



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

December 21, 2010 Government Records Council Meeting

Stephon Downer
Complainant

Complaint No. 2009-235

v.

Camden County Prosecutor's Office
Custodian of Record

At the December 21, 2010 public meeting, the Government Records Council ("Council") considered the December 14, 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. The Custodian lawfully denied access to the Complainant's OPRA request items No. 1 and No. 2 because photographic arrays are criminal investigatory records not subject to disclosure pursuant to N.J.S.A. 47:1A-9.a. and Executive Order No. 69 (Whitman 1997) and police sketches are not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. See State of New Jersey v. Raymond A. Ginardi, 111 N.J. Super. 435 (App. Div. 1970)(holding that sketches provided by the victims of a crime were admissible as evidence in the criminal trial of the defendant).
2. The Custodian lawfully denied access to the two (2) letters sought by the Complainant because said letters from F.C. to Assistant Prosecutor Mary Alison Albright relating to a crime of which the Complainant was ultimately convicted were not required to be made, maintained or kept on file; thus, said letters are criminal investigatory in nature and are exempt from disclosure under OPRA. See N.J.S.A. 47:1A-1.1., Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005) 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 21st Day of December, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

James W. Requa, Secretary
Government Records Council

Decision Distribution Date: January 4, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 21, 2010 Council Meeting**

**Stephon Downer¹
Complainant**

GRC Complaint No. 2009-235

v.

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

Records Relevant to Complaint: Copies of:

1. Photographic arrays reviewed by E.R.;
2. Police sketches reviewed by E.R.; and
3. Correspondence between F.C. and Assistant Prosecutor Mary Alison Albright admitted into evidence in the Complainant's criminal trial.³

Request Made: July 15, 2009⁴

Response Made: July 16, 2009

Custodian: Cheryl Hendler-Cohen

GRC Complaint Filed: August 4, 2009⁵

Background

July 1, 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.

July 16, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested records is denied because the records are deemed to be criminal investigatory records not subject to disclosure under OPRA. N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² Represented by Howard Goldberg, Esq. (Camden, NJ).

³ Initials have been used to protect the identities of persons believed to be witnesses in a criminal trial.

⁴ The Custodian received the Complainant's OPRA request on July 15, 2009. However, the GRC notes that there is a discrepancy regarding the date of receipt, which was identified as July 15, 2009 in the Custodian's response letter and July 14, 2009 in the Statement of Information. Please note that the Complainant asserts that the request was submitted July 1, 2009.

⁵ The GRC received the Denial of Access Complaint on said date.

August 4, 2009

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching a letter from the Custodian to the Complainant dated July 16, 2009.⁶

The Complainant states that he submitted an OPRA request to the Camden County Prosecutor’s Office (“CCPO”) on July 1, 2009. The Complainant states that the Custodian responded in writing on July 16, 2009 denying access to the requested records pursuant to N.J.S.A. 47:1A-1.1.

August 19, 2009

Offer of Mediation sent to both parties.

August 20, 2009

The Complainant agrees to mediate this complaint.

August 28, 2009

The Custodian agrees to mediate this complaint.

September 2, 2009

Complaint referred to mediation.

August 3, 2010

Complaint referred back from mediation.

August 6, 2010

Letter from the GRC to the Complainant. The GRC informs the Complainant that he has the opportunity to amend this Denial of Access Complaint prior to the GRC’s request for the Statement of Information from the Custodian. The GRC states that the Complainant’s response is due by close of business on August 13, 2010.⁷

September 2, 2010

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

September 10, 2010

E-mail from the Custodian’s Counsel to the GRC. Counsel requests an extension of two (2) weeks to provide the requested SOI because Counsel received the SOI request on this day and is starting a trial on September 13, 2010.

September 15, 2010

E-mail from the GRC to the Custodian’s Counsel. The GRC states that it will normally grant one extension of five (5) business days to submit an SOI. The GRC states that based on the circumstances, the GRC will grant an extension until September 24, 2010 to provide the requested SOI.

⁶ The Complainant also attached what appear to be transcripts from the Complainant’s criminal trial.

⁷ The Complainant did not respond to the GRC’s letter.

September 27, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel states that the trial concluded on this day and he is not sure if the GRC is in receipt of the SOI. Counsel requests that if the SOI has not yet been provided to the GRC, Counsel be given an extension of one (1) additional day to submit the SOI.

September 27, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension of one (1) additional day to provide the requested SOI.

September 28, 2010

Custodian's SOI attaching a letter from the Custodian to the Complainant dated July 16, 2009.⁸

The Custodian certifies that her search involved searching the evidence room and case file.

The Custodian also certifies that whether 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") is not applicable in this complaint.

