



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 25, 2020 Government Records Council Meeting

Laura Harris
Complainant

Complaint No. 2018-241

v.

Borough of Waldwick (Bergen)
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 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 the requested investigative report of employee conduct is exempt as a personnel record. N.J.S.A. 47:1A-10. Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). Further, there is no evidence to support a conclusion that the Complainant had full knowledge and intent to waive her confidentiality rights when she submitted her OPRA request. N.J.S.A. 47:1A-10; Fleming v. Greenwich Township (Warren), GRC Complaint No. 2015-18 (Interim Order dated January 31, 2017). See McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011). Thus, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-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 25th Day of August 2020

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: August 27, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Laura Harris¹
Complainant**

GRC Complaint No. 2018-241

v.

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

Records Relevant to Complaint: Copies via e-mail of the investigation report provided by Brian Campion or the firm “KKMT” during the last two (2) weeks of August 2018.³

Custodian of Record: Kelley Halewicz
Request Received by Custodian: October 2, 2018
Response Made by Custodian: October 5, 2018
GRC Complaint Received: October 17, 2018

Background⁴

Request and Response:

On October 2, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 5, 2018, the Custodian responded in writing denying access to the OPRA request, as “advisory, consultative or deliberative [(“ACD”)] material.” N.J.S.A. 47:1A-1.1. The Custodian further stated that the report was generated as part of a “grievance filed by or against an individual.” N.J.S.A. 47:1A-10; see also Gonzales v. Cnty. of Hudson, GRC Complaint No. 2011-212 (August 2012). The Custodian stated that there were no responsive records for item No. 3.

Denial of Access Complaint:

On October 17, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she was entitled to the responsive investigation report because it was part of her employment record. The Complainant

¹ No legal representation listed on record.

² Represented by Craig P. Bossong, Esq., of Florio, Perrucci, Steinhardt, & Cappelli, LLC (Rochelle Park, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ 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.

further asserted that the Borough of Waldwick's ("Borough") disciplinary policy afforded her the opportunity to respond to the allegations against her. The Complainant argued that the Custodian's denial of access violated the Borough's disciplinary policy.

Statement of Information:

On December 4, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on October 2, 2018. The Custodian certified that she successfully located the responsive report. The Custodian certified that she responded in writing on October 5, 2018, denying access to the responsive investigation report under the ACD and personnel exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A.47:1A-10.

The Custodian stated that OPRA exempted personnel records, specifically "records related to any grievance filed by or against an individual." N.J.S.A. 47:1A-10. The Custodian asserted that the investigation report was created in response to a tort claims notice as well as workplace harassment complaints involving the Complainant. The Custodian further contended that the report was a personnel record related to an allegation of misconduct and accordingly "not considered a government record." N.J.S.A. 47:1A-10. Gonzalez, GRC 2011-12.

The Custodian also asserted that she properly denied access to the investigation report pursuant to OPRA. N.J.S.A. 47:1A-1.1. The Custodian argued that the Borough Council utilized the report in their decision to terminate the Complainant's employment and thus constituted ACD material.

Additional Submissions:

On December 14, 2018, the Complainant submitted a response to the Custodian's SOI. The Complainant asserted that her complaint differed from Gonzalez, GRC 2011-12 in that she had knowledge of the contents of the requested record. The Complainant further asserted that the Custodian violated Executive Order No. 11 (Gov. Byrne, 1974) ("EO 11"), which provides that an individual's "date of separation from government and the reason therefor" are subject to disclosure under OPRA. The Complainant contended that the Supreme Court determined claimants have the right to inquire into the basis for their discharge to substantiate claims of discrimination. See Valentzas v. Colgate Palmolive Co., 109 N.J. 189 (1988). The Complainant alleged that the requested record was defamatory and illegal in nature. The Complainant further argued the report contained grievances filed by employees and the Borough's policy allowed her to respond to such filings. The Complainant averred that the Borough violated its own policy by withholding the requested record.

On December 20, 2018, the Custodian's Counsel submitted a letter brief responding to the Complainant's December 13, 2018 letter. Therein, Counsel asserted that the Complainant's arguments were immaterial to an OPRA Denial of Access Complaint. Counsel further asserted that the Complainant cited case law that did not reference OPRA, thus it was inapplicable to the instant complaint. The Custodian's Counsel argued that the Borough did not violate EO 11, because the date of separation and reason therefor was included in Resolution 147-2018, which the Borough disclosed to the Complainant in response to the non-relevant part of the subject

OPRA request. Counsel further argued that a municipal administrator may be removed with or without cause, therefore the contents of the report were immaterial. N.J.S.A. 40A:9-138.

