



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

Richard Rivera
Complainant

Complaint No. 2010-152

v.

Passaic County Sheriff'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 because the Complainant's OPRA request sought criminal investigatory records, 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 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**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-152

v.

**Passaic County Sheriff's Office²
Custodian of Records**

Records Relevant to Complaint: Copies of:

Any and all reports for an incident involving Paolo Mariano and Sheriff Speziale on February 11, 2010 at approximately 9:00 p.m. in Little Ferry and South Hackensack. Please include incident reports, arrest reports, injury reports, use of force reports, vehicle damage reports, vehicle pursuit reports, tow/impound reports, request for reimbursement, overtime and compensation time reports/requests.

Request Made: July 1, 2010

Response Made: July 7, 2010

Custodian: William Maer

GRC Complaint Filed: July 16, 2010³

Background

July 1, 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.

July 7, 2010

Custodian's response to the OPRA request. The Custodian received the OPRA request on July 2, 2010. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that access to the requested record is denied because this matter has not yet been adjudicated and therefore the information cannot be released.

July 8, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he is aware that the incident has not been adjudicated, but the Complainant is not seeking investigation reports. The Complainant also states that similar OPRA requests have been made to other public agencies involved in the same incident and those agencies fulfilled

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Albert C. Buglione, Esq., of DeYoe, Heissenbittel, and Buglione, LLC (Wayne, NJ).

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

his OPRA requests. The Complainant asks the Custodian to reconsider his position so as to avoid costly litigation to the Passaic County taxpayers. The Complainant also states that the Custodian is still within the statutory time frame to respond. The Complainant further states that if he does not hear from the Custodian within seven (7) business days, the Complainant will assume that the Custodian's response has not changed and the Complainant will file a suit.

July 16, 2010

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

- Complainant's OPRA request dated July 1, 2010
- Letter from the Custodian to the Complainant dated July 7, 2010
- Letter from the Complainant to the Custodian dated July 8, 2010

The Complainant does not agree to mediate this complaint.

The Complainant states that he filed an OPRA request on July 1, 2010. The Complainant also states that the Custodian responded to the OPRA request in writing on July 7, 2010 stating that access to the records is denied because the incident has not been adjudicated. The Complainant states that he wrote the Custodian on July 8, 2010 stating that in an effort to avoid litigation, the Complainant was not seeking investigative reports, as is clear by his OPRA request

Furthermore, the Complainant states that the Custodian did not respond to his letter dated July 8, 2010. In addition, the Complainant states that Jerry Speziale, the Passaic County Sheriff, was involved in a vehicle pursuit while on duty. The Complainant also states that the vehicle pursuit ended following a collision between the suspect's vehicle in which Sheriff Speziale was a passenger. The Complainant states that the collision took place on the border of Little Ferry and South Hackensack in Bergen County. The Complainant also states that he requested substantially similar records from other public agencies and those public agencies provided police reports to the Complainant, including twenty (20) pages of records containing reports, as well as criminal complaints signed by Sheriff Speziale. The Complainant states that according to one report received pursuant to a separate OPRA request, Sheriff Speziale was supposedly injured while using force to apprehend one suspect. However, the Complainant states that the Custodian would not provide any record relating to the injury or use of force or other records often readily available under Executive Orders, OPRA or the common law.

July 22, 2010

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

August 2, 2011

Custodian's incomplete SOI with the following attachments:⁴

- Complainant's OPRA request dated July 1, 2010
- Letter from the Custodian to the Complainant dated July 7, 2010
- Letter from the Complainant to the Custodian dated July 8, 2010

The Custodian certifies that the Complainant submitted an OPRA request for any and all reports for an incident that occurred on February 11, 2010 involving Paolo Mariano and Sheriff Speziale in Little Ferry or South Hackensack. The Custodian also certifies that the Complainant specifically requested incident reports, arrest reports, injury reports, use of force reports, vehicle damage reports, vehicle pursuit reports, tow/impound reports, requests for reimbursement, overtime and compensation time reports. Lastly, the Custodian certifies that the records responsive involve an ongoing criminal matter currently being investigated by the Bergen County Prosecutor's Office.

The Custodian argues that the records responsive to the Complainant's OPRA request are privileged and confidential in nature. The Custodian argues that his denial of the Complainant's OPRA request was valid pursuant to State v. Garcia 131 N.J. 67 (1993).

