



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 29, 2022 Government Records Council Meeting

Richard Battaglia
Complainant

Complaint No. 2021-210 and 2021-211

v.

Hanover Township Police Department (Morris)
Custodian of Record

At the September 29, 2022 public meeting, the Government Records Council (“Council”) considered the September 22, 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:

1. The Custodian and Ms. Hertzig responded in writing to the subject OPRA requests providing a specific lawful basis for denying access to each and included their names and dates on which the responses were proffered. Thus, both responses were sufficient and no violation of OPRA occurred. N.J.S.A. 47:1A-5(g); Valdes v. N.J. Dep’t of Educ., GRC Complaint No. 2010-256 (March 2012).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request No. 1. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The records sought in OPRA request No. 2 are exempt from disclosure under OPRA 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). Thus, the Custodian lawfully denied access to the subject OPRA request. 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 29th Day of September 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: October 6, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2022 Council Meeting**

**Richard Battaglia¹
Complainant**

**GRC Complaint No. 2021-210
and 2021-211²**

v.

**Hanover Township Police Department (Morris)³
Custodial Agency**

Records Relevant to Complaint:

OPRA Request No. 1:⁴ Copies of “[a]ll patrol vehicle video recorder footage and body attached microphone audio covering the duration” of a traffic stop involving the Complainant on May 20, 2020.

OPRA Request No. 2:⁵ Copies of “[a]ny and all complaint, discipline and misconduct materials (sic) and records” regarding Sergeant Anthony Vitanza “for the last 20 years.”

Custodian of Record: Joseph A. Giorgio

Request Received by Custodian: July 14, 2021

Response Made by Custodian: July 23, 2021; August 2, 2021

GRC Complaint Received: August 30, 2021

Background⁶

Request and Response:

On July 14, 2021, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On July 23, 2021, the Custodian responded in writing advising that an extension of time until July 30, 2021 would be required for OPRA request No. 2 due to the voluminous nature of the Complainant’s OPRA request. On July 29, 2021, the Custodian responded in writing to OPRA request No. 2 denying access based on OPRA and a multitude of precedential case law. N.J.S.A. 47:1A-10; Libertarians for Transparent Gov’t v. Cumberland Cnty., 465 N.J. Super. 11, 20 (App. Div. 2020); Gannett Satellite Info.

¹ No legal representation listed on record.

² These complaints have been consolidated due to commonality of parties and issues.

³ Represented by Susan C. Sharpe, Esq., of Dorsey & Semrau, LLC (Boonton, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2021-210.

⁵ This OPRA request is the subject of GRC Complaint No. 2021-211.

⁶ 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.

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Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). The Custodian noted that per In Re: Attorney Gen. Law Enf't Directive Nos. 2020-5 & 2020-6, 244 N.J. 447 (2020), the Hanover Township Police Department (“HTPD”) posted information related to personnel major discipline on its website and provided a link thereto.

On August 2, 2021, OPRA Coordinator Diane Hertzig responded in writing to OPRA request No. 1 on behalf of the Custodian stating that no responsive records existed.

Denial of Access Complaint:

On August 30, 2021, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council (“GRC”). The Complainant argued that the Township of Hanover (“Township”) unlawfully denied access to his OPRA requests as part of a plot to “destroy evidence, obstruct justice and become accessories with an abusive and dangerous police patrolman.” The Complainant argued that the records sought related to an interaction with Sgt. Vitanza and an allegation that he littered in a parking lot.

The Complainant contended that the Township “made the police cruiser video recordings material disappear” and unlawfully withheld disciplinary records that are subject to “immediate and automatic turnover” to the public upon demand. The Complainant also argued that the Custodian violated OPRA by failing to identify the specific lawful basis for denying his requests on the form, as well as failing to sign and date same.

Statement of Information:

On October 5, 2021, the Custodian filed a Statement of Information (“SOI”) for GRC 2021-210 and 2021-211 attaching legal certifications from Deputy Clerk Krista DiGiorgio, Sergeant John Schauder, and Ms. Hertzig. The Custodian certified that the Complainant hand-delivered and he received both OPRA requests on July 14, 2021. The Custodian certified that same were forwarded to HTPD. Hertzig Cert. ¶ 2. The Custodian certified that he worked with Ms. Hertzig to provide responses to the Complainant, including an extension letter relevant to OPRA request No. 2 on July 23, 2021. The Custodian certified that he responded to OPRA request No. 2 in writing on July 29, 2021 denying access to any responsive records under N.J.S.A. 47:1A-10 and relevant case law. The Custodian further certified that Ms. Hertzig responded in writing on his behalf on August 2, 2021 denying access to OPRA request No. 1 because no responsive records existed.

