



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

June 23, 2009 Government Records Council Meeting

James R. Osman
Complainant

Complaint No. 2009-32

v.

New Jersey Department of Law & Public Safety,
Division of Alcoholic Beverage Control
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council ("Council") considered the June 16, 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 requested database was created under the Attorney General Law Enforcement Directive 2007-2 to be used as an investigatory tool to enforce *N.J.A.C. 13:2-23.1(b)*, the Custodian did not unlawfully deny access to the requested database because it is exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., *N.J.A.C. 13:2-29.2* and Frizell v. Division of Alcoholic Beverage Control, GRC Complaint No. 2004-113 (December 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 23rd Day of June, 2009



Robin Berg Tabakin, Chair
Government Records Council

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

Kathryn Forsyth
Government Records Council

Decision Distribution Date: June 26, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 23, 2009 Council Meeting**

**James R. Osman¹
Complainant**

GRC Complaint No. 2009-32

v.

**New Jersey Department of Law & Public Safety,
Division of Alcoholic Beverage Control²
Custodian of Records**

Records Relevant to Complaint: Electronic (database) or paper copy of a list of the drinking establishments provided to the Division of Alcoholic Beverage Control (“ABC”) as part of the “Last Drink” initiative, including the names, location, date, time and municipality that the information was provided to law enforcement.

Request Made: January 6, 2009

Response Made: January 15, 2009

Custodian: David N. Bregenzer

GRC Complaint Filed: January 21, 2009³

Background

January 6, 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.

January 15, 2009⁴

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 the requested records is denied pursuant to N.J.S.A. 47:1A-1.1., which exempts access to records that would reveal security measures and surveillance techniques of the ABC.

The Custodian also states that access to the requested records is denied pursuant to *N.J.A.C.* 13:1E-3.2(a)(4) of the New Jersey Department of Law & Public Safety (“L&PS”) OPRA rules and regulations, which exempts from disclosure records considered confidential as they may reveal the identity of a confidential informant,

¹ No legal representation listed on record.

² Represented by DAG Julian F. Gorelli, on behalf of the NJ Attorney General.

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

⁴ The Custodian certifies in the Statement of Information that he received the Complainant’s January 6, 2009 OPRA request on January 8, 2009.

confidential source, a citizen informant or an agency's surveillance, security or investigation techniques or procedures of undercover personnel. Additionally, the Custodian states that the requested records are collected as part of an ongoing investigation to identify specific licensees for further investigative action.

January 21, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Custodian's response dated January 15, 2009.

The Complainant states that he submitted an OPRA request to the ABC for the records relevant to this complaint on January 6, 2009. The Complainant states that the ABC denied access to the requested records pursuant to N.J.S.A. 47:1A-1.1., which exempts from disclosure records that would reveal security measures and surveillance techniques of the ABC. The Complainant states that the ABC cannot claim that the program is confidential because the details of the program have already been publicly revealed in previous news articles, specifically in an article appearing in the New York Times on December 30, 2007.

The Complainant states that the ABC also claims the records are considered exempt from disclosure because they may reveal the identity of a confidential informant, confidential source, a citizen informant or an agency's surveillance, security or investigation techniques or procedures of undercover personnel. The Complainant asserts that he is actually requesting the information received from drivers who have been arrested for Driving Under the Influence ("DUI"). The Complainant asserts that this information does not fall under the category of above mentioned exemptions.

The Complainant states that the ABC also claims that the records are exempt because they are part of an ongoing investigation. The Complainant states that pursuant to OPRA:

"where it shall appear that the record or records which are being sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA] may be denied if the inspection, copying, or examination of such record or records shall be inimical to the public interest." (Emphasis added.)
N.J.S.A. 47:1A-3.

The Complainant argues that the ABC cannot prove how the disclosure of the requested records would be inimical to the public interest. The Complainant asserts that after a Massachusetts agency equivalent to the ABC released the exact same kind of reports to the Complainant's CBS affiliate in Boston, the affiliate's story aided in enhancing public awareness about establishments serving intoxicated patrons without any of the adverse effects that the ABC are claiming in this complaint.

Additionally, the Complainant states that OPRA requires the release of:

"information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if

any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police.” N.J.S.A. 47:1A-3.b.

The Complainant asserts that the information regarding which drinking establishment a DUI suspect names as part of the “Last Drink” initiative is “information of the circumstances immediately surrounding the arrest.” The Complainant contends that this information directly relates to how the suspect committed the crime of DUI.

The Complainant asserts that for all of the above reasons, the ABC should be compelled to disclose the requested records to the Complainant.

The Complainant did not agree to mediate this complaint.

February 3, 2009

Request for the Statement of Information sent to the Custodian.

