



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

June 27, 2007 Government Records Council Meeting

Ronald Long
Complainant

Complaint No. 2007-99

v.

NJ Department of Law & Public Safety,
Division of NJ State Police
Custodian of Record

At the June 27, 2007 public meeting, the Government Records Council (“Council”) considered the June 20, 2007 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 Executive Director respectfully recommends that the Council find that:

1. The Custodian complied with the provisions of N.J.S.A. 47:1A-5.i. by providing a written response to the Complainant’s request denying access to government records within seven (7) business days of receiving Complainant’s OPRA request.
2. There was no unlawful denial of access because the requested records are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. and Executive Order No. 48, and are exempt from disclosure.

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 2007

Vincent Maltese, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 5, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2007 Council Meeting**

**Ronald Long¹
Complainant**

GRC Complaint No. 2007-99

v.

**N. J. Department of Law & Public Safety, Division of N. J. State Police²
Custodian of Records**

Records Relevant to Complaint:

All laboratory reports, request forms, log entries and related information with respect to Lab No. 54829H conducted by Laura A. Barbato and Nancy J. Taylor.

Request Made: February 9, 2007

Response Made: March 6, 2007

Custodian: SFC Linda Largey-Whitehead

GRC Complaint Filed: April 23, 2007

Background

February 9, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

March 5, 2007

Letter from Complainant to the GRC. The Complainant claims a deemed denial of records he requested from the New Jersey State Police.

March 6, 2007

Custodian's response to the OPRA request. The Custodian responded to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that the requested records are denied because the records sought were criminal investigatory records. The Custodian referred the Complainant to the New Jersey Court Rules for guidance in seeking the records via the discovery process, should same be applicable.

March 9, 2007

¹ No legal representation listed on record.

² Represented by DAG Kenneth B. Goodman, on behalf of the New Jersey Attorney General.
Ronald Long v. N.J. Department of Law & Public Safety, Division of N.J. State Police, 2007-099 – Findings and Recommendations of the Executive Director

Letter from the Complainant to the GRC. The Complainant claims he was unreasonably denied the records requested from the New Jersey State Police. On this same date, the Complainant sent a letter to the New Jersey State Police Forensic Laboratory seeking the same records which he was already denied previously.

April 23, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA records request dated February 9, 2007
- Copy of United States Postal Service PS Form 3800, Certified Mail Receipt and PS Form 3811, Domestic Return Receipt date stamped February 16, 2007
- Letter from the Complainant to the GRC dated March 5, 2007
- Copy of two page State of New Jersey Government Records Request Receipt
- Letter from the Complainant to the GRC dated March 9, 2007
- Letter from the Complainant to the New Jersey State Police Forensic Laboratory dated March 9, 2007
- Copy of certified mail envelope dated March 20, 2007, addressed to Stuart Rabner, Esq., Attorney General
- Letter from the Complainant to the GRC dated March 19, 2007

The Complainant asserts that he filed another complaint with the GRC concerning this records request. In support of such assertion, he references two letters addressed to the GRC dated March 5, 2007 and March 9, 2007 which were attached to his Denial of Access Complaint.³

The Complainant forwarded his request for government records to the Custodian via certified mail. The Complainant asserts that the denial of his request for government records was untimely because the request date indicated on the request receipt was February 26, 2007, however the received date stamped on the return receipt was February 16, 2007. The Complainant further asserts the denial of his request for government records was unreasonable because the records sought are purported to be business records.⁴

May 2, 2007

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

May 9, 2007

Request for the Statement of Information sent to the Custodian.

³ These letters did not refer to another complaint, but rather, the present complaint.

⁴ Complainant also made an allegation of a fraudulent transaction which has no relevance to his Denial of Access Complaint and is not within the purview of the GRC pursuant to N.J.S.A. 47: 1A-1 et seq. Accordingly, this allegation will not be addressed by the GRC.

May 15, 2007

Custodian's telephone request for a five (5) business day extension of time to return the Statement of Information to the GRC received and granted.

