



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

September 29, 2016 Government Records Council Meeting

Matthew R. Curran, Esq.
(o/b/o Marlowe Botti)
Complainant

Complaint No. 2015-110

v.

Borough of West Long Branch (Monmouth)
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 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 has borne her burden of proof that she lawfully denied access to the requested “audio and video for Officer Hanlon,” described in the Complainant’s February 5, 2015 OPRA request, because she certified that no responsive record exists, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian did not unlawfully deny access to requested Item No. 2 because she advised that the “handwritten spreadsheet,” originally sought by the Complainant, did not exist. However, following clarification, the Custodian obtained a Police Department record containing the information sought. Additionally, the Complainant did not contest that the record provided on June 2, 2015 did not satisfy his request. The GRC therefore declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released all responsive records on June 2, 2015.

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 29th Day of September, 2016

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: October 4, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2016 Council Meeting**

Matthew R. Curran, Esq.
(On behalf of Marlowe Botti)¹
Complainant

GRC Complaint No. 2015-110

v.

Borough of West Long Branch (Monmouth)²
Custodial Agency

Records Relevant to Complaint: Copies of the following:

1. Audio and video for Officer Hanlon, marked for August 23, 2014, at approximately 8:35 PM for Case I-2014-0012099.
2. Handwritten spreadsheets containing firearms qualifications scores for all Borough of West Long Branch police officers for the past five years.

Custodian of Record: Lori Cole

Request Received by Custodian: February 5, 2015

Response Made by Custodian: February 17, 2015; February 20, 2015

GRC Complaint Received: April 13, 2015

Background³

Request and Response:

On February 5, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 17, 2015, the Custodian responded in writing, stating with respect to item 1, “this will confirm that information was previously provided to you by letter dated January 9th . . .” With respect to item 2, the Custodian sought an extension of time until February 20, 2016.

On February 17, 2015, the Complainant responded to the Custodian’s letter, advising that the Custodian’s previous response, referenced as letter dated January 9, contained “video . . .

¹ No legal representation listed on record.

² Represented by Gregory S. Baxter, Esq. (Eatontown, NJ).

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.

Matthew R. Curran, Esq. o/b/o Marlowe Botti v. Borough of West Long Branch (Monmouth), 2015-110 – Findings and Recommendations of the Executive Director

from Sgt. Gomez's vehicle" and that he sought audio and video of Officer Hanlon from the referenced event.

On February 20, 2015, the Custodian responded in writing, stating her belief that the disk she had previously mailed to the Complainant (referenced as the January 9th letter) contained the "audio/video" from both Sergeant Gomez and Officer Hanlon. She informed the Complainant that she had since been advised by the Police Department that there was "no audio/video from Officer Hanlon" on that date and time. Therefore, the Custodian contended that there are no records to produce.

The Custodian then stated that item 2 of the Complainant's request was denied because "[n]o handwritten spreadsheets exist." She then noted, "the chart that I sent to you previously did not preexist your request but was created, even though not required under OPRA, in response to your request." The Complainant attached a copy of a document from the GRC's website, titled "OPRA Exemptions," and referenced "OPRA Exemption No. 10 – Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software," and "OPRA Exemption No. 23 – Personnel and pension records."

Denial of Access Complaint:

On April 10, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). With respect to item 1, the Complainant asserted that, "it is believed that Officer Hanlon hit his camera button to record at approximately this time." The Complainant stated that the requested audio and video "should reflect another angle of the events identified in this case." The Complainant further stated that the requested recording would identify "who is captured in the video."

With respect to item 2, the Complainant noted his belief that the requested scores are handwritten on a sheet and kept in a binder that is stored in the Firearms Bureau. According to the Complainant, the spreadsheet in question contains the following information: (a) officer's name; (b) type of firearm; (c) serial number; (d) caliber of weapon; and (e) "HQC day and night fire scores."

The Complainant stated that the Borough had previously provided "a list of 'P's, noting passing of firearm qualifications for all its officers." The Complainant contended that the list does not identify the officer, the dates of attempted qualification, nor the scores. The Complainant further contended that the "P" to indicate passing is inaccurate because "officers do not necessarily pass all their attempts at the HQC course and a percentage score must be recorded to identify their proficiency." He further argued that the Borough's response to the OPRA request failed to specify the security measures or surveillances in jeopardy, noting that a blanket assertion does not justify a denial or exemption. He then suggested, "if . . . [the] OPRA request is a security concern, then the serial number, weapon type, and caliber can be redacted, listing only the date, officers' names, and scores."

