



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

April 26, 2016 Government Records Council Meeting

Aakash Dalal
Complainant

Complaint No. 2015-326

v.

Borough of Paramus (Bergen)
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the April 19, 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. Borough Attorney Paul Kaufman’s response was legally insufficient because he failed to respond in writing to each request item contained in the request individually. Therefore, the Borough Attorney violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Notwithstanding the fact that the Custodian certified that he disclosed the two incident reports in redacted form, the records responsive to request items number 1 and 2 – to wit, police incident and supplementary reports – are exempt from access pursuant to N.J.S.A. 47:1-1.1, Janeczko v. NJ Dep’t of Law and Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79, 2002-80 and Nance v. Scotch Plains Twp. Police Department, GRC Complaint No. 2003-125 (January 2005). As such, the Custodian did not unlawfully deny access to said records in whole or part.
3. The Custodian did not unlawfully deny access to request item number 3 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 26th Day of April, 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 2, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Aakash Dalal¹
Complainant**

GRC Complaint No. 2015-326

v.

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

Records Relevant to Complaint: Copies via regular mail of:

1. All records referencing or concerning “Department Case Number,” “Complaint Number,” and “Incident Number” I-2012-000203.
2. All records referencing or concerning “Department Case Number,” “Complaint Number,” and “Incident Number” I-2012-001408.
3. All press releases and written or electronic communications to the news media by the Paramus Police Department and its personnel regarding the incidents in the aforementioned records.

Custodian of Record: Kenneth Ehrenberg
Request Received by Custodian: October 5, 2015
Response Made by Custodian: October 13, 2015
GRC Complaint Received: October 20, 2015

Background³

Request and Response:

On October 5, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 13, 2015, the fifth (5th) business day following receipt of said request, Paul Kaufman, Esq., of Kaufman, Semeraro & Leibman, LLP, responded in writing, identifying himself as the Borough Attorney. Mr. Kaufman informed the Complainant that the requested documents are criminal investigatory records that are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² Represented by Justin D. Santagata, Esq., of Kaufman, Semeraro & Leibman, LLP (Fort Lee, 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 October 20, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he provided the OPRA request to the Custodian on October 5, 2015, and that the Borough Attorney denied access to the requested records on October 13, 2015. Citing O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009), the Complainant states that for records to be exempt as criminal investigatory records, as here, they must not be required by law to be made and must pertain to any criminal investigation or related civil enforcement proceeding. The Complainant contends that the Borough bears the heavy burden of demonstrating that each record he requested in items numbered 1 and 2 pertains to a criminal investigation and is not required to be made or maintained by law.

The Complainant states that the records sought in request item number 3 must be made and maintained by law pursuant to N.J.S.A. 47:1A-3(b). The Complainant argues that, even though communications with the news media may pertain to a criminal investigation, the public should have a right to any such records that are made readily available to the press.

Statement of Information:

On November 9, 2015, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that he received the Complainant’s OPRA request on October 5, 2015, and that he responded in writing on October 13, 2015. The Custodian certifies that there are three (3) records responsive to request items number 1 and 2 that are on file with the Paramus Police Department:

1. A police incident report, dated January 3, 2012, for Case No. I-2012-00203, consisting of 2 pages.
2. A police supplementary report, dated January 3, 2012, consisting of 2 pages.
3. A police incident report dated, January 11, 2012, for Case No. I-2012-001408, consisting of 2 pages.

The Custodian certifies that the two incident reports were disclosed to the Complainant in redacted form; however, the supplementary report was denied as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1 and N. Jersey Media Grp., v. Twp. of Lyndhurst, 441 N.J. Super. 70, 102 (App. Div. 2015).

The Custodian certifies that the record responsive to request item number 3 is a press release, which is not on file with the Borough. The Custodian certifies that any press releases that exist are possessed by the Bergen County Prosecutor’s Office.

The Custodian’s Counsel states that, even though the Custodian provided some of the records to the Complainant in redacted form, the Custodian did not have to do so because the records are all exempt as criminal investigatory records.

Additional Submissions:

On November 17, 2015, the Complainant submitted to the GRC a faxed response to the SOI. The Complainant states that the Custodian asserted in the SOI that he disclosed records to the Complainant in response to the request. The Complainant states that he never received any records from the Borough, which is confirmed in the response sent to him by the Borough Attorney, who denied the request in its entirety.

On January 8, 2016, the GRC informed the Custodian's Counsel that the response to the request does not comport with the facts and legal argument contained in the Custodian's SOI. The GRC asked for a supplement to the SOI.

