had previously been made available to the Complainant.

Analysis

Timeliness

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA

⁶ A custodian’s written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant asserted that he submitted an OPRA request on October 30, 2014, but received no response from the Custodian regarding his request until December 2, 2014, apart from a conversation on November 10, 2014, advising him that his request was being reviewed. The Custodian’s own certification does not dispute the Complainant’s assertion. In fact, the Custodian acknowledges that no written response was made until the Complainant picked up the denial on December 2, 2014.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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, GRC 2007-11.

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.

The Custodian argued in his certification that the request was denied because records involving employee discipline or investigations into employee misconduct are property classified as personnel records that are exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian additionally noted that Attorney General Guidelines provide that, “the nature and source of internal allegations, progress of internal affairs investigations and the resulting materials are confidential information.”

Regarding requests for personnel information, OPRA mandates that:

[T]he 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[.]

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

The GRC recently noted that, with respect to personnel records and specifically internal affairs complaints, such records are not personnel records pursuant to the Attorney General’s

Internal Affairs Policy & Procedure (“IAPP”).⁷ See Wares v. Township of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015), Blaustein v. Lakewood Police Dep’t (Ocean), GRC Complaint No. 2011-102 (June 2012). Moreover, the GRC has held that the IAPP and other Attorney General Guidelines have the force of law. See Id. (citing O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009)).

Nevertheless, the IAPP exempts internal affairs records from disclosure, providing that “[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information.”⁸ In Rivera v. Borough of Keansburg Police Dep’t (Monmouth), GRC Complaint No. 2007-222 (June 2010), the Administrative Law Judge, relying upon the IAPP guidelines, held that internal affairs reports are confidential records not subject to OPRA.

Based on the foregoing, the Custodian did not unlawfully deny access to the Complainant’s request for personnel records, including internal affairs complaints, because such records are exempt from public access pursuant to the IAPP, which classifies these records as confidential. See Wares, GRC No. 2014-274, Blaustein, GRC No. 2011-102, and Rivera, GRC No. 2007-222. N.J.S.A. 47:A1-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
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Prepared By: Husna Kazmir

⁷ The IAPP was promulgated via the Division of Criminal Justice in the New Jersey Department of Law and Public Safety. All GRC references to the IAPP are to the July 2014 revision of the document.

⁸ IAPP, Internal Affairs Records, pg. 42.

Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

November 10, 2015