February 9, 2009

E-mail from the Custodian’s Counsel to the GRC. Counsel requests an extension of time until February 18, 2009 to submit the Statement of Information.

February 9, 2009

E-mail from the GRC to the Custodian’s Counsel. The GRC grants an extension of time until February 18, 2009 to submit the Statement of Information.

February 13, 2009

E-mail from the Custodian’s Counsel to the GRC. Counsel requests another extension of time until February 25, 2009 to submit the Statement of Information. Counsel states that the extension of time is needed because certain personnel that Counsel needs to contact will not be available until after the upcoming State holiday.

February 17, 2009

E-mail from the GRC to the Custodian’s Counsel. The GRC states that, if needed, it usually grants a five (5) business day extension of time to respond to a request for a Statement of Information. The GRC states that, in certain situations, a smaller extension of time may be granted. Therefore, the GRC grants an extension of time until February 20, 2009 to submit the Statement of Information.

February 20, 2009

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

- Complainant’s OPRA request dated January 6, 2009.
- Letter from the Custodian to the Complainant dated January 15, 2009.
- Attorney General Law Enforcement Directive No. 2007-2.

The Custodian certifies that no search was needed because all of the requested records are electronically stored.

The Custodian also certifies the requested records have no Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”) and that information is purged after twenty-five (25) months per the Attorney General Law Enforcement Directive No. 2007-2 (“AG Directive No. 2007-2”), Paragraph 5.

The Custodian certifies that he received the Complainant’s January 6, 2009, OPRA request on January 8, 2009. The Custodian certifies that he responded on January 15, 2009, denying access to the requested records.

The Custodian contends that the ABC properly denied access to the Complainant’s request pursuant to N.J.S.A. 47:1A-1.1 and *N.J.A.C.* 13:1E-3.2(a)(4). The Custodian further asserts that even if the requested records were government records, they would be confidential because the records relate to an investigation in progress disclosure of which would be inimical to the public interest pursuant to N.J.S.A. 47:1A-3.

The Custodian states that the ABC is charged with regulating the retail alcoholic beverage industry, of which one key Legislative goal is to foster moderation and responsibility in drinking alcohol. N.J.S.A. 33:1-12.40. The Custodian states that to enforce moderate and responsible drinking, the ABC’s regulations prohibit, among other things, any licensed establishment from serving an “actually or apparently intoxicated” patron. *N.J.A.C.* 13:2-23.1(b). The Custodian states that potential penalties for violating this regulation range from a 15-day suspension of the establishment’s license (for a first offense) to revocation of the establishment’s license. *N.J.A.C.* 13.2-19.11.

The Custodian states that the Attorney General’s “Last Drink” initiative, established by the AG Directive No. 2007-2, provides a valuable investigative tool for the ABC’s enforcement of *N.J.A.C.* 13:2-23.1(b). The Custodian states that the “Last Drink” initiative requires state and local law enforcement agencies to gather key information collected from persons arrested for DUI and report it to the ABC, including:

- Municipal Code for the location of the arrest.
- Date and time of the arrest.
- The age and sex of the subject.
- The Blood Alcohol Content (“BAC”).
- The name, address and municipality of the place where the subject stated he/she consumed their last drink.

The Custodian states that the Attorney General required that the ABC establish an electronic database of the reported information and prohibited the use of that information, or its dissemination, for any purpose other than:

“as intelligence lead information and as such may only be used by and disseminated to the [ABC] and/or any other law enforcement agency.”
Attorney General Law Enforcement Directive No. 2007-2, Paragraph 5.

The Custodian argues that in conjunction with other investigative information, the data collected from the “Last Drink” initiative is critical to ongoing investigations of potential violations of *N.J.A.C. 13:2-23.1(b)*. The Custodian asserts that while the information alone is not a sufficient basis for prosecution, such information is useful in determining and identifying potential violators, whether by undercover operations or otherwise.

Requested Information is not a Government Record

The Custodian avers that the Complainant seeks key components of the information reported under the Attorney General’s “Last Drink” initiative. The Custodian contends that the Complainant’s January 6, 2009, OPRA request was properly denied pursuant to N.J.S.A. 47:1A-1 et seq. because the requested information is not a government record pursuant to Executive Order No. 26 (McGreevey 2002)(“E.O. No. 26”). The Custodian argues that E.O. No. 26 implements the ABC proposed regulation *N.J.A.C. 13:1E-3.2(a)(4)*, which lists several categories of records that do not constitute a government record under OPRA. The Custodian asserts that included in these categories are records which may reveal the identity of sources and informants, or an agency’s surveillance or investigative techniques or procedures. The Custodian also cites to N.J.S.A. 47:1A-1.1. and the exemption to disclosure set forth therein for security measures and surveillance techniques.

