



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

November 30, 2010 Government Records Council Meeting

Russell Tinsley
Complainant

Complaint No. 2009-195

v.

New Jersey State Parole Board
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council (“Council”) considered the November 23, 2010 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. Because New Jersey has a strong public policy in favor of public access to government records, N.J.S.A. 47:1A-9.b. does not operate to permit the exemption from disclosure set forth at California Government Code § 6254(f) in the matter currently before the Council pursuant to Mejias v. NJ Department of Corrections, GRC Complaint No. 2007-181 (July 2008).
2. Because the Custodian certified that the requested records contained criminal investigatory information and victims’ records which resulted in the conviction of the Complainant in 1984 and 1999, she has lawfully denied access to the requested records under OPRA pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-2.2(a). and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004).

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 November, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: December 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting**

**Russell Tinsley¹
Complainant**

GRC Complaint No. 2009-195

v.

**New Jersey State Parole Board²
Custodian of Records**

Records Relevant to Complaint: Copies of privileged and confidential documents that were used by the New Jersey Department of Corrections (“DOC”), South Woods State Prison (“SWSP”) and the New Jersey State Parole Board (“SPB”) to place an administrator’s hold on the Complainant’s March 13, 2009 parole release date.

Request Made: May 16, 2009

Response Made: June 3, 2009

Custodian: Dina Rogers

GRC Complaint Filed: June 9, 2009³

Background

May 16, 2009

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.

June 3, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request.⁴

The Custodian states that access to the requested records is denied because the requested records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and California Government Code § 6254(f) of the California Public Records Act (“CPRA”).

¹ No legal representation listed on record.

² Represented by DAG Ellen Hale, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Custodian received the Complainant’s OPRA request on May 21, 2009. The State was closed on May 25, 2009 in observance of Memorial Day and closed again on May 26, 2009 because all non-essential State workers were required to take a furlough day.

Additionally, the Custodian states that the DOC would not permit the Complainant to possess such records pursuant to *N.J.A.C.* 10A:18-2.14(c).⁵

However, the Custodian states that two (2) records, San Francisco Information No. 114515 and San Francisco Information MCN 1852680/SCN 175247, have been deemed to be disclosable. The Custodian advises that the copying costs will be \$3.75 for five (5) pages of records.

June 9, 2009

Denial of Access Complaint filed with the Government Records Council (“GRC”) with no attachments.⁶

The Complainant states that he submitted an OPRA request to the SPB on May 16, 2009. The Complainant states that he did not receive a response from the Custodian.

The Complainant states that this Denial of Access Complaint arises from a rescission of parole hearing in which the SPB placed the Complainant’s parole date on administrative hold based on new confidential information. The Complainant asserts that he initially asked a hearing officer at a rescission hearing on March 16, 2009 to provide this new confidential information and was denied access to such.

The Complainant contends that he was denied the opportunity to defend himself against new confidential information used to revoke his parole date of March 13, 2009. The Complainant states that the SPB’s promulgated regulations provides that:

“[a]n adult inmate shall be released on parole at the time of parole eligibility, unless information supplied in the report filed pursuant to section 10 of P.L.1979, c.441 (C.30:4-123.54) or developed or produced at a hearing held pursuant to section 11 of P.L.1979, c.441 (C.30:4-123.55) indicates by a preponderance of the evidence that the inmate has failed to cooperate in his or her own rehabilitation or that there is a reasonable expectation that the inmate will violate conditions of parole imposed pursuant to section 15 of P.L.1979, c.441 (C.30:4-123.59) if released on parole at that time. In reaching such determination, the board panel or board shall state on the record the reasons therefor.” N.J.S.A.30:4-123.53(a). See also Trantino v. New Jersey State Parole Board, 166 N.J. 113, 189 (2001) and New Jersey State Parole Board v. Cestari, 224 N.J. Super. 534 (App. Div. 1988).

The Complainant states that the SPB has an obligation to render decisions by application of all evidence as opposed to the basis of testimony of a single expert or selected experts.

⁵ *N.J.A.C.* 10A:18-2.14(c) provides that “[t]he inmate’s name and number shall appear on the outside of the incoming correspondence. Correspondence without either the inmate’s name or number shall be returned to the sender.”

⁶ The Complainant attached e-mails between the DOC and the GRC which relate to a prior complaint administratively disposed of by the GRC in June, 2009. Moreover, the Complainant attached other documents which are not relevant to this complaint.