The Custodian certifies that she received the Complainant's OPRA request on July 14, 2009.⁹ The Custodian certifies that she responded to the OPRA request in writing on July 16, 2009 denying access to the records requested because said records, consisting of seven (7) photographic arrays, one (1) police sketch, and two (2) letters, constitute criminal investigatory records not subject to disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

October 4, 2010

Letter from the GRC to the Custodian. The GRC states that the evidence of record indicates that the Custodian denied access to two (2) letters responsive to the Complainant's OPRA request. The GRC states that it is in need of additional information regarding these two (2) letters. The GRC requests that the Custodian legally certify to the following:

1. Provide a general nature description of the letters responsive to the Complainant's OPRA request (*i.e.*, subject matter, explanation of the content of said letters and how the letters relate to the Complainant's criminal trial).

The GRC states that the requested legal certification is due by October 7, 2010.

⁸ The Custodian included additional information regarding correspondence between the parties while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

⁹ The Custodian notes that the Complainant's original OPRA request form was not found in the file.

October 7, 2010

E-mail from the Custodian’s Counsel to the GRC. Counsel requests an extension of time until October 12, 2010 to submit the Custodian’s legal certification.¹⁰

October 7, 2010

E-mail from the GRC to the Custodian’s Counsel. The GRC grants Counsel an extension until October 12, 2010 to submit the Custodian’s legal certification.

October 14, 2010

Custodian’s legal certification. The Custodian certifies that the Complainant, who was convicted of an indictable offense by the CCPO, is seeking the disclosure of two (2) letters from F.C. to Assistant Prosecutor Mary Alison Albright, who was the prosecutor in the Complainant’s criminal trial.

The Custodian certifies that the records sought are criminal investigatory records not subject to disclosure under OPRA. The Custodian states that OPRA defines criminal investigatory records 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.*” (Emphasis added.) N.J.S.A. 47:1A-1.1. See also Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005).

The Custodian certifies that the letters at issue here were exchanged between the Assistant Prosecutor and a witness in the criminal homicide matter of which the Complainant was ultimately convicted. The Custodian certifies that the letters were not introduced as evidence at trial and contain sensitive information relevant to the criminal matter. Further, the Custodian certifies that the letters were not required to be made, maintained or kept on file.

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

¹⁰ Counsel notes that he was unaware that documents from mediation are not officially part of the record, but that the additional information being requested by the GRC is contained within said documents. Stephon Downer v. Camden County Prosecutor’s Office, 2009-235 – Findings and Recommendations of the Executive Director

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.

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.

Additionally, OPRA further provides that:

“[t]he provisions of [OPRA], *shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.*” (Emphasis added.) N.J.S.A. 47:1A-9.a.

Executive Order No. 69 states that:

“[t]he following records shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the provisions of [OPRA], as amended: fingerprint cards, plates and *photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.*” (Emphasis added.) Executive Order No. 69 (Whitman, 1997).

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’s OPRA request Item No. 1 sought photographic arrays reviewed by E.R. in relation to the Complainant’s criminal trial. The Custodian responded in writing in a timely manner stating that the requested records were deemed to be criminal investigatory records not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1.

Criminal investigatory records are excluded from the definition of a government record set forth at N.J.S.A. 47:1A-1.1.

Moreover, 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 also noted that:

“[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete. The exemption applies to records that conform to the statutory description, without reference to the status of the investigation 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.”

Executive Order No. 69 (Whitman, 1997)(“E.O. No. 69”) states that:

“[t]he following records *shall not be deemed to be public records...* pursuant to [OPRA], as amended: fingerprint cards, plates and *photographs* and similar criminal investigatory records... required to be made, maintained or kept by any State or local governmental agency.” (Emphasis added.)

Additionally, N.J.S.A. 47:1A-9.a. states that the provisions of OPRA do not affect exemptions of government records from public access which are contained in state and federal statutes, regulations and executive orders.

Therefore, the photographic arrays responsive to Item No. 1 of the Complainant’s July 1, 2009 OPRA request are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9.a. and E.O. No. 69 (Whitman, 1997).

The Complainant’s OPRA request Item No. 2 sought a police sketch also reviewed by E.R. in relation to the Complainant’s criminal trial. The Custodian responded in writing in a timely manner stating that the requested records were deemed to be criminal investigatory records not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1.

In State of New Jersey v. Raymond A. Ginardi, 111 N.J. Super. 435 (App. Div. 1970), the Appellate Division addressed whether composite sketches created by the victims of a crime committed by the defendant were erroneously admitted into evidence. The Appellate Division determined that a composite or police sketch is a record admissible in a criminal trial. The court reasoned that:

“Rule 63(1) provides in pertinent part:

‘[a] statement is admissible if previously made by a person who is a witness at a hearing, provided it would have been admissible if made by him while testifying and the statement:

(c) Is a prior identification of a party where identity is in issue, if made under circumstances precluding unfairness or unreliability.’

