



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Francisco Lado
Complainant

Complaint No. 2010-102

v.

Essex County Prosecutor's Office
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council ("Council") considered the May 17, 2011 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 the records sought in the Complainant's request items No. 1 through No. 4 are criminal investigatory records, they are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Thus, the Custodian lawfully denied access to these records pursuant to N.J.S.A. 47:1A-6.
2. The records sought in the Complainant's OPRA request items No. 5 and No. 6 are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, McCrone (The Trenton Times) v. Burlington County Prosecutor's Office, GRC Complaint No. 2005-146 (November 2005) and Executive Order No. 69 (Governor Whitman, 1997). See Leak v. Union County Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009). Accordingly, the Custodian has lawfully denied access to the requested records.
3. Because the Complainant's request Item No. 7 is overly broad inasmuch as it fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request Item No. 7 is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) and Gonzales v. City of Gloucester (Camden), GRC Complaint No. 2008-255 (November 2009). See also Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009).



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 24th Day of May, 2011

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: June 2, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Francisco Lado¹
Complainant**

GRC Complaint No. 2010-102

v.

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

Records Relevant to Complaint: Copies of the following records related to State v. Francisco Lado, Essex Co. Indictment No. 5-89-2591 and 2723-5-91:

1. Essex County Prosecutor's Office ("ECPO") preliminary and continuation reports.
2. Telephone bills of Ms. Elizabeth Ann Lado and Delta Plastics in March 1989.
3. All Delta Plastics employee time cards.
4. Statements of all persons interviewed.
5. Autopsy report.
6. Photographic evidence.
7. Documents concerning bullets and shells related to the above mentioned matter.

Request Made: March 10, 2010

Response Made: March 17, 2010

Custodian: Debra G. Simms, Esq.³

GRC Complaint Filed: May 24, 2010⁴

Background

March 10, 2010

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.

March 17, 2010

Custodian's response to the OPRA request. The Custodian received the Complainant's OPRA request on March 15, 2010. The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that access to the requested records is denied because

¹ No legal representation listed on record.

² Represented by James Paganelli, Esq. (Newark, NJ).

³ The original Custodian of record was Hilary Brunell.

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

said records are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

May 24, 2010

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

- Complainant’s OPRA request dated March 10, 2010.
- Letter from the Custodian to the Complainant dated March 17, 2010.
- State v. Francisco Lado, Essex Co. Indictments No. 5-89-2591 and No. 2723-5-91 dated June 7, 1991.

The Complainant states that he submitted an OPRA request to the ECPO on March 10, 2010. The Complainant states that the Custodian responded to such request on March 17, 2010 denying access to the requested records stating that same were exempt from disclosure under OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

The Complainant argues that by classifying the requested records as criminal investigatory records, the Custodian has wrongly claimed that an investigation is open and ongoing.

The Complainant agrees to mediate this complaint.

May 26, 2010

Offer of Mediation sent to the Custodian.

May 27, 2010

The Custodian declines mediation.

May 28, 2010

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

June 3, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 10, 2010.
- Letter from the Custodian to the Complainant dated March 17, 2010.

The Custodian certifies that no search was conducted because no records subject to disclosure were requested.

The Custodian also certifies that the question whether any 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.

The Custodian certifies that she received the Complainant's OPRA request on March 15, 2010. The Custodian certifies that she responded in writing on March 17, 2010 denying access to the requested records pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies that the requested records are exempt for the following:

Records Responsive to the Complainant's OPRA request	Records Provided	Legal Explanation and Statutory Citation
Preliminary and continuation reports	No.	Police reports are not government records pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
Telephone records for Elizabeth Lado and Delta Plastics in March 1989	No.	Investigatory documents contained within the ECPO file are not government records pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
Time cards for all Delta Plastics employees	No.	Investigatory documents contained within the ECPO file are not government records pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Additionally, the Complainant's request is a blanket request. <i>See Asarnow v. Department of Labor & Workforce Development</i> , GRC Complaint No. 2006-24 (May 2006)
Statements of all persons interviewed	No.	Investigatory documents contained within the ECPO file are not government records pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Additionally, the Complainant's request is a blanket request. <i>See Asarnow v. Department of Labor & Workforce Development</i> , GRC Complaint No. 2006-24 (May 2006)
Autopsy Report	No.	Investigatory documents contained within the ECPO file are not government records pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Additionally, under <i>N.J.A.C. 3.1(a)</i> , the entire autopsy report is not available. The ECPO has a "responsibility and an obligation" to safeguard a citizen's reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1</u> . This obligation extends to records concerning the manner

		of death of a deceased person. <u>Asbury Park Press v. Ocean County Prosecutor's Office</u> , 374 N.J. Super. 312 (Law Div. 2004).
Photographic evidence.	No.	Investigatory documents contained within the ECPO file are not government records pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
Documents concerning bullets and shells.	No.	Investigatory documents contained within the ECPO file are not government records pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Additionally, forensic reports are not public records. <u>McCrone v. Burlington County Prosecutor's Office</u> , GRC Complaint No. 2005-146 (November 2005) and <u>Brewer v. New Jersey Department of Law & Public Safety, Division of State Police</u> , GRC Complaint No. 2006-204 (October 2007).

June 25, 2010

Letter from the Custodian to the GRC. The Custodian states that she will be retiring on June 30, 2010 and that Ms. Debra G. Simms, Esq., Deputy Chief Assistant Prosecutor, will be assuming the duties of Custodian of Records for ECPO.

