



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

December 20, 2013 Government Records Council Meeting

Mark L. Tompkins
Complainant

Complaint No. 2013-175

v.

Essex County Prosecutor's Office
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council ("Council") considered the December 10, 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 Complainant's OPRA request is part of a criminal investigatory record, the Custodian has borne her burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. N.J. Dep't of Law and Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); and Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581 (2011).

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 20th Day of December, 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: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

**Mark L. Tompkins¹
Complainant**

GRC Complaint No. 2013-175

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: A certified copy of; "Discovery Receipt" pertaining to Ind. # 03-03-893.

Custodian of Record: Debra G. Simms, Deputy Chief Assistant Prosecutor

Request Received by Custodian: May 8, 2013

Response Made by Custodian: May 15, 2013

GRC Complaint Received: June 10, 2013

Background³

Request and Response:

On May 8, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On May 15, 2013, five (5) business days later, the Custodian responded in writing denying the Complainant's request on the grounds that a prosecutor's criminal investigatory file is not a public record and is exempt from disclosure under N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On June 10, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that the document requested pertains to the Complainant's criminal appeal and cannot be located at the Public Defender's Office. Therefore, the Complainant requests a copy of said document from the Prosecutor's Office.

¹ No legal representation listed on record.

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

³ 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.

Statement of Information:

On June 21, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that a prosecutor’s criminal investigatory files are records which are not required to be made, maintained, or kept on file as defined under N.J.S.A. 47:1A-1.1. The Custodian next certifies that the criminal investigatory exemption applies to all investigations regardless of their status.

The Custodian asserts that the Complainant’s requested record, if it exists, would be part of the prosecutor’s criminal investigatory file, and therefore would be exempt from disclosure.

Analysis

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 in pertinent part that “a government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA] ... 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.

Thus, 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 is encompassed within the definition of a criminal investigatory record set forth at N.J.S.A. 47:1A-1.1 and is therefore exempt from disclosure under OPRA. See also Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 591 (2011) (affirming that criminal investigatory records are exempt from OPRA).

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. N.J. Dep’t of Law and Public Safety, Div. 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. The Council found that pursuant to 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.”

In the instant case, the Custodian certifies that the requested record, if it exists, would be part of a prosecutor’s criminal investigatory file. As a result, the document is not required by law to be made, maintained, or kept on file. The Complainant has not provided any competent

evidence to refute this certification. Therefore, the record is exempt from disclosure as a criminal investigatory record.

Since the Complainant's OPRA request is part of a criminal investigatory record, the Custodian has borne her burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko, GRC Complaint Nos. 2002-79 and 2002-80; and Kovalcik, 206 N.J. 581.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that since the Complainant's OPRA request is part of a criminal investigatory record, the Custodian has borne her burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. N.J. Dep't of Law and Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); