



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

November 4, 2009 Government Records Council Meeting

Ali S. Morgano
Complainant

Complaint No. 2008-107

v.

Essex County Prosecutor's Office
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 2009 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 because the Custodian certified that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive to the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 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 4th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council



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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Ali S. Morgano¹
Complainant**

GRC Complaint No. 2008-107

v.

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

Records Relevant to Complaint:³

- 1) Prosecutor's application document(s) regarding an order for Cheryl Johnson AKA Cheryl Harris to appear in an Essex County Superior Court material witness hearing.
- 2) Date of appearance document(s) and name of the presiding judge in the material witness proceedings for Cheryl Johnson AKA Cheryl Harris.

Request Made: April 22, 2008

Response Made: April 29, 2008

Custodian: Executive Assistant Prosecutor Hilary L. Brunell

GRC Complaint Filed: May 30, 2008⁴

Background

April 22, 2008

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

April 29, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same date the request was received. The Custodian denies the Complainant's request for the records relevant to the complaint because the Custodian asserts that there are no records responsive to the Complainant's request.

May 30, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated April 22, 2008.

¹ No legal representation listed on record.

² Represented by Essex County Counsel (Newark, NJ).

³ The Complainant captioned this matter as State of N.J. v. Cheryl Johnson A.K.A. Cheryl Harris, Indictment Numbers: 3278-10-88 and 0442-02-89; Prosecutor's File Numbers: 88005354, 880067784.

⁴ The GRC received the Denial of Access Complaint on said date.

The Complainant states that he has been unlawfully denied access to the requested records because the Custodian never responded to his OPRA request in violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 3:1A-5.i. The Complainant states that Cheryl Johnson AKA Cheryl Harris (“Johnson”) was a material witness against him, and that the Prosecutor’s application document(s) for the order directing her to appear at the Essex County Superior Court material witness hearing is kept on file at the Essex County Criminal Division Manager’s Office pursuant to N.J.S.A. 3:26-3(a)(b)(c). The Complainant contends that he is entitled to the requested records under N.J.S.A. 47:1A-3.b. The Complainant further contends that, although the Custodian denied him the requested records, N.J.S.A. 3:26-3 proves that the records exist and therefore should be disclosed.

September 16, 2008

Letter from the Complainant to the GRC. The Complainant requests that the GRC obtain from the Custodian a certification index table and forward a copy of it to him.

November 2, 2008

Letter from the Complainant to the GRC. The Complainant declines to participate in mediation.

November 10, 2008

Request for the Statement of Information (“SOI”) sent to the Custodian.

November 17, 2008

Custodian’s SOI attaching the Custodian’s response to the OPRA request dated April 29, 2008. The Custodian certifies that her search for the requested records involved dispatching Homicide Section personnel to a remote storage facility to retrieve the file which could contain records responsive to the Complainant’s request and searching the file for the requested records. The Custodian also certifies that the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable to the records requested in this complaint.

The Custodian certifies that she received the Complainant’s OPRA request on April 29, 2008 and that she responded to the request on the same date it was received. The Custodian also certifies that there are no records responsive to the Complainant’s request.⁵

December 5, 2008

Letter from the Complainant to the GRC. The Complainant confirms that he has received the Custodian’s SOI. The Complainant requests a copy of the Custodian’s index table certification.

⁵ The Custodian further certifies that if the records did exist they would be exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1. (The Custodian means N.J.S.A. 47:1A-1.1.).
Ali S. Morgano v. Essex County Prosecutor’s Office, 2008-107 – Findings and Recommendations of the Executive Director

March 25, 2009

Letter from the GRC to the Complainant. The GRC acknowledges receipt of the Complainant's December 5, 2008 correspondence to the GRC. The GRC informs the Complainant that it is not clear what the Complainant is seeking because the Custodian included a document index table as part of the SOI, on which the Custodian copied the Complainant. The GRC further informs the Complainant that if said table is missing from the SOI that the Complainant received, the Complainant should so advise the GRC and the GRC will send a copy of the table to him.

March 30, 2009

Letter from the Complainant to the GRC. The Complainant states that he is submitting additional arguments in support of his Denial of Access Complaint.