The Custodian further argues that N.J.S.A. 47:1A-3 provides that if records responsive to an OPRA request pertain to an investigation in progress by a public agency (*i.e.*, law enforcement agency) and if release of those records is deemed to be inimical to the public interest, then that request may be denied. The Custodian also states that State law provides that Prosecutors are chief law enforcement agents, and all agencies conducting investigations on their behalf must answer exclusively to the Office of the Prosecutor. The Custodian also argues that the issue of privilege in this context has been extensively litigated and both the New Jersey Superior Court Law Division and Appellate Division have consistently held that criminal records should not be released to uninterested parties when 1) an investigation is ongoing, 2) the matter has not been presented to a Grand Jury, and 3) the matter has not been resolved through a plea agreement or a trial. Furthermore, the Custodian argues that information relating to witnesses, the need to protect sources contributing to an investigation, and current or ongoing criminal activity/investigations must be kept confidential. *See, Newman v. Benitz*, 2006 WL 1210684 (N.J. Super. A.D., May 4, 2006).

The Custodian states that the Passaic County Sheriff's Department answers directly to the Bergen County Prosecutor's Office regarding the underlying investigation and therefore it is not appropriate for the Custodian to release these records because said investigation is ongoing and has not yet been completed.

The Custodian also states that if the New Jersey Supreme Court has decreed that criminal defendants are not entitled to precise information regarding their underlying criminal investigation, then civil litigants and OPRA complainants should similarly not be entitled to that information. The Custodian further states that the Complainant is

⁴ The Custodian failed to include the signed legal certification and Item No. 9, document index.
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attempting to obtain records that pertain to a pending criminal action in which the Complainant is not involved. The Custodian also states that the Complainant has requested a number of other reports including but not limited to requests for reimbursement, overtime compensation reports and requests. The Custodian argues that the Complainant's OPRA request is burdensome and overbroad.

August 5, 2010

Letter from the GRC to the Custodian. The GRC informs the Custodian that his SOI is incomplete because he failed to include the legal certification and Item No. 9, the document index. The GRC also states that the SOI must be completed by August 10, 2010.

August 24, 2010

Letter from the Custodian to the GRC. The Custodian includes the legal certification and Document Index from his incomplete SOI dated August 2, 2010.

The Custodian provided the following document index:

List all records responsive to Complainant's OPRA request	List the records retention requirement and disposition schedule for each record responsive to the Complainant's OPRA request	List of all records provided to the Complainant in their entirety or with redactions	If records were disclosed with redactions, give a general nature description of their redactions	If records were denied in their entirety, give a general nature description of the record.	List the legal explanation and statutory citation for the denial of access to records in their entirety or with redactions
Not applicable The records requested are privileged and maintained by a law enforcement agency. As such, the records have not even been reviewed by the Custodian or the Custodian's legal counsel.	The records requested must be maintained by the agency and destruction is not allowed.	Not applicable. The records requested are privileged and cannot be released pursuant to the prevailing state of the law.	Not applicable. The records requested are privileged and cannot be released pursuant to the prevailing state of the law.	Not applicable. The records requested are privileged and cannot be released pursuant to the prevailing state of the law.	<u>N.J.S.A.</u> 47:1A-9.a. allows for exemptions from disclosure in other state statutes to apply under OPRA and <u>N.J.S.A.</u> 10:4-12 and <u>N.J.S.A.</u> 47:1A-3, provide that law enforcement

					agencies may withhold from disclosure records if the said records pertain to investigations that are ongoing.
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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 the following information which is deemed to be confidential ... *criminal investigatory records...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA defines a criminal investigatory record 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...” 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.

The evidence of record indicates that the Complainant filed an OPRA request seeking any and all reports pertaining to an incident involving Paolo Mariano and Sheriff Speziale on February 11, 2010 at approximately 9:00 p.m. in Little Ferry and South Hackensack, including incident reports, arrest reports, injury reports, use of force reports, vehicle damage reports, vehicle pursuit reports, tow/impound reports, request for reimbursement, overtime and compensation time reports/requests. The evidence of record also indicates that the Custodian responded in writing to the Complainant’s OPRA request on the third (3rd) business day following receipt of such request. The evidence of record further indicates that the Custodian denied the Complainant’s OPRA request stating that the matter was not yet adjudicated and therefore the information could not be released.

OPRA defines a “criminal investigatory record” 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. 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.”

In the instant complaint, the Custodian responded to the Complainant’s OPRA request stating that the incident which was the subject of the OPRA request was not yet adjudicated and therefore the information could not be released. The Custodian certified in the SOI that the records responsive involve an ongoing criminal matter currently being investigated by the Bergen County Prosecutor’s Office.

Thus, the Complainant’s OPRA request sought criminal investigatory records held by a law enforcement agency; such records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Therefore, because the Complainant’s OPRA request sought criminal investigatory records, 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 because the Complainant's OPRA request sought criminal investigatory records, 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

May 17, 2011