See Hunterson v. Disabato, 140 F. Supp. 2d 353, 378 (D.N.J. 2001).⁷ The Complainant argues that no new information exists in the open record that would have brought about the delay of his release besides the requested confidential records now at issue.

The Complainant contends that his inability to rebut the requested confidential records is a violation of the Complainant's due process. See U.S. Constitutional Amendment No. 14. Further, the Complainant argues that the SPB's promulgated rules at *N.J.A.C. 10A:71-3.3(d)*, stating that all evidence not classified as confidential pursuant to *N.J.A.C. 10A:71-2.1* or the rules and regulations of the department shall be disclosed to the inmate, is inapposite to *N.J.A.C. 10A:71-3.13(e)*, which states that an inmate shall have the right to rebut any evidence and shall have the right to present evidence on his or her own behalf. The Complainant argues that inherent in the language of *N.J.A.C. 10A:71-3.13(e)* is the reasonable expectation that an inmate will be able to review any records that could negatively affect a parole hearing and will be given a chance to rebut such. The Complainant states that the Parole Act of 1979 creates a sufficient expectation to entitle inmates to some measure of constitutional protection with respect to probation eligibility decisions. See N.J. State Parole Board v. Byrne, 93 N.J. 192 (1983) and Thompson v. N.J. State Parole Board, 210 N.J. Super. 107, 121 (1986).

The Complainant asserts that the ability to rebut evidence introduced and relied upon by the SPB in a parole hearing is an integral part of the process granted by the U.S. Constitution. The Complainant asserts that when evidence such as psychological reports and other material deemed to be confidential is withheld it dilutes the purpose of the hearing process. The Complainant states that the Thompson court noted that, "although parole is not a constitution[al] right, the prisoner's liberty interest is sufficient to invoke certain procedural rights..." *Id.* at 120. The Complainant argues that based on the court's statement in Thompson, the SPB has an obligation to give the Complainant an opportunity to review the confidential records requested.

The Complainant states that in Watson v. DiSabato, 933 F. Supp. 39 (1996), the court assessed the competing interest of the inmate and the State, holding that, "in this particular context the process required is ... a statement by the government showing that the prisoner is substantially likely to recidivate, and an opportunity for the prisoner to submit a written response to the [S]tate's reasons." *Id.* at 393. The Complainant alleges that in the instant matter, the SPB failed to provide the Complainant with the requested records so that he may rebut the information contained therein and further failed to provide the Complainant with a summary of the content.

The Complainant argues that although security concerns are legitimate and understandable, the SPB has exercised said exemption to disclosure too broadly. The Complainant asserts that the exemption appears to be aimed primarily at third parties who may have motivation to harm the inmate or person preparing the report. The Complainant asserts that inmates know the names of the professionals preparing the reports and know if the report played into the SPB's decision to rescind parole because such would be indicated on the Notice of Decision; therefore, there is no reason to withhold the requested records.

⁷ The Complainant includes information pertaining to a Mr. Lopez; however, the GRC cannot determine the relevance of this information to the instant complaint.

In closing, the Complainant states that the standard of evidence at an inmate disciplinary proceeding is one of “substantial credible evidence.” *N.J.A.C.* 10A:4-9.15(a). The Complainant alleges that the SPB’s failure to provide access to the requested records has resulted in his inability to adequately defend himself before the SPB. The Complainant requests that the GRC order the SPB to disclose the requested records or at the very least a summary of the records. The Complainant requests that if disclosure of such records is deemed to be too dangerous, the records should be reviewed *in camera*.⁸

The Complainant agrees to mediate this complaint.

July 1, 2009

Letter from the Complainant to the GRC attaching a letter from the Custodian to the Complainant dated June 3, 2009.

The Complainant states that he is forwarding the Custodian’s written response to the OPRA request for the GRC’s consideration in the instant matter.

July 29, 2009

Offer of Mediation sent to the Custodian.

August 3, 2009

The Custodian declines mediation.

August 10, 2009

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

August 17, 2009

E-mail from the Custodian’s Counsel to the GRC. Counsel requests an extension of five (5) business days to submit the requested SOI.

August 17, 2009

E-mail from the GRC to the Custodian’s Counsel. The GRC grants an extension until August 25, 2009 to submit the requested SOI.

August 19, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated May 16, 2009.
- Letter from the Custodian to the Complainant dated June 3, 2009.

