State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

February 23, 2016 Government Records Council Meeting

Paul R. Rizzo
(On behalf of Borough of South Plainfield)
Complainant
v.
Middlesex County Prosecutor's Office
Custodian of Record

Complaint No. 2014-284

At the February 23, 2016 public meeting, the Government Records Council ("Council") considered the February 16, 2016 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 notwithstanding the Custodian's mistaken disclosure of exempt records during an on-site inspection, the Custodian lawfully denied access to the records sought to be copied. The documents are nonetheless protected from disclosure as criminal investigative records. Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013); Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013); Lewen v. Robbinsville Pub. School, Dist., GRC Complaint No. 2008-211 (February 2011).

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 23rd Day of February, 2016

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: February 25, 2016

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
February 23, 2016 Council Meeting

Paul R. Rizzo[1] **GRC Complaint No. 2014-284**
(On behalf of South Plainfield)
Complainant

v.

Middlesex County Prosecutor's Office[2]
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of any and all records of investigations, complaints, findings, and penalties assessed against JPRCI, Inc., Philip Colasanti, John Colasanti, and any other entity or individual concerning the liquor license for the bar/club known as Liquid Assets from January 1, 2003, to present (including but not limited to any correspondence sent or received relating to the individuals or entities identified herein).

Custodian of Record: Christopher Kuberiet, First Assistant Prosecutor
Request Received by Custodian: June 3, 2014
Response Made by Custodian: June 11, 2014
GRC Complaint Received: August 8, 2014

Background[3]

Request and Response:

On May 30, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 11, 2014, James O'Neill, Public Information Officer, responded in writing on behalf of the Custodian, denying the Complainant's OPRA request on the basis that no responsive records existed. On June 17, 2014, the Complainant sent a letter to Mr. O'Neill, attaching correspondence from 2006 referring to JPRC, Inc., that called into question the initial response that no records existed. The Complainant asserted that records clearly exist and should be provided.

On July 1, 2014, the Complainant sent a letter to the Custodian, requesting the following records, which he had inspected onsite earlier that same day:

[1] No legal representation listed on record.
[2] No legal representation listed on record.
[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.

1. Letter from Assistant Prosecutor ("AP") Judson Hamlin to Mr. Mongello, dated October 6, 2005.
2. Recommendations of Probation Department to reject John Colasanti from Pre-Trial Intervention ("PTI").
3. Letter from AP Hamlin to Mr. Mongello concerning PTI, dated December 5, 2005.
4. Memorandum from AP Hamlin, dated January 17, 2006, concerning decision to allow John Colasanti into PTI.
5. Letter from AP Hamlin to Mr. Mongello, consenting to John Colasanti's enrollment into PTI.
6. Complaints against "Colasanti and JPRC, Inc.," filed in May 2005.

The Complainant requested that the Middlesex County Prosecutor's Office ("MCPO") provide an estimated cost for these records so that he may remit payment.

On July 24, 2014, the Custodian responded to the Complainant's letter, referring to same as a "supplemental discovery request." The Custodian granted access to the complaints (Item No. 5) but denied access to the remainders of the records as "privileged and not subject to disclosure." On August 1, 2014, the Custodian sent a letter to the Complainant, advising that the MCPO was providing responsive complaints that it had inadvertently failed to include as attachments to the Custodian's July 24, 2014 response.

Denial of Access Complaint:

On August 8, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian offered him the opportunity to inspect responsive records onsite and indicate which documents he wanted copied. The Complainant averred that he sent a letter to the Custodian on July 1, 2014 (following his on-site inspection), seeking access to six (6) specific items.

The Complainant argued that the Custodian's subsequent July 24, 2014 denial of all but one item as "privileged" was unlawful. The Complainant asserted that the criminal investigation and complaints were resolved and concluded approximately eight (8) years to prior to his request. The Complainant also noted that he had not received the complaints, although the Custodian granted access to them.[4]

Statement of Information:

On September 4, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that the MCPO received the Complainant's OPRA request on June 3, 2014. The Custodian certified that Mr. O'Neill initially responded in writing on June 11, 2014, denying the request on the basis that no records existed. The Custodian certified that the Complainant's June 17, 2014 letter (with attachments) provided additional clarifying information that allowed the Custodian to locate responsive records.

