



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 27, 2017 Government Records Council Meeting

David J. Meenan
Complainant

v.

Township of Edgewater Park (Burlington)
Custodian of Record

Complaint No. 2016-178

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 2017 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 requested letters of recommendation are personnel records that do not fall within any of the delineated categories of personnel documents and information that can be disclosed pursuant to N.J.S.A. 47:1A-10, and because the Complainant provided no evidence that he is an “individual in interest,” the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6. See Kovalcik v. Somerset Cnty. Pros. Office, 206 N.J. 581 (2011); N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office; 405 N.J. Super. 386 (App. Div. 2009); Hewitt v. Longport Police Dep’t, GRC Complaint No. 2004-148 (March 2005); Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 30, 2010). See also Cintron v. NJ Dep’t of Human Serv., Ancora Psychiatric Hosp., GRC Complaint No. 2016-1 (March 2017).

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 27th Day of June, 2017

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: June 30, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2017 Council Meeting**

David J. Meenan¹
Complainant

GRC Complaint No. 2016-178

v.

Township of Edgewater Park (Burlington)²
Custodial Agency

Records Relevant to Complaint: “I am requesting copies of all letters of recommendation for the position of police sergeant that were written and submitted at the direction of the Chief of Police during the 2014 promotional process. This request should include both [of the] letters that were written by Lt. Brett Evans, first submission as well as the second letter that was ordered by the Chief of Police. These letters were submitted on or about August 02, 2014.”

Custodian of Record: Linda Dougherty

Request Received by Custodian: March 24, 2016

Responses Made by Custodian: March 29, 2016, April 7, 2016

GRC Complaint Received: July 5, 2016

Background³

Request and Response:

On March 24, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 29, 2016, the second (2nd) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that she needed an extension of time until April 10, 2016, because she had to consult with legal counsel. On April 7, 2016, the Custodian responded in writing to inform the Complainant that the request was denied because the records requested were personnel records that are exempt from access pursuant to N.J.S.A. 47:1A-10.

Denial of Access Complaint:

On July 5, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he provided the OPRA

¹ No legal representation listed on record.

² Represented by Nicholas J. Repici, Esq., of Genova Burns, LLC (Camden, 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.

request to the Custodian on March 24, 2016, and that she denied the request on April 7, 2016, alleging that the requested records were exempt from disclosure.⁴

The Complainant contends that on or about August 2, 2014, Lieutenant Brett Evans, Lieutenant Robert Hess, Sergeant Mark Herkoperec, and Sergeant John Harris submitted letters of recommendation to the Police Chief for Edgewater Park Police Department promotions. The Complainant states that the letters were intended to be read at a Township Committee meeting. The Complainant further contends that Lieutenant Evans was ordered to submit a second letter, and in the second letter Lieutenant Evans changed his recommendation. The Complainant states that the Custodian denied his request for copies of the letters because they are exempt from disclosure under OPRA.

Statement of Information:

On July 13, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 24, 2016, and responded in writing on March 29, 2016 and April 7, 2016.⁵ The Custodian certifies that the following records are responsive to the Complainant’s request: three (3) one page letters of recommendation for promotion to sergeant, and one (1) two page letter of recommendation for promotion to sergeant.⁶ The Custodian certifies that all of the responsive records are exempt from disclosure as personnel and pension records pursuant to N.J.S.A. 47:1A-10.

The Custodian’s Counsel states that the Custodian received the OPRA request on March 24, 2016, and responded March 29, 2016, informing the Complainant that she was seeking advice of counsel and requested an extension until April 10, 2016, to respond. Counsel states that on April 7, 2016, the Custodian responded to the request by informing the Complainant that the requested records fell under the OPRA exemption for personnel and pension records.

The Custodian’s Counsel argues that the requested records clearly fall within the personnel records exemption provided by N.J.S.A. 47:1A-10. Counsel cites N. Jersey Media Grp., Inc. v. State of New Jersey, Office of the Governor, 2013 WL 1809887 (App. Div. 2013) (Unpub.), in support of the Custodian’s denial. Counsel states that the court found that documents sought by the appellant, including recommendations, were personnel records exempt from access pursuant to N.J.S.A. 47:1A-10. Counsel also cites N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office; 405 N.J. Super. 386 (App. Div. 2009), wherein the court determined that documents related to outside employment qualified as personnel records and that the only personnel information the agency was authorized to disclose were the specific items listed in N.J.S.A. 47:1A-10, which did not include the requested records.

Counsel argues that the letters of recommendation in the instant complaint, submitted to the Chief of Police for candidates for the police sergeant position, are personnel records under OPRA. Counsel asserts that the requested letters do not fall into one of the exceptions set forth in N.J.S.A. 47:1A-10 and that the therefore Custodian properly denied access to them.

⁴ The Complainant did not attach to the complaint a copy of the Custodian’s responses.

⁵ The Custodian did not attach to the SOI copies of the referenced responses.

⁶ The Custodian identified neither the dates of the letters of recommendation nor their authors.

