



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

Barbara Sacco
Complainant

Complaint No. 2010-123

v.

Monmouth County Prosecutor's Office
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council ("Council") considered the September 13, 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 the Custodian certified that no records responsive to the Complainant's request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
2. Although the requested records date back to 1911, these records are considered criminal investigatory records. Thus, the Custodian did not unlawfully deny access to these records 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).

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 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Barbara Sacco¹
Complainant**

GRC Complaint No. 2010-123

v.

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

Records Relevant to Complaint: Any records pertaining to the murder of Joseph Sacco, age 35, of Beech Street Red Bank, New Jersey, dated July 28, 1911 at Drummond Pond. Case Detective: Detective Elwood Minugh. Prosecutor: John S. Applegate, Jr.

Request Made: May 20, 2010³

Response Made: May 24, 2010

Custodian: Patricia Quelch

GRC Complaint Filed: June 22, 2010⁴

Background

May 20, 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.

May 24, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day as receipt of such request. The Custodian states that access to the requested records is denied because the records are criminal investigatory records which are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

June 22, 2010

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

- Complainant's OPRA request dated May 20, 2010
- Letter from the Custodian to the Complainant dated May 24, 2010

¹ No legal representation listed on record.

² Represented by Andrea I. Bazer, Esq., Monmouth County Counsel (Freehold, NJ).

³ The Records Custodian received the OPRA request on May 24, 2010.

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

⁵ The Complainant includes records not relevant to the adjudication of this complaint.

- Newspaper article pertaining to the murder of Joseph Sacco dated August 2, 1911

The Complainant asserts that the information she is seeking is for a family genealogy project. The Complainant states that her request was denied because the documents requested are criminal investigatory records and thus not public records. The Complainant also argues that after 99 years, some information should be available.

The Complainant agrees to mediate this complaint.

June 24, 2010⁶

Offer of Mediation sent to the Custodian.

June 29, 2010

Letter from Custodian's Counsel to the GRC. Custodian's Counsel states that the Custodian properly denied access to the requested records as they are criminal investigatory records exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. Custodian's Counsel also argues that the records request does not specifically identify a government record and is a request for information; therefore, it is invalid pursuant to MAG Entertainment LLC v. Division of ABC, 375 N.J. Super. 534 (App. Div. 2005). Custodian's Counsel further asserts that custodians are not required to conduct research to locate responsive records. Custodian's Counsel states that she nevertheless instructed the Custodian to try and locate any responsive records that may exist; however, the Prosecutor's Office does not have any records that date back to 1911 because the earliest file records are from 1924. Custodian's Counsel asserts that no records responsive to the request exist.

July 6, 2010

E-mail from the GRC to the Custodian. The GRC requests a legal certification from the Custodian stating that no records responsive exist.

July 14, 2010

E-mail from the Custodian to the GRC. The Custodian attaches a legal certification stating that she first denied the Complainant's OPRA request because the requested records are criminal investigatory records. The Custodian also certifies that upon request from the Custodian's Counsel she attempted to look for any responsive records, but the Monmouth County Prosecutor's Office does not have any records that date back to 1911. Additionally, the Custodian certifies that the Prosecutor's Office does not categorize their files by name of the victim but does so only by defendant's name. Lastly, the Custodian certifies that since this is an unsolved homicide there is no way to track this case.

July 15, 2010

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

July 22, 2010

Custodian's SOI with the following attachments:

⁶ The Custodian did not respond to the Offer of Mediation.

- Complainant’s OPRA request dated May 20, 2010
- Letter from the Custodian to the Complainant dated May 24, 2010

The Custodian certifies that when she received the Complainant’s OPRA request, the Custodian reviewed it and determined that the request sought criminal investigatory records and therefore the request was denied pursuant to N.J.S.A. 47:1A-1.1 and Janeczko v. New Jersey Department of Law and Public Safety, GRC Complaint Nos. 2002-79 and 2002-80. The Custodian also certifies that the status of the criminal investigation is not controlling to the categorization of the document or file pursuant to Janeczko supra; Andrew Johnson/Press of Atlantic City v. New Jersey Division of State Police, GRC Complaint No. 2004-46; and Harvey v. Division of State Police, GRC Complaint No. 2004-65.

Additionally, the Custodian certifies that after the Complainant filed her Denial of Access Complaint, the Custodian, as directed by legal counsel, searched for any responsive records by searching the record room. The Custodian states that records predating the Promis/Gavel system are categorized by the last name of the defendant charged with the crime. The Custodian also certifies that locating any responsive records was difficult because this was an unsolved homicide. The Custodian certifies that the records clerk searched the index cards and did not find any records responsive to the request; the earliest solved case on file was from the mid-1920s. The Custodian also certifies that she checked with the Assistant Prosecutor in charge of the Cold Case Squad. The Custodian certifies that the Assistant Prosecutor with the help of his paralegal searched the cold case files and the earliest file was from the 1970s.

Finally, the Custodian certifies that the Division of Archives and Records Management’s (DARM) published retention schedule C312222-003, County Prosecutor’s Office has been in effect since May 20, 2004 states that Prosecutor’s Offices are required to permanently retain files relating to homicide investigations see 0013-0002; 0018-0008. However, the Custodian certifies that DARM was not created until 1920 and the subject of this homicide predates DARM. Therefore the Custodian certifies that no records responsive exist, pursuant to Smith v. Government Records Council, A-5830-08T3 (decided July 19, 2010).

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 ...” (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 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 complaint, the evidence of record indicates that the Complainant requested any records pertaining to the murder of Joseph Sacco, age 35, on July 28, 1911. The Custodian first denied the records on the grounds that the requested records were criminal investigatory records. However, after the filing of the Complainant’s Denial of Access Complaint and upon direction from the Custodian’s attorney, the Custodian attempted to find any records responsive to the Complainant’s OPRA request. The Custodian has certified that no records responsive exist. Furthermore, the Custodian certified that the oldest records that the Monmouth County Prosecutor’s has for solved cases is from 1924 and for cold-cases is from the 1970s. Additionally, the Custodian certified that the agency was not required to keep files relating to homicide investigations because DARM was not created until 1920 and these documents date back to 1911. The Complainant has submitted no evidence to refute the Custodian’s certification in this regard.

The Complainant asserts that after 99 years some information should be available pertaining to this homicide. Conversely, the Custodian asserts that these records are criminal investigatory records. Additionally, the Custodian asserts that the request was broad and unclear and would require the Custodian to conduct research. Lastly, the Custodian certifies that no records responsive exist.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed. The GRC determined that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed, and the Complainant provided no evidence to refute the Custodian’s certification.

Therefore, because the Custodian certified that no records responsive to the Complainant's request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

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."

In the instant complaint, since the records sought were part of a 1911 homicide investigation, it is important to note that the criminal investigatory records exemption continues to survive the conclusion of the investigation. Even though this homicide investigation became a cold-case and was never solved, as the Council pointed out in Janeczko, supra:

"[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."

Therefore, although the requested records date back to 1911, these records are considered criminal investigatory records. Thus, the Custodian did not unlawfully deny access to these records 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).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that no records responsive to the Complainant's request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
2. Although the requested records date back to 1911, these records are considered criminal investigatory records. Thus, the Custodian did not unlawfully deny access to these records 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).

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 13, 2010