



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 27, 2013 Government Records Council Meeting

Kevin Richards
Complainant

Complaint Nos. 2012-256 and 2012-257

v.

Bergen County Prosecutor's Office
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council ("Council") considered the August 20, 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 lawfully denied access to the responsive records because the records relate to a criminal investigation and are thus exempt as criminal investigatory records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; Janeczko v. NJ Dep't of Law & Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Johnson v. NJ Div. of State Police, GRC Complaint No. 2004-46 (June 2004). The Council should not address the Custodian's additional arguments as the responsive records are deemed to be 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 August, 2013

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: August 29, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting**

**Kevin Richards¹
Complainant**

GRC Complaint Nos. 2012-256 and 2012-257²

v.

**Bergen County Prosecutor's Office³
Custodial Agency**

Records Relevant to Complaint:

OPRA request No. 1: Hardcopies via U.S. mail of the interview report of Ewan Edwards – 1996 employee Sears Brand Central.

OPRA request No. 2: Hardcopies via U.S. mail of all photo line-up reports prepared and filed as a result of witnesses viewing line-up of the Complainant, Alva Roosevelt McLean and Kevin Lee in the April 19, 1996 Sears Brand Central homicide.

Custodian of Record: Frank Puccio, Esq.

Request Received by Custodian: August 13, 2012

Response Made by Custodian: August 13, 2012

GRC Complaint Filed: August 31, 2012⁴

Background⁵

Request and Response:

On August 6, 2012, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian. On August 13, 2012, the Custodian responded in writing denying access to the Complainant’s OPRA requests as criminal investigatory records. N.J.S.A. 47:1A-1.1; Janeczko v. NJ Dep’t of Law & Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Johnson v. NJ Div. of State Police, GRC Complaint No. 2004-46 (June 2004). The Custodian noted that the case file included at least three (3) boxes of records that the Custodian did not search prior to his response.

¹ No legal representation listed on record.

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by John Carbone, Esq. (North Haledon, NJ).

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.

Denial of Access Complaint:

On August 31, 2012, the Complainant filed these Denial of Access Complaints with the Government Records Council (“GRC”) disputing the Custodian’s denial of access to his OPRA requests. The Complainant did not provide any additional arguments.

Statement of Information:⁶

On November 28, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that the OPRA requests seek records pertaining to State v. Kevin Richards, et al., Indictment No. S-302-97, Docket No. 908-96, a case in which three defendants were indicted for a 1996 homicide of a security guard. The Custodian certifies that the Complainant is currently engaged in various stages of appeal and/or post-conviction relief proceedings. On November 25, 2012, in preparation of the SOI, the Custodian examined the case file consisting of three (3) 16 inch by 24 inch boxes, six (6) 11 inch by 18 inch boxes and additional small folders containing voluminous records. The Custodian certifies that the file contained normal investigative and prosecution records, as well as appeals records from all defendants. The Custodian certifies that because the records are not obviously captioned, his office would have to read through these records to determine whether any were responsive to the Complainant’s OPRA requests. For this reason, the Custodian responds to the SOI without verifying that the Bergen County Prosecutor’s Office (“BCPO”) possesses the records at issue.

The Custodian certifies that the Complainant’s own description of the responsive records clearly indicates that the reports are exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1. The Custodian certifies that although the criminal investigation may be completed, the exemption still applies. Janeczko, supra; Johnson, supra.

The Custodian further argues that the Complainant’s requests would force the Custodian to research his files to locate the responsive records, which is not required under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian also argues that simply searching for the records would cause a substantial disruption of agency operations. N.J.S.A. 47:1A-5(g). The Custodian asserts that alternatively, the BCPO could seek a third-party vendor to review the file and pass the cost to the Complainant. N.J.S.A. 47:1A-5(d).

Analysis⁷

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

⁶ On September 27, 2012, this complaint was referred to mediation. On November 13, 2012, the complaint was referred back to the GRC for adjudication.

⁷ 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.

“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. OPRA further provides that “[a] government record shall not include the following information which is deemed to be confidential ... criminal investigatory records ...” N.J.S.A. 47:1A-1.1.

Here, the Complainant sought records relating to a homicide investigation that led to the indictment of three (3) defendants. The GRC is satisfied that, as indicated by the Custodian, the responsive records directly relate to a criminal investigation and are thus exempt under OPRA.

Therefore, the Custodian lawfully denied access to the responsive records because the records relate to a criminal investigation and are thus exempt as criminal investigatory records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; Janeczko, supra; Johnson, supra. The Council should not address the Custodian’s additional arguments as the responsive records are deemed to be exempt from disclosure.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to the responsive records because the records relate to a criminal investigation and are thus exempt as criminal investigatory records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; Janeczko v. NJ Dep’t of Law & Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Johnson v. NJ Div. of State Police, GRC Complaint No. 2004-46 (June 2004). The Council should not address the Custodian’s additional arguments as the responsive records are deemed to be exempt from disclosure.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

August 20, 2013