The Custodian certifies that her search for the requested records included contacting Assistant District Attorney (“ADA”) Susan Eto at the District Attorney’s (“DA”) office in San Francisco, California on June 1, 2009. The Custodian certifies that

⁸ The Complainant also requests that the SPB’s decision to revoke his parole be dismissed based on their failure to provide the Complainant with a chance to rebut the information contained in the records requested. However, the GRC has no jurisdiction over decisions rendered by the SPB. See *N.J.S.A.* 47:1A-7.b.

ADA Eto advised on June 2, 2009 that the requested records regarding criminal investigations as well as victim's records were confidential pursuant to California Government Code §6254(f). The Custodian certifies that ADA Eto further advised on June 3, 2009 that San Francisco Information No. 114515 and San Francisco Information MCN 1852680/SCN 175247 could be disclosed to the Complainant.

The Custodian also certifies that no records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that she received the Complainant's OPRA request on May 21, 2009. The Custodian certifies that upon receipt of the Complainant's OPRA request she reviewed the records responsive and determined that those records consisted of the State of California's criminal investigation and victims' records which resulted in the conviction of the Complainant in 1984 and 1999 (which occurred while the Complainant was incarcerated). The Custodian certifies based on her review of the records used to place an administrative hold on the Complainant's prospective parole date and her discussion with ADA Eto, the Custodian determined that the responsive records were not subject to disclosure.

The Custodian certifies that she responded in writing to the Complainant on June 3, 2009 denying access to the requested records as criminal investigatory records and victims' records pursuant to N.J.S.A. 47:1A-1.1. and California Government Code § 6254(f). Additionally, the Custodian certified that she advised that the DOC would not permit the Complainant to possess such records pursuant to *N.J.A.C.* 10A:18-2.14(c). The Custodian also provided access to two (2) records, San Francisco Information No. 114515 and San Francisco Information MCN 1852680/SCN 175247.

The Custodian argues that the records requested by the Complainant are considered confidential records not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. and California Government Code § 6254(f). The Custodian states that 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.

The Custodian states that OPRA exempts criminal investigatory records from the definition of a public record. N.J.S.A. 47:1A-1.1. Moreover, the Custodian states that OPRA exempts victim's information from disclosure. N.J.S.A. 47:1A-2.2. The Custodian certifies that the records responsive contained both types of information; therefore, the Custodian denied access to those records. The Custodian further argues that based on some of the material within the records that detailed the crimes committed

by the Complainant, such records were not subject to disclosure pursuant to *N.J.A.C.* 10A:18-2.14(c).

The Custodian avers that based on the foregoing, this complaint should be dismissed because the SPB properly denied access to the records sought by the Complainant.

June 19, 2010

E-mail from the GRC to the Custodian. The GRC states that it is in need of additional information. Specifically, the GRC states that the Custodian certified in the SOI that she contacted ADA Susan Eto at the DA's Office in San Francisco regarding the records requested. The GRC states that the Custodian further certified that ADA Eto advised on June 2, 2009 that the records were exempt from disclosure pursuant to California Government Code § 6254(f), but that she advised on June 3, 2009 that two (2) other records could be disclosed.

The GRC requests that the Custodian advise as to whether the records requested were maintained by the SPB at the time of the Complainant's request.

June 19, 2010

E-mail from the Custodian to the GRC. The Custodian states that the records responsive to the Complainant's OPRA request were maintained by the SPB at the time of the Complainant's OPRA request.

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 ... A government record shall not include ... *criminal investigatory records* ... 'Criminal investigatory record' means 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." (Emphasis added.) N.J.S.A. 47:1A-1.1.

Further, OPRA provides that:

“... where it shall appear that a person who is *convicted of any indictable offense* under the laws of this State, any other state or the United States is *seeking government records containing personal information pertaining to the person's victim* or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, *the right of access provided for in [OPRA] shall be denied.*” (Emphasis added.) N.J.S.A. 47:1A-2.2.

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.

OPRA provides that:

“[t]he provisions of [OPRA] shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” N.J.S.A. 47:1A-9.b.

CPRA provides that:

“Except as provided in [CPRA], nothing in this chapter shall be construed to require disclosure of records that are any of the following ... Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or *any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes*, except that state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all

witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (c) of Section 13960, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflect the analysis or conclusions of the investigating officer.” (Emphasis added.) California Government Code § 6254(f).

The GRC must first turn to the issue of whether the Custodian’s denial of access pursuant to CPRA is lawful under OPRA.