May 18, 2007

Custodian's Statement of Information ("SOI"). The Custodian certifies that there are six (6) records identified as being responsive to the Complainant's request. The Custodian further certifies the Complainant was denied access to each of the six (6) records responsive because they were created as part of a criminal investigation and that lab reports created as part of a criminal investigation are criminal investigatory records exempt from access under OPRA. The records identified as being responsive to the Complainant's request, and the legal basis for such denial, are enumerated in the following table:

List of all Documents Responsive to Complainant's August 10, 2006 OPRA Request	Documents Provided to Complainant, in Whole or in Part and the Date(s) Provided	Documents Not Provided to Complainant, in Whole or in Part w/ General Nature Description	Legal Explanation and Citation for Non-Disclosure
1) New Jersey State Police Special and Technical Services Section, Forensic Science Bureau, Biochemistry Report Bloodstain Analysis dated 2-28-83, Laboratory Number 54829H. (1 page)	None	See 1 st Column	Pursuant to <u>N.J.S.A.</u> 47:1A-1.1, 47:1A-5, and Executive Order No. 48 (1968) (Hughes), the records requested are exempt from public access under OPRA because they are "criminal investigatory records."

2) State of New Jersey Department of Law and Public Safety, Division of State Police, Request for Examination of Evidence, Submitting Agency Atlantic County Sheriff Department dated Jan. 31, 1983. (1 page)	None	See 1 st Column	Pursuant to <u>N.J.S.A. 47:1A-1.1, 47:1A-5,</u> and Executive Order No. 48 (1968) (Hughes), the records requested are exempt from public access under OPRA because they are “criminal investigatory records.”
3) Analyst notes dated Feb 28, 1983. (1 page)	None	See 1 st Column	Pursuant to <u>N.J.S.A. 47:1A-1.1, 47:1A-5,</u> and Executive Order No. 48 (1968) (Hughes), the records requested are exempt from public access under OPRA because they are “criminal investigatory records.”
4) New Jersey State Police, Special and Technical Services Section, Antigen Bloodstain Analysis Sheet. (1 page)	None	See 1 st Column	Pursuant to <u>N.J.S.A. 47:1A-1.1, 47:1A-5,</u> and Executive Order No. 48 (1968) (Hughes), the records requested are exempt from public access under OPRA because they are “criminal investigatory records.”
5) State of New Jersey Department of Law and Public Safety, Division of State Police, Request for Examination of Evidence, Submitting Agency Atlantic County Sheriff Department dated Jan. 31, 1983. (1 page)	None	See 1 st Column	Pursuant to <u>N.J.S.A. 47:1A-1.1, 47:1A-5,</u> and Executive Order No. 48 (1968) (Hughes), the records requested are exempt from public access under OPRA because they are “criminal investigatory records.”

6) New Jersey State Police Special and Technical Services Section, Forensic Science Bureau, Evidence Receipt Log, Dated Jan. 31, 1983. (1 page)	None	See 1 st Column	Pursuant to <u>N.J.S.A. 47:1A-1.1, 47:1A-5, and Executive Order No. 48 (1968) (Hughes)</u> , the records requested are exempt from public access under OPRA because they are “criminal investigatory records.”
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The Custodian argues that the denial of access is lawful pursuant to N.J.S.A. 47:1A-1.1, 47: 1A-5, and Executive Order No. 48 (1968) (Hughes), because the records requested are exempt from public access as criminal investigatory records.⁵ The Custodian, citing Paff v. New Jersey Department of Labor, 379 N.J. Super. 346 (App. Div. 2005), asserts that criminal investigatory records are *per se* exempt from access under OPRA; therefore they are not subject to *in camera* review.⁶ The Custodian also relies upon Janeczko v. Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 80 (June 2004), affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004 (Docket No. A-309-03T1), to argue that the aforementioned exemption does not permit access to criminal investigatory records even after the investigation is complete.⁷ The Custodian further asserts that N.J.S.A. 47:1A-5 and N.J.S.A. 47: 1A-9 provide that a government record exempt from public access by an Executive Order of the Governor is not subject to public access and Executive Order No.48 (1968) (Hughes) exempts from public disclosure criminal investigative files. The Custodian asserts that the requestor is seeking access to records that are exempt from access by Executive Order No. 48.⁸

The Custodian’s SOI did not include a copy of the OPRA records request or indicate the date on which the Custodian responded to the OPRA records request upon which the complaint was based.

