



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

Thomas Parker
Complainant

Complaint No. 2009-225

v.

Essex County Prosecutor's Office
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council ("Council") considered the September 21, 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 because the requested witness statements and fingerprint records are exempt from disclosure under OPRA as criminal investigatory records, the Custodian has not violated OPRA by denying the Complainant's requests. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007).

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 26th Day of October, 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: November 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Thomas Parker¹
Complainant**

GRC Complaint No. 2009-225

v.

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

Records Relevant to Complaint:

1. Statement of Syhim Cobb A.K.A. Syhim Jackson dated January 16, 1993
2. Statement of Alfuquan Maing dated January 16, 2009
3. Statement of Mary Williams dated January 16, 1993 or anytime thereafter
4. Statement of Michael Lewis dated January 19, 1993
5. Statement of Bahiya Marshall dated January 16, 1993 or anytime thereafter
6. Statement of Shawn Garner dated January 16, 1993 or anytime thereafter
7. Copy of documents pertaining to the recovery of any finger or latent prints
8. Statement of Al-Rashid Bendow dated January 16, 1993 or any reports given by him

Request Made: June 22, 2009

Response Made: June 29, 2009

Custodian: Debra G. Simms³

GRC Complaint Filed: July 21, 2009⁴

Background

June 22, 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 29, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that access to all of the requested records is denied because they are part of a criminal investigatory file and are therefore exempt from disclosure under N.J.S.A. 47:1A-1.

¹ No legal representation listed on record.

² Represented by Terriann Moore-Abrams, Esq., Essex County Counsel (Newark, NJ).

³ Hilary Brunell retired on June 30, 2010, making Debra G. Simms the current Custodian.

⁴ The GRC received the Denial of Access Complaint on July 27, 2009.

July 21, 2009

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:⁵

- Complainant’s OPRA request dated June 22, 2009
- Letter from the Custodian to the Complainant dated June 29, 2009

The Complainant asserts that the Custodian did not respond to the OPRA request.

The Complainant agrees to mediate this complaint.

August 5, 2009

Offer of Mediation sent to the Custodian.

August 5, 2009

The Custodian declines to mediate this complaint.

August 11, 2009

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

August 14, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated June 22, 2009
- Letter from the Custodian to the Complainant dated June 29, 2009 (with attachments)

The Custodian certifies that no search was conducted for any of Complainant’s requested records because they are not public records. The Custodian asserts that each of the requested records is subject to the criminal investigatory exemption contained in OPRA, N.J.S.A. 47:1A-1 et seq.

The Custodian certifies that he has requested Homicide File #4-93 that corresponds with Indictment Number 1390-0493⁶, but at the time of the completing of the SOI had yet to receive the file. Despite not having the file, the Custodian argues that examining the file is unnecessary because the Complainant has requested documents that are not public records.

The Custodian specifically argues that the statements of witnesses Syhim Cobb, Alfuquan Maing, Mary Williams, Michael Lewis, Bahiya Marshall, and Al-Rashid Benbow are exempt from the statutory definition of public records because they are criminal investigatory records exempt from disclosure under OPRA. In support of his argument, the Custodian cites to N.J.S.A. 47:1A-1.1; Bent v. Twp. Of Stafford Police Dep’t, 381 N.J. Super. 30, 38-39 (App. Div. 2005); Akbar Na’im v. Union County Prosecutor’s Office, GRC Complaint No. 2005-66 (January 27, 2006), *aff’d*, Akbar Na’im v. Union County Prosecutor’s Office, Appellate Division, No. A-3481-05, unpublished decision, January 23, 2007. The Custodian further argues that a criminal investigatory file, open or closed, is not a

⁵ The Complainant attached additional correspondence to his Denial of Access Complaint which is not relevant to the adjudication of said complaint.

⁶ Indictment Number 1390-0493 corresponds with the Complainant’s criminal matter.

public record under N.J.S.A. 47:1A-1.1; Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice; GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

In response to the Complainant's request for latent fingerprints recovered from a vehicle during the criminal investigation, the Custodian argues that the GRC has consistently held the results of tests performed on criminal evidence are investigatory records which are not public records. N.J.S.A. 47:1A-1.1. See also Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007).

Analysis

Whether the records denied by the Custodian are criminal investigatory records exempt from disclosure under OPRA?

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 the following information which is deemed to be confidential ... criminal investigatory records[.]" (Emphasis added.) N.J.S.A. 47:1A-1.1.

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 requested, among other things, seven (7) itemized records that consist of copies of statements made to police officers during the course of a criminal investigation against the Complainant. In addition, the Complainant requested a copy of records related to finger and latent fingerprints obtained by criminal investigators in the course of an investigation against the Complainant. The Custodian denied the Complainant's request because the Custodian asserts that the records are exempt from disclosure under OPRA as criminal investigatory records as defined by N.J.S.A. 47:1A-1.1. Criminal investigatory records are defined in OPRA as those records which are not required by law to

be made, maintained or kept on file and which are 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. Those records which fall under this definition are *excluded* from the public accessibility requirements that OPRA places upon government records.

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 Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004. In Janeczko, the complainant requested access to copies of records related to alleged criminal actions committed by her son, who was ultimately 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”. Consequently, the complainant’s request was denied.

The finding in this case concurs with the Council’s decision in Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007). In Brewer, the Complainant filed an OPRA request to obtain lab records that were in the custody of the New Jersey State Police for use in an investigation. The Council found that the requested records were part of a criminal investigative file and were exempt from disclosure under OPRA. Accordingly, the Council determined that the complainant’s request was lawfully denied.

Here, the Complainant has requested statements made by witnesses obtained during the course of a criminal investigation, as well as records pertaining to fingerprints and associated evidence. The evidence of record indicates that the requested records are held by a law enforcement agency and pertain to a criminal investigation; therefore, the requested records fall under the definition of criminal investigatory records as defined in N.J.S.A. 47:1A-1.1. As in Janeczko, the Complainant is requesting records that were used in the course of a police investigation. Thus, the requested records are criminal investigatory records and, as such, are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. *See also* Janeczko, supra; Brewer, supra.

Therefore, because the requested witness statements and fingerprint records are exempt from disclosure under OPRA as criminal investigatory records, the Custodian has not violated OPRA by denying the Complainant’s request. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the requested witness statements and fingerprint records are exempt from disclosure under OPRA as criminal investigatory records, the Custodian has not violated OPRA by denying the Complainant’s requests. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ

Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007).

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 21, 2010