



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

James Sage
Complainant

Complaint No. 2011-17

v.

Monmouth County Sheriff's Department
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council ("Council") considered the July 24, 2012 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 Custodian certified in the Statement of Information dated April 12, 2011 that no records that may be 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 said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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 31st Day of July, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 7, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**James Sage¹
Complainant**

GRC Complaint No. 2011-17

v.

**Monmouth County Sheriff's Department²
Custodian of Records**

Records Relevant to Complaint: Copies of any correspondence dated October 1, 2010 to January 11, 2011 from Monmouth County Sheriff Shaun Golden to the United States Attorney's Office, New Jersey Attorney General's Office, New Jersey Comptroller's Office, New Jersey Treasury Department, or the Monmouth County Prosecutor's Office requesting an investigation into pension payments paid by the New Jersey Police and Fireman's Pension System to Monmouth County Chief Warrant Officer/Law Enforcement Chief Michael Donovan.

Request Made: January 11, 2011

Response Made: January 18, 2011

Custodian: Cynthia Scott

GRC Complaint Filed: January 24, 2011³

Background

January 11, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA.

January 18, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that access to the requested record is denied because criminal investigatory records are not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1.

January 24, 2011

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

¹ No legal representation listed on record.

² Represented by Andrea Bazer, Esq. (Freehold, NJ).

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

- Complainant's OPRA request dated January 11, 2011
- Custodian's response to the OPRA request dated January 18, 2011
- N.J.S.A. 47:1A-3 accessed from oncle.com dated January 19, 2011

The Complainant states that the Custodian correctly asserted that the requested records were criminal investigatory records not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. The Complainant states, however, that he is entitled to the requested records pursuant to N.J.S.A. 47:1A-3.b., which the Complainant alleges provides for disclosure in circumstances:

“...where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any...information as to the identity of the investigating and arresting personnel and agency and the length of the investigation...”

The Complainant states that his request encompasses information regarding the crime or crimes investigated and agency responsible for such investigation, and that he is entitled to such information pursuant to N.J.S.A. 47:1A-3.b.

The Complainant does not agree to mediate this complaint.

April 6, 2011

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

April 12, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 11, 2011
- Custodian's response to the OPRA request dated January 18, 2011

The Custodian certifies that her search for the requested records involved an extensive search of all correspondence executed by Sheriff Golden from October 1, 2010 to January 11, 2011 to determine if any records responsive to the Complainant's request existed. The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable.

The Custodian certifies that the Complainant's OPRA request was received on January 11, 2011. The Custodian also certifies that the Custodian's Counsel responded to the request on January 18, 2011, informing the Complainant that access to the requested records was denied because criminal investigatory records are not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian certifies that she believed the requested records would be criminal investigatory records because all of the agencies that the Complainant listed as possible recipients of correspondence from the sheriff conduct criminal investigations. The Custodian certifies that the Complainant inferred from her response that a criminal investigation [of Michael Donovan] was underway; however, the Custodian certifies that she is unaware of any such criminal investigation.

The Custodian certifies that pursuant to Counsel's advice, she conducted a complete and thorough search for any of the records requested by the Complainant during the relevant time frame. The Custodian certifies that N.J.S.A. 47:1A-1.1 provides an exemption from disclosure for criminal investigatory records if such a record responsive to the Complainant's request existed; however, her search revealed that no records that may be responsive to the Complainant's request exist.

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.

There is no dispute between the parties that the Complainant's OPRA request was delivered to the Custodian on January 11, 2011, and that the Custodian responded to the request in writing on January 18, 2011, which was the fourth (4th) business day following receipt of the request.

The Complainant agrees with the Custodian that the requested records were criminal investigatory records not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1.; however, the Complainant asserted that he was nonetheless entitled to the requested

records pursuant to N.J.S.A. 47:1A-3.b., which the Complainant alleged provides for disclosure of certain information when a crime has been reported but no arrest yet made.

The Custodian certified that the Complainant inferred from her response that a criminal investigation was underway; however, the Custodian certified that she is unaware of any such criminal investigation of Michael Donovan, who is the subject of the records requested by the Complainant. The Custodian certified that under the advice of counsel she conducted a complete and thorough search for any of the records requested by the Complainant. The Custodian further certified that her search revealed that no records that may be responsive to the Complainant's request exist.

In the instant complaint the Custodian certified in the SOI that no records that may be responsive to the Complainant's request exist. Further, the Complainant provided no evidence to refute the Custodian's certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him 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 and the complainant did not provide any evidence to refute the custodian's certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the SOI dated April 12, 2011 that no records that may be 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 said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian certified in the Statement of Information dated April 12, 2011 that no records that may be 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 said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012