



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 25, 2017 Government Records Council Meeting

Kevin S. Reagan
Complainant

Complaint No. 2016-28

v.

Camden County Prosecutor's Office
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council ("Council") considered the July 18, 2017 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 did not unlawfully deny access to responsive records because same are exempt from disclosure under the IAPP. N.J.S.A. 47:1A-6; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); Rivera v. Borough of Keansburg Police Dep't (Monmouth), GRC Complaint No. 2007-222 (June 2010); Camarata v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2014-127 (June 2015).
2. The Custodian lawfully denied access to the responsive medical records that were provided to a grand jury pursuant to a subpoena, as well as the subpoena itself, because the records responsive to the request are a grand jury subpoena and "records relating to grand jury proceedings," which are excluded from public access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); R. 1:38-3 (c)(4); Byrnes v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2009-323 (June 2011).
3. The Custodian has borne his burden of proof that the denial of access to the case initiation sheet, summary, memorandum, and closure form was lawful pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6; Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Solloway v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-39 (January 2013); Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013). Specifically, these records meet the two-prong definition of a criminal investigatory record and are therefore not disclosable under OPRA.
4. The handwritten memorandum and Post-It® notes are exempt as "inter-agency or intra-agency advisory, consultative, or deliberative" material O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007); Sage v. Freehold Reg'l High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (Final Decision dated



November 29, 2011). The Custodian has therefore lawfully denied access to the handwritten records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.

5. The Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking video tapes because he certified in the Statement of Information, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *see* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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 July, 2017

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: July 28, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Kevin S. Reagan¹
Complainant**

GRC Complaint No. 2016-28

v.

**Camden County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Copies of "files, records and video tapes which should be dated June 6, 2008" as part of the Complainant's case.

Custodian of Record: William Staas
Request Received by Custodian: November 24, 2015
Response Made by Custodian: November 25, 2015
GRC Complaint Received: January 26, 2016

Background³

Request and Response:

On November 17, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On November 25, 2015 the Custodian responded in writing, denying access to the Complainant's OPRA request. The Custodian first stated that no videotape existed within Special Prosecutor File ("SPF") No. 0161-08-06. The Custodian further stated that the remainder of the records were exempt under the criminal investigatory exemption and because they pertained to an internal affairs ("IA") investigation. N.J.S.A. 47:1A-1.1; Executive Order No. 69 (Gov. Whitman, 1997) ("EO 69"); New Jersey Attorney General Guidelines ("AG Guidelines").

Denial of Access Complaint:

On January 26, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he sought the responsive records to prove that he was targeted wrongfully during the incident in question on June 6, 2008.

¹ No legal representation listed on record.

² Represented by Howard Goldberg, Esq. (Camden, NJ).

³ 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.

The Complainant contended that he was unlawfully denied access to requested video tapes and “criminal background reports” and that those records should have been disclosed.

Statement of Information:⁴

On June 8, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 24, 2015. The Custodian certified that he obtained SPF No. 0161-08-05 from the Special Prosecution Unit and reviewed it.⁵ The Custodian affirmed that the CCPO conducted a criminal investigation to determine whether a Delaware River Port Authority (“DRPA”) officer committed a criminal act. The Custodian certified that, in conducting this investigation, the CCPO reviewed criminal investigatory records and IA records. The Custodian certified that he responded in writing on November 25, 2015, denying access to the Complainant’s OPRA request because no video existed and all remaining records were exempt from disclosure.

Regarding the requested video tapes, the Custodian stated that he denied access to them because no records exist within the Camden County Prosecutor’s Office. (“CCPO”). The Custodian certified that CCPO never received or a reviewed a video tape in connection with its investigation. The Custodian stated that if the video does exist, DRPA might possess it.

