



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

January 28, 2014 Government Records Council Meeting

William Dunn
Complainant

Complaint No. 2013-218

v.

Burlington County Prosecutor's Office
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council ("Council") considered the January 21, 2014 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 lawfully denied access to the Complainant's request for a transcript and an audio or video recording of a May 21, 2013 grand jury proceeding. N.J.S.A. 47:1A-6. The Custodian certified that the BCPO does not possess a written transcript of the proceeding and does not maintain audio or video recordings of same. Furthermore, the Complainant has not sought to demonstrate that he has a "strong particularized need" for the transcript before the judiciary, where such issue would be properly venued. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); R. 1:38-3(c)(4); R. 3:6-7; Bent v. Township of Stafford Police Department, 381 N.J. Super. 30, 39 (App. Div. 2005); State v. Doliner, 96 N.J. 236, 245 (1984); Maniscalco v. Atlantic County Prosecutor's Office, GRC Complaint No. 2012-247 (July 2013); Pustenhofer v. N.J. Department of Education, GRC Complaint No. 2005-49 (July 2005). Accordingly, this issue is not properly before the GRC. *See* State v. Doliner, 96 N.J. 246 n.2, 256 (1984).
2. The Custodian lawfully denied access to the Complainant's requests for the persons, and titles of such persons, present at the grand jury hearing because, under OPRA, public agencies are required only to disclose identifiable government records. *See* N.J.S.A. 47:1A-6. MAG Entm't, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546, 549 (App. Div. 2005); Bent v. Township of Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 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 28th Day of January, 2014

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: January 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**William Dunn¹
Complainant**

GRC Complaint No. 2013-218

v.

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

Records Relevant to Complaint: The Complainant seeks copies of the transcript of a May 21, 2013 grand jury hearing, the persons present at the hearing, the titles of persons present at the hearing, any letters that arose out of the hearing that were sent out to other law enforcement and judiciary agencies, and audio and video recordings of the persons present at the hearing.

Custodian of Record: Glenn Filippone
Request Received by Custodian: July 22, 2013
Response Made by Custodian: July 23, 2013
GRC Complaint Received: July 25, 2013

Background³

Request and Response:

On July 22, 2013, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On July 23, 2013, one (1) business day later, the Custodian partially denied the Complainant's request in writing by stating that the Burlington County Prosecutor's Office ("BCPO") does not possess the requested "transcript record," that grand jury materials are confidential, and that portions of the request are overly broad. The Custodian did, however, provide a copy of a document responsive to the Complainant's request for any "letters that arose out of the alleged hearing."

Denial of Access Complaint:

On July 25, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant states that he is a "Victim Witness" in the criminal case connected to the grand jury proceedings in question. The Complainant asserts

¹ No representation listed in record.

² The Custodian is represented by Matthew P. Madden, Esq. (Haddonfield, 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.

that he was denied access to the requested records in retaliation for lawsuits he filed against various Superior Court judges. The Complainant also contends that his need for a transcript of the grand jury testimony outweighs the need for secrecy.

Statement of Information:

On August 23, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on July 22, 2013 and responded on July 23, 2013, partially denying and partially granting said request. The Custodian additionally certifies that the letter disclosed on July 23, 2013 represents the sole and complete file responsive to the Complainant’s request, and that no recordings of grand jury proceedings are maintained by the BCPO.

The Custodian asserts, through counsel, that the BCPO neither possesses the transcript at issue nor is required to maintain such a transcript. *Citing N.J.S.A. 47:1A-1.1; Bent v. Twp. of Stafford Police Dep’t*, 381 N.J. Super. 30, 38-39 (App. Div. 2005). The Custodian next contends that, owing to a long recognized need to maintain the secrecy of grand jury proceedings, the sole avenue through which the Complainant could obtain the requested transcript is by demonstrating a “strong and particularized need.” *Citing R. 1:38-3(c)(4); R. 3:6-7; State v. Doliner*, 96 N.J. 236, 245 (1984). The Custodian also argues that the Complainant’s requests for the “persons” and “titles of persons” present at the grand jury hearing are invalid, overly broad requests for information rather than for specific government records. *Citing Bent*, 381 N.J. Super. at 37.

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.

Request for Grand Jury Materials

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).

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 . . . 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).

