



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 23, 2013 Government Records Council Meeting

James Kellinger
Complainant

Complaint No. 2012-193

v.

Bergen County Prosecutor's Office
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council ("Council") considered the July 16, 2013 Supplemental 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 Complainant, has failed to establish in his request for reconsideration of the Council's May 28, 2013 Final Decision either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 23 Day of July 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting

James Kellinger¹
Complainant

GRC Complaint No. 2012-193

v.

Bergen County Prosecutor's Office²
Custodial Agency

Records Relevant to Complaint: Regarding the criminal case – State v. Stephen F. Sharp, Bergen Case Number 08003467:

1. Expert report by physical scientist, Dr. Kurt H. Becker of Stevens Institute of Technology.
2. Defense expert report by civil engineer, Mr. Steven Schorr.

Custodian of Record: Frank Puccio, Esq.
Request Received by Custodian: May 16, 2012
Response Made by Custodian: May 22, 2012
GRC Complaint Received: June 25, 2012

Background³

May 28, Council 2013:

At its May 28, 2013 public meeting, the Council considered the May 21, 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, found that: the Custodian lawfully denied the Complainant access to the responsive expert reports because said reports are criminal investigatory records. The Custodian has carried her burden of proving that the records are not required to be “made, maintained or kept on file” and the records are held by a law enforcement agency and pertain to a criminal investigation. *See N.J.S.A. 47:1A-1.1.*

¹ No legal representation listed on record.

² Represented by James M. Carbone, Esq. of Carbone & Faase Attorneys at Law (Ridgewood, NJ).

³ The parties may have submitted additional correspondence or made additional statements/asserations in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Procedural History:

On June 10, 2013 the Council distributed its May 28, 2013 Final Decision to all parties. On June 24, 2013 the Complainant filed a request for reconsideration requesting that the Council reconsiders its May 28, 2013, Final Decision, based on mistake an illegality. On July 2, 2013 the Custodian submitted an objection to the Complainant's request for reconsideration.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order dated May 28, 2013 on June 24, 2013, ten (10) business days from the issuance of the Council's Order.

Applicable case law holds that:

"[A] party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, *supra*, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*

In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his motion for reconsideration, the Complainant submitted a Request for Reconsideration on the GRC form together with a page and a half of arguments. The Complainant acknowledges that the Bergen County Prosecutor was not required to make either of the reports which the he seeks a copy of. The Complainant, however, asserts that once made,

the reports were required to be maintained. The Complainant also argues that the Bergen County Prosecutor's office is the Custodian of Court Records. Finally, the Complainant contends that because the contents of each of the reports were exposed at trial any purpose for not producing them is "vacated." The Complainant does not provide any additional relevant legal or factual support for his motion for reconsideration.

On July 2, 2013, the Custodian filed a reply brief in opposition to the Complainant's motion for reconsideration. The Custodian argues that the Complainant's motion for reconsideration fails to provide any new facts or legal arguments and further fails to meet the standards for reconsideration.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 1) that the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, *supra*. The Complainant, has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, *supra*. Thus, the Complainant's request for reconsideration should be denied. Cummings, *supra*; D'Atria, *supra*; Comcast, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant, has failed to establish in his request for reconsideration of the Council's May 28, 2013 Final Decision either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Dawn R. SanFilippo, Esq.
Senior Counsel

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
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FINAL DECISION

May 28, 2013 Government Records Council Meeting

James Kellinger
Complainant

Complaint No. 2012-193

v.

Bergen County Prosecutor's Office
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council ("Council") considered the May 21, 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 lawfully denied the Complainant access to the responsive expert reports because said reports are criminal investigatory records. The Custodian has carried her burden of proving that the records are not required to be "made, maintained or kept on file" and the records are held by a law enforcement agency and pertain to a criminal investigation. *See N.J.S.A. 47:1A-1.1.*

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 28th Day of May, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 11, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**James Kellinger¹
Complainant**

GRC Complaint No. 2012-193

v.

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

Records Relevant to Complaint: Regarding the criminal case – State v. Stephen F. Sharp, Bergen Case Number 08003467:

1. Expert report by physical scientist, Dr. Kurt H. Becker of Stevens Institute of Technology.
2. Defense expert report by civil engineer, Mr. Steven Schorr.

Request Made: May 16, 2012

Response Made: May 22, 2012

GRC Complaint Filed: June 25, 2012³

Background⁴

Request and Response:

On May 16, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records.⁵ On May 22, 2012, the following business day following receipt of said request, Ms. Maureen Parenta, Communications Director, denied the Complainant access to the requested reports because such reports are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.⁶ Ms. Parenta also states that a criminal investigatory record remains exempt from disclosure after the criminal investigation has been closed. Janeczko v. NJ Department of Law and Public Safety, GRC Complaint Nos. 2002-79 and 2002-

¹ No legal representation listed on record.