May 22, 2007

Letter from GRC to Custodian’s Counsel. The GRC requested a certified response to the incomplete SOI item number six, the copy of the OPRA records request, item number eight, and the date on which the Custodian responded to the OPRA records request.

May 23, 2007

E-mail from the Custodian’s Counsel to the GRC. The Custodian remitted the copy of the OPRA records request, the date on which the Custodian responded to the OPRA records request and a legal certification. This remittance provided the GRC with a fully executed SOI.

⁵Letter Brief, page 4.

⁶ *Id.* at 5.

⁷ *Id.* at 6.

⁸ *Id.* at 7.

May 24, 2007

Letter from the GRC to the Complainant and the Custodian's Counsel. The GRC requested a certification as to the parties' knowledge, if any, regarding redactions made to the request form.

May 29, 2007

Certification of the Custodian. The Custodian certifies she did not send the request form to the Complainant. The Custodian also certifies that when the request form was received from the Complainant, it already contained redactions, including the redaction of the agency names from the back of the form. The Custodian further certifies that the file was reviewed to determine who made the redactions and why they were made, but the Custodian was unable to make such determination and has no knowledge of how or why the information was redacted.

June 6, 2007

Certification of the Complainant. The Complainant certifies that he requested an OPRA request form from the New Jersey State Police and received a form with blacked out portions. The Complainant further certifies he has no knowledge as to what was blacked out, why it was blacked out or who blacked it out. The Complainant attached a copy of a blank request form to his certification and certified he received the form as it appears attached to the certification.⁹

Analysis

Whether the Custodian responded to Complainant's OPRA request within the statutorily mandated seven (7) business days?

OPRA provides that:

“Unless a shorter time period is provided...a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days *after receiving* the request ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

The Complainant's assertion that the Custodian's response to his February 9, 2007 OPRA request was untimely is not supported by the evidence of record. The Custodian is required to respond granting or denying access to the Complainant's OPRA request within seven (7) business days of receiving the request pursuant to N.J.S.A. 47:1A-5.i. The evidence reveals the Custodian received the request on February 26, 2007 and responded by denying access to the Complainant on March 6, 2007, a period of time encompassing six (6) business days. Since the Custodian responded denying access to

⁹ The GRC has been unable to determine how or why the mailing information was partially redacted from the Complainant's request form, and whether there was a nexus between the altered form and the delay in mail delivery mentioned in his complaint.

the Complainant within (7) business days of receiving Complainant's OPRA request, the Custodian has complied with the provisions of N.J.S.A. 47:1A-5.i.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

".....government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added) N.J.S.A. 47:1A-1.1.

OPRA defines a government record as:

" ... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, 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...or that has been received in the course of his or its official business ..." N.J.S.A. 47:1A-1.1.

OPRA also provides:

"A government record shall not include ... *criminal investigatory records...*" (Emphasis added) N.J.S.A. 47:1A-1.1.

OPRA defines a criminal investigatory record as:

" ... a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding..." N.J.S.A. 47:1A-1.1.

Regarding Executive Orders, OPRA provides that:

".....government records shall be subject to public access unless exempt from such access by...*Executive Order of the Governor...*" (Emphasis added.) N.J.S.A. 47:1A-1.

OPRA also provides:

"The provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...Executive Order of the Governor. N.J.S.A. 47:1A-9.a.

The Custodian identified the records responsive to the request to be six (6) lab reports. The Custodian certifies that these lab reports are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1., and therefore are exempt from disclosure. The Complainant disagrees with the Custodian's denial of his request for government records.