In the instant complaint, the Custodian responded to the Complainant on June 3, 2009 denying access to the requested records pursuant to N.J.S.A. 47:1A-1.1. and California Government Code § 6254(f). The Custodian subsequently certified in the SOI that her search involved contacting ADA Eto at the DA’s Office in San Francisco, who confirmed that the records responsive to the Complainant’s OPRA request were exempt from disclosure under CPRA.

In Mejias v. NJ Department of Corrections, GRC Complaint No. 2007-181 (July 2008), the GRC was tasked with deciding whether N.J.S.A. 47:1A-9.b. applies to statutes of other states. In that complaint, the complainant requested “copies of the annual report that the Virginia Department of Corrections (receiving agent) provided to the New Jersey Department of Corrections (sending state) pursuant to *N.J.A.C.* 10A:10-3.15(c) and [(d)] under the Interstate Corrections Compact from 2002 to 2007.”

The evidence of record indicated that after receiving the complainant’s OPRA request, the custodian contacted the Virginia Department of Corrections in order to determine whether the records were exempt from disclosure. The Virginia Department of Corrections subsequently advised the custodian that its Operating Procedure exempted the requested records from disclosure. Thus, the custodian responded in writing in a timely manner denying access to the requested records pursuant to Executive Order No. 26 (McGreevey, 2002) and the Virginia Department of Corrections Operating Procedure Number 050.6, which cites to Va. Code Ann. §2.2-3703(C).

The Council found that:

“because the records requested are not exempt from disclosure pursuant to OPRA, any other NJ statute, regulation, resolution, Executive Order, Court Rule or federal law, the Custodian should release said records to the Complainant with appropriate redactions, if any, including a detailed redaction index explaining the legal basis for each redaction.” Interim Order dated March 26, 2008 at pg. 7.

Following distribution of the Council's March 26, 2008 Interim Order to all parties, the custodian's counsel submitted a request for reconsideration asserting a misinterpretation of OPRA. Counsel argued that the records sought are not subject to disclosure under OPRA because another state's statute prohibits inmates from acquiring the records sought. Counsel stated that OPRA provides that it:

“... shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” N.J.S.A. 47:1A-9.b.

To this end, counsel argued that the Virginia Freedom of Information Act provides that “[n]o provision of this chapter ... shall be construed to afford any rights to any person (i) incarcerated in a state, local or federal correctional facility ...” Va. Code. Ann. §2.2-3703(c). Counsel contended that contrary to the Council's interpretation of OPRA, N.J.S.A. 47:1A-9.b. applies to other state statutes and the Virginia Freedom of Information Act applies because it prohibits the disclosure of records to inmates.

The Council, recognizing that N.J.S.A. 47:1A-9.b. is silent as to whether it applies to statutes of other states, focused on the Full Faith and Credit Clause of the U.S. Constitution. The Council noted that notwithstanding the Full Faith and Credit Clause, “subsequent decisions of the United States Supreme Court, given application in New Jersey, exemplify the versatility of the principle that full faith and credit will give way to strong local policy. Estin v. Estin, 334 U.S. 541, 547, 68 S. Ct. 1213, 92 L. Ed. 1561 (1948); Carroll v. Lanza, 349 U.S. 408, 411, 75 S. Ct. 804, 99 L. Ed. 1183 (1955); Buccheri v. Montgomery Ward & Co., 19 N.J. 594, 599 (1955); Bowers v. American Bridge Co., 43 N.J. Super. 48 (App. Div. 1956); Reese and Johnson, “The Scope of Full Faith and Credit Faith and Credit to Judgments,” 49 Col. L. Rev. 153 (1949); and *see* Nappe v. Nappe, 20 N.J. 337, 342 (1956); Casteel v. Casteel, 45 N.J. Super. 338, 354 (App. Div. 1957).” (Emphasis added.) *Id.* at pg. 7-8.

The Council then acknowledged that OPRA represents a “strong public policy in favor of public access to government records.” *Id.* at pg. 8. Thus, the Council ultimately held that:

“... because every state is entitled to enforce in its own courts the policy of its own statutes on subjects properly the incidents of its jurisdiction ... and because New Jersey has a strong public policy in favor of public access to government records, N.J.S.A. 47:1A-9.b. does not operate to permit the exemption from disclosure set forth at Va. Code Ann. §2.2-3703(C) in the matter currently before the Council.” Council's Interim Order dated May 28, 2008, pg. 8.

