



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

November 19, 2008 Government Records Council Meeting

Michael Boyle
Complainant

Complaint No.2008-78

v.

Princeton Borough Police Department (Mercer)
Custodian of Record

At the November 19, 2008 public meeting, the Government Records Council ("Council") considered the November 12, 2008 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 because the Custodian certified that the records responsive to the Complainant's request are subject to an Order of Expungement, and because the provisions of N.J.S.A. 2C:52-15 prohibits disclosure of expunged records and said provisions have not been abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., the Custodian lawfully denied the Complainant access to the requested records.

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 19th Day of November, 2008

Robin Berg Tabakin, Chair
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: November 20, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2008 Council Meeting**

**Michael Boyle¹
Complainant**

GRC Complaint No. 2008-78

v.

**Princeton Borough Police Department (Mercer)²
Custodian of Records**

Records Relevant to Complaint: All police reports, witness names, witness statements and photographs for alleged rape involving J. L. at the Tiger Inn on February 10, 2006.³

Request Made: April 6, 2008⁴
Response Made: April 8, 2008
Custodian: Andrea Lea Quinty, RMC
GRC Complaint Filed: April 11, 2008

Background

April 6, 2008

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.

April 8, 2008

Response to the OPRA request. Princeton Borough Police Department Records Clerk Shannon Lawson responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request informing the Complainant that the case involving J. L. was forwarded to the Mercer County Prosecutor's Office and Ms. Lawson advises the Complainant that all requests regarding the case must first go through the Prosecutor's Office.

April 11, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachment:

¹ No legal representation listed on record.

² Represented by Karen L. Cayci, Esq. (Princeton, NJ).

³ The records requested are different in the Denial of Access Complaint versus as stated in the original request; see April 11, 2008 background entry.

⁴ The date the request was received is written as April 6, 2007 (sic); however, the request is signed and dated by the Complainant on April 7, 2008 and initialed and dated by the "municipal official" on April 8, 2008. The Custodian certifies that the request was made on April 6, 2008.

- Response e-mail from the Princeton Borough Police Department dated April 8, 2008

The Complainant lists the following items as the records denied: “police report, witness names, witness statements, photos.” The Complainant agreed to mediate this complaint.

April 14, 2008

Offer of Mediation sent to the Custodian.⁵

April 23, 2008

Request for the Statement of Information sent to the Custodian.

April 28, 2008

Facsimile transmission from the GRC to the Custodian. In response to a telephone request from the Custodian for an extension of time to complete the Statement of Information, the GRC grants a five (5) business day extension of time for the Custodian to complete and submit the Statement of Information to the GRC.

May 8, 2008

Custodian submits to the GRC a non-conforming Statement of Information. The Custodian fails to complete Items numbered 7, 8, 9, 10, 11 and 12 of the Statement of Information.

May 9, 2008

Letter from the GRC to the Custodian. The GRC informs the Custodian that she has failed to properly complete the Statement of Information. The GRC advises the Custodian what she must do to cure the deficiencies and warns that the GRC will only return an incomplete Statement of Information to the Custodian one time, thereafter adjudicating the matter based only on information submitted in the Denial of Access Complaint.

May 14, 2008

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated April 6, 2008
- Response e-mail from the Princeton Borough Police Department dated April 8, 2008⁶

The Custodian certifies that her search for the requested records involved having the file retrieved and examined by a superior officer. The Custodian also certifies that the records responsive to the request have not been destroyed in accordance with Local Police Department Records Retention Schedule M9-00000-904 established and approved by New Jersey Department of State, Division of Archives and Records Management.

⁵ The Custodian did not respond to the Offer of Mediation within the required time period.

⁶ The Custodian also attached copies of correspondence from the GRC which have been previously noted as part of the file and do not add to the efficacy of the SOI.

The Custodian certifies that the records requested are for an alleged rape that occurred at an eating club located on the Princeton University campus. The Custodian determined that the records for that incident that are responsive to the Complainant's request are as follows:

- Police Criminal Investigation Reports
- Audio/Visual Tapes
- Arrest Reports
- Victim Statement
- Order of Expungement

The Custodian states that the records responsive to the Complainant's request pertain to the investigation of a possible rape which is criminal conduct and, as such, they cannot be considered government records pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certifies that the records are subject to an Order of Expungement dated September 18, 2007 by Darlene J. Pereksta, J.S.C., and that pursuant to N.J.S.A. 2C:52-7 et seq. any records relating to the arrest or conviction of the subject of the expungement order cannot be released for any reason unless ordered by the Superior Court.⁷ The Custodian states that she therefore lawfully denied the Complainant access to the requested records.

July 21, 2008

Telephone call from the Complainant to the GRC. The Complainant alleges that he has not been kept informed about the status of his complaint and that the last communication he received about the complaint was dated April 23, 2008. The Complainant states that he never received a copy of the Custodian's Statement of Information. The Complainant also states that he does not understand why he did not have an opportunity to participate in mediation because he had completed and returned the Agreement to Mediate. The GRC informs the Complainant that the Custodian failed to respond to an offer to agree to mediation and that both parties must agree to mediation otherwise, as here, the matter goes to adjudication. The GRC also informs the Complainant that the GRC copied him on every communication; therefore he should be aware of the present status of this complaint.

July 21, 2008

Letter from the GRC to the Complainant. The GRC confirms the telephone conversation between the GRC and the Complainant earlier this date. The GRC also forwards to the Complainant a copy of the Custodian's Statement of Information as well as copies of fax confirmation receipts for transmissions sent to the Complainant on April 23, 2008, April 28, 2008 and May 9, 2008.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

⁷ A copy of the Order for Expungement of Records, Superior Court of NJ, Law Division, Mercer County under Docket No. 18006 is on file with the GRC.

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.

Additionally, 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 ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“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.

Additionally, OPRA provides that:

“[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...any other statute...” N.J.S.A. 47:1A-9.a.

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

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

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.

The Custodian contends that the records responsive to the Complainant’s request are criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-

1.1. The Custodian further contends that the records are not to be released pursuant to the provisions of N.J.S.A. 2C:52-7 et seq., because they are subject to an Order of Expungement.

An analysis of whether the requested records are exempt from disclosure as criminal investigatory records under N.J.S.A. 47:1A-1.1 is unnecessary because the Custodian certified that the records responsive to the Complainant's request are subject to the disclosure proscriptions of an Order of Expungement dated September 18, 2007. Once a record is expunged, "the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred..." N.J.S.A. 2C:52-27.

Once an Order of Expungement has been entered by the court, N.J.S.A. 2C:52-15 provides that:

"...all the records specified in said order shall...be placed in the control of a person who has been designated by the head of each such agency which...possesses said records. That designated person shall...insure that such records or the information contained therein *are not released for any reason and are not utilized or referred to for any purpose.*" (Emphasis added). N.J.S.A. 2C:52-15.

Accordingly, because the Custodian certified that the records responsive to the Complainant's request are subject to an Order of Expungement, and because the provisions of N.J.S.A. 2C:52-15 prohibits disclosure of expunged records and said provisions have not been abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., the Custodian lawfully denied the Complainant access to the requested records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian certified that the records responsive to the Complainant's request are subject to an Order of Expungement, and because the provisions of N.J.S.A. 2C:52-15 prohibits disclosure of expunged records and said provisions have not been abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., the Custodian lawfully denied the Complainant access to the requested records.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

November 12, 2008