



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

July 29, 2014 Government Records Council Meeting

James L. Newman, Jr., Esq.
(On behalf of Brandi Feaster)
Complainant

Complaint No. 2013-347

v.
NJ State Police
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 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 has borne his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The requested record is an incident report which meets the criteria for a criminal investigatory record. The report is not a government record as defined under OPRA and is not subject to public access. Thus, the Custodian did not unlawfully deny access to said record. N.J.S.A. 47:1A-1.1. See also Nance v. Scotch Plains Twp. Police Dep’t, GRC Complaint No. 2003-125 (January 2005); Rivera v. Passaic County Sheriff’s Office, GRC Complaint No. 2010-152 (May 2011). Further, because the record is exempt under N.J.S.A. 47:1A-1.1, the GRC declines to address the applicability of Executive Order No. 48 (Gov. Hughes, 1968) to the responsive record.

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 29th Day of July, 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: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**James L. Newman, Jr., Esq.
(On Behalf of Brandi Feaster)¹
Complainant**

GRC Complaint No. 2013-347

v.

**New Jersey State Police²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of any and all records related to the incident involving LeSean McCoy and Brandi Feaster on December 19, 2012 (Report No. D01-2012-00310).

Custodian of Record: Sergeant Dave Robbins
Request Received by Custodian: October 15, 2013
Response Made by Custodian: October 24, 2013
GRC Complaint Received: December 3, 2013

Background³

Request and Response:

On October 15, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 24, 2013, the seventh (7th) business day after receipt of the request, the Custodian responded in writing denying access to a criminal investigatory report under N.J.S.A. 47:1A-1.1 and Executive Order No. 48 (Gov. Hughes, 1968)(“EO 48”).⁴

Denial of Access Complaint:

On December 3, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant alleged that he never received a response to his OPRA request.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Megan E. Shafranski.

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.

⁴ On November 20, 2013, the Complainant requested a status update from the Government Records Council and was advised of his options for challenging an alleged denial of access.

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Statement of Information:

On January 31, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 15, 2013, and responded to same on October 24, 2013 via e-mail. In said response, the Custodian stated that a search of the State Police records database yielded one (1) responsive record, a Criminal Investigation Report, that is exempt from disclosure as a criminal investigatory record and, as a State Police file that no person is allowed to disclose to another person “. . . who is not a member of a duly recognized law enforcement agency unless ordered to do so by a court or competent jurisdiction or by the Governor . . .” N.J.S.A. 47:1A-1.1; EO 48.

The Custodian certified that a review of the complaint indicated that the Complainant initially listed the wrong e-mail address, “jim@berarnardmgross.com,” on his request form; thus, the Complainant never received his timely response.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant alleged that the Custodian failed to respond to his OPRA request. However, in the SOI, the Custodian certified that he responded on October 24, 2013, the seventh (7th) business day after receipt of the request. Further, the Custodian certified that the Complainant entered the wrong e-mail address on the request form, which resulted in the Complainant not receiving the response. The Custodian provided sufficient evidence supporting this certification in the form of his response with the date and wrong e-mail address inputted therein.

Therefore, the Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley, GRC 2007-11.

⁵ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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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.

Criminal investigatory records are exempt from disclosure. N.J.S.A. 47:1A-1.1. A criminal investigatory record is defined 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 . . .” Id.

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 Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). In Janeczko, 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.”

More specifically, in Nance v. Scotch Plains Twp. Police Dep’t, GRC Complaint No. 2003-125 (January 2005), the Council determined that police incident reports, continuation reports, and property and evidence reports are criminal investigatory records as defined by N.J.S.A. 47:1-1.1, and are therefore exempt from disclosure.

Here, the Complainant sought records, related to an incident where the State Police were called, involving his client. Thus, by its very nature, the resulting report is akin to an incident report, which the Council has routinely determined to be exempt from disclosure as a criminal investigatory record. *See also* Rivera v. Passaic County Sheriff’s Office, GRC Complaint No. 2010-152 (May 2011).

Accordingly, the requested record is an incident report which meets the criteria for a criminal investigatory record. The report is not a government record as defined under OPRA and is not subject to public access. Thus, the Custodian did not unlawfully deny access to said record. N.J.S.A. 47:1A-1.1. *See also* Nance, GRC 2003-125; Rivera, GRC 2010-152. Further, because the record is exempt under N.J.S.A. 47:1A-1.1, the GRC declines to address the applicability of EO 48 to the responsive record.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The requested record is an incident report which meets the criteria for a criminal investigatory record. The report is not a government record as defined under OPRA and is not subject to public access. Thus, the Custodian did not unlawfully deny access to said record. N.J.S.A. 47:1A-1.1. *See also* Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005); Rivera v. Passaic County Sheriff's Office, GRC Complaint No. 2010-152 (May 2011). Further, because the record is exempt under N.J.S.A. 47:1A-1.1, the GRC declines to address the applicability of Executive Order No. 48 (Gov. Hughes, 1968) to the responsive record.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014