



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 26, 2013 Government Records Council Meeting

Gregory A. Scott
Complainant

Complaint No. 2011-244

v.

Red Bank Police Department (Monmouth)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 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 Custodian did not unlawfully deny the Complainant access to the remainder of the police report because said statement was used as part of the criminal investigation and there is no evidence in the record that the police report responsive to the request is required to be “made, maintained or kept on file” pursuant to N.J.S.A. 47:1A-1.1.

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 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 28, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

**Gregory A. Scott¹
Complainant**

GRC Complaint No. 2011-244

v.

**Red Bank Police Department (Monmouth)²
Custodian of Records**

Records Relevant to Complaint: copies of records related to a bias incident on September 13, 2006.³

Request Made: July 13, 2011

Response Made: July 18, 2011

GRC Complaint Filed: July 22, 2011⁴

Background⁵

The Complainant filed his OPRA request with the Red Bank Police Department (“Police Department”) on July 13, 2011 seeking the records listed above. The Complainant states that the bias incident on September 13, 2006 relates to a dispute with a woman over a parking space at Riverview Towers in Red Bank, New Jersey.⁶ The Custodian responded on July 18, 2011, the third (3rd) business day following receipt of such request with only copies of the cover page of the police report dated February 13, 2006 Log No. 06-01757 (“police report”).⁷ The Custodian denied the Complainant access to the remainder of the records because they were criminal investigatory records.

The Complainant filed his Denial of Access Complaint with the Government Records Council (“GRC”) on July 22, 2011. The Complainant argues that the Custodian should have granted him access to the entire police report, not just the cover page. The Complainant also

¹ No legal representation listed on record.

² Robert Talerico, Custodian of Records. Represented by Daniel J. O’Hern, Jr., Esq., of Byrnes, O’Hern & Heugle (Red Bank, NJ).

³ Although the Complainant’s request fails to specifically identify a government record, the request is not invalid under OPRA because the Custodian identified a responsive record. See Gannet v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ 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.

⁶ The Complainant requests additional records not relevant to the adjudication of this complaint.

⁷ The cover page details the releasable information pursuant to N.J.S.A. 47:1A-3(b).

argues that N.J.S.A. 47:1A-3(b) states that the Custodian may deny access to records when the records pertain to an investigation in progress. The Complainant further argues that there is no investigation in progress. The Complainant additionally argues that the alleged victim can no longer file a complaint because the five (5) year statute of limitations has run. Lastly, the Complainant argues that release of this record would not be inimical to the public interest.

The Custodian filed his Statement of Information (“SOI”) on July 28, 2011. The Custodian certified that he denied the Complainant access to the requested police report because said report is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certifies that he only provided the Complainant with a copy of the police report cover page. The Custodian argues that the Complainant incorrectly states that the entire police report was denied as a criminal investigatory record pursuant to N.J.S.A. 47:1A-3(b). The Custodian argues that the police report was denied because it is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1 and Janeczko v. New Jersey Department of Law & Public Safety, GRC Complaint No. 2002-79 and 2002-80 (June 2004). Lastly, the Custodian argues that N.J.S.A. 47:1A-1.1 does not permit the release of these records even after the investigation is complete.

Analysis⁸

Criminal Investigatory Records

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.

Further, a criminal investigatory record is defined in OPRA 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.

OPRA further provides that:

“...where a crime has been reported but no arrest yet made [the following information shall be made available to the public] the type of crime, time, location and type of weapon, if any...” N.J.S.A. 47:1A-3(b).

Thus, 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 is encompassed within the definition of a criminal investigatory record set forth at N.J.S.A. 47:1A-1.1 and is therefore exempt from disclosure under OPRA.

⁸ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

The evidence of record is clear that the Custodian responded to the Complainant's OPRA request within the statutorily-mandated seven (7) business days and provided the Complainant with the police report cover page. The Custodian denied the Complainant access to the remainder of the police report as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.

The Council's recent decision in Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (January 2013) reversed its decision in Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (October 2008). In Morgano, *supra*, the Council held that "[t]he record requested...a police arrest report, is required to be maintained or kept on file by the [Records Management Services ("RMS")] and therefore is a government record subject to disclosure pursuant to N.J.S.A. 47:1A-1.1." However, the Council held in Michalak, *supra*, that RMS schedules do not have the force of law requiring that police departments "make maintain or keep on file" police reports, thus the requested police report is considered a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. See also Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order February 27, 2008).

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), affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004. In Janeczko, the complainant requested access to copies of records related to alleged criminal actions committed by her son, who was ultimately killed by police officers. 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". Consequently, the complainant's request was denied.

It is important to note that the criminal investigatory records exemption continues to survive the conclusion of the investigation. As the Council pointed out in Janeczko, *supra*:

"[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 finding in Janeczko concurs with the Council's decision in Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007). In Brewer, the Complainant filed an OPRA request to obtain lab records that were in the custody of the New Jersey State Police for use in an investigation. The Council found that the requested records were part of a criminal investigative file and were exempt from disclosure under OPRA. Accordingly, the Council determined that the complainant's request was lawfully denied.

In the instant complaint, the Custodian properly released to the Complainant all the information required to be disclosed under N.J.S.A. 47:1A-3(b). Moreover, the Custodian properly denied the Complainant access to the remainder for the police report because said report is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. Further, there is no evidence in the record that the report responsive to the request is required by law to be “made, maintained or kept on file” pursuant to N.J.S.A. 47:1A-1.1.

Therefore, the Custodian did not unlawfully deny the Complainant access to the remainder of the police report because said statement was used as part of the criminal investigation and there is no evidence in the record that the police report responsive to the request is required to be “made, maintained or kept on file” pursuant to N.J.S.A. 47:1A-1.1.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny the Complainant access to the remainder of the police report because said statement was used as part of the criminal investigation and there is no evidence in the record that the police report responsive to the request is required to be “made, maintained or kept on file” pursuant to N.J.S.A. 47:1A-1.1.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

February 19, 2013