On January 19, 2016, the Custodian's Counsel forwarded to the GRC an "Updated Item 12 to GRC Statement of Information." The Custodian's Counsel asserts that Borough of Paramus Police Department employee Deanna Brenniser remembers mailing records to the Complainant. The mailed records were those listed in the SOI as being disclosed to the Complainant. Counsel states that Ms. Brenniser believes there may have been a miscommunication between the Paramus Police Department and the Borough Attorney, Paul Kaufman, Esq., which explains why Mr. Kaufman's response denies the request in its entirety. Counsel attached a "Supplemental Certification of Deanna Brenniser" in support of his submission.

Analysis

Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)."

Here, Borough Attorney Paul Kaufman responded to the Complainant's request on October 13, 2015, stating "I am in receipt of your letter dated October 5, 2015 wherein you request certain records concerning a criminal investigation. . . [t]he Documents you request fall under the criminal investigatory records exception to 'government records' which must be produced under OPRA."

As such, Borough Attorney Paul Kaufman's response was legally insufficient because he failed to respond in writing to each request item contained in the request individually. Therefore, the Borough Attorney violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

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.

Here, the Custodian determined that a police incident report for Case Number I-2012-00203, a police incident report for Case Number I-2012-001408, and a supplementary report were all responsive to request items number 1 and 2. The Custodian certified that all of the reports are criminal investigatory records.⁴ The Custodian further certified that he disclosed to the Complainant the two incident reports in redacted form but that he denied the Complainant access to the supplementary report under N.J.S.A. 47:1A-1.1.

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the Council in Janeczko v. NJ Dep’t of Law and Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).⁵ In Janeczko, the Council found that under OPRA, “criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed.” Moreover, with respect to concluded investigations, the Council pointed out in Janeczko that, “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete.”

More specifically, in Nance v. Scotch Plains Twp. Police Department, GRC Complaint No. 2003-125 (January 2005), the Council determined that police incident reports, continuation reports, and property and evidence reports are criminal investigatory records as defined by N.J.S.A. 47:1-1.1, and are therefore exempt from disclosure. Police incident reports and continuation (supplementary) reports are the very records the Custodian found here to be exempt from access as criminal investigatory records pursuant to N.J.S.A. 47:1-1.1.

Therefore, notwithstanding the fact that the Custodian certified that he disclosed the two incident reports in redacted form, the records responsive to request items number 1 and 2 – to wit, police incident and supplementary reports – are exempt from access pursuant to N.J.S.A. 47:1-1.1, Janeczko, GRC 2002-79, 2002-80 and Nance, GRC 2003-125. As such, the Custodian did not unlawfully deny access to said records in whole or part.

Request item number 3 seeks press releases and written or electronic communications to the news media by the Paramus Police Department and its personnel regarding Case Numbers I-2012-00203 and I-2012-001408.

⁴ Copies of the redacted reports were attached to the SOI as Exhibit A. Each incident report was captioned as “Paramus Police Department Investigation Report.” The crime/incident for Case Number I-2012-00203 was listed as arson, and the crime/incident for Case Number I-2012-001408 was listed as a suspicious person (trespasser). Arson is a crime pursuant to N.J.S.A. 2C:17-1. Trespassing may be a crime or a disorderly persons offense pursuant to N.J.S.A. 2C:18-3. In Nance v. Scotch Plains Twp. Police Dep’t, GRC Complaint No. 2003-125 (January 2005), the Council determined that “records pertaining to disorderly persons offenses, including petty offenses . . . held by a law enforcement agency involving a criminal investigation are deemed to be ‘criminal investigatory records,’ and are not disclosable, pursuant to OPRA.”

⁵ Affirmed in an unpublished opinion of the Appellate Division in May 2004.

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 the records responsive to request item number 3 are not in the possession of the Borough. The Custodian further certified that that any press releases that do exist are possessed by the Bergen County Prosecutor's Office.

As such, the Custodian did not unlawfully deny access to request item number 3 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. Borough Attorney Paul Kaufman's response was legally insufficient because he failed to respond in writing to each request item contained in the request individually. Therefore, the Borough Attorney violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Notwithstanding the fact that the Custodian certified that he disclosed the two incident reports in redacted form, the records responsive to request items number 1 and 2 – to wit, police incident and supplementary reports – are exempt from access pursuant to N.J.S.A. 47:1-1.1, Janeczko v. NJ Dep't of Law and Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79, 2002-80 and Nance v. Scotch Plains Twp. Police Department, GRC Complaint No. 2003-125 (January 2005). As such, the Custodian did not unlawfully deny access to said records in whole or part.
3. The Custodian did not unlawfully deny access to request item number 3 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

April 19, 2016