He alleges that the records sought should be considered business records, and, as such, subject to public access.

In the matter before the Council, the Complainant seeks blood analysis laboratory reports. The GRC has previously found that laboratory reports prepared in the course of a police investigation, and otherwise meeting statutory criteria, could properly be classified as criminal investigatory reports. The GRC considered records held by a law enforcement agency in Glen Blue for Labor Management Concepts, Inc. v. Wall Township, GRC Complaint No. 2002-47 (August 2003). In that matter, the GRC determined that “a record which is not required to be made, maintained or kept on file” includes commonly made police records such as incident reports, supplemental reports and operations reports.

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). The Council found that police shooting homicide records sought by the requestor were considered criminal investigatory records, and were therefore exempt from disclosure. Specifically, the Council found that under OPRA, criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed.

In Glen Blue, *supra*, the requestor was seeking, among other things, lab reports related to blood alcohol content. Although the GRC found the records were releasable because the incident under investigation was not a criminal matter, the GRC determined that “where the ... violation is punishable as a crime, records related to such charge would fall within the criminal investigatory records exemption.” Subsequently, in McCrone v. Burlington County Prosecutor’s Office, GRC Complaint No. 2005-146 (November 2005), the GRC found that blood analysis laboratory reports related to a criminal death by auto investigation were exempt from public access.

Because the analysis indicates the records sought are criminal investigatory records, they are not government records as defined under OPRA. Only government records are subject to public access; therefore, the records are not subject to public access.

In this matter, since the records sought were part of a 1983 investigation, it is important to note that the criminal investigatory records exemption continues to survive the conclusion of the investigation. In Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004, the GRC determined:

“[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete. The exemption applies to records that conform to the statutory description, without reference to the status of the investigation and the Council does not have a

basis to withhold from access only currently active investigations and release those where the matter is resolved or closed.”

The Custodian cites the proscriptions within Executive Order No. 48 (1968) (Hughes), along with N.J.S.A. 47: 1A-5 and N.J.S.A. 47:1A-9. as further grounds for denying Complainant access to the records sought.

Executive Order No. 48 (1968) specifically addresses investigative files in the possession of the New Jersey State Police. The Order provides, in relevant part, that:

No person having custody of State Police investigative files shall turn over the same to any other person who is not a member of a duly recognized law enforcement agency unless ordered to do so by a court of competent jurisdiction or by the Governor of the State of New Jersey.

The GRC has previously found that Executive Order No. 48 barred access to criminal investigatory records pursuant to N.J.S.A. 47:1A-9. In Johnson/Press of Atlantic City v. New Jersey Division of State Police, Complaint No. 2004-46 (June 2004), the GRC determined that Executive Order No. 48 was relevant pursuant to N.J.S.A. 47:1A-9 as a basis for denial of access to State Police criminal investigatory records. The same provision was again upheld by the GRC to exempt criminal investigatory records from disclosure in Harvey v. Division of State Police, Complaint No. 2004-65 (July 2004).

Here, the records being sought are New Jersey State Police investigative records. The Complainant is not a member of a law enforcement agency; therefore, short of a court order or gubernatorial directive, this Executive Order would bar release of investigative files to him.

OPRA places the responsibility on the Custodian to prove that a denial of access is lawful. Specifically, OPRA provides:

“ The public agency shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. 47:1A-6.

In this case, the evidence reveals the Custodian has met that burden. Accordingly, there was no unlawful denial of access, as the requested records are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1., and as such, they are exempt from disclosure.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. The Custodian complied with the provisions of N.J.S.A. 47:1A-5.i. by providing a written response to the Complainant’s request denying access to government records within seven (7) business days of receiving Complainant’s OPRA request.

2. There was no unlawful denial of access because the requested records are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. and Executive Order No. 48, and are exempt from disclosure.

Prepared By:

John E. Stewart
Case Manager/*In Camera* Attorney

Approved By:

Catherine Starghill, Esq.
Executive Director

June 20, 2007