Regarding the remainder of the records contained within SPF No. 0161-08-05, the Custodian certified that he sent three (3) letters to the Complainant on May 19, 2016. The Custodian noted that all three (3) letters were originally addressed or cc’ed to the Complainant in the course of CCPO’s investigation. The Custodian further certified that he denied access to the following records:

1. DRPA Internal Investigation Case, DRPA 08-0606 (30 pages) – criminal investigatory record and exempt under the Attorney General’s Internal Affairs Policy & Procedure (“IAPP”).⁶
2. Medical records produced by Kennedy Hospital pursuant to a Grand Jury subpoena (109 pages) – Grand Jury records NJ Court Rules R. 3:6-7.1.
3. Grand Jury subpoena to Kennedy Hospital dated June 23, 2008 (2 pages) - Grand Jury records R. 3:6-7.1.
4. Handwritten memorandum from the Custodian to Lt. A. Turner regarding criminal investigation assignments dated September 11, 2008 (1 page) – “Inter-agency or intra-agency advisory, consultative, or deliberative” (“ACD”) material containing work product, mental impressions, and investigative actions.
5. Special Prosecutions Case Initiation Sheet (1 page) – criminal investigatory record/IAPP.
6. CCPO Case Summary (1 page) – criminal investigatory record/IAPP.

⁴ On February 24, 2016, the complaint was referred to mediation. On May 19, 2016, the complaint was referred back to the GRC for adjudication.

⁵ The Custodian noted that he was assigned to SPF No. 0161-08-05 originally in 2008 when he served as Assistant Prosecutor in the Special Prosecutions Unit.

⁶ The IAPP was promulgated via the Division of Criminal Justice in the New Jersey Department of Law and Public Safety. All GRC references to the IAPP are to the July 2014 revision of the document.

7. Memo to file from Lt. Turner regarding conversation with DRPA IA officer Sgt. Ray Paterno (1 page) – criminal investigatory record/ACD material.
8. CCPO Closure Form (1 page, double-sided) – criminal investigatory record/IAPP.
9. Five (5) Post-It® notes either undated or with various dates – ACD material.

The Custodian contended that the records in question were clearly exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1. Additionally, the Custodian categorized the remaining records by exemption. The Custodian argued that the IA records within the file were exempt under the IAPP. The Custodian asserted that the grand jury records were not subject to disclosure. N.J.S.A. 47:1A-9(a); R. 3:6-7.1. Finally, the Custodian argued that all notes and handwritten memos were exempt as ACD material. N.J.S.A. 47:1A-1.1.

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.

Files and Records

Initially, the GRC has typically held that a request seeking access to “files” or “records” is invalid because it represents a blanket request for a class of various records. *See* Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008); Bradley-Williams v. Atlantic Cnty. Jail, GRC Complaint No. 2011-232 (December 2012); Reed v. Camden Cnty. Police Dep’t (, GRC Complaint No. 2014-158 (January 2015). However, the GRC declines to find that the portion of the request seeking “files [and] records” in the instant matter is invalid because the Custodian was able to locate finite records. *See* Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012) (holding that a custodian’s ability to locate responsive records “belied any assertion that the request was . . . overbroad”); Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011).

Here, the Custodian identified nine (9) records responsive to the Complainant’s OPRA request. For each responsive item, the Custodian exempted access to all nine (9) records as either criminal investigatory records, ACD material IA records, or grand jury records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; IAPP; R. 3:6-7; R. 1:38-3(c)(4). Based on prevailing case law, the GRC declines to determine that the OPRA request portion seeking “files” or “records” was invalid because the Custodian identified and located responsive records. The GRC will therefore address each record and the applicable exemptions below.

DRPA IA File

The IAPP effectively carries the force of law as applicable to law enforcement agencies. In

O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009), the plaintiff sought a municipality’s Use of Force Reports for a multi-year period. In upholding the trial judge’s decision to disclose the reports, the Appellate Division examined whether the reports were required to be made. After determining that there were no specific statutes or administrative rules requiring the reports to be completed or maintained by a police department, the Court turned to the Attorney General’s Guidelines on the Use of Force (“AG Guidelines”). In concluding that the AG Guidelines did require police departments to prepare Use of Force Reports, the Court stated, “[w]e hold, however, that [AG Guidelines] . . . [have] the force of law for police entities.” Id. at 382 (emphasis added).

