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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 9, 2022 Government Records Council Meeting

Jermaine Vaughn
Complainant

Complaint No. 2021-174

v.

City of Trenton (Mercer)
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 2022 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 Custodian lawfully denied access to the Complainant’s OPRA request seeking disciplinary records of a retired police detective. N.J.S.A. 47:1A-6. Such records are exempt from disclosure under OPRA’s personnel records exemption and the Internal Affairs Policies and Procedures. N.J.S.A. 47:1A-10; Rivera v. Union Cnty. Prosecutor’s Office, 250 N.J. 124 (2022); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). Furthermore, the Attorney General’s Law Enforcement Directive Nos. 2020-05 and 2020-06 do not confer a substantive right of access to third parties. In re Att’y Gen. Law Enf’t Directive Nos. 2020-5 & 2020-6, 465 N.J. Super. 111, 139-40 (App. Div. 2020), aff’d, 246 N.J. 462 (2021).

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 9th Day of November 2022

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: November 15, 2022

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 9, 2022 Council Meeting**

**Jermaine Vaughn¹
Complainant**

GRC Complaint No. 2021-174

v.

**City of Trenton (Mercer)²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of: “Detective Robert Sheehan’s (retired 7/2004) disciplinary violations committed by him during his service with the Trenton Police Department.”

Custodian of Record: Matthew Conlon³
Request Received by Custodian: June 16, 2021
Response Made by Custodian: July 13, 2021
GRC Complaint Received: August 2, 2022

Background⁴

Request and Response:

On June 9, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 6, 2021, the Complainant sent correspondence to the Custodian, stating he has not received a response to his OPRA request.

On July 12, 2021, the Custodian responded in writing, denying access under OPRA’s personnel records exemption. N.J.S.A. 47:1A-10.

Denial of Access Complaint:

On August 2, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his request in accordance with the Attorney General’s Law Enforcement Directive No. 2020-05 (“Directive 2020-05”), which mandated the release of serious disciplinary violations committed by a law

¹ No legal representation listed on record.

² Represented by Andrew J. Ball, Esq., of Davison, Eastman, Munoz, Paone, P.A. (Freehold, NJ).

³ The current Custodian of Record is Brandon Garcia.

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.

enforcement officer. The Complainant asserted that on or around May or June 2021, the New Jersey Supreme Court held that Directive 2020-05 was law and was therefore permitted access to disciplinary records under OPRA.

Statement of Information:

On October 21, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified he received the Complainant’s OPRA request on June 16, 2021. The Custodian certified that any responsive records would have been destroyed five (5) years after retirement in accordance with the State’s retention schedule. The Custodian certified he responded in writing on July 13, 2021, denying access.

The Custodian maintained the requested records were properly denied access under N.J.S.A. 47:1A-10. The Custodian also argued the request involved internal affairs files and the applicable Attorney General’s Internal Affairs Policy and Procedures (“IAPP”) provision states “[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information.” The Custodian asserted while there are limited exceptions to allow access to such records, no exception exists to permit public access via OPRA. Lastly, the Custodian argued that any responsive records would have been eligible for destruction in 2009 in accordance with the State’s retention schedule.

Additional Submissions:

On December 20, 2021, the Complainant submitted correspondence to the GRC in response to the SOI. The Complainant asserted that N.J.A.C. 13:1E-3.2(a) exempts from access records pertaining to employees which form the basis of discipline. However, the Complainant argued that this regulation did not apply to records enumerated under N.J.S.A. 47:1A-10.

The Complainant further argued that Directive 2020-05 and Attorney General’s Law Enforcement Directive No. 2020-06 (“Directive 2020-06”) (collectively, “Directives”) permitted the release of all findings of major discipline by police officers dating back twenty (20) years. The Complainant further stated that the Appellate Division and New Jersey Supreme Court found that the Directives did not conflict with OPRA or other authorities pertaining to the confidentiality of personnel records.⁵

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.

⁵ Although not cited, the Complainant appears to reference In re Att’y Gen. Law Enf’t Directive Nos. 2020-5 & 2020-6, 246 N.J. 462 (2021).

OPRA provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, the 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.]

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, 594 (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.

[Id.]

The Council has addressed whether personnel records not specifically identified in OPRA were subject to disclosure. For instance, the Council has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 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).

Additionally, the Appellate Division has held that Attorney General Guidelines have the force of law for police entities. See O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). In particular, the IAPP is bound upon all law enforcement agencies in New Jersey pursuant to statute. See N.J.S.A. 40A:14-181. Further, the IAPP explicitly states “[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the

resulting materials are confidential information.” IAPP at 9.6.1 (December 2021). Consistent with the IAPP, the Council held in Wares v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2014-330 (June 2015) that internal affairs records are not subject to access under OPRA (citing N.J.S.A. 47:1A-9). See also Rivera v. Union Cnty. Prosecutor’s Office, 250 N.J. 124 (2022) (holding that internal affairs reports are exempt from disclosure under OPRA); Camarata v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2014-127 (June 2015), Rivera v. Borough of Keansburg Police Dep’t (Monmouth), GRC Complaint No. 2007-222 (June 2010).

