



State of New Jersey
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Joseph W. Bernisky
Complainant

v.

NJ State Police
Custodian of Record

Complaint No. 2014-275

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 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 requested records. The Custodian certified that the records are criminal investigatory records. In response, the Complainant has offered no competent, credible evidence to refute the certification. OPRA’s criminal investigatory records exemption does not permit access to investigatory records once the investigation is complete. The Council has no basis to withhold from access only currently active investigations and release those where the matter is resolved or closed. Therefore, because the requested law enforcement reports constitute criminal investigatory records, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. N.J. Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Brewer v. N.J. Dep’t of Law and Pub. Safety, GRC Complaint No. 2006-204 (October 2007); and Hwang v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-348 (January 2013).

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 30th Day of June, 2015

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 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting**

**Joseph W. Bernisky¹
Complainant**

GRC Complaint No. 2014-275

v.

**New Jersey State Police²
Custodial Agency**

Records Relevant to Complaint: E-mail or CD-ROM copies of the following:

“NJ police investigations of an alleged prisoner witness, Christopher Thieme[,] who was reported to have written letters to defense lawyers . . . on behalf of Melanie McGuire, the reported ‘suitcase killer’ of Woodbridge, NJ . . . I am making a limited request for all records, recordings, notes, reports, findings, statements that contained the NJ police questioning [*sic*] . . . witness Christopher Thieme[,] . . . I request the notes, reports and records the police documented to determine Mr. Thieme accused the defense lawyers of bribing or enticing him to give false testimony. This Requestor seeks the police records made by prisoner Thieme against the McGuire defense team.”

Custodian of Record: Marco Rodriguez
Request Received by Custodian: July 25, 2014
Response Made by Custodian: July 25, 2014
GRC Complaint Received: July 30, 2014

Background³

Request and Response:

On July 24, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 25, 2014, the Custodian received the request and denied it in writing on that same day, stating the records sought were “part of a criminal investigation” and that criminal investigatory records are exempt from public access under OPRA.

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.

Denial of Access Complaint:

On July 30, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records he sought concerned “information [that] was released in a highly publicized trial.” The Complainant further contended that the records were not sealed and that he only sought a “very narrow portion of the records,” having to do with one witness rather than the entire case. In an effort to support his position, the Complainant included a copy of an unpublished written opinion from the New Jersey Superior Court, Grossman v. Office of the Cnty Prosecutor, etc., et al., No. OCN-L-533-13 (Law Div., 2013).

Statement of Information:

On August 21, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the OPRA request on July 2, 2015, and responded in writing on the same day. The Custodian denied the request, contending that all the records sought are criminal investigatory records and are therefore exempt from public access. The Custodian stated the responsive records were “investigation report, arrest report, crime scene reports, etc.” and described them as being records of a homicide investigation.

Analysis

Unlawful Denial of Access

The Custodian determined that all the records responsive to the Complainant’s request were exempt as criminal investigatory records. The Complainant and Custodian agree that the records sought concern police reports gathered in a homicide investigation. However, the Complainant’s sole argument to justify disclosure is that the records are no longer protected by the exemption because the records were used in a public trial.

The GRC previously examined the status of records purported to fall under the criminal investigatory records exemption. In Janeczko v. N.J. Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), the complainant sought access to copies of records related to alleged criminal actions committed by her son, who allegedly died from “police weapons fire.” The Council opined that criminal investigatory records under OPRA “include records involving all manner of crimes, resolved or unresolved, and [include] information that is part and parcel of an investigation, confirmed and unconfirmed” The Council found those records not accessible under N.J.S.A. 47:1A-1.1 and found no violation by the Custodian, stating: “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete . . . 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”.

Similarly, in Brewer v. N.J. Dep’t of Law and Pub. Safety, GRC Complaint No. 2006-204 (October 2007), the complainant sought lab records in the custody of the State Police for use in an investigation. As the records were part of a criminal investigative file, they were exempt

from disclosure under OPRA. Accordingly, the Council determined the complainant's request was lawfully denied. *See also*, Scott v. Red Bank Police Dep't (Monmouth), GRC Complaint No. 2011-244 (February 2013).