Additional Submissions:

On May 19, 2017, the GRC e-mailed the Custodian’s Counsel, requesting copies of the Custodian’s purported responses to the Complainant on March 29, 2016, and April 7, 2016, which were referenced in the SOI.

On May 25, 2017, the GRC e-mailed the Complainant, requesting copies of the Custodian’s purported responses to the Complainant on March 29, 2016 and April 7, 2016.

On May 30, 2017, the Complainant e-mailed the GRC in response to the GRC’s e-mail dated May 25, 2017. The Complainant acknowledged that the Custodian did request an extension of time prior to sending him a letter denying his request. The Complainant stated that he mailed copies of the Custodian’s responses to the GRC.

On May 31, 2017, the Custodian’s Counsel telephoned the GRC. Counsel stated that he believed the municipality had retained legal counsel other than Genova Burns, and was unsure whether the municipality wanted him to continue to represent the municipality in this complaint.⁷ Counsel stated that if the municipality confirmed his status as counsel in this matter, he would obtain copies of the Custodian’s responses and promptly forward them to the GRC.⁸

On June 5, 2017, the GRC received from the Complainant copies of the Custodian’s responses dated March 29, 2016, and April 7, 2016.

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.

OPRA provides 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.

⁷ The GRC never received a substitution of attorney or other notification from the Custodian that there was different legal counsel representing the municipality in this matter.

⁸ The GRC did not receive any further communications from Counsel.

When dealing with personnel records, OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or *when authorized by an individual in interest*; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

N.J.S.A. 47:1A-10 (emphasis added).

The GRC has stated that:

N.J.S.A. 47:1A-10 . . . has been applied and understood that [the] only individuals who have access to personnel and pension records are specific public officials and the person who is the subject of the personnel file. An “individual in interest” is to mean the person who is the subject of the personnel file

Hewitt v. Longport Police Dep’t, GRC Complaint No. 2004-148 (March 2005); Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 30, 2010).

Moreover, the Appellate Division in N. Jersey Media Grp., 405 N.J. Super. 386 (App. Div. 2009) made it clear that the only personnel information a public entity is authorized to disclose are the specific items listed in N.J.S.A. 47:1A-10. Id. at 389.

Here, the Complainant sought “copies of all letters of recommendation for the position of police sergeant that were written and submitted at the direction of the Chief of Police during the 2014 promotional process”⁹ The Custodian denied the request based on OPRA’s exemption for personnel records, N.J.S.A. 47:1A-10.

The requested letters of recommendation are related to a promotional process within the Police Department. The Council has previously found similar records to be personnel records under OPRA. See Cintron v. NJ Dep’t of Human Serv., Ancora Psychiatric Hosp., GRC

⁹ Although the Complainant asserted that the letters were intended to be read at a Township Committee meeting, there is nothing in the evidence of record to indicate that the records were read at a Township Committee meeting or any other meeting.

Complaint No. 2016-1 (March 2017), finding that Performance Assessment Reviews related to a promotional process are personnel records.

The Custodian's Counsel cited N. Jersey Media Grp., 2013 WL 1809887, in support of the Custodian's denial. In that decision, the court found that documents sought by the appellant, including recommendations, were personnel records exempt from access pursuant to N.J.S.A. 47:1A-10. And although this is an unpublished decision, it is instructive for the court's determination that letters of recommendation are considered personnel records.

In the instant matter, the GRC concludes that the requested letters of recommendation are personnel records that do not fall within any of the delineated categories of personnel documents and information that can be disclosed pursuant to N.J.S.A. 47:1A-10. Further, the Complainant never alleged that he is the person who is the subject of the personnel file containing the requested letters of recommendation, i.e., the "individual in interest," which would trigger OPRA's exception to N.J.S.A. 47:1A-10. See Hewitt, GRC 2004-148; Mapp, GRC 2009-334.

Therefore, because the requested letters of recommendation are personnel records that do not fall within any of the delineated categories of personnel documents and information that can be disclosed pursuant to N.J.S.A. 47:1A-10, and because the Complainant provided no evidence that he is an "individual in interest," the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6. See Kovalcik, 206 N.J. 581; N. Jersey Media Grp., 405 N.J. Super. 386; Hewitt, GRC 2004-148; Mapp, GRC 2009-334. See also Cintron, GRC 2016-1.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the requested letters of recommendation are personnel records that do not fall within any of the delineated categories of personnel documents and information that can be disclosed pursuant to N.J.S.A. 47:1A-10, and because the Complainant provided no evidence that he is an "individual in interest," the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6. See Kovalcik v. Somerset Cnty. Pros. Office, 206 N.J. 581 (2011); N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office; 405 N.J. Super. 386 (App. Div. 2009); Hewitt v. Longport Police Dep't, GRC Complaint No. 2004-148 (March 2005); Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 30, 2010). See also Cintron v. NJ Dep't of Human Serv., Ancora Psychiatric Hosp., GRC Complaint No. 2016-1 (March 2017).

Prepared By: John E. Stewart

June 20, 2017