² Frank Puccio, Esq., Custodian of Records. Represented by James M. Carbone, Esq. of Carbone & Faase Attorneys at Law (Ridgewood, NJ).

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

⁴ The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁵ The Complainant filed his OPRA request on a New Jersey Records Request Form and hand delivered the request to the Bergen County Prosecutor's Office.

⁶ The Custodian certifies in the Statement of Information that the Bergen County Prosecutor's Office received the Complainant's OPRA request on May 21, 2012.

80 (June 2004), affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004 and Johnson (on behalf of Press of Atlantic City) v. NJ Division of State Police, GRC Complaint No. 2004-46 (June 2004).

Denial of Access Complaint:

On June 25, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the Bergen County Prosecutor’s Office denied him access to the requested records as criminal investigatory records. The Complainant argues that since the records were involved in a public trial, such records are subject to public access.⁷

Statement of Information:

On October 24, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that the underlying OPRA request emanates from a recent homicide prosecution, State v. Stephen F. Scharf, Indictment No. S-1485-09, Docket No. 3467-08. The Custodian states that the defendant was charged with murdering his wife by causing her to fall or otherwise be propelled from a cliff. The Custodian certifies that this case was tried before a jury in 2011, the defendant was convicted, and the case is currently on appeal.⁸

The Custodian certifies that the Complainant sought to obtain copies of reports of two (2) experts: 1) Professional Engineer, Steve M. Schorr, an expert retained by the defense; and 2) Kurt H. Becker, an expert who prepared a report for the State. The Custodian also certifies that these reports were exchanged in discovery pursuant to N.J. Court Rule 3:13-3. The Custodian further certifies that Mr. Schorr testified during the trial, but Mr. Becker did not. The Custodian additionally certifies that both expert reports were referred to during trial; however, neither report was admitted into evidence.

The Custodian argues that the records responsive are not required to be made, maintained or kept on file. The Custodian also argues that both reports responsive are held by a law enforcement agency and pertain to a criminal investigation, thus said reports are considered criminal investigatory records. N.J.S.A. 47:1A-1.1. The Custodian further argues that although this case may have to be retried and thus, the investigation remains open, a criminal investigatory record remains exempt from disclosure even after the criminal investigation has been closed. Janeczko v. NJ Department of Law and Public Safety, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004) and Johnson (on behalf of Press of Atlantic City) v. NJ Division of State Police, GRC Complaint No. 2004-46 (June 2004).

The Custodian also argues that the reports are exempt from disclosure because this case is on appeal and there is a possibility of retrial, thus these reports are exempt from disclosure because of an ongoing investigation. N.J.S.A. 47:1A-3(a). The Custodian asserts that retrial would require re-interviewing witnesses. The Custodian also asserts that each side may choose

⁷ The Complainant and the Custodian agreed to mediate this complaint. This complaint was referred to mediation on July 17, 2012. The complaint was referred back to the GRC for adjudication on October 16, 2012.

⁸ The Custodian attaches a copy of the notice of appeal and the judgment of conviction.

to retain new experts, who may render different opinions. The Custodian further asserts that this process can result in new evidence or change the significance of existing evidence, thus an investigation is always considered open while a case is pending appeal. Lastly, the Custodian asserts that until the appellate process is completed, the responsive reports and all records associated with this case pertain to a criminal investigation and an investigation still in progress.

The Custodian also argues that deliberative material is excluded from the definition of a government record and is exempt from disclosure. N.J.S.A. 47:1A-1.1. The Custodian argues that this exemption “permits the government to withhold documents that reflect intra agency advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Education Law Center v. New Jersey Department of Education, 198 N.J. 274, 285 (2009). The Custodian further argues that expert reports bear on every decision the trial attorney makes including, but not limited to, which witnesses to call, the order in which to call them, how to examine and cross examine each witness, what points to emphasize during opening statement, testimony and summation, which defenses to raise and how to respond to those defenses. The Custodian additionally argues that the two (2) responsive reports concern whether the defendant could have caused his wife to fall or propelled his wife from the cliff, the ultimate issue in this case. The Custodian contends that should this case be retried, these reports will be an essential part of the deliberative process of the attorneys representing both parties as they were during preparation of the first (1st) trial.

