



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

May 24, 2016 Government Records Council Meeting

Dane R. Ellis
Complainant

v.

North Brunswick Police Department (Middlesex)
Custodian of Record

Complaint Nos. 2015-184

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 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 because the Custodian forwarded the Complainant’s OPRA request to the proper custodian and certified that the Township was not in possession of the requested records, she complied with N.J.S.A. 47:1A-5.h and did not unlawfully deny access to the requested records. See also Pusterhofer v. N.J. 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 24th Day of May, 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: May 27, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting**

**Dane R. Ellis¹
Complainant**

GRC Complaint No. 2015-184

v.

**North Brunswick Police Department (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Any information stored or maintained electronically or by sound recording or in a similar device, or any copy thereof, that has been made. Specifically: Ellis, Dane Russell. Dept. Case No. 99-000870, dates 5/16/99 – 5/23/99. Location, NOBPD, 710 Hermann Road, North Brunswick, NJ
2. Any paper, “written or documents,” (*sic*) not otherwise exempt under N.J.S.A. 47:1A-3(b), particularly by Det. Saloon and Inv. Angelin, Dept. Case No. 99-000870

Custodian of Record: Lisa Russo

Request Received by Custodian: May 18, 2015

Response Made by Custodian: May 28, 2015

GRC Complaint Received: June 18, 2015

Background³

Request and Response:

On May 18, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 28, 2015, the seventh (7th) business day following the Custodian’s receipt of the request, C. Baumgartner of the North Brunswick Police Department (“NBPD”) Records Bureau responded in writing, informing the Complainant that his request was forwarded to the Middlesex County Prosecutor’s Office (“MCPO”) for review.

¹ No legal representation listed on record.

² Represented by Ronald H. Gordon, Esq. (Teaneck, 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.

Denial of Access Complaint:

On June 15, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that under OPRA, he was entitled to the above-mentioned records and that the Custodian’s denial “violates my state and federal rights.” He attached to the Complaint a copy of a transcript where Inv. Angeli “acknowledges the existence of the content for which I am asking, in a hearing on both direct and cross testimony under oath.”

Statement of Information:

On July 13, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 18, 2015. The Custodian certified that “the police officer who would be responsible for maintaining the Township’s law enforcement video recordings for discovery or OPRA requests” was asked for the records. The Custodian averred that the police officer advised that video recordings of municipal court proceedings are not made or maintained, a fact which “was confirmed by the municipal court administrator.” The Custodian argued that because the Township does not “make or maintain” the requested records, “the requested records do not exist.” The Custodian attached to the SOI a copy of a May 28, 2015 letter from C. Baumgartner, advising the Complainant that his request was forwarded to the MCPO for review.

In a later section of the SOI, the Custodian addressed the Complainant’s request seeking “audio statements pertaining to criminal investigatory record” and argued that said request was lawfully denied, as N.J.S.A. 47:1A-1.1 provides that sound and visual recordings as well as statements and reports are considered criminal investigatory records that are not public documents and exempt from disclosure. The Custodian argued that the contents of the criminal investigatory file, open or closed, that was forwarded to the MCPO, are not a public record and exempt pursuant to Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 38-39 (App. Div. 2005). The Custodian argued that in Janeczko v. Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004), the GRC held that the exemption for criminal investigatory records applies to all investigations, “resolved and unresolved” and “without reference to the status of the investigation.”

The Custodian additionally cited a recent Appellate Court decision, which held that various documents of criminal suspect records pertaining to a fatal police shooting fell under the criminal investigatory records exception to OPRA because the requested documents were either not “required by law” to be made or “pertained to” a criminal investigation. New Jersey Media Group, Inc. v. Township of Lyndhurst, et. al., No. A-2523-14T1 (App. Div. 2015). The Custodian thus argued that the documents fall under the criminal investigatory records exception and therefore the request was properly denied.

Additional Submissions:

On March 11, 2016, the GRC wrote to the Custodian, seeking additional information in this matter. On March 16, 2016, the Custodian's Counsel submitted a certification to the GRC. Custodian's Counsel certified that "the police officer who would be responsible for maintaining the Township's law enforcement video recordings for discovery or OPRA requests was asked for the records." That individual advised that the video recordings of municipal court proceedings are not made or maintained, which the Custodian confirmed with the municipal court administrator.