Statement of Information:

On May 12, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 5, 2015. The Custodian certified that she initially responded in writing on February 17, 2015, the seventh (7th) business day following receipt.⁴

With respect to item 1, the Custodian certified that the requested record does not exist. With respect to item 2, the Custodian averred that the Borough had previously provided the Complainant “a pass/fail chart of firearms qualifications of WLB Police Officers for the period of 2010-2014” by e-mail on January 16, 2015, in response to a prior OPRA request. The Custodian noted that the Borough had no obligation to provide the information because it did not exist prior to the request but was created by the Police Department in response to the request. She further explained that the Borough denied the specific request for a handwritten spreadsheet because the Police Department advised that no such document existed.

The Custodian also stated that the Police Department consulted with staff of the Monmouth County Prosecutor’s Office, who recommended not to supply the data because they have had similar requests in the past and have treated them in the same manner: i.e., they release each Officer’s name and whether they passed. She then argued that the County and local Police authorities are concerned with having each individual officer’s personal weapon types released to the general public. She argued that security could be jeopardized if such information were available and “got into the hands of persons with criminal intentions”

Additional Submissions:

On May 13, 2015, the Complainant responded to the Custodian’s SOI. The Complainant questioned the Borough’s assertion that no responsive record exists. He noted that his client, as a police officer employed by the Borough, is fully aware that data related to the scoring is recorded and maintained by the Borough. The Complainant thereafter amended the Denial of Access Complaint to request the firearm qualification scores and data of West Long Branch police officers and supervisors. He reiterated his earlier suggestion that legitimate security concerns could be cured by redacting the serial number, weapon type, and caliber and listing only the date, officer’s name, and scoring data.

On June 2, 2015, the Custodian responded to the Complainant’s correspondence. She repeated the Borough’s position that no handwritten spreadsheet, as originally requested by the Complainant, exists. However, the Complainant’s subsequent clarification of his OPRA request resulted in further investigation, which showed her that the Police Department does maintain a chart, although to her knowledge they were no longer required to do so, showing the name of each Officer, their Social Security Numbers, the scores for each type of weapon, and the qualification data. Based on the Complainant’s May 13, 2015 amendment to his complaint, she stated that she was able to provide copies of the charts for the past five years (2010-2014), with Social Security numbers redacted.

⁴ February 16, 2015, was the President’s Day Holiday.

Analysis

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.

Item 1: Audio and Video of Officer Hanlon from August 23, 2014

The Council has previously found that, in light of a custodian’s certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian’s certification, no unlawful denial of access occurred. *See Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified that, with respect to the portion of the request seeking audio and video of Officer Hanlon from the date in and event in question, no such records exist.

Therefore, the Custodian has borne her burden of proof that she lawfully denied access to the requested “audio and video for Officer Hanlon,” described in the Complainant’s February 5, 2015 OPRA request, because she certified that no responsive record exists, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Item 2: Past Five Years of Firearms Qualifications Scores (Handwritten Spreadsheet)

With respect to item 2, the Custodian’s initial response denied the Complainant’s request, because “no handwritten spreadsheets exist.” In the Complainant’s additional submission to the GRC on May 13, 2015, however, he amended his Complaint to seek “data related to the scoring,” which he insisted is “recorded and maintained by the Borough.” Thereafter, the Custodian responded on June 2, 2015, advising that per the original request, “no handwritten spreadsheet” containing such information exists. However, the Complainant’s clarification permitted a subsequent search that revealed charts maintained by the Police Department that contain the information sought. The Custodian provided copies of the responsive charts to the Complainant.

Accordingly, the Custodian did not unlawfully deny access to requested Item No. 2 because she advised that the “handwritten spreadsheet,” originally sought by the Complainant, did not exist. However, following clarification, the Custodian obtained a Police Department record containing the information sought. Additionally, the Complainant did not contest that the record provided on June 2, 2015, did not satisfy his request. The GRC therefore declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released all responsive records on June 2, 2015.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she lawfully denied access to the requested “audio and video for Officer Hanlon,” described in the Complainant’s February 5, 2015 OPRA request, because she certified that no responsive record exists, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian did not unlawfully deny access to requested Item No. 2 because she advised that the “handwritten spreadsheet,” originally sought by the Complainant, did not exist. However, following clarification, the Custodian obtained a Police Department record containing the information sought. Additionally, the Complainant did not contest that the record provided on June 2, 2015 did not satisfy his request. The GRC therefore declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released all responsive records on June 2, 2015.

Prepared By: Husna Kazmir
Staff Attorney

September 22, 2015