



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

**FINAL DECISION**

**January 26, 2010 Government Records Council Meeting**

Jeffrey Patti, Esq. (on behalf of Glen Mays)  
Complainant

Complaint No. 2009-76

v.

Sussex County Prosecutor's Office  
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council ("Council") considered the January 19, 2010 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 Complainant's request is invalid under OPRA because it fails to specify an identifiable government record, but rather seeks access to all of the records in the agency's files. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.
2. Pursuant to N.J.S.A. 47:1A-1.1., Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004), and Feggans v. City of Newark, GRC Complaint No. 2007-238 (October 2008), the requested video tapes are criminal investigatory records exempt from disclosure. As such, the Custodian has carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
3. The 45-day filing limit set forth in Mason v. City of Hoboken, 196 N.J. 51 (2008) only applies to complaints filed in Superior Court and does not apply to the GRC; there is no provision in OPRA that limits the time in which a Denial of Access Complaint may be filed before the GRC.



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 26<sup>th</sup> Day of January, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: January 29, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 26, 2010 Council Meeting**

**Jeffrey Patti, Esq. (On behalf of Glen Mays)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-76**

v.

**Sussex County Prosecutor's Office<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the criminal investigation file and internal affairs investigation file, including Keogh-Dwyer Correctional Facility ("KDCF") video tapes regarding the July 26, 2007 incident at the KDCF between Glen Mays and County Sheriff Officers.

**Request Made:** July 31, 2008

**Response Made:** August 7, 2008

**Custodian:** David Weaver

**GRC Complaint Filed:** March 4, 2009<sup>3</sup>

**Background**

**July 31, 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.

**August 7, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested records is denied because they are criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

**March 4, 2009**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching a letter from the Custodian to the Complainant dated August 8, 2008.<sup>4</sup>

The Complainant states that he was retained by Glen Mays to investigate an alleged assault on Mr. Mays by Sussex County Sheriff's officers while Mr. Mays was a

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Robert B. Campbell, Esq., of McConnell, Lenard & Campbell, LLP (Stanhope, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Complainant includes additional material that is not relevant to the adjudication of this complaint.  
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pre-trial detainee lodged at the Sussex County Jail. The Complainant states that the alleged assault occurred on or about July 26, 2007. The Complainant states that the Sussex County Prosecutor is in possession of two (2) video tapes of the incident. The Complainant states that after the Sheriff's Office Internal Affairs Department reviewed the incident, the video tapes were forwarded to the Sussex County Prosecutor's Office. The Complainant states that the Sussex County Prosecutor's Office denied the Complainant's request on the basis that the records requested were exempt from disclosure as criminal investigatory records.

The Complainant argues that the video tapes are not criminal investigatory records because the video tapes were made and maintained by KDCF in the ordinary course of business to provide a contemporaneous history of ongoing events for security purposes. The Complainant states that the video tapes were not created or maintained by the Sussex County Prosecutor's Office and the investigation to which they pertain is complete. The Complainant states that his interest in disclosure of the video tapes is to ascertain if any violations of Mr. Mays' civil rights occurred. Moreover, the Complainant further argues that the public has a right to know of an assault by law enforcement personnel.

The Complainant does not agree to mediate this complaint.

**April 9, 2009**

Request for the Statement of Information ("SOI") sent to the Custodian.

**April 17, 2009<sup>5</sup>**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 31, 2008;
- Sheriff's Office Internal Affairs' Policy and Procedures.<sup>6</sup>

The Custodian certifies that on or about March 13, 2008, he received a letter from Susan Remis Silver, Esq., Special Assistant to the Public Defender, in which she raised an allegation of an assault on Mr. Mays, an inmate at the Keogh-Dwyer Correctional Facility by certain Corrections Officers. The Custodian certifies that the Sussex County Prosecutor's Office conducted a criminal investigation of the alleged assault. The Custodian certifies that criminal investigation file number 08-1-01868 was opened and any and all records created, received and maintained by the Sussex County Prosecutor's Office regarding the alleged incident were held by the Sussex County Prosecutor's Office solely as a part of the criminal investigation file. The Custodian certifies that he was not aware of any law or statute that independently requires this particular record to be made, maintained or kept on file by the Sussex County Prosecutor's Office. The Custodian argues that this file only includes items material to the Prosecutor's Office investigation.