The Custodian asserts that, as recognized by the GRC, E.O. No. 26 implements and gives continued efficacy to the proposed regulations of L&PS regarding confidential records and cites to Buttimore v. New Jersey Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2005-92 (March 2006). The Custodian states that *N.J.A.C. 13:1E-3.2(a)(4)* provides that the following records are not considered government records under OPRA:

“[r]ecords which may reveal the identity of a confidential informant, a confidential source, a citizen informant, or an agency’s surveillance security or investigative techniques or procedures or undercover personnel.”

The Custodian argues that disclosing the requested records could alert a drinking establishment to expect further investigations by the ABC, including by an undercover ABC investigator. The Custodian asserts that this is especially true in that disclosure of the requested list would allow drinking establishments to know how often they are identified as serving a last drink in comparison with other establishments throughout the State, thereby inferentially allowing drinking establishments to know how likely they are to experience heightened investigative scrutiny from the ABC. The Custodian also argues that disclosure of the list could allow drinking establishments to identify those patrons that named them as the place that served their last drink, with possible retributive action thereby.

Additionally, the Custodian argues that disclosure of the list could reveal investigative techniques, procedures or undercover personnel. The Custodian asserts that the list could help drinking establishments and patrons in projecting where and when a

DUI stop is most likely. The Custodian argues that while the DUI information could be made available piecemeal from police departments state-wide, the release of the list would provide a singularly compiled database.

The Custodian further contends that, contrary to the Complainant's contention that disclosure of the list would further the public's awareness about establishments serving patrons who are intoxicated, the list may be inherently unreliable without further investigation by the ABC. The Custodian contends that subjects of a DUI arrest may seek to protect a favorite establishment or other patrons of that establishment by identifying a different location with a more responsible reputation. The Custodian asserts that regardless of the reliability of the information, the requested list is still exempt pursuant to *N.J.A.C. 13:1E-3.2(a)(4)*.

Requested Information Pertains to an Investigation in Progress

The Custodian contends that the requested list is confidential under N.J.S.A. 47:1A-3 because it "pertains to an investigation in progress," and disclosure thereof is "inimical to the public interest." The Custodian states that OPRA provides that:

"where it shall appear that the record or records which are sought...pertain to an investigation in progress by any public agency, the right of access [under OPRA] may be denied if...such record or records shall be inimical to the public interest..." N.J.S.A. 47:1A-3.

The Custodian contends that the requested list is part of an ongoing investigation by the ABC of establishments serving alcohol to "actually or apparently intoxicated" patrons. *N.J.A.C. 13:2-23.1(b)* and *N.J.A.C. 13:2-19.11*. The Custodian asserts that AG Directive No. 2007-2 prohibits the ABC from using the information on the requested list for anything other than "intelligence lead gathering."

The Custodian contends that disclosure of the requested list would be inimical to the public interest. The Custodian asserts that disclosure of the list would undermine both the effectiveness of the Last Drink initiative and the ABC's efforts to investigate and suspend or revoke the licenses of drinking establishments that serve alcohol to "actually or apparently intoxicated" patrons. The Custodian argues that drinking establishments high on the ABC's list of named establishments already under investigation might be alerted to undercover investigators or where DUI stops are most likely to occur, as to forewarn intoxicated patrons.

The Custodian contests the Complainant's assertion that the information should be provided because it discloses the "circumstances immediately surrounding the arrest" pursuant to N.J.S.A. 47:1A-3.b. The Custodian asserts that this provision only applies to "information concerning a criminal investigation," which DUI arrests do not fall under according to Blue v. Wall Township Police Department, GRC Complaint No. 2002-47

(August 2003).⁵ The Custodian asserts that the information collated does not relate to any criminal arrests by the ABC but rather relates to investigations for serving intoxicated patrons and is therefore not included in the circumstances surrounding an arrest pursuant to N.J.S.A. 47:1A-3.b. The Custodian contends that the effectiveness and vitality of the Last Drink initiative depends on maintaining the confidentiality of the ABC's database, which is the reason for the limitations on disclosure set forth in AG Directive No. 2007-2.

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 ... "*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 also provides that:

“where it shall appear that the record or records which are sought...pertain to an investigation in progress by any public agency, the right of access [under OPRA] may be denied if...such record or records shall be inimical to the public interest...” N.J.S.A. 47:1A-3.a.

OPRA requires the disclosure of:

“information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police.” N.J.S.A. 47:1A-3.b.

⁵ The GRC held that “a Title 39 motor vehicle offense such as [DUI] was not a "crime" and that, therefore, police investigation of such offenses was accessible under OPRA and not a "criminal investigatory record" exempt from access pursuant to N.J.S.A. 47:1A-1.1.”
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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.