The Custodian asserted that he lawfully denied access to OPRA request No. 1 because no responsive records existed. The Custodian noted that the Complainant already previously sought recordings as part of a discovery request sent to the Township on November 19, 2020. Schader Cert. ¶ 3. The Custodian averred that the Township responded to that demand advising that no recordings existed because no mobile video recordings (“MVR”) were created during the interaction and HTPD was not yet equipped with body-worn cameras (“BWC”). The Custodian further asserted that after receiving the subject OPRA request Sgt. Schauder called the

Complainant and again advised that no recordings existed due to the forgoing reasons. Schauder Cert. ¶ 4.

The Custodian further asserted that he lawfully denied access to OPRA request No. 2. First, the Custodian argued that the request was invalid on its face because it sought generic discipline records regarding Sgt. Vitanza over a twenty (20) year period. Doe v. Rutgers State Univ. of N.J., 466 N.J. Super. 14, 27 (App. Div. 2021); Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian also argued that the inclusion of “any and all” has been identified as invalid by the courts. See Shipyard Assoc's, LP v. City of Hoboken, 2015 N.J. Super. Unpub. LEXIS 2117 (App. Div. 2015). The Custodian next argued that any responsive records are clearly exempt from access under OPRA. N.J.S.A. 47:1A-10; Gannett, 467 N.J. Super. 385; Libertarians, 465 N.J. Super. 11. The Custodian noted that the Complainant included “as mandated by the Supreme Court” in his OPRA request, which may refer to In Re: AG, 244 N.J. 447. The Custodian stated that In Re: AG only required police departments to release certain limited information about disciplinary actions that resulted in “major discipline” beginning after June 19, 2020 subject to additional court review. The Custodian noted that, in accordance with that decision, he provided the Complainant a website link to HTPD’s public report.

The Custodian noted that in closing, the Township’s interactions with the Complainant have been “confrontational.” The Custodian noted that the Complainant refused to provide a method of delivery as part of his request, refused response letters upon retrieving them from the Township, and often engaged in threatening and inappropriate language. DiGiorgio Cert.

Analysis

Sufficiency of Response

A valid response to an OPRA request is set forth in N.J.S.A. 47:1A-5(g). OPRA states that a custodian shall indicate the specific basis for non-compliance with an OPRA request on the request form itself and provide such to the requestor pursuant to N.J.S.A. 47:1A-5(g). This provision of OPRA also states that a custodian must sign and date the form and provide the requestor a copy thereof.

In Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2010-256 (March 2012), the complainant contended that the custodian violated OPRA by failing to respond directly on the submitted OPRA request (citing Paff v. Twp. of Old Bridge, Complaint No. 2005-123 (Interim Order April 7, 2006)). In the SOI, the custodian certified that upon receipt of the OPRA request, it was entered into a tracking system. The custodian further certified that the custodian at that time subsequently responded in writing through said system inclusive of his signature. The Council held that no violation of OPRA occurred reasoning that:

[D]espite the language in N.J.S.A. 47:1A-5(g) regarding a custodian’s response to an OPRA request being on the official OPRA request form, the Council routinely recognizes a custodian’s written response to a request even when same is not on the official OPRA request form. See Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009) (holding that requestors should continue to use public agencies’

OPRA request forms when filing requests and stating that custodians shall not withhold records if a request is not on an official OPRA request form).

[Id. at 6. See also Renna v. Twp. of Warren (Somerset), GRC Complaint No. 2008-40 (Interim Order dated November 19, 2008).]

Here, the Complainant contended that the Custodian violated OPRA by failing to identify the specific lawful basis for denial on and signing and dating his submitted OPRA request form. In the SOI, the Custodian certified that himself and Ms. Hertzig responded in writing to both OPRA requests denying access to them and providing the reasons therefor. The Custodian included as part of both SOIs copies of the aforementioned written responses. Those responses also included dates and the identification of the responder. Thus, and consistent with Valdes, GRC 2010-256, the Custodian and Ms. Hertzig did not violate OPRA because they responded to the Complainant's OPRA requests in writing and included a specific basis for denial, the respondent's name, and a date.