The Custodian certifies that the Complainant submitted an OPRA request on or about July 31, 2008. The Custodian certifies that he denied the request on or about

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<sup>5</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

<sup>6</sup> The Complainant includes additional material that is not relevant to the adjudication of this complaint. Jeffrey Patti v. Sussex County Prosecutor's Office, 2009 -76 – Findings and Recommendations of the Executive Director

August 7, 2008 on the grounds that the records requested were not subject to disclosure pursuant to N.J.S.A. 47: 1A-1.1.

The Custodian asserts that because the Complainant expressly requested the production of a criminal investigation file and an internal affairs investigation file, the request was improper, as it sought access to confidential records. The Custodian asserts that he properly denied the Complainant access to the records requested. The Custodian certifies that any part of this criminal investigatory file that may also be a part of an internal affairs investigation file, is confidential pursuant to the *Attorney General Guidelines on Internal Affairs Policy and Procedures*, revised through November, 2000. The Custodian argues that court decisions and prior GRC decisions have upheld the confidentiality of these types of records under OPRA. Daily Journal v. Police Dept. of City of Vineland, 351 N.J. Super. 110 (App. Div. 2002), cert. denied, 174 N.J. 364. See also Janeczko v. NJ Department of Law and Public Safety, GRC Complaint No. 2002-79 & 80 (June 2004); Johnson v. New Jersey Division of State Police, GRC Complaint No. 2004-46 (June 2004). The Custodian also argues that in the Denial of Access Complaint, the Complainant acknowledged the criminal investigatory nature of the records requested when he stated:

“At a minimum, the videos are not criminal investigatory records as contemplated by OPRA. The County jail kept/maintained videos in the ordinary course of business to provide a contemporaneous history of ongoing events for security purposes these video tapes were not records created or maintained by the prosecutor. Additionally, the investigation is complete.”

The Custodian asserts that the Complainant believes that because the criminal investigation has been completed, the resulting criminal investigation file is no longer confidential. The Custodian certifies that the Council has previously considered this issue and has found that the criminal investigatory exemption continues to apply even after the underlying investigation is complete. Janeczko, and Johnson, *supra*.

The Custodian further argues that the Denial of Access Complaint must be dismissed because it was filed after the 45 day limitation period. Mason v. City of Hoboken, 196 N.J. 51 (2008). The Custodian argues that because the regulations at *N.J.A.C. 5:105-2.1(a)* and (c) provide that complaints filed with the GRC shall be brought and conducted pursuant to N.J.S.A. 47:1A-6, the Mason forty-five day limitation and the Court's reason that any disputes should be addressed in the same rapid manner, applies to GRC proceedings as well. The Custodian certifies that for the aforementioned reasons, the Denial of Access Complaint must be dismissed for being out of time.

### **Analysis**

#### **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.

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 ... *A government record shall not include* the following information which is deemed to be confidential... *criminal investigatory records...* ‘Criminal investigatory record’ means 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.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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 responded in writing to the Complainant’s OPRA request on the fourth (4<sup>th</sup>) business day, denying access to the records requested on the basis that the requested records were criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47: 1A-1.1.

Although the Custodian denied the Complainant’s request on the basis that the requested records were criminal investigatory records exempt from disclosure, the Complainant’s request is nonetheless invalid, in part. The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise

exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>7</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>8</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." *Id.* at 181. The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..." *Id.* at 182.

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

In Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), the Complainant filed an OPRA request for two entire prosecutor's office files. The Council relied upon MAG, *supra*, and Bent, *supra*, in determining that the request was overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific government record. As such, the Council found that the Custodian met her burden of proof in denying the Complainant access to the records.

In Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008), the GRC held that because the records requested comprise an entire Somerset County Prosecutor's Office file, was overbroad and a blanket request for a class of various documents rather than a request for specific government records, the request was invalid.

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<sup>7</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>8</sup> As stated in Bent, *supra*.

