



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

May 28, 2013 Government Records Council Meeting

Leigh Overton Boyd
Complainant

Complaint No. 2012-253

v.

Atlantic 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 requested records meet the criteria for criminal investigatory records as set forth in N.J.S.A. 47:1A-1.1; therefore, they are not government records as defined under OPRA and are not subject to public access. Thus, the Custodian did not unlawfully deny access to said records. See Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

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**

**Leigh Overton Boyd¹
Complainant**

GRC Complaint No. 2012-253

v.

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

Records Relevant to Complaint: A copy of the complete investigation file for the fire that occurred at 805 Burk Court, Ventnor, New Jersey on June 21, 1974, to include photographs taken of the scene in 8 by 10 inch size.

Request Made: July 23, 2012³

Response Made: August 2, 2012

GRC Complaint Filed: August 31, 2012⁴

Background⁵

Request and Response:

On July 23, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above-listed records. On August 2, 2012, the fifth (5th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the records responsive to her request constitute criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1 et seq., and Janeczko v. Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 80. The Custodian further informed the Complainant that criminal investigatory records are exempt from public inspection regardless of whether a matter is an open or closed investigation.

Denial of Access Complaint:

On August 31, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant states she provided the records request to the Custodian on July 23, 2012 and the Custodian responded, denying her request, on August 2, 2012.

¹ No legal representation listed on record.

² Cary Shill, Custodian of Records. Represented by Deborah Hay, Esq. (Mays Landing, NJ).

³ This is the date the Complainant stated she provided it to the Custodian; the request is dated July 18, 2012.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ 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.

The Complainant states that her parents perished in a house fire at 805 Burk Court, Ventnor, New Jersey on June 21, 1974. The Complainant further states she met with two employees of the Atlantic County Prosecutor's Office ("ACPO") on July 11, 2012, in order to view the fire case file. The Complainant also states that the ACPO employees told her most of the file was destroyed in a flood but that several photographs of the fire scene survived and they allowed her to view those photographs. The Complainant acknowledges that the fire was of a suspicious origin but contends the investigation is no longer active; therefore, the Custodian should disclose the requested records to her.

Statement of Information:

On February 26, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies he received the OPRA request on July 26, 2012, and responded to it on August 2, 2013.⁶

The Custodian certifies that he located thirty nine (39) records responsive to the Complainant's request: thirty-eight (38) photographs and one scene (1) sketch. The Custodian further certifies that all of the records constitute criminal investigatory records which are exempt from disclosure under OPRA. The Custodian cites Janeczko, *supra*, as holding that criminal investigatory records are exempt from public inspection regardless of whether the matter is an open or closed investigation. As such, the Custodian certifies that none of the requested records are subject to disclosure.

Analysis⁷

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.

Criminal investigatory records are exempt from disclosure. N.J.S.A. 47:1A-1.1. A criminal investigatory record is defined 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..." Id.

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

⁶ The Custodian attached a copy of the OPRA request which is date stamped by the ACPO on July 26, 2012.

⁷ 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.

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 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, it is undisputed that the requested records are criminal investigatory because the Complainant acknowledged that the records she sought were generated as part of the investigation of a suspicious fire and the Custodian certified that the requested records were located in a file within the ACPO and are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

Accordingly, the requested records meet the criteria for criminal investigatory records as set forth in N.J.S.A. 47:1A-1.1; therefore, they are not government records as defined under OPRA and are not subject to public access. Thus, the Custodian did not unlawfully deny access to said records. See Janeczko, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the requested records meet the criteria for criminal investigatory records as set forth in N.J.S.A. 47:1A-1.1; therefore, they are not government records as defined under OPRA and are not subject to public access. Thus, the Custodian did not unlawfully deny access to said records. *See Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice*, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

Prepared By: John E. Stewart, Esq.

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

May 21, 2013