[4] The Complainant executed the Denial of Access Complaint on July 29, 2014, three (3) days prior to MCPO's letter correcting its failure to attach the responsive complaints to the July 24, 2014 letter. The Complainant subsequently verbally confirmed via telephone on January 12, 2016, that he received the complaints after filing this Complaint.

The Custodian certified that the Complainant reviewed the responsive records on-site on or about July 1, 2014, and thereafter submitted a supplemental request seeking copies of certain records. The Custodian averred that he responded on July 24, 2014, granting access to the complaints (without redactions), but denied access to the remainder of the records as "privileged." The Custodian noted that he inadvertently failed to attach the complaints to his response; thus, he rectified that issue on August 1, 2014.

The Custodian argued that the remaining five (5) items are exempt as criminal investigatory records, *citing* N.J.S.A. 47:1A-1. Kovalick v. Somerset Cnty. Prosecutor's Office, 206 N.J. Super. 581, 591 (2011); Bent v. Stafford Police Dep't., 381 N.J. Super. 30, 38-39 (App. Div. 2005); Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); State v. DeGeorge, 113 N.J. Super. 542 (App. Div. 1971).

Additional Submissions:

On July 2, 2015, the GRC requested additional information from the Custodian. Specifically, the GRC requested clarification as to whether the Custodian allowed the Complainant to inspect the actual records or whether he provided a document index by which the Complainant was able to identify the six (6) items sought in his July 1, 2014 letter.

On July 30, 2015, the Custodian responded to the GRC's request for additional information. The Custodian certified that he permitted the Complainant to inspect Prosecutor's File No. 05-1309 (State v. Colasanti) in its entirety. The Custodian further certified that he was never shown a document index.

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.

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). There, the complainant sought access to copies of records related to alleged criminal actions committed by her son, who was allegedly 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" and are not accessible under N.J.S.A. 47:1A-1.1. Consequently, the complainant's request was denied and the Council 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."

Further, in Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013), the complainant requested reports made for case number BCP0-1002349 regarding the September 20, 2010 arrest of Hwang and a codefendant. The complainant also requested all police logs for September 20, 2010. The custodian agreed to disclose the requested arrest report because it merely recorded the basic factual data for the arrest, which required only a 35 cents copy fee; however, he refused to disclose 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. The complainant asserted that the case resulted in his arrest and had since been closed.

Relying on the holding in Janeczko, the GRC stated that:

> [I]n the instant matter the 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].

Id.

The Custodian's sole reason for denying access to the five items at issue was that the items sought were criminal investigative records. However, the instant case is somewhat unique in that the Custodian disclosed records during an on-site inspection but later denied a subsequent request for copies of the same records produced during that inspection. In short, the Custodian disclosed the records by mistake, a subject of infrequent review and a defense which the Custodian did not raise.

The Appellate Division has ruled that the Council is permitted to raise additional defenses regarding the disclosure of records. Paff v. Twp. of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007).[5] In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act ("OPMA") prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The Court held that:

[5] On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

> "[t]he GRC has an independent obligation to 'render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA…The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."
>
> The Court further stated that:
>
> "[a]side from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998)(citing Isko v. Planning Bd. Of Livingston, 51 N.J. 162, 175 (1968)(lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956)(question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957)." *Id.*

OPRA's stated policy is to make government records "readily accessible . . . for the protection of the public interest . . ." N.J.S.A. 47:1A-1. In Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013), the Mayor, during a Township special meeting, showed members of the public the conceptual drawings of a redevelopment plan on a tablet device. Despite a public airing of the document, the Custodian later denied a copy of the drawings, arguing that they constituted "inter-agency or intra-agency, advisory, consultative or deliberative" ("ACD") material, and were thus exempt from OPRA. N.J.S.A. 47:1A-1.1. The GRC held that:

> [T]he ACD exemption is "not akin to a privilege that can be waived through voluntary disclosure to the public similar to the attorney-client privilege exemption. ACD material is a description, not a privilege. Therefore, ACD material does not lose its character as ACD merely because it was shown in public.

Thus, despite the Mayor's mistaken decision to show the ACD material at a public meeting, OPRA intends that the ACD privilege can be preserved in the public interest. That interest protects a privilege that "bars the 'disclosure of proposed policies before they have been fully vetted and adopted by a government agency,' thereby ensuring that an agency is not judged by a policy that was merely considered." Eastwood at 4, *citing* Ciesla v. NJ Dep't of Health and Senior Serv., 429 N.J. Super. 127 (App. Div. 2012).