What has been said with respect to the admissibility of an extra-judicial identification of a photograph is fully applicable to an extra-judicial identification of a *composite sketch prepared from a description given by a victim and by him identified*, when the composite was completed, as a likeness of the culprit. In each case the *eyewitness' statement is that what he sees, be it a photograph or a composite sketch*, looks like the offender ... *an identification of a sketch which resembles a defendant is an identification of a party. This is the evidential value of testimony of such an identification made prior to trial -- and this whether such hearsay testimony is deemed competent under a rule such as Evidence Rule 63(1)(c) ... to be admitted into evidence where the identification testimony of the witness at the trial is assailed as a recent fabrication.*” (Emphasis added.) *Id.* at 444-445.

The Appellate Division here clearly identified a composite or police sketch as a record admissible in a criminal trial. According to the Appellate Division, a police sketch is a sketch created through testimony of a victim or eyewitness that acts as aid to an identification. Thus, the very manner in which a police sketch is created makes it criminal investigatory in nature.

In the matter before the Council, the requested police sketch was created in relation to the Complainant’s criminal trial.¹¹ Therefore, the requested police sketch is a criminal investigatory record not subject to access under OPRA pursuant to N.J.S.A. 47:1A-1.1. See Ginardi, *supra*.

Based on the foregoing, the Custodian lawfully denied access to the Complainant’s OPRA request items No. 1 and No. 2 pursuant to N.J.S.A. 47:1A-6 because photographic arrays are criminal investigatory records not subject to disclosure under OPRA pursuant to N.J.S.A. 47:1A-9.a. and E.O. No. 69 and police sketches are not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. See Ginardi, *supra* (holding that sketches provided by the victims of a crime were admissible as evidence in the criminal trial of the defendant).

The Complainant’s OPRA request Item No. 3 sought correspondence between F.C. and Assistant Prosecutor Mary Alison Albright. The Custodian responded in writing within the statutorily mandated seven (7) business days stating that the requested records were criminal investigatory records not subject to disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. In the SOI, the Custodian identified two (2) letters as responsive to the Complainant’s OPRA request item and reiterated that these records are exempt from disclosure under OPRA because they constitute criminal investigatory records.

¹¹ Testimony regarding the requested police sketch is contained in the trial transcripts attached to the Complainant’s Denial of Access Complaint.

On October 4, 2010, the GRC sought additional clarification from the Custodian regarding the letters, specifically asking the Custodian to legally certify to the general nature description of the requested letters. The Custodian provided the requested legal certification on October 14, 2010. The Custodian certified that the two (2) letters between Assistant Prosecutor Mary Alison Albright and F.C., a witness to the crime of which the Complainant was ultimately convicted, were not required to be made, maintained or kept on file.

Based on the legal certification of the Custodian, it is clear that the requested letters fall within the exemption to disclosure under OPRA for criminal investigatory records. First, the evidence of record is clear that the letters were from a witness to a crime of which the Complainant was tried and convicted to the assistant prosecutor who tried the case. Second, the evidence of record indicates that the letters contained information that directly related to the crime of which the Complainant was ultimately convicted. Third, the evidence indicates that the requested letters are not required to be made, maintained or kept on file. *See also* Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005). Moreover, the Custodian's denial of access to the two (2) letters responsive to the Complainant's OPRA request is consistent with the Council's holding in Janeczko, *supra* ("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.").

Therefore, the Custodian lawfully denied access to the two (2) letters sought by the Complainant because said letters from F.C. to Assistant Prosecutor Mary Alison Albright relating to a crime of which the Complainant was ultimately convicted were not required to be made, maintained or kept on file; thus, said letters are criminal investigatory in nature and are exempt from disclosure under OPRA. *See* N.J.S.A. 47:1A-1.1 and Janeczko, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the Complainant's OPRA request items No. 1 and No. 2 because photographic arrays are criminal investigatory records not subject to disclosure pursuant to N.J.S.A. 47:1A-9.a. and Executive Order No. 69 (Whitman 1997) and police sketches are not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. *See* State of New Jersey v. Raymond A. Ginardi, 111 N.J. Super. 435 (App. Div. 1970)(holding that sketches provided by the victims of a crime were admissible as evidence in the criminal trial of the defendant).
2. The Custodian lawfully denied access to the two (2) letters sought by the Complainant because said letters from F.C. to Assistant Prosecutor Mary Alison Albright relating to a crime of which the Complainant was ultimately convicted were not required to be made, maintained or kept on file; thus, said letters are criminal investigatory in nature and are exempt from disclosure

under OPRA. *See* N.J.S.A. 47:1A-1.1., *Nance v. Scotch Plains Township Police Department*, GRC Complaint No. 2003-125 (January 2005) 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

December 14, 2010