



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

July 30, 2008 Government Records Council Meeting

Abdiel Avila
Complainant

Complaint No. 2007-287

v.

Camden County Prosecutor's Office
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council ("Council") considered the July 23, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has not unlawfully denied access to request items No. 1, No. 2 and No. 3 because the Custodian certified in the Statement of Information that the Camden County Prosecutor's Office was not in possession of the records requested. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. The Custodian has not unlawfully denied access to request Items No. 4 and No. 5 because the Custodian certified that no OPRA request was ever received from the Complainant.

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 July, 2008



Robin Berg Tabakin, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: August 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 30, 2008 Council Meeting**

**Abdiel Avila¹
Complainant**

GRC Complaint No. 2007-287

v.

**Camden County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint:

1. Transcript of the Grand Jury
2. Judge Holden's Oath of Office.
3. Transcript of Oath by foreperson.
4. "DYF report."³
5. Signed copy of "Tru Bill."⁴

Request Made: June 7, 2007⁵

Response Made: June 29, 2007

Custodian: Cheryl Hendler Cohen

GRC Complaint Filed: November 15, 2007

Background

June 7, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on three (3) official OPRA request forms.⁶

June 29, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the Complainant's request Item No. 1 is

¹ No legal representation listed on record.

² Represented by Donna M. Whiteside, Esq., of the Office of Camden County Counsel (Camden, NJ).

³ The Complainant gives no further information on the nature of records requested in Item No. 4.

⁴ The Complainant gives no further information on the nature of records requested in Item No. 5.

⁵ The Complainant states in his Denial of Access Complaint that he submitted the requests on May 15, 2007. However, the evidence of record shows that the three (3) received OPRA requests relevant to this complaint were signed and dated June 7, 2007 by the Complainant. Additionally, the three (3) requests were marked received by the Camden County Prosecutor's Office on June 21, 2007 at which time the requests were initialed by "GW."

⁶ The Complainant's OPRA request was received by the Custodian on June 21, 2007. The evidence of record shows that other records not relevant to this complaint were requested in the Complainant's three (3) June 7, 2007 OPRA requests.

denied because grand jury investigation and criminal investigation reports are not public records pursuant to N.J.S.A. 47:1A-1.1. and N.J. Court Rule 3:6-7⁷ and that Items No. 2 and No. 3 are denied because the Custodian is not in possession of Judge Holden’s Oath of Office or the transcript of proceedings of a bail hearing occurring on July 5, 2007.

November 15, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching a letter from the Custodian to the Complainant dated June 29, 2007.

The Complainant states that he submitted three (3) OPRA requests relevant to this complaint on June 7, 2007. The Complainant states that he was denied access to the requested records on June 29, 2007.

The Complainant agreed to mediate this complaint.

December 12, 2007

Offer of Mediation sent to the Custodian. The Custodian did not respond to the Offer of Mediation.

February 15, 2008

Request for the Statement of Information sent to the Custodian.

March 7, 2008

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s three (3) OPRA requests dated June 7, 2007.
- Letter from the Custodian to the Complainant dated June 29, 2007.⁸

The Custodian states that she received the Complainant’s June 7, 2007 OPRA requests on June 21, 2007. The Custodian further states that she responded to the Complainant on June 29, 2007 denying access to request Items No. 1 through No. 3. The Custodian certifies to the following:

Requested Records	Provided	Legal Explanation for Denial
1. Transcript of the Grand Jury	No.	No such records maintained in the Prosecutor’s Office.
2. Judge Holden’s Oath of Office	No.	No such records maintained in the Prosecutor’s Office.

⁷ N.J. Court Rule 3:6-7 states that “[e]xcept as otherwise provided by R. 3:13-3, the requirement as to secrecy of proceedings of the grand jury shall remain as heretofore, and all persons other than witnesses, permitted by R. 3:6-6 to be present while the grand jury is in session, shall be required to take an oath of secrecy before their admission thereto. Such oath shall also be taken by typists making transcripts of testimony given before the grand jury.”

⁸The Custodian also includes another request and response that is not relevant to this complaint. *Abdiel Avila v. Camden County Prosecutor’s Office, 2007-287 – Findings and Recommendations of the Executive Director*

3. Transcript of Oath by foreperson	No.	No such records maintained in the Prosecutor's Office.
4. "DYF Report"	No.	No request for a "DYF Report" received.
5. "Tru Bill"	No.	No request for the "Tru Bill" received.

The Custodian's Counsel asserts that the Custodian responded to the Complainant in a timely manner. Counsel states that the Custodian was unable to provide any records responsive to the Complainant's OPRA request Items No. 1 through No. 3 because the Custodian was not in possession of any of the requested records. Counsel additionally states that the Custodian never received an OPRA request from the Complainant for Items No. 4 and No. 5.⁹

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

"[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian....If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." N.J.S.A. 47:1A-5.g.

⁹ The Complainant submitted a subsequent correspondence dated January 4, 2008 which contains information not relevant to the instant complaint.

OPRA further provides that:

“a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived....” N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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 Complainant in this complaint filed three (3) OPRA requests on June 7, 2007. The evidence of record shows that the requests were received by the Custodian on June 21, 2007. The Custodian responded in writing to the Complainant on June 29, 2007 stating that access to the Complainant’s request Item No. 1 (Transcript of the Grand Jury) is denied because grand jury investigation and criminal investigation reports are not public records pursuant to N.J.S.A. 47:1A-1.1. and N.J. Court Rule 3:6-7 and the Complainant’s request Items No. 2 (Judge Holden’s Oath of Office) and No. 3 (Transcript of Oath by foreperson) are denied because the Custodian is not in possession of these records. In the SOI, the Custodian certifies that no records responsive to request Items No. 1, No. 2 and No. 3 exist in the possession of the Camden County Prosecutor’s Office.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the GRC held that there was no unlawful denial of access to the requested record because the Custodian certified that no records responsive existed. Therefore, the Custodian has not unlawfully denied access to request items No. 1, No. 2 and No. 3 because the Custodian certified in the SOI that the Camden County Prosecutor’s Office was not in possession of the records requested. See Pusterhofer, supra.

Additionally, in this complaint the Custodian also certifies in the SOI that no OPRA request for either request Item 4 (“DYF Report”) or request Item 5 (“Tru Bill”) was received from the Complainant. Therefore, the Custodian has not unlawfully denied access to request Items No. 4 and No. 5 because the Custodian certified that no OPRA request was ever received from the Complainant.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not unlawfully denied access to request items No. 1, No. 2 and No. 3 because the Custodian certified in the Statement of Information that the Camden County Prosecutor's Office was not in possession of the records requested. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

2. The Custodian has not unlawfully denied access to request Items No. 4 and No. 5 because the Custodian certified that no OPRA request was ever received from the Complainant.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 23, 2008