Moreover, in the GRC's reconsideration of Lewen v. Robbinsville Pub. School, Dist., GRC Complaint No. 2008-211 (February 2011), the Council reversed its own mistake of ordering disclosure following an *in camera* examination of an e-mail between two public employees that only pertained to personal (non-governmental) matters. After a lengthy analysis

of decisional law concerning similar state statues to OPRA, the GRC found disclosure would not be in the public interest. *See* Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ., 789 N.W.2d 495 (2010), Schill v. Wis. Rapids Sch. Dist., 786 N.W.2d 177 (Wis. 2010), Denver Publ. Co. v. Bd. of County Comm'rs of Arapahoe Cnty., 121 P.3d 190 (Colo. 2005), State of Florida, et als v. City of Clearwater, 863 S. 2d 149 (Fla. 2003), and Tiberino v. Spokane Cnty. Prosecutor, 13 P.3d 1104 (Wash. 2000).[6]

In Lewin, the GRC noted that the purpose of OPRA is "to maximize public knowledge about public affairs in order to ensure an informed citizenry." In reconsidering its Interim Order, the GRC reflected that its "*in* camera review of the e-mail in question revealed that the contents of the e-mail constituted a personal communication between friends and as such, the contents of the e-mail in question contribute nothing to the public's knowledge about public affairs." [emphasis supplied]. Finally, as "the e-mail in question constituted a personal communication, it was not 'made, maintained or kept on file . . . in the course of official business' and is therefore not disclosable under OPRA. N.J.S.A. 47:1A-1.1." *Citing* Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010).

Here the Custodian argued that the criminal investigatory records exemption warranted denial, but he did not sufficiently address the mistake that his office made when they displayed all of the records to the requestor during an on-site inspection. However a mistaken disclosure should not be exacerbated by further mistakes.

In Kohn v. Twp. of Livingston, GRC Complaint No. 2011-328 (February 2013), the complainant conducted an on-site inspection of responsive records. During the inspection, the complainant identified 12 pages of records he wanted, tagged those pages with sticky tabs, and asked that the records be e-mailed to him. After not receiving the requested copies, the complainant filed a Denial of Access Complaint. In that case, the GRC found that the custodian unlawfully denied access by not timely providing copies of the records that the complainant identified during his on-site inspection.

Without question, the instant matter is clearly distinguishable from Kohn. In particular, the custodian in Kohn did not disclose statutorily exempt records. However, the agency here erred enormously in showing the Complainant records that are not disclosable to the public under OPRA. The improper release of criminal investigatory records could serve to compromise and potentially undermine the integrity of a criminal investigation. Moreover, criminal investigatory records are exempt, not privileged, under OPRA. Even if a privilege were to apply in this particular case, the agency's mistake in showing exempt records should not effectively waive any privilege. The agency's mistake does not undermine the statutory exemption for non-disclosure of the records. Like the public interest in protecting ACD material in Eastwood and the refusal to extend OPRA to strictly personal communications by public employees in Lewen,

[6] In Tiberino, the Court upheld nondisclosure of a former employee's e-mails in a case where the employee had been terminated, in part owing to her use of e-mail for personal reasons. The Court said: "[T]he public has an interest in seeing that public employees are not spending their time on the public payroll pursuing personal matters. But it is the amount of time spent on personal matters, not the content of personal e-mails or phone calls or conversations, that is of public interest." [emphasis supplied].

the public interest designed to be protected by OPRA can only be advanced under these facts by protecting the exemption and not compromising or undermining a criminal investigation.

Accordingly, and notwithstanding the Custodian's mistaken disclosure of exempt records during an on-site inspection, the Custodian lawfully denied access to the records sought to be copied. The documents are nonetheless protected from disclosure as criminal investigative records. Hwang, GRC 2011-348 (January 2013); Eastwood, GRC 2012-121; Lewen, GRC 2008-211.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that notwithstanding the Custodian's mistaken disclosure of exempt records during an on-site inspection, the Custodian lawfully denied access to the records sought to be copied. The documents are nonetheless protected from disclosure as criminal investigative records. Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013); Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013); Lewen v. Robbinsville Pub. School, Dist., GRC Complaint No. 2008-211 (February 2011).

Prepared By: Ernest Bongiovanni
Staff Attorney

February 16, 2016