Accordingly, the Custodian and Ms. Hertzig responded in writing to the subject OPRA requests providing a specific lawful basis for denying access to each and included their names and dates on which the responses were proffered. Thus, both responses were sufficient and no violation of OPRA occurred. N.J.S.A. 47:1A-5(g); Valdes, GRC 2010-256.

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 Request No. 1

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA request No. 1 sought video and audio recordings from his interaction with Sgt. Vitanza on May 20, 2020. Ms. Hertzig responded in writing on August 2, 2021 advising that no responsive records existed. This complaint followed, wherein the Complainant made multiple allegations regarding spoliation and obstruction of justice. In the SOI, the Custodian certified that no responsive records existed because no MVR was created during the interaction and HTPD was not yet equipped with BWCs at that time. The Custodian also noted that the Complainant had been previously advised of the non-existence of these records in response to a discovery request in November 2020.

A review of the facts available to the GRC in this case support that the Custodian lawfully denied access to OPRA request No. 1 on the basis that no records existed. Specifically, the Custodian has certified to this fact and included evidence of same in the response. Additionally, the Custodian supplemented his certification by noting the consistency in the Township's response

to a November 19, 2020 discovery request. Further compelling evidence exists in the Township's assertion that no MVR footage was created and that HTPD was not equipped with BWC cameras on May 20, 2020. Thus, in the absence of any competent, credible evidence to the contrary, a finding that no records existed is appropriate here.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request No. 1. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

OPRA Request No. 2

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).

Further, 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 Internal Affairs Policy & Procedures (“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 provides that “[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 (August 2020). 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).

Here, the Complainant’s OPRA request No. 2 sought access to “[a]ny and all complaint, discipline and misconduct materials (sic) and records . . . for [the] last 20 years,” noting that disclosure was “mandated by the Supreme Court.”⁷ The Custodian responded in writing denying access to the subject OPRA request under N.J.S.A. 47:1A-10, Libertarians, 465 N.J. Super. 11,⁸ and Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), among other precedential case law. The Complainant subsequently filed this complaint alleging that the requested records were readily available to the public upon request. In the SOI, the Custodian maintained his position that the records sought are exempt from disclosure.

Upon review of the facts here and all available case law, the GRC finds that a lawful denial of access occurred. Specifically, the GRC have long held that the records sought were exempt under both N.J.S.A. 47:1A-10 and the IAPP. Merino, GRC 2003-110. Additionally, and contrary to the Complainant’s assertion, the Supreme Court very recently reaffirmed the forgoing conclusion in Rivera v. Union Cnty. Prosecutor’s Office, 250 N.J. 124 (2022).⁹ For these reasons, the GRC is satisfied that the Custodian lawfully denied access to the subject OPRA request.

⁷ The GRC notes that the Complainant’s OPRA request is invalid on its face because it sought “[a]ny and all documents . . . materials (sic) and records. . .” MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). See also Weiner v. Cnty. of Essex, GRC Complaint No. 2020-145 (September 2021).

⁸ This decision holding that an employee settlement agreement was exempt from disclosure under the personnel exemption was reversed by the Supreme Court in Libertarians for Transparent Gov’t v. Cumberland Cnty., 250 N.J. 46 (2022).

⁹ The GRC notes that the Court also held that the records at issue there could be disclosed under the “common law” right of access but was clear that same were not disclosable under OPRA. To this end, the GRC is compelled to note that it has no authority over the common law right of access and thus no ability to determine whether responsive records should have been disclosed thereunder. N.J.S.A. 47:1A-7(b); see also Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).

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Accordingly, the records sought in OPRA request No. 2 are exempt from disclosure under OPRA and the IAPP. N.J.S.A. 47:1A-10; Rivera, 250 N.J. 124; Merino, GRC 2003-110. Thus, the Custodian lawfully denied access to the subject OPRA request. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian and Ms. Hertzig responded in writing to the subject OPRA requests providing a specific lawful basis for denying access to each and included their names and dates on which the responses were proffered. Thus, both responses were sufficient and no violation of OPRA occurred. N.J.S.A. 47:1A-5(g); Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2010-256 (March 2012).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request No. 1. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The records sought in OPRA request No. 2 are exempt from disclosure under OPRA 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). Thus, the Custodian lawfully denied access to the subject OPRA request. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

September 22, 2022