Further, several courts have recognized the importance of maintaining the secrecy of grand jury proceedings to protect witnesses, innocent parties, and the system in general. *See Douglas Oil Co. of Cal. V. Petrol Stops Nw.*, 441 U.S. 211, 218-19 (1979); Daily Journal v. Police Dep’t of City of Vineland, 351 N.J. Super. 110, 124 (App. Div. 2002); State v. Kearney, 109 N.J. Super. 502, 506 (Ch. Div. 1970). In order for Grand Jury records to be disclosed, the requesting party must demonstrate “compelling circumstances” or a “strong showing of particularized need.” Doliner, 96 N.J. at 245; Doe v. Klein, 143 N.J. Super. 134, 141 (App. Div. 1976); Maniscalco v. Atl. Cnty. Prosecutor’s Office, GRC Complaint No. 2012-247 (July 2013). As noted by the N.J. Supreme Court, the turnover of grand jury evidence requires court approval through “a two-step judicial determination that such a turnover will be consistent with both the policies furthered by grand jury secrecy and the deterrence of abuse of grand jury process.” Doliner, 96 N.J. at 246 n.2, 256.

Additionally, custodians are under no obligation to search for documents that are beyond what a particular agency makes, maintains, or keeps on file. N.J.S.A. 47:1A-1.1; Bent, 381 N.J. Super. at 39. Similarly, no unlawful denial of access results from a custodian’s certification that no responsive records exist. Pustenhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Here, the Complainant requested a transcript and audio or video recording of a May 21, 2013 grand jury hearing. The Custodian certified that the BCPO is not in possession of such a transcript and that no such recordings are maintained. It is clear from the Court Rules, made applicable to OPRA requests by N.J.S.A. 47:1A-9(a), and past judicial precedent that the disclosure of material from grand jury proceedings is not ordered without a showing of special and compelling circumstances. Furthermore, the Complainant has not made his plea of compelling circumstances to the judiciary. Doliner, 96 N.J. at 246 n.2, 256.

Therefore, the Custodian lawfully denied access to the Complainant’s request for a transcript and an audio or video recording of a May 21, 2013 grand jury proceeding. N.J.S.A. 47:1A-6. The Custodian certified that the BCPO does not possess a written transcript of the proceeding and does not maintain audio or video recordings of same. Furthermore, the Complainant has not sought to demonstrate that he has a “strong particularized need” for the transcript before the judiciary, where such issue would be properly venued. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); R. 1:38-3(c)(4); R. 3:6-7; Bent, 381 N.J. Super. at 39; Doliner, 96 N.J. at 245-56; Maniscalco, GRC 2012-247; Pustenhofer, GRC 2005-49. Accordingly, this issue is not properly before the GRC. *See* Doliner, 96 N.J. at 246 n.2, 256.

Request for Information

The New Jersey Appellate Division has held that:

While 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.

MAG Entm’t, LLC v. Div. 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.” Id. at 549. *See also*, Bent, 381 N.J. Super. at 37; N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Here, the Complainant requested to know the persons present at the grand jury hearing and the titles of such persons. These are requests do not reasonably identify a government record, but instead seek only information.

Therefore, the Custodian lawfully denied access to the Complainant’s requests for the persons, and titles of such persons, present at the grand jury hearing because, under OPRA, public agencies are required only to disclose identifiable government records. *See* N.J.S.A. 47:1A-6; MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546, 549 (App. Div. 2005); Bent, 381 N.J. Super. at 37.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the Complainant’s request for a transcript and an audio or video recording of a May 21, 2013 grand jury proceeding. N.J.S.A. 47:1A-6. The Custodian certified that the BCPO does not possess a written transcript of the proceeding and does not maintain audio or video recordings of same. Furthermore, the Complainant has not sought to demonstrate that he has a “strong particularized need” for the transcript before the judiciary, where such issue would be properly venued. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); R. 1:38-3(c)(4); R. 3:6-7; Bent v. Township of Stafford Police Department, 381 N.J. Super. 30, 39 (App. Div. 2005); State v. Doliner, 96 N.J. 236, 245 (1984); Maniscalco v. Atlantic County Prosecutor’s Office, GRC Complaint No. 2012-247 (July 2013); Pustenhofer v. N.J. Department of Education, GRC Complaint No. 2005-49 (July 2005). Accordingly, this issue is not properly before the GRC. *See* State v. Doliner, 96 N.J. 246 n.2, 256 (1984).

2. The Custodian lawfully denied access to the Complainant's requests for the persons, and titles of such persons, present at the grand jury hearing because, under OPRA, public agencies are required only to disclose identifiable government records. *See* N.J.S.A. 47:1A-6. MAG Entm't, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546, 549 (App. Div. 2005); Bent v. Township of Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

January 21, 2014