In the matter currently before the Council, the Complainant's request seeks, in part, access to the criminal investigation file and internal affairs investigation file. Pursuant to Bent, *supra*, a proper request under OPRA must identify with reasonable clarity those documents that are desired and a party cannot satisfy this requirement by simply requesting all of an agency's documents. However, like those requests invalidated in Morgano, *supra*, and Feiler-Jampel, *supra*, the Complainant's request seeks, in part, access to entire case files. OPRA operates to make identifiable government records readily accessible. N.J.S.A. 47:1A-1. MAG, *supra*. The Complainant's request does not identify the record or records sought, but rather, it specifies the file sought. Like the requests considered in Morgano, *supra*, and Feiler-Jampel, *supra*, the Complainant's request, in part, is essentially a blanket request for a class of various documents rather than a request for specific government records.

Therefore, the Complainant's request is invalid, in part, under OPRA because it fails to specify an identifiable government record, but rather seeks access to all of the records in the agency's files. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.

Despite the overly broad nature of the Complainant's request, with respect to that portion of the Complainant's request for the KDCF video tapes, the GRC finds that the Complainant described these records with sufficient specificity. The Complainant sought access to video tapes of an alleged assault between an inmate and Sheriff Officers. The Custodian denied the Complainant access to the video tapes on the basis that said records were exempt from disclosure as criminal investigatory records. The Complainant admitted in the Denial of Access Complaint that the requested video tapes were a part of a completed investigation. However, the Complainant argued that the criminal investigatory record exemption only applied to records involved in open investigations.

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).

In Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004),<sup>9</sup> the Council found that the records sought were considered criminal investigatory records and therefore exempt from disclosure. The Council also held that:

“[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete. The exemption

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<sup>9</sup> Affirmed on appeal in Janeczko v. Department of Law and Public Safety, Division of Criminal Justice, Superior Court of New Jersey, Docket No. A-309-03T1 (Unpublished Decision, decided May 26, 2004). Jeffrey Patti v. Sussex County Prosecutor's Office, 2009 -76 – Findings and Recommendations of the Executive Director



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.” Janeczko, supra.

In Feggans v. City of Newark (Essex), GRC Complaint No. 2007-238 (October 2008), the complaint sought access to a police video tape marked as evidence. The custodian denied the complainant access to said record on the basis that it was a criminal investigatory record. The GRC held that because the requested video tape was part of a criminal investigation, the video tape was exempt from disclosure as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.

It is undisputed that the video tapes in question were a part of an investigation by the Sussex County Prosecutor’s Office. The Custodian has certified that the video tapes were a part of an official investigation. Furthermore, the Complainant has also admitted that the requested video tapes were a part of a completed investigation.

Therefore, pursuant to N.J.S.A. 47:1A-1.1, Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004),<sup>10</sup> and Feggans v. City of Newark, GRC Complaint No. 2007-238 (October 2008), the requested video tapes are criminal investigatory records exempt from disclosure. As such, the Custodian has carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

Moreover, the Custodian’s assertion that the 45-day filing limit set forth in Mason v. City of Hoboken, 196 N.J. 51 (2008), applies to the GRC is erroneous. The Mason decision only applies to complaints filed in Superior court; there is no provision in OPRA that limits the time in which a Denial of Access Complaint may be filed before the GRC.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Complainant’s request is invalid under OPRA because it fails to specify an identifiable government record, but rather seeks access to all of the records in the agency’s files. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008), Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.

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<sup>10</sup> Affirmed on appeal in Janeczko v. Department of Law and Public Safety, Division of Criminal Justice, Superior Court of New Jersey, Docket No. A-309-03T1 (Unpublished Decision, decided May 26, 2004). Jeffrey Patti v. Sussex County Prosecutor’s Office, 2009 -76 – Findings and Recommendations of the Executive Director

2. Pursuant to N.J.S.A. 47:1A-1.1., Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004), and Feggans v. City of Newark, GRC Complaint No. 2007-238 (October 2008), the requested video tapes are criminal investigatory records exempt from disclosure. As such, the Custodian has carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
  
3. The 45-day filing limit set forth in Mason v. City of Hoboken, 196 N.J. 51 (2008) only applies to complaints filed in Superior Court and does not apply to the GRC; there is no provision in OPRA that limits the time in which a Denial of Access Complaint may be filed before the GRC.

Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

January 19, 2010