Further, in Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013), the Complainant requested all reports by any law enforcement officer regarding a specific arrest and incident. The Complainant also requested all police logs for the date of the arrest. The Custodian disclosed the requested arrest report because it merely recorded the basic factual data for the arrest. However, he denied access to the "narrative" police logs, as they pertained to an open and ongoing criminal investigation. The Complainant disagreed with the proposition that police reports constitute exempt criminal investigatory records, asserting that the case resulted in an arrest and has since been closed. Relying on the holding in Janeczko, where the Council found that criminal investigatory records remain exempt whether the investigation is pending or closed, the GRC in Hwang stated that:

[T]he Custodian has certified that Item No. 1 of the Complainant's request constitutes criminal investigatory files. The Complainant has not provided any competent evidence to refute this certification. Therefore, because the requested law enforcement reports . . . constitute criminal investigatory files, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. [citations omitted].

Hwang, at 9.

In the instant matter, the Custodian determined that all the records responsive to the Complainant's request were exempt as criminal investigatory records. The Complainant contends that the records no longer fall under the exemption because the records were used in a public trial. However, whether the criminal investigation is "resolved or unresolved" is not relevant because "[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete[.]" Janeczko, GRC 2002-79 and 2002-80. Exempt criminal investigatory records are those records, which are "not required by law to be made, maintained or kept on file that [are] held by a law enforcement agency which [pertain] to any criminal investigation or related civil enforcement proceeding." *Id.*

Noteworthy is the Complainant's reliance on Grossman. However, the reliance is misplaced. Regardless of the weight to be given the unpublished opinion, the portion of the case favorable to the Complainant's position was based on that Court's interpretation of the common law right of access rather than OPRA. *Id.* at 17-18. The GRC has no jurisdiction over complaints concerning the common law right of access. N.J.S.A. 47:1A-7; Rowan v. Warren Hills Regional School Dist., GRC Complaint No. 2011-347 (January 2013). Further, the relevant portion of the decision cited by the Complainant held that the records could not be disclosed under OPRA, as they were criminal investigatory records, notwithstanding that they had already been released in the course of a criminal trial. Grossman, OCN-L-533-13 at 13-14.

Here, as occurred in Hwang, the Custodian has certified that the records⁴ are part of a criminal investigatory file. Complainant has offered no competent evidence to refute the certification. In fact, Complainant and Custodian agree that the records sought concern police reports gathered in a homicide investigation. Therefore, because the requested law enforcement reports constitute criminal investigatory records, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko, GRC 2002-79 and GRC 2002-80; Brewer, GRC 2006-204, and Hwang, GRC 2011-348.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to the requested records. The Custodian certified that the records are criminal investigatory records. In response, the Complainant has offered no competent, credible evidence to refute the certification. OPRA's criminal investigatory records exemption does not permit access to investigatory records once the investigation is complete. The Council has no basis to withhold from access only currently active investigations and release those where the matter is resolved or closed. Therefore, because the requested law enforcement reports constitute criminal investigatory records, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. N.J. Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Brewer v. N.J. Dep't of Law and Pub. Safety, GRC Complaint No. 2006-204 (October 2007); and Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013).

Prepared By: Ernest Bongiovanni
Staff Attorney

Reviewed By: Joseph Glover
Executive Director

June 23, 2015

⁴ The Complainant sought "records the police documented to determine Mr. Thieme accused the defense lawyers of bribing or enticing him to give false testimony." Although those records may have included arrest reports, which, unlike other criminal investigatory records, may be subject to disclosure, by failing to provide the Custodian with reasonable identifiers, the request requires the Custodian to do research, speculate, or make a judgment call in order to locate responsive records. Therefore, that request was on its face invalid. See Goodman v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2010-323 (April 2012); MAG Entm't, LLC v. Div. of Alcohol Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).