



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

July 23, 2013 Government Records Council Meeting

Antoinette Maniscalco
Complainant

Complaint No. 2012-247

v.

Atlantic County Prosecutor's Office
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council ("Council") considered the July 16, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that since the responsive records either pertained to a criminal investigation or were received by the Atlantic County Prosecutor's Office pursuant to a grand jury subpoena, the Custodian has borne his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6. See N.J.S.A. 47:1A-1.1; Janeczko v. NJ Dep't of Law & Public Safety, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); N.J.S.A. 47:1A-9(a); NJ Court Rule 3:6-7.

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 23rd 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**

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

**Antoinette Maniscalco¹
Complainant**

GRC Complaint No. 2012-247

v.

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

Records Relevant to Complaint: Copies of all records pertaining to grand jury investigation (ACPO OCU10050), including:

1. Copy of the inspection report conducted by Bruce Funk, Longport Building Department, on the property at issue.
2. Specific proof of fines and payment associated with the property pertaining to Frank DiLorenzo, Jr. (please refer to information enclosed).
3. "Proof of Option" by Mr. James Agnesino, Longport Building Department, to allow the Complainant's husband to perform his own legal work on his property.

Request Made: February 12, 2012

Response Made: February 28, 2012

GRC Complaint Filed: August 20, 2012³

Background⁴

Request and Response:

On February 12, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian. On February 28, 2012, the ninth (9th) business day following receipt of said request, the original Custodian responded in writing stating that the Atlantic County Prosecutor's Office ("ACPO") conducted a review of all records maintained in connection with the Complainant's OPRA request and is denying access to these records as criminal-investigatory in nature. N.J.S.A. 47:1A-1.1; Janeczko v. NJ Dep't of Law & Public Safety, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

¹ No legal representation listed on record.

² Cary Shill, Custodian of Records. Represented by Deborah Hay, Esq., of the Atlantic County Prosecutor's Office (Mays Landing, NJ). The original Custodian of Record was Julie Horowitz.

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.

Denial of Access Complaint:

On August 20, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”) disputing the original Custodian’s denial of access based on a letter to her previous attorney from First Assistant Prosecutor James P. McClain, dated January 10, 2011, in which he states that “an inquiry” was conducted and that insufficient evidence of criminal activity existed to justify criminal prosecution. The Complainant states that she subsequently received a subpoena regarding the property and was informed that no grand jury took place. The Complainant notes that she is not seeking grand jury “testimony.”

Statement of Information:

On October 4, 2012, the Custodian filed a Statement of Information (“SOP”). The Custodian certifies that four (4) pages of records deemed to be criminal investigatory exist. N.J.S.A. 47:1A-1.1; Janeczko, supra. The Custodian certifies that these records were based on a complaint filed with ACPO.

The Custodian certifies that 139 pages of records obtained pursuant to a grand jury subpoena exist and are exempt from disclosure. NJ Court Rule 3:6-7; State v. Kearney, 109 N.J. Super. 502 (Law Div. 1970). The Custodian states that the grand jury is “an arm of the court and therefore an essential part of the administration of justice.” In re Camden County Grand Jury, 10 N.J. 23, 64 (1952). The Custodian states that the grand jury has extraordinary inquisitional and investigative powers, and its proper function depends significantly upon the concept of secrecy in its proceedings. The Custodian states that it is “as important for the protection of the innocent as for the pursuit of the guilty.” United States v. Johnson, 319 U.S. 503, 513, 63 (1943), *reh’g den.*, 320 U.S. 808 (1943). The Custodian states that the concept of the secrecy of the grand jury has been maintained by rules of criminal procedure. The Custodian states that R. 3:6-7, provides that:

The requirement as to the secrecy of proceedings of the grand jury shall remain as heretofore, and all persons other than witnesses, permitted by R. 3:6-6 to be present while the grand jury is in session, shall be required to take an oath of secrecy before their admission thereto. Such oath shall also be taken by typists making transcripts of testimony given before the grand jury.

The Custodian states that the principle of secrecy in grand jury proceedings is not absolute: it is said to rest on the following principles:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) to protect innocent accused who is

exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

State v. Doliner, 96 N.J. 236, 247 (1984)

The Custodian states that it has long been the rule of the State that grand jury proceedings may be disclosed if justice so requires. Doe v. Klein, 143 N.J. Super. 134, 140-141 (App. Div. 1976). The Custodian states that courts have “lifted the veil of secrecy on being satisfied in the circumstances of a particular case that the policy of secrecy should be subordinate to the search for the whole truth.” *Id.* The Custodian states that a litigant must demonstrate special and compelling circumstances to warrant disclosure of grand jury testimony. *Id.* The Custodian contends that access to the grand jury records is exempt unless, upon judicial review, the requestor seeking access demonstrates special and compelling circumstances that warrant disclosure.

Additional Submissions:

On October 15, 2012, the Complainant submitted a letter to the GRC contending that a grand jury never convened and thus the responsive records should be disclosed to her and her husband as legal owners of the property in question.

Analysis⁵

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 provides that:

A government record shall not include the following information which is deemed to be confidential ... criminal investigatory records ... 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.

⁵ 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.

OPRA further provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order* of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

N.J.S.A. 47:1A-9(a)(Emphasis added).

NJ Court Rule 3:6-7 provides that “the requirement as to secrecy of proceedings of the grand jury shall remain as heretofore ...” See Daily Journal v. Police Dep’t of Vineland, 351 N.J. Super. 110 (App. Div. 2002)(*certif. denied*, 174 N.J. 364, 807 A.2d 195 (2002)).

Here, the Custodian argued that the responsive records fell within two (2) exemptions: criminal-investigatory records (4 pages) and records obtained pursuant to a grand jury subpoena (139 pages). The Complainant disputed the Custodian’s denial of access; however, the Complainant also submitted to the GRC a letter from the ACPO dated January 10, 2011, and the grand jury subpoena sent to the Borough of Longport in ACPO OCU10050. Both documents support the Custodian’s denial of access.

The ACPO letter refers to its review of material submitted by the Complainant’s attorney, gathering of additional materials and statements from witnesses at Longport and at the New Jersey Department of Community Affairs before determining that insufficient evidence existed to initiate a criminal prosecution. Thus, the ACPO clearly conducted an investigation into possible criminal activity arising from allegations submitted on behalf of the Complainant. Additionally, the grand jury subpoena required the Borough to appear with “any and all records involving” the Complainant’s property “... not limited to permits, licenses, code violations, summonses, certifications, certificates of occupancy, *inspections reports*, notes, correspondence, *payments* and any and all documents associated with the mentioned property from 01/01/05 to present.” (Emphasis added). Thus, the evidence is clear that all records identified as responsive are not subject to disclosure under OPRA for the reasons cited by the Custodian.

Therefore, since the responsive records either pertained to a criminal investigation or were received by ACPO pursuant to a grand jury subpoena, the Custodian has borne his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6. See N.J.S.A. 47:1A-1.1; Janeczko, supra; N.J.S.A. 47:1A-9(a); NJ Court Rule 3:6-7.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that since the responsive records either pertained to a criminal investigation or were received by the Atlantic County Prosecutor’s Office pursuant to a grand jury subpoena, the Custodian has borne his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6. See

N.J.S.A. 47:1A-1.1; Janeczko v. NJ Dep't of Law & Public Safety, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); N.J.S.A. 47:1A-9(a); NJ Court Rule 3:6-7.

Prepared By: Frank F. Caruso
Senior Case Manager

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

July 16, 2013