



CITY OF BRIGANTINE

Lynn Sweeney, RMC, CMR
City Clerk/Registrar

August 10, 2022

"James"

c/o opra+request-34222-0427e23c@requests.opramachine.com

Re: July 27, 2022 OPRA request

Dear James:

The City of Brigantine Clerk's Office received your Open Public Records Act and common law right of access request through the OPRA Machine on Wednesday July 27, 2022. On August 3, 2022, the City informed you that it needed an additional seven days to respond to your request (August 12, 2022). This response is provided with the extension period.

Your OPRA and common law request seeks:

The final report or summary report of any internal investigation of Chief Timothy Reed in 2015 and 2016. This will include findings of the investigation, recommendations for discipline and any agreements made between the City and Mr. Reed for separation.

OPEN PUBLIC RECORDS ACT

As you cited to Rivera v. Union County Prosecutor's Office (A-58-20), you are likely aware that Internal Affairs investigations, if any, are not subject to release under OPRA. Here, there was no Internal Affairs investigation conducted by either the County Prosecutor's Office or the local police department.

The City engaged the services of a law firm to conduct an independent investigation concerning grievances raised by employees. The law firm produced a report to City with its findings and recommendations. That report is not subject to release under OPRA for the below reasons:

Advisory-Consultative-Deliberative - The advisory, consultative or deliberative ("ACD") privilege exception is imbedded in the definition of a "government record" under OPRA:

'Government record' or 'record' means any paper, ... [or] information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business ... The terms **shall not** include inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1. (Emphasis added).

In O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April

2006), the Government Council stated that “neither the statute nor the courts have defined the terms... ‘advisory, consultative, or deliberative’ in the context of the public records law.” The GRC looked to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure government material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

The New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process and its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009).

The City contracted a legal firm to provide investigation, analysis and recommendations to the City about employee complaints. Advisory, consultative or deliberative materials include memorandum and reports prepared by employees and consultants seeking to create or influence policy and advise decision-makers on such matters. The New Jersey Supreme Court has ruled that a record is entitled to deliberative-process protection when its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009). Here, the documents are deliberative in nature, contain opinions, recommendations, and advice about agency policies and are thus protected from disclosure.

Grievance - OPRA further excludes from release document that contain:

“...information generated by or on behalf of public employers or public employees in connection with any ... grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position...” N.J.S.A. 47:1A-1.1.

Further, N.J.S.A. 47:1A-10 provides in pertinent part that “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 public record and shall not be made available for public access...”

Therefore, because you have requested a record generated on behalf of a public employer in connection with a grievance filed against an employee, the requested investigative report is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10.

Agreement for Separation – There is no separation agreement. The Chief submitted a letter of resignation in January 2016, a copy of that letter is attached.

COMMON LAW RIGHT OF ACCESS

Having responded in part and also partially denied your request under OPRA, we next turn to the common law right of access. The document identified above was not an Internal Affairs report so Rivera v. Union County is in applicable. Instead, the City evaluates this request under the standard common law right of access balancing test found in Loigman v. Kimmelman, 102 N.J. 98, 113 (1985). This test includes six parts and balances non-disclosure with your stated purpose that “Mr. Reed now holds a position of high authority as Chief Warrant Officer of Atlantic County. The right of the public’s interest in transparency of Mr. Reed’s past

behavior while in positions of high authority clearly outweighs Mr. Reed's right to confidentiality." Here we analyze your interest against non-disclosure:

1. The extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government.
 - Release of this document would quell any future public employees from seeking to identify issues in the work place. While redactions are possible, anyone close to the matter can analyze the content and determine who made the complaint.
2. The effect disclosure may have upon person who have given such information and whether they did so in reliance that their identities would not be disclosed.
 - Witnesses were told by the investigator that their comments and discussions would be kept confidential. Violating that initial communication is unfair to those who made such statement and will further prevent individuals from coming forward as a grievant or witnesses in the future.
3. The extent to which agency self-evaluation, program improvement or other decision-making will be chilled by the disclosure.
 - The attorneys report was generated to identify potential problems within the department. The City may not seek future services if reports like this are required to made available to the public.
4. The degree to which the information sought includes factual data as opposed to evaluative reports of policymakers
 - The document is evaluative and summarizes statements by witnesses. It does not contain factual data which could otherwise be released.
5. Whether any finding of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency;
 - The report contains no summary findings or conclusion upon which remedial actions are required.
6. Whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials
 - This is not applicable to this common law request.

Based on the above, the City believes the common law balancing test weighs in favor of non-disclosure under the common law, however, even considering the "extra factors" raised in Rivera v. Union County, release is still not appropriate:

1. the nature and seriousness of the misconduct;
2. whether the alleged misconduct was substantiated;
3. the nature of the discipline imposed;

4. the nature of the official's position; and
5. the individual's record of misconduct.

Here, while the allegation in the complaint were sufficiently serious that the City paid for an independent investigator to review, the report does not conclude that the alleged misconduct was substantiated, there was no discipline imposed and the employee has no significant record of misconduct. Even based upon these factors, the City does not believe a six-year old investigation report should be released under this balancing test.

For these reasons, with the exception of the resignation letter which has been provided, the City denies the remainder of your request under OPRA and the common law right of access.

Sincerely,

A handwritten signature in black ink, appearing to read "Lynn Sweeney", written in a cursive style.

Lynn Sweeney
Records Custodian

POLICE DEPARTMENT
CITY OF BRIGANTINE

BRIGANTINE



NEW JERSEY



08203

Timothy J. Reed
Chief of Police

CITY HALL
1417 W. BRIGANTINE AVENUE
PHONE: (609) 266-7414
FAX: (609) 266-1066

MEMORANDUM

TO: Ed Stinson, City Manager

FROM: Chief Timothy J. Reed

DATE: January 7, 2016

SUBJECT: Retirement

I would like to express my gratitude for the opportunity to work with the Brigantine Police Department for the past 27 years. This decision has been a struggle for me, and one that has been difficult to make, as I believe in this department and have been committed to serving this community in a professional and progressive manner. But one of the most important things to me is my family, and they need all my attention right now.

I will be out sick starting January 11, 2016 to address medical issues that have recently arisen with my family, and retiring March 1 2016.

Thank you for your support and that of the City Council. I also wish to thank you for the opportunity to serve this fine City and the excellent employees of the Brigantine Police Department.

Again I would like to say what a pleasure and privilege it has been to serve the City of Brigantine and its residents especially in my role as Chief of Police.

God Bless..

Respectfully,

Chief Timothy J. Reed

cc: Mayor P. Guenier
Members of City Council
D. Efrati, Personnel Director