



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**

**February 26, 2013 Government Records Council Meeting**

Alan Rogers  
Complainant

Complaint No. 2011-23

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 amended findings and recommendations. The Council, therefore, finds that the Custodian did not unlawfully deny access to any records because the Complainant failed to provide sufficient information in his OPRA request, thus making it impossible for the Custodian to identify responsive records. N.J.S.A. 47:1A-6.

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 26<sup>th</sup> 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 27, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Alan Rogers<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-23**

v.

**Essex County Prosecutor's Office<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of reports concerning Indictment No. 305-9-86 from:

1. Command-Homicide Squad Badge No. 147 Detective Gary Miller.
2. Command West Badge No. 1096 P.O. Michael W. Thomas.
3. Prosecutor Officer Thomas Gilsenan.
4. Prosecutor Officer Kirk Swindell.
5. Narcotics Bureau Badge No. 113 Detective Peter Leone.
6. Command- DB Sector 414 District No. W-19064, General Complaint No. 87024 Sergeant Frederick Staudinger (NJSP).
7. Auto-Squad Detective Lee Williams.
8. Command-Homicide Squad Detective Elbert Eutsey.
9. Command-Homicide Squad Detective Charles Whitner.
10. Command Detective Badge No. 68 Daniel Zieser.

**Request Made:** November 16, 2010

**Response Made:** December 8, 2010

**Custodian:** Debra G. Simms, Esq.

**GRC Complaint Filed:** February 3, 2011<sup>3</sup>

**Background**

**November 16, 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.

**December 8, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by James Paganelli, Esq. (Newark, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

receipt of such request.<sup>4</sup> The Custodian states that the Essex County Prosecutor's Office ("ECPO") received the Complainant's OPRA request on November 30, 2010.

The Custodian states that a check of the ECPO's computer system using Indictment No. 305-9-86 revealed no matching indictment.

The Custodian also states that the Complainant's OPRA request is denied because an ECPO criminal investigatory file, whether open or closed, is not subject to access pursuant to N.J.S.A. 47:1A-1.1. The Custodian states that in Janeczko v. NJ Dept. of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004), the GRC held that OPRA's criminal investigatory exemption applies to all investigations "resolved and unresolved" and "without reference to the status of the investigation." *See also* Johnson (Press of Atlantic City) v. NJ Division of State Police, GRC Complaint No. 2004-46; Harvey v. Division of State Police, GRC Complaint No. 2004-65; Daily Journal v. Police Department of the City of Vineland, 351 N.J. Super. 110, 120 (App. Div. 2002), *cert. denied* 174 N.J. 364 (2002). The Custodian states that the only exception to the criminal investigatory exemption is arrest reports that must be redacted pursuant to N.J.S.A. 47:1A-5.a.

The Custodian further states that the Complainant's OPRA request is being denied because same is an invalid request for general data, information or statistics. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian states that OPRA was not intended to provide "... a research tool ... to force government officials to identify and siphon useful information." MAG at 546. *See also* Reda v. Township of West Milford, GRC Complaint No. 2002-58 (July 2004) and Asarnow v. NJ Dept. of Labor & Workforce Development, GRC Complaint No. 2006-24 (May 2006). The Custodian thus states that the Complainant's OPRA request is a general blanket request and is therefore invalid under OPRA.

The Custodian also states that the Complainant's OPRA request is being denied pursuant to OPRA's confidentiality clause, which provides 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.

### **February 3, 2011**

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

- Complainant's OPRA request dated November 16, 2010.
- Letter from the Custodian to the Complainant dated December 8, 2010.

The Complainant states that he submitted an OPRA request to the ECPO on November 16, 2010. The Complainant states that the Custodian responded in writing on December 8, 2010 denying access to the requested records for several reasons.

---

<sup>4</sup> The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on November 30, 2010.

The Complainant states that the ECPO's failure to find a matching indictment could be because the Complainant's co-defendants have Indictment No. 582-2-86. The Complainant asserts that this indictment number may identify the records he is seeking.<sup>5</sup>

**February 25, 2011**

Offer of Mediation sent to both parties.

**March 1, 2011**

The Complainant agrees to mediation.

**March 4, 2011**

The Custodian agrees to mediation.

**March 8, 2011**

Complaint referred to mediation.

**October 3, 2011**

Complaint referred back from mediation.

**October 6, 2011**

Letter from the GRC to the Complainant. The GRC informs the Complainant that he has the opportunity to amend this Denial of Access Complaint prior to the GRC's request for the SOI from the Custodian. The GRC states that the Complainant's response is due by close of business on October 14, 2011.

**October 20, 2011**

Complainant's amended Denial of Access Complaint. The Complainant states that all records at issue prior to mediation are still at issue herein.

**October 24, 2011**

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

**October 28, 2011**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated November 16, 2010 with the ECPO's date stamp thereon dated November 30, 2010.
- Letter from the Custodian to the Complainant dated December 8, 2010.
- Complainant's Denial of Access Complaint dated February 3, 2011.
- Custodian's Agreement to Mediate dated March 4, 2011.
- Arrest Report No. 10421 dated June 17, 1986.<sup>6</sup>

---

<sup>5</sup> The GRC notes that the Complainant's OPRA request references Indictment No. 305-9-86; however, the Complainant also refers to his indictment number as Indictment No. 3075-9-86.