The Custodian's Counsel then explained that because the Complainant was charged with an indictable offense, "any responsive documents had been forwarded to the Middlesex County Prosecutor's Office . . . prosecuting Complainant's case." The Custodian's Counsel thereafter clarified that the Township "did not have or maintain any responsive records," and that C. Baumgartner of the Township's Records Bureau notified the Complainant by letter dated May 28, 2015 that his request had been forwarded to the Middlesex County Prosecutor's Office for handling. By letter dated April 15, 2015, James O'Neill of the MCPO denied the Complainant's request, citing to N.J.S.A. 47:1A-1.1, which provides that sound and visual recordings as well as statements and reports are considered criminal investigatory records that are not public and are thus exempt from disclosure.

On March 18, 2016, the Complainant wrote to the GRC, stating that he felt the Custodian's SOI "misrepresent[ed]" his request, which was "not open-ended" but "rather specific." The Complainant additionally stated that he "never requested" video recordings of municipal court proceedings. On April 20, 2016, the Complainant wrote to the GRC, noting that the letter from the MCPO was dated "April 15, 2015 . . . [a] month before my request was filed."

On May 6, 2016, the GRC wrote to the Custodian, seeking clarification as to the date discrepancy. On May 10, 2016, the Custodian certified that "upon information and belief "from the MCPO, the Complainant had submitted an OPRA request to their office on April 7, 2015, seeking documents in connection to his case No. 99-000870. The Custodian attached a copy of that request, dated April 7, 2015, which sought "all recordings by sound or visual communication of the interrogations on Dept. Case No. 99-000870 dated May 17 – 23, 1999, from the North Brunswick PD/Middlesex County Prosecutor's Office" and "all statements and reports dealing with case No. 99-000870/indictment # 99-07-00783-1."

The Custodian then certified that the MCPO denied the Complainant's request by correspondence dated April 15, 2015. Thereafter, the Complainant submitted the OPRA request at issue in the instant matter on May 18, 2015. The Custodian certified that at the time of receipt of the request, the Township was "not aware of the Complainant's request to MCPO" and thereafter sent the Complainant the correspondence dated May 28, 2015, notifying that the Township was forwarding his request to the MCPO. The Custodian certified that "unbeknownst" to the Township at the time they responded, "the MCPO had already reviewed and denied Complainant's request by letter dated April 15, 2015, regarding the same request submitted to the Township, which accounts for the date discrepancy in the correspondences." The Custodian then certified that "upon information and belief" the MCPO sent no further correspondence to the Complainant "since the request had already been denied."

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.

In the instant matter, it appears that the Complainant is challenging two responses he received to his May 18, 2015 request, one from the North Brunswick Police Department, dated May 28, 2015, which advised him that his request was being forwarded to the MCPO, and one from the MCPO, dated April 15, 2015, which advised him that his request was denied pursuant to N.J.S.A. 47:1A-1.1. Because the instant matter involves the filing of a complaint against the North Brunswick Police Department, the Council will only adjudicate the May 28, 2015 response provided by that agency.

The Council has previously found that, in light of a custodian’s certification that no records responsive to the request exist, no unlawful denial of access occurred. *See Pusterhofer v. N.J. Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian’s Counsel certified that, after conducting a search, including asking the police officer responsible for maintaining the Township’s law enforcement video recordings for the responsive records, it was determined that any responsive documents had been forwarded to the MCPO, and the Township did not have or maintain any responsive records at the time of the request. Accordingly, the response made to the Complainant on May 28, 2015 advised him that his request was forwarded to that agency’s office. Additionally, the Complainant failed to provide any evidence in the record to rebut the Custodian’s certification. Furthermore, the Custodian’s May 10, 2016 certification clarified the date discrepancy between the MCPO’s denial and the Township’s May 28 response, as the Custodian certified that the Township was unaware that the MCPO had earlier received a similar request from the Complainant.

Additionally, OPRA requires public agency officers or employees to forward an OPRA request to the proper custodian or to direct the requestor to the custodian. N.J.S.A. 47:1A-5(h). In this matter, the Custodian forwarded the request to the proper agency that would be in possession of any responsive records and informed the Complainant of same.

Because the Custodian forwarded the Complainant’s OPRA request to the proper custodian and certified that the Township was not in possession of the requested records, she complied with N.J.S.A. 47:1A-5(h) and did not unlawfully deny access to the requested records. *See also Pusterhofer*, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian forwarded the Complainant's OPRA request to the proper custodian and certified that the Township was not in possession of the requested records, she complied with N.J.S.A. 47:1A-5.h and did not unlawfully deny access to the requested records. See also Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Husna Kazmir
Staff Attorney

May 17, 2016