The Custodian also argues that N.J.R.E. 515 prohibits any person from disclosing official information “(a) if disclosure is forbidden by or pursuant to any Act of Congress or of this State, or (b) if the judge finds that disclosure of the information in the action will be harmful to the interests of the public.” The Custodian asserts that because this case might have to be retried, public disclosure of the reports would be harmful to the public interest in that it would expose the deliberative processes of the prosecutor and defense counsel and it could influence potential jurors who may be exposed to the reports.

Additional Information:

On January 22, 2013, the Complainant sent an e-mail to the GRC. The Complainant states that the report responsive to request Item No. 2 does not pertain to a police investigation because the report was created by the defense attorney. The Complainant also states that given that information much more directly associated with police activity, such as Use of Force reports have been deemed accessible under OPRA, the report responsive to request Item No. 2 should also be accessible. The Complainant argues that the Custodian should not be permitted to make blanket declarations that requested records pertain to a criminal investigation.

The Complainant also questions the Custodian’s claim that the responsive reports are deliberative material. The Complainant contends that the government could easily claim that every piece of paper in its possession is deliberative material since it may use any of it to evaluate its various courses of action. The Complainant argues that OPRA presumes the public right to access, absent the Custodian’s proof that the material is exempt. The Complainant contends that the Custodian has made no such showing because Dr. Becker is a physicist and Mr. Schorr is a civil engineer, and thus neither is apt to advise on trial strategy.

The Complainant also argues that the Custodian cites to N.J.R.E. 515 and alludes the rule may be invoked to an anticipated appellate proceeding. The Complainant states that the Custodian made a similar argument in a separate proceeding, which was rejected by the court as “wholly unsupported and unconvincing.” The Complainant also states that the court found that “categorical and encompassing assertions of safety concerns or jeopardy to existing investigations, without support, are insufficient.” The Complainant contends that the Custodian makes no showing and the GRC should reject these arguments.

Analysis⁹

Unlawful Denial of Access

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.

OPRA exempts from public access “criminal investigatory records.” N.J.S.A. 47:1A-1.1. Further, a criminal investigatory record is defined in OPRA 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 Council’s recent decision in Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (January 2013) reversed its decision in Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (October 2008) regarding criminal investigatory records. In Morgano, supra, the Council held that “[t]he record requested...a police arrest report, is required to be maintained or kept on file by the [Records Management Services (“RMS”)] and therefore is a government record subject to disclosure pursuant to N.J.S.A. 47:1A-1.1.” However, the Council held in Michalak, supra, that RMS schedules do not have the force of law requiring that police departments “make, maintain, or keep on file” police reports, thus the requested police report is considered a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. See also Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order February 27, 2008).

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was also 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. In Janeczko, the complainant requested access to copies of records related to alleged criminal actions committed by her son, who was ultimately killed by police

⁹ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

officers. 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”. Consequently, the complainant’s request was denied.

It is important to note that the criminal investigatory records exemption continues to survive the conclusion of the investigation. 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.”

The finding in Janeczko concurs with the Council’s decision in Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint No. 2006-204 (October 2007). In Brewer, the complainant filed an OPRA request to obtain lab records that were in the custody of the New Jersey State Police for use in an investigation. The Council found that the requested records were part of a criminal investigative file and were exempt from disclosure under OPRA. Accordingly, the Council determined that the complainant’s request was lawfully denied.

Here, the Complainant requested two (2) expert reports used in the criminal case State v. Stephen F. Sharp, Indictment No. S-1485-09, Docket No. 3467-08. Ms. Parenta denied the Complainant access to the expert reports as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. The Complainant argued in his Denial of Access Complaint that since the records were involved in a public trial such records are subject to public access. Conversely, the Custodian argued in the SOI that the responsive records are not required to be made, maintained or kept on file. The Custodian also argued that the expert reports are held by a law enforcement agency and pertain to a criminal investigation. Lastly, the Custodian argued that a criminal investigatory record remains exempt from disclosure even after the investigation has been closed, even though this case is currently on appeal and might have to be retried.

Therefore, the Custodian lawfully denied the Complainant access to the responsive expert reports because said reports are criminal investigatory records. The Custodian has carried her burden of proving that the records are not required to be “made, maintained or kept on file” and the records are held by a law enforcement agency and pertain to a criminal investigation. *See* N.J.S.A. 47:1A-1.1.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied the Complainant access to the responsive expert reports because said reports are criminal investigatory records. The Custodian has carried her burden of proving that the records

are not required to be “made, maintained or kept on file” and the records are held by a law enforcement agency and pertain to a criminal investigation. *See* N.J.S.A. 47:1A-1.1.

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

Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013