N.J.S.A. 33:1-12.38 provides that:

“[t]he Director [of the ABC]...may adopt...rules and regulations as shall be necessary or desirable to carry out the provisions of this act and of the act to which this act is a supplement.” N.J.S.A. 33:1-12.38.

Additionally, the Division of Alcoholic Beverage Control’s regulations provide that:

“[f]or purposes of investigative confidentiality and integrity, the following records constitute “confidential records”...and shall not be available for inspection or photocopy...all such documents, records, reports and memoranda the Division shall possess, where the primary purpose is the investigation and enforcement of the Alcoholic Beverage Law and its regulations...” (Emphasis added.) *N.J.A.C. 13:2-29.2(a)(5)*

Further, Attorney General Law Enforcement Directive No. 2007-2 prohibits the use of Last Drink initiative information, or its dissemination, for any purpose other than:

“as intelligence lead information and as such may only be used by and disseminated to the [ABC] and/or any other law enforcement agency.”
Attorney General Law Enforcement Directive No. 2007-2, Paragraph 5.

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 Custodian denied access to the Complainant’s January 6, 2009 OPRA request stating that L&PS regulations exempt access to records considered

confidential as such records may reveal the identity of a confidential informant, confidential source, a citizen informant or an agency's surveillance, security or investigation techniques or procedures of undercover personnel. The Custodian further stated that the requested records were collected as part of an ongoing investigation.

The Complainant argued that the records do not fall under the exemption from disclosure afforded to investigatory records and asserted that the ABC would not be able to prove how the requested records would be "inimical to the public interest." N.J.S.A. 47:1A-3.

OPRA provides that "the provisions of [OPRA] shall not abrogate any exemption of a...regulation promulgated..." N.J.S.A. 47:1A-9.a. Additionally, N.J.S.A. 33:1-12.38 provides that the Director of the ABC may adopt rules and regulations that are conducive to effectively carrying out the duties of the ABC. Under such authority, *N.J.A.C. 13:2-29.2* sets forth all records which shall be deemed confidential and "not...available for inspection or photocopy." *Id.* Specifically, the regulation precludes from public access investigatory records "where the *primary purpose* is the *investigation and enforcement* of the *Alcoholic Beverage Law and its regulations*..." (Emphasis added.) *N.J.A.C. 13:2-29.2(a)(5)*.

The Custodian in this complaint stated in the SOI that the "Last Drink" initiative, established by the AG Directive No. 2007-2, allows the ABC to create a valuable investigative tool for the ABC's enforcement of *N.J.A.C. 13:2-23.1(b)* which in part prohibits any licensed establishment from serving an "actually or apparently intoxicated" person.

Additionally, in Frizell v. Division of Alcoholic Beverage Control, GRC Complaint No. 2004-113 (December 2004), the Complainant requested all records relating to a Raritan Yacht Club in the calendar year 2004. The ABC responded in a timely manner stating that access to the request records was denied because the records were part of an investigation in progress pursuant to N.J.S.A. 47:1A-3.a. The Custodian subsequently argued in the SOI that investigatory files were deemed confidential pursuant to N.J.S.A. 47:1A-9.a and *N.J.A.C. 13:2-29.2*. The GRC stated that because the Director's regulation renders all investigative records confidential, so that the ABC may preserve the investigative confidentiality and integrity of the investigation process, *N.J.A.C. 13:2-29.2* supports the position that release of the requested records would be "inimical to the public interest." The Council held that:

"...on the basis that *N.J.A.C. 13:2-29.2* supersedes [OPRA]...access to the requested [records] is not permitted pursuant to N.J.S.A. 47:1A-9.a."

The facts in this complaint are similar to those in Frizell, *supra*, in that the Custodian responded in writing in a timely manner denying access to the requested records because they were part of an investigation in progress pursuant to N.J.S.A. 47:1A-3.a. The Custodian subsequently argued in the SOI that the requested database is a valuable investigative tool in the ABC's enforcement of *N.J.A.C. 13:2-23.1(b)*.

Therefore, because the requested database was created under the AG Directive 2007-2 to be used as an investigatory tool to enforce *N.J.A.C. 13:2-23.1(b)*, the Custodian did not unlawfully deny access to the requested database because it is exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., *N.J.A.C. 13:2-29.2* and Frizell, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the requested database was created under the Attorney General Law Enforcement Directive 2007-2 to be used as an investigatory tool to enforce *N.J.A.C. 13:2-23.1(b)*, the Custodian did not unlawfully deny access to the requested database because it is exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., *N.J.A.C. 13:2-29.2* and Frizell v. Division of Alcoholic Beverage Control, GRC Complaint No. 2004-113 (December 2004).

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 16, 2009