The facts of this complaint are similar to those in Mejias, *supra*. Here, after the Custodian received the Complainant's OPRA request, she contacted ADA Eto in California for guidance regarding the requested records because some consisted of State

of California criminal investigation and victims' records. ADA Eto replied advising that the requested records were exempt from disclosure pursuant to California Government Code § 6254(f). The Custodian subsequently responded in writing to the Complainant in a timely manner advising that the records were exempt from disclosure pursuant to California Government Code § 6254(f) (and N.J.S.A. 47:1A-1.1).

Consistent with the Council's determination in Mejias, supra, it is evident that although the Custodian cited to California Government Code § 6254(f) as a valid exemption because the records originated in California, N.J.S.A. 47:1A-9.b. does not operate to permit this exemption to be recognized in New Jersey.

Therefore, because New Jersey has a strong public policy in favor of public access to government records, N.J.S.A. 47:1A-9.b. does not operate to permit the exemption from disclosure set forth at California Government Code § 6254(f) in the matter currently before the Council pursuant to Mejias, supra.

The GRC now turns to the issue of whether the Custodian unlawfully denied access to the requested records.

In the instant complaint, the Custodian certified in the SOI that the records requested contained criminal investigatory and victim's information exempt from access pursuant to N.J.S.A. 47:1A-1.1. and CPRA. The Custodian certified that she contacted ADA Eto in California, who confirmed that the records were exempt from disclosure as criminal investigatory records under CPRA. Although the GRC has already invalidated the use of another state's public records statute, the Custodian also cited to OPRA, which contains exemptions from disclosure for both criminal investigatory records and records containing victim's information. N.J.S.A. 47:1A-1.1.

OPRA defines a "criminal investigatory record" 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 (N.J.S.A. 47:1A-1.1). Criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and include information that is part and parcel of an investigation, confirmed and unconfirmed.

In Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004), the Council found that the records being sought were considered criminal investigatory records and therefore exempt from disclosure. Specifically, 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. The Council stated that it is also important to note that the exemption does not permit access to investigatory records once the investigation is complete.

Additionally, OPRA provides that:

“... where it shall appear that a person who is convicted of any indictable offense under the laws of this State, any other state or the United States is seeking government records containing personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, *the right of access provided for in [OPRA] shall be denied.*” (Emphasis added.) N.J.S.A. 47:1A-2.2(a).

In the instant complaint, the Complainant is an incarcerated individual attempting to procure records regarding the placement of an administrator's hold on the Complainant's March 13, 2009 parole release date. The Custodian certified in the SOI that she reviewed the records responsive and determined that those records consisted of the State of California's criminal investigation and victims records which resulted in the conviction of the Complainant in 1984 and 1999 (which occurred while the Complainant was incarcerated). Moreover, the Custodian certified that her determination was confirmed by ADA Eto on June 2, 2009. The Custodian certified that she denied access to the requested records stating that same were exempt from disclosure pursuant N.J.S.A. 47:1A-1.1. (and CPRA).

Based on the Council's ruling in Janeczko, even if the 1984 and 1999 investigations were complete, the records are still considered to be exempt as criminal investigatory in nature. Additionally, OPRA explicitly prohibits a person convicted of an indictable offense from gaining access to records containing personal information pertaining to said person's victim or that victim's family. *See* N.J.S.A. 47:1A-2.2(a).

Therefore, because the Custodian certified that the requested records contained criminal investigatory information and victims' records which resulted in the conviction of the Complainant in 1984 and 1999, she has lawfully denied access to the requested records under OPRA pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-2.2. and Janeczko.

The GRC notes that OPRA allows persons convicted of an indictable offense to obtain those records otherwise exempt from disclosure pursuant to N.J.S.A. 47:1A-2.2(a) “if the information is necessary to assist in the defense of the requestor”; however, “[a] determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his representative.” N.J.S.A. 47:1A-2.2(b). The evidence of record in this complaint does not indicate that the Complainant obtained such a determination; therefore, the exception does not apply to this complaint.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because New Jersey has a strong public policy in favor of public access to government records, N.J.S.A. 47:1A-9.b. does not operate to permit the exemption from disclosure set forth at California Government Code § 6254(f) in the matter currently before the Council pursuant to Mejias v. NJ Department of Corrections, GRC Complaint No. 2007-181 (July 2008).

2. Because the Custodian certified that the requested records contained criminal investigatory information and victims' records which resulted in the conviction of the Complainant in 1984 and 1999, she has lawfully denied access to the requested records under OPRA pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-2.2(a). and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 23, 2010