June 9, 2009⁶

Letter from the GRC to the Complainant. The GRC informs the Complainant that *N.J.A.C. 5:105 et seq.* provides for one (1) submission to the GRC from the Complainant (the Denial of Access Complaint) and one (1) submission to the GRC from the Custodian (the Statement of Information); therefore, his additional arguments will not be considered by the GRC unless they are in reply to new issues or arguments that were raised by the Custodian.⁷

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-1.1.

OPRA defines a government record as:

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:

“[i]f an arrest has been made [the following information shall be made available to the public] the defendant's name, age, residence, occupation,

⁶ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

⁷ The Custodian did not raise any new issues or arguments.

marital status and similar background information and the identity of the complaining party...the text of any charges...the identity of the investigating and arresting personnel and agency...the time and place of arrest...and information as to circumstances surrounding bail, whether it was posted and the amount thereof.” N.J.S.A. 47:1A-3.b.

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.

In the instant matter, the Complainant stated that he was unlawfully denied access to the requested records because he asserted the Custodian never responded to his OPRA request and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 3:1A-5.i.

The Custodian certified that she responded in writing to the Complainant’s OPRA request on the same date that she received it, April 29, 2008. The Custodian attached a copy of the “Essex County Prosecutor’s Office Public Records Response” form to her SOI. The response is addressed to the Complainant and states that the requested records are not being provided because there are no records responsive to the Complainant’s request. The response form is signed by the Custodian and dated April 28, 2008.

The Complainant’s assertion that the Custodian failed to respond to the Complainant’s OPRA request is not supported by the evidence of record. The Custodian not only certified that she responded in writing to the Complainant’s OPRA request on the same date that she received it, but she attached a copy of the purported response form to the Statement of Information. Further, the Complainant stated in the last paragraph of his legal argument that the “...evidence submitted herein...prove[s] that the requested document(s) exist in the custodian’s...files.” The fact the Complainant was arguing against nonexistent records certainly militates toward knowledge of the Custodian’s reason for denial of access articulated in her response. Therefore, the evidence of record supports the Custodian’s contention that she responded in writing to the Complainant’s OPRA request on the same date the request was received.

The Complainant also asserted that the Essex County Prosecutor’s application document(s) for an order directing Johnson to appear as a material witness must be kept on file at the Essex County Criminal Division Manager’s Office pursuant to N.J.S.A. 3:26-3(a)(b)(c). The Complainant cited to sections of New Jersey Statutes that do not exist. The Complainant may be referring to the New Jersey Court Rules rather than statutes because parts of the alleged statutes the Complainant cited contain language

similar to R. 3:26-3. But even the Court Rules do not support the Complainant's argument. R. 3:26-3(a), R. 3:26-3(b) and R. 3:26-3(c) address the application process and other procedural aspects of proceedings to determine whether a person should be adjudged a material witness; however, these rules do not address the filing or storage of records.

The Complainant further asserted that the records should be disclosed to him pursuant to N.J.S.A. 47:1A-3.b. The Complainant cited the section of OPRA which he alleged was relevant to his request as follows:

“[i]f an arrest has been made [the following information shall be made available to the public] the defendant's name, age, residence, occupation, marital status and similar background information and the identity of the complaining party...the text of any charges...the identity of the investigating and arresting personnel and agency...the time and place of arrest...*and information as to circumstances surrounding bail, whether it was posted and the amount thereof.*” (Emphasis added by the Complainant).

The Complainant is incorrect. First, N.J.S.A. 47:1A-3.b provides for disclosure of specific information listed within that statute. Second, N.J.S.A. 47:1A-3.b provides that “...the [listed information] concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a *request for such information* ... (Emphasis added.). The Complainant did not request any of the information listed in N.J.S.A. 47:1A-3.b. Rather, the Complainant requested the application to the court for commencement of proceedings to determine whether Johnson should be adjudged a material witness, the date such proceedings were conducted and the name of the presiding judge.

The Custodian certified that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive to the Complainant's request.

Pursuant to N.J.S.A. 47:1A-1.1., a government record is only responsive to an OPRA request if it has “been made, maintained or kept on file...or has been received in the course of [the public agency's] official business ...”

The Council has held that if a custodian has sufficiently borne his/her burden of proving that there is no record responsive to the Complainant's request, the Custodian could not have unlawfully denied access. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that averred that the requested record was nonexistent. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record can not (sic) be released and there was no unlawful denial of access.”

Because the Custodian certified that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive to the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-6 and Pusterhofer, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian certified that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive to the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009