However, because the Superior Court determined that Attorney General Guidelines have the force of law for police entities, the IAPP operates to exempt the requested records from disclosure. To that end, the IAPP provides that “[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information.”⁷ See also Rivera v. Borough of Keansburg Police Dep’t (Monmouth), GRC Complaint No. 2007-222 (June 2010)(accepting an Initial Decision of the Office of Administrative Law that internal affairs reports are confidential records); Camarata v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2014-127 (June 2015)(holding that the custodian lawfully denied access to IA investigation records).

Here, one of the responsive records was a DRPA IA case file. The Custodian argued in the SOI that said record was exempt under the IAPP. It is obvious here that the record in question is comparable to those at issue in Rivera, and Camarata. Based on this similarity, the GRC concludes that the Custodian lawfully denied access to said file because it is explicitly exempt under the IAPP.

Therefore, the Custodian did not unlawfully deny access to responsive records because same are exempt from disclosure under the IAPP. N.J.S.A. 47:1A-6; O’Shea, 410 N.J. Super. 371; Rivera, GRC 2007-222; Camarata, GRC 2014-127.

Grand Jury Records

OPRA further states that:

The provisions of [OPRA] *shall not abrogate any exemption* of a public record or government record from public access heretofore *made pursuant to* [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; *Rules of Court*; any federal law; federal regulation; or federal order.

N.J.S.A. 47:1A-9(a) (emphasis added).

New Jersey Court Rules (“Court Rules”) hold that the “requirement as to secrecy of proceedings of the grand jury shall remain as heretofore, and all people other than witnesses . . .

⁷ See IAPP, Internal Affairs Records, Confidentiality, Paragraph 1.

shall be required to take an oath of secrecy before their admission thereto.” R. 3:6-7. A similar Court Rule provides that records relating to grand jury proceedings pursuant to R. 3:6-7 must be kept confidential. R. 1:38-3(c)(4). To that end, the Council has previously held that a custodian lawfully denied access to records included as part of a grand jury investigation. See Maniscalco v. Atlantic Cnty. Prosecutor’s Office, GRC Complaint No. 2012-247 (July 2013); Dunn v. Burlington Cnty. Prosecutor’s Office, GRC Complaint No. 2013-218 (January 2014). Additionally, the Council has previously held that a grand jury subpoena is exempt from disclosure under R. 1:38-3(c)(4). Byrnes v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2009-323 (June 2011).

Here, the Custodian identified two (2) types of grand jury records: medical records produced pursuant to a grand jury subpoena and the actual subpoena. Precedential GRC case law supports the denial. This is especially true for the subpoena, given that the Council determined that a grand jury subpoena is exempt from disclosure in Byrnes, GRC 2009-323.

Accordingly, the Custodian lawfully denied access to the responsive medical records that were provided to a grand jury pursuant to a subpoena, as well as the subpoena itself, because the records responsive to the request are a grand jury subpoena and “records relating to grand jury proceedings,” which are excluded from public access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); R. 1:38-3 (c)(4); Byrnes, GRC 2009-323.

Case Initiation Sheet, Summary, Memorandum, and Closure Form

Criminal investigatory records are exempt from disclosure. N.J.S.A. 47:1A-1.1. A criminal investigatory record is defined 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 . . .” Id.

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 Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). In Janeczko, 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.” See also Solloway v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-39 (January 2013); Reitzler v. Egg Harbor Police Dep’t (Atlantic), GRC Complaint No. 2011-85 (January 2013); Hwang v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-348 (January 2013).

Here, the Custodian identified several records to which he denied access, citing *inter alia* the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1. Those records included prosecution case documents and a memorandum to the file regarding DRPA’s IA investigation. The Custodian certified in the SOI that CCPO conducted a criminal investigation into whether the DRPA officer committed a criminal act during his June 6, 2008 altercation with the Complainant. Based on the foregoing, and in accordance with precedent, the GRC concludes that the evidence of record supports that the CCPO was conducting a criminal investigation regarding the actions of the DRPA officer. Specifically, the record indicates that CCPO initiated an

investigation, obtained DRPA's IA file on the incident, and communicated with the DRPA about their investigation. The evidence of record also supports that CCPO went through the grand jury process and, at some point, closed the criminal investigation. Further, there is no evidence supporting that these records were required to be made, maintained, received, or kept on file by any law. For these reasons, the records in question here meet the two-prong test necessary to be considered exempt under the criminal investigatory exemption.

