



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 26, 2013 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2011-221

v.

Essex County Prosecutor's Office
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council ("Council") considered the January 22, 2013 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 the Custodian has lawfully denied access to the requested photographs and has borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Specifically the Complainant is not entitled to the requested photographs because they are specifically exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9(a) and Executive Order No. 69 (Gov. Whitman, 1997).

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 February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 28, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

Rashaun Barkley¹
Complainant

GRC Complaint No. 2011-221

v.

Essex County Prosecutor's Office²
Custodian of Records

Records Relevant to Complaint: Copies of:

1. Death scene photographs of the murder of Bunny L. Burt on January 16, 1993.
2. Crime scene photographs in State v. Barkley Ind. No. 1390-4-93.

Request Made: May 19, 2011

Response Made: May 26, 2011

Custodian: Debra G. Simms

GRC Complaint Filed: June 22, 2011³

Background

May 19, 2011

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 26, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested record is denied because he has requested the Prosecutor's criminal investigatory file which is not considered a public record pursuant to the holding of Janeczko v. Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). The Custodian further states that the request is being denied because OPRA requires that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." N.J.S.A. 47:1A-1.1.

In addition, the Custodian asserts that she is denying access because the Superior Court of New Jersey has held that OPRA is not meant to be used to circumvent the discovery process and is not meant to be a tool of discovery pursuant to MAG

¹ No legal representation listed on record.

² Represented by James Paganelli, Esq. of the Office of the Essex County Counsel (Newark NJ).

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

Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-9 (App. Div. 2005). The Custodian further argues that Executive Order 69 of Governor Christie Todd Whitman in 1997 prevents disclosure of the requested photographs.

June 22, 2011

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

- Complainant’s OPRA request dated May 19, 2011
- Letter from the Custodian to the Complainant dated May 26, 2011

The Complainant states that he has requested crime scene photos surrounding the homicide of Bunny Burt in Newark, NJ on January 16, 1993. The Complainant agrees to mediate this complaint.

July 8, 2011

Offer of Mediation sent to the Custodian.

August 1, 2011

The Custodian declines the Offer of Mediation.

August 1, 2011

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

August 10, 2011⁴

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated May 19, 2011
- Letter from the Custodian to the Complainant dated May 26, 2011

The Custodian certifies that a search for the requested records yielded the requested death scene and crime photographs. The Custodian further certifies that the requested records do not have an applicable Records Management Services retention schedule and were not destroyed.

The Custodian states that in Janeczko v. Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), the GRC held that the criminal investigatory exemption of OPRA applies to all investigations, whether resolved or unresolved. The Custodian further asserts that the disclosure of the requested records would constitute a failure to protect the citizen’s reasonable expectation of privacy, which the Custodian must safeguard pursuant to N.J.S.A. 47:1A-1.1. In addition, the

⁴ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007). (Note: if the Custodian certifies to one of these points but not the other, include the appropriate half of this footnote after the paragraph describing search or Records Management schedule.)

Custodian states that the request is denied on the separate and independent ground that the OPRA statute is not meant to circumvent the discovery process, nor replace or supplement discovery by private litigants pursuant to MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-49 (App. Div. 2005).

In addition, the Custodian argues that Executive Order No. 69 of Christine Todd Whitman (1997) provides that “photographs and other similar criminal investigation records which are required to be made, maintained or kept by any State or local governmental agency shall not be deemed to be public records subject to inspection and examination and available for copying,” and therefore access to the requested criminal investigatory photographs was lawfully denied.

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.

Additionally, OPRA states that “[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access... made pursuant to Executive Order of the Governor.” N.J.S.A. 47:1A-9(a).

Executive Order No. 69 (Gov. Whitman, 1997) (“EO 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.)

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 Complainant filed an OPRA request seeking crime and death scene photographs related to a criminal matter. In denying the Complainant’s request, the Custodian lawfully asserted that Executive Order No. 69 (Gov. Whitman, 1997) precludes the release of the requested photographs.

OPRA at N.J.S.A. 47:1A-9(a) mandates that OPRA’s provisions do not supersede any exemption contained in an Executive Order of the Governor, or any regulation promulgated pursuant to an Executive Order of the Governor. The Custodian in this matter alleged that EO 69 exempts the requested photographs from public access.

Therefore, the Custodian has lawfully denied access to the requested photographs and has borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Specifically the Complainant is not entitled to the requested photographs because they are specifically exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9(a) and Executive Order No. 69 (Gov. Whitman, 1997).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has lawfully denied access to the requested photographs and has borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Specifically the Complainant is not entitled to the requested photographs because they are specifically exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9(a) and Executive Order No. 69 (Gov. Whitman, 1997).

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013⁵

⁵ This complaint was originally prepared for the Council’s January 29, 2013 meeting; however, the complaint could not be adjudicated due to lack of quorum.