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" (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.

OPRA also 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.) E.O. Order 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 Items No. 1 through No. 4 sought ECPO preliminary and continuation reports, telephone bills, time cards and statements of all persons interviewed related to State v. Francisco Lado, Essex Co. Indictment No. 5-89-2591 and 2723-5-91. The Custodian responded to the Complainant in a timely manner stating that access to the requested records was denied because the records are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

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. 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 Custodian certified in the SOI that these records are criminal investigation records contained within an ECPO file. Additionally, the evidence of record indicates that the requested records pertained to a criminal case in which the Complainant was a defendant and indicted.

Therefore, because the records sought in the Complainant's request Items No. 1 through No. 4 are criminal investigatory records, they are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and Janeczko, supra. Thus, the Custodian lawfully denied access to these records pursuant to N.J.S.A. 47:1A-6.

Moreover, the Complainant's OPRA request items No. 5 and No. 6 sought photographs and an autopsy report. The GRC has previously decided that similar records were not subject to disclosure under OPRA. In Leak v. Union County Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009), the complainant sought, among other records, autopsy results and crime scene photographs from a 1994 trial. The custodian responded in writing on the third (3rd) business day denying access to the records pursuant to N.J.S.A. 47:1A-1.1. and Executive Order No. 69 (Governor Whitman, 1997)("E.O. No. 69"). The complainant subsequently filed a Denial of Access Complaint.

Regarding the autopsy results and crime scene photographs, the GRC held the following:

"Request Item No. 1 seeks an autopsy report relating to a criminal trial in 1994. In McCrone (The Trenton Times) v. Burlington County Prosecutor's Office, GRC Complaint No. 2005-146 (November 2005), the Complainant requested records pertaining to a fatal auto accident, which included an autopsy report. The Custodian responded, denying access to the requested autopsy record as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. The GRC held that the Custodian had borne his burden of proving that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

...

Request Item No. 3 seeks crime scene photographs relating to a criminal trial in 1994 ... E.O. No. 69, enacted on May 15, 1997, modified Executive Order No. 9 (Gov. Hughes, 1963) and Executive Order No. 123 (Gov. Kean, 1983). E.O. No. 69 holds 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.)

N.J.S.A. 47:1A-9.a. recognizes exemptions from disclosure included in state and federal statutes, regulations and executive orders. In this

complaint, E.O. No. 69 explicitly states that criminal investigatory photographs shall not be deemed to be public records. Therefore, the crime scene photographs responsive to request Item No. 3 of the Complainant's May 5, 2007 OPRA request are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9.a and E.O. No. 69.

Therefore, pursuant to N.J.S.A. 47:1A-6, the Custodian has borne his burden of proving a lawful denial of access to records responsive to request Items No. 1 ... and No. 3 because the records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, McCrone, *supra* and E.O. No. 69."

Based on the foregoing, the records sought in the Complainant's OPRA request Items No. 5 and No. 6 are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, McCrone, *supra* and E.O. No. 69. *See Leak*, *supra*. Accordingly, the Custodian has lawfully denied access to the requested records.

Finally, the Complainant's request Item No. 7 sought "[d]ocuments concerning bullets and shells related to the above mentioned matter." The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹¹ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."¹²

Additionally, in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) the Council held that "[b]ecause the Complainant's OPRA requests[No.] 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375

N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

The Complainant’s request Item No. 7 herein sought documents relating to bullets and shells pertinent to State v. Francisco Lado, Essex Co. Indictment No. 5-89-2591 and 2723-5-91; although the Complainant identified a content for the records, the Custodian would have to research her files to find all documents relating to the “bullets and shells” in the indictment of the Complainant. This request is similar to a request made in Gonzales v. City of Gloucester (Camden), GRC Complaint No. 2008-255 (November 2009).

In Gonzales, supra, the complainant sought, among other records, review of “documents that indicate that any past owner of 308 and/or 310 North Broadway in Gloucester City that combined deeds for these two (2) properties.” The Council found that although the complainant identified a specific topic, the complainant’s request “... failed to identify specific government records being sought. The Complainant’s OPRA request ... documents relating to 308 and/or 310 North Broadway in Gloucester City would have required the Custodian to search all of her records to identify those responsive to the Complainant’s requests.” *Id.* at pg. 5.

Therefore, because the Complainant’s request Item No. 7 is overly broad inasmuch as it fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request Item No. 7 is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) and Gonzales, supra. See also Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the records sought in the Complainant’s request items No. 1 through No. 4 are criminal investigatory records, they are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Thus, the Custodian lawfully denied access to these records pursuant to N.J.S.A. 47:1A-6.
2. The records sought in the Complainant’s OPRA request items No. 5 and No. 6 are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, McCrone (The Trenton Times) v. Burlington County Prosecutor’s Office, GRC Complaint No. 2005-146 (November 2005) and Executive Order No. 69 (Governor Whitman, 1997). See Leak v. Union County Prosecutor’s Office, GRC

Complaint No. 2007-148 (Interim Order dated February 25, 2009). Accordingly, the Custodian has lawfully denied access to the requested records.

3. Because the Complainant's request Item No. 7 is overly broad inasmuch as it fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request Item No. 7 is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) and Gonzales v. City of Gloucester (Camden), GRC Complaint No. 2008-255 (November 2009). *See also* Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 17, 2011