Accordingly, the Custodian has borne his burden of proof that the denial of access to the case initiation sheet, summary, memorandum, and closure form was lawful pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-6; Janeczko, GRC 2002-79, *et seq.*; Solloway, GRC 2011-39; Hwang, GRC 2011-348. Specifically, these records meet the two-prong definition of a criminal investigatory record and are thus not disclosable under OPRA.

Handwritten Internal Memorandum and Notes

The Appellant Division held in O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007), that handwritten notes of a meeting were exempt from disclosure as ACD material. Subsequent to the Appellate Division's decision, in Sage v. Freehold Reg'l High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (Final Decision dated November 29, 2011), the Council was tasked with determining whether a student's handwritten notes were exempt as ACD material. There, the complainant argued that O'Shea did not apply because the notes were not taken during a public meeting and thereafter used as a memory aid. However, the Council conducted an *in camera* review and held that "because the handwritten student note contain[ed] information of an alleged incident . . . and was used in preparation of . . . Final Incident Report." Id. (Final Decision dated November 29, 2011) at 6. *See also* Lotito v. NJ Dep't of Labor, Div. of Unemployment Ins., GRC Complaint No. 2013-66, *et seq.* (Interim Order dated July 30, 2014).

Here, the Custodian identified two (2) types of handwritten records: a memorandum and five (5) Post-It® notes. All relevant case law above provides that such records are exempt from disclosure as ACD records. Further, the O'Shea Court used a Post-It® example to support that handwritten notes were exempt as ACD material. Specifically, the Court rejected plaintiff's assertion that the handwritten notes were government records for purposes of OPRA by stating that "[u]nder that rationale . . . every yellow-sticky note penned by a government official to help him or her remember a work-related task would be a public record. Such absurd results were not contemplated or required by OPRA." Id. at 538-539. For these reasons, the GRC finds that the Custodian lawfully denied access to the handwritten memorandum and Post-It® notes.

Accordingly, the handwritten memorandum and Post-It® notes are exempt as ACD material. O'Shea, 391 N.J. Super. at 538-539; Sage, GRC 2010-108. The Custodian has thus lawfully denied access to the handwritten records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.

Video Tapes

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See* Pusterhofer v. NJ Dep't of Educ., GRC

Complaint No. 2005-49 (July 2005). Here, the Custodian denied access to the requested video tapes because no records existed. The Custodian subsequently certified to this fact in the SOI, and noted that, if any video tapes exist, DRPA may possess them. Additionally, there is no evidence in the record to refute that the Custodian did not possess the responsive records.

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to responsive records because same are exempt from disclosure under the IAPP. N.J.S.A. 47:1A-6; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); Rivera v. Borough of Keansburg Police Dep't (Monmouth), GRC Complaint No. 2007-222 (June 2010); Camarata v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2014-127 (June 2015).
2. The Custodian lawfully denied access to the responsive medical records that were provided to a grand jury pursuant to a subpoena, as well as the subpoena itself, because the records responsive to the request are a grand jury subpoena and "records relating to grand jury proceedings," which are excluded from public access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); R. 1:38-3 (c)(4); Byrnes v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2009-323 (June 2011).
3. The Custodian has borne his burden of proof that the denial of access to the case initiation sheet, summary, memorandum, and closure form was lawful pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6; Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Solloway v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-39 (January 2013); Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013). Specifically, these records meet the two-prong definition of a criminal investigatory record and are therefore not disclosable under OPRA.
4. The handwritten memorandum and Post-It® notes are exempt as "inter-agency or intra-agency advisory, consultative, or deliberative" material O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007); Sage v. Freehold Reg'l High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (Final Decision dated November 29, 2011). The Custodian has therefore lawfully denied access to the handwritten records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.
5. The Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking video tapes because he certified in the Statement of Information, and the record reflects, that no responsive documents

exist. N.J.S.A. 47:1A-6; *see* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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July 18, 2017