Counsel argued that the Complainant’s attempt to distinguish Gonzalez, GRC 2011-212 was in error. Counsel also contended that Velantzas, 109 N.J. 189 was “wholly distinguishable” from this complaint. Counsel asserted that Velantzas did not reference OPRA in any way; rather, it discussed the summary judgement of a retaliation complaint. Id. at 192.

On December 31, 2018, the Complainant responded to Custodian Counsel’s December 21, 2018 letter. Therein, the Complainant reiterated that the Borough violated EO 11 because she had not been provided with the reason for her termination. The Complainant further contended that she had only received hearsay from Councilmembers which included allegations of threats made by Borough Counsel to facilitate a vote to terminate her employment.

The Complainant contended that finding in favor of the Borough here would render their formally adopted policies “irrelevant.” The Complainant contended that should Gonzalez “truly permit[] employers to generate false, defamatory documents to wrongfully terminate employees,” the GRC should consider amending the decision to carve out a disclosure exception. The Complainant contended that such a carve-out would improve the employer/employee process.

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 places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states “. . . [t]he public agency shall have the burden of proving that the denial of access is authorized by law. . .” N.J.S.A. 47:1A-6.

OPRA provides:

[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, except that an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record . . .

[N.J.S.A. 47:1A-10 (Emphasis added).]

The GRC has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records within the exemption from disclosure set forth at N.J.S.A. 47:1A-10. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10. For this reason, the Council concluded that “records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access.” Id.; See also Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).

In Fleming v. Greenwich Township (Warren), GRC Complaint No. 2015-18 (Interim Order dated January 31, 2017), the complainant submitted an OPRA request for a thirteen (13) page investigative report involving herself. The complainant argued that the personnel exemption should not apply since she is the subject of the record. However, it was neither clear nor unequivocal that the complainant’s statement was an express waiver of her confidentiality rights. The Council instead found that “her argument against the personnel record exemption constituted an exception for herself as an individual, rather than a waiver for the public.” Id. at 4. Moreover, the Council found no evidence in the record demonstrating that the complainant knew of her confidentiality rights and expressly waived them at the time she signed and submitted her OPRA request. See McGee v. Twp. of East Amwell (Hunterdon), GRC 2007-305 (March 2011).

In the instant complaint, the Complainant requested a copy of an internal, investigative report of her employee conduct provided by the Township Solicitor’s firm. The Custodian denied this request stating that said report was exempt from disclosure under the ACD and personnel exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. The Complainant argued that she was entitled to the report under EO 11, as well as per the Township disciplinary policy. The Custodian certified in the SOI that the report was created in response to a grievance filed against the Complainant and is therefore exempt as a personnel record under OPRA. N.J.S.A. 47:1A-10.

As was the case in Merino, and Fleming, the Complainant’s employer initiated an investigation of an employee’s conduct in the course of her duties. Because such records involved disciplinary matters and/or matters concerning an employee’s alleged misconduct, such records are exempt from disclosure as personnel records pursuant to N.J.S.A. 47:1A-10. Merino, GRC 2003-110. It should also be noted that the Complainant in the instant matter did not clearly demonstrate knowledge of her rights to confidentiality, nor did she expressly waive such at the time of her OPRA request. N.J.S.A. 47:1A-10. Fleming, GRC 2015-18. See McGee, GRC 2007-305.

Therefore, the requested investigative report of employee conduct is exempt from disclosure as a personnel record. N.J.S.A. 47:1A-10. Merino, GRC 2003-110. Further, there is no evidence to support a conclusion that the Complainant had full knowledge and intent to waive her confidentiality rights when she submitted her OPRA request. N.J.S.A. 47:1A-10; Fleming, GRC 2015-18. See McGee, GRC 2007-305. Thus, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the requested investigative report of employee conduct is exempt as a personnel record. N.J.S.A. 47:1A-10. Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). Further, there is no evidence to support a conclusion that the Complainant had full knowledge and intent to waive her confidentiality rights when she submitted her OPRA request. N.J.S.A. 47:1A-10; Fleming v. Greenwich Township (Warren), GRC Complaint No. 2015-18 (Interim Order dated January 31, 2017). See McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011). Thus, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6.

Prepared By: Brandon Garcia
Case Manager

August 18, 2020