More recently, in In re Att’y Gen. Law Enf’t Directive Nos. 2020-5 & 2020-6, 246 N.J. 462 (2021), the Court largely affirmed the Appellate Division’s decision⁶ in holding that Directive 2020-05 did not violate OPRA by requiring all law enforcement agencies in the State to publicize the names of law enforcement officers who committed misconduct that resulted in “major discipline.” Id. at 488 The Court noted that because Attorney General directives have the force of law, OPRA’s personnel records exemption is superseded by same, since OPRA does not abrogate other laws which permit the disclosure of personnel records. Id. at 487. Likewise, the Court held that Directive 2020-06 did not violate OPRA by requiring the Division of State Police, the Division of Criminal Justice, and the Juvenile Justice Commission to publish the names of its law enforcement officers who committed serious misconduct from the previous twenty (20) years. Id. at 488.

In the instant matter, the Complainant relies on the Appellate Division and the Court to assert his ability to receive copies of Mr. Sheehan’s disciplinary violations. However, the Complainant misinterprets the Directives, as well as the findings of both the Court and the Appellate Division. Initially, Directive 2020-05 does not require the disclosure of records pertaining to the misconduct committed by law enforcement officers; rather, Directive 2020-05 only requires the publication of the officer’s name, sanction imposed, and a summary of the complaint filed against same. See In re Att’y Gen. Directives, 246 N.J. at 474. Additionally, Directive 2020-05 is prospective, in that law enforcement agencies are only required to publish misconduct information of the previous twelve (12) months. Id. at 475. Here, the Complainant seeks records from an officer who retired in 2004. Furthermore, although the Complainant notes that Directive 2020-06 requires publishing officers’ names for misconduct dating back twenty (20) years, Directive 2020-06 applies only to State law enforcement agencies. See Id. at 475. The Complainant seeks disciplinary records from a retired officer from Trenton Police Department, a local agency.

Lastly, the Appellate Division held that the information required to be disclosed via the Directives would not be subject to OPRA. The Appellate Division found:

Were this an OPRA case, with third parties seeking the information the Attorney General has determined to release in Directives 2020-5 and 2020-6, those third parties would not be entitled to the information under OPRA. As we recently held in Libertarians for Transparent Gov’t v. Cumberland Cty., 465 N.J. Super. 11, 13, 20-21, 238 A.3d 1135, 2020 N.J. Super. LEXIS 211 (App. Div. 2020), a public employee’s internal disciplinary records, including “a settlement agreement resolving an internal disciplinary action,” are not “government records” under

⁶ In re Att’y Gen. Law Enf’t Directive Nos. 2020-5 & 2020-6, 465 N.J. Super. 111 (App. Div. 2020).

OPRA but instead are classified as "personnel record[s] exempt from disclosure under section 10 of the statute." The Attorney General has likewise taken pains to make clear that Directives 2020-5 and 2020-6 were issued "pursuant to the Attorney General's authority to ensure the uniform and efficient enforcement of the laws and administration of criminal justice throughout the State" and are not to be construed "to create any substantive right that may be enforced by any third party."

[In re Att'y Gen. Directives, 465 N.J. Super. at 139-40.]

Thus, as a third party the Complainant may not refer to the Directives as establishing a right of access to records, even if the Directives required the publication of police officers' disciplinary records. As such, in accordance with the prevailing case law, the GRC agrees that a lawful denial of access occurred, as the requested records are exempt under N.J.S.A. 47:1A-10 and the IAPP. Merino, GRC 2003-110.

Accordingly, the Custodian lawfully denied access to the Complainant's OPRA request seeking disciplinary records of a retired police detective. N.J.S.A. 47:1A-6. Such records are exempt from disclosure under OPRA's personnel records exemption and the IAPP. N.J.S.A. 47:1A-10; Rivera, 250 N.J. 124; Merino, GRC 2003-110. Furthermore, Directives 2020-05 and 2020-06 do not confer a substantive right of access to third parties. In re Att'y Gen. Directives, 465 N.J. Super. 139-40.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to the Complainant's OPRA request seeking disciplinary records of a retired police detective. N.J.S.A. 47:1A-6. Such records are exempt from disclosure under OPRA's personnel records exemption and the Internal Affairs Policies and Procedures. N.J.S.A. 47:1A-10; Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124 (2022); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). Furthermore, the Attorney General's Law Enforcement Directive Nos. 2020-05 and 2020-06 do not confer a substantive right of access to third parties. In re Att'y Gen. Law Enf't Directive Nos. 2020-5 & 2020-6, 465 N.J. Super. 111, 139-40 (App. Div. 2020), aff'd, 246 N.J. 462 (2021).

Prepared By: Samuel A. Rosado
Staff Attorney

October 27, 2022