<sup>6</sup> The Custodian included additional information regarding correspondence between the parties that occurred while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or Alan Rogers v. Essex County Prosecutor's Office, 2011-23 – Findings and Recommendations of the Executive Director

The Custodian certifies that her search for the requested records included attempting to locate a file entitled Indictment No. 582-2-86, which was not located. The Custodian certifies that she also performed a search for Indictment No. 3075-9-86, which yielded records.

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 (“RMS”) is not applicable.

The Custodian certifies that she received the Complainant’s OPRA request on November 30, 2010. The Custodian certifies that she responded to the Complainant in writing on December 8, 2010 denying access to his OPRA request for the following reasons:

- The ECPO could not locate any match for Indictment No. 305-9-86.
- Any responsive records are exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1.
- The OPRA request is a blanket request seeking general data, information or statistics. MAG and Bent.
- Any responsive records are exempt from disclosure pursuant to the ECPO’s obligation to safeguard personal information the disclosure of which would violate a citizen’s reasonable expectation of privacy. N.J.S.A. 47:1A-1.

The Custodian certifies that she conducted a search for Indictment No. 3075-9-86 after the submission of the Denial of Access Complaint. The Custodian states that she located records associated with this indictment number. The Custodian states that she attached to the GRC’s copy of the SOI only is a copy of the Arrest Report No. 10421. The Custodian states that she will not submit a copy of the unredacted arrest report to the Complainant; however, she will provide a redacted version of the arrest report to the Complainant at the GRC’s direction.

The Custodian contends that the rest of the records associated with Indictment No. 3075-9-86 are exempt from disclosure for the reasons stated above. The Custodian further reiterates that the Complainant’s OPRA request is invalid pursuant to MAG, Bent, Reda and Asarnow.

### **March 2, 2012**

Letter from the GRC to the Custodian. The GRC states that its regulations provide that “[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.” *N.J.A.C. 5:105-2.4(1)*. The GRC states that it has reviewed the parties’ submissions and has determined that additional information is required.

The GRC states that the evidence of record indicates that the Custodian initially responded to the Complainant's OPRA request on December 8, 2010 stating that any responsive records are exempt from disclosure as criminal investigatory record. N.J.S.A. 47:1A-1.1. The GRC states that the Custodian additionally stated that the only record required to be disclosed is an arrest report with certain redactions. The GRC states that the Custodian reiterated this denial in the SOI.

The GRC thus requests a legal certification, pursuant to N.J. Court Rule 1:4-4, in response to the following questions:

1. Whether the records responsive to the Complainant's OPRA request were part of or are currently part of a criminal investigation?
2. Whether there are any statutes, regulations or Attorney General Guidelines requiring that the responsive records be made, maintained or kept on file?

The GRC requests that the Custodian provide the requested legal certification by close of business on March 7, 2012. The GRC further advises that any submissions received after this deadline date may not be considered by the Council for adjudication.

### **March 6, 2012**

Custodian's legal certification. The Custodian certifies that the responsive records were part of a criminal investigation. The Custodian certifies that as previously stated in her SOI response, no files were located for Indictment No. 305-9-86 and Indictment No. 582-2-86. The Custodian further certifies that an unredacted copy of the arrest report for Indictment No. 3075-9-86 was forwarded to only the GRC as part of the SOI.

The Custodian further certifies that after reviewing the Attorney General's Guidelines, relevant Executive Orders, prior GRC case law and performing other legal research, she determined that there exists no requirement that the responsive records be made, maintained or kept on file. The Custodian certifies that nevertheless, certain information usually found in arrest reports must be disclosed. N.J.S.A. 47:1A-3.b., Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008) and Executive Order No. 69 (Gov. Whitman, 1997).

### **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.

The Complainant filed the instant complaint noting that the Custodian denied access to his OPRA request for several reasons. The Complainant addressed one of these reasons, the Custodian was unable to locate records under Indictment No. 305-9-86, by noting that the correct number may be Indictment No. 582-2-86.

The Custodian certified in the SOI that after the filing of this complaint, the Complainant provided her with a new number: Indictment No. 3075-9-86. The Custodian further certified that this number yielded records that the Custodian still believed were criminal investigatory in nature with the exception of portions of the arrest report.

The crux of this complaint is whether the Custodian could have unlawfully denied access to the Complainant’s OPRA request in the face of insufficient information, or in this complaint, the wrong indictment number.

The evidence is clear on its face that the Complainant’s OPRA request failed to identify the right indictment number. Specifically, the Custodian advised the Complainant of this error and he subsequently provided a second, equally erroneous indictment number. It was not until after the filing of this complaint that the Complainant provided the Custodian with the correct indictment number that yielded records. Thus, the Custodian could not have unlawfully denied for the foregoing reasons.

Therefore, the Custodian did not unlawfully deny access to any records because the Complainant failed to provide sufficient information in his OPRA request, thus making it impossible for the Custodian to identify responsive records. N.J.S.A. 47:1A-6.

The GRC acknowledges that the Custodian initially responded that any responsive records would be exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and further argued same in the SOI. The Custodian also certified in the SOI that she located an arrest report and would only disclose same with redactions at the behest of the GRC. However, the GRC declines to address whether the exemptions apply and whether

the Custodian must disclose the arrest report because the Complainant's OPRA request contained insufficient information in the first place.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to any records because the Complainant failed to provide sufficient information in his OPRA request, thus making it impossible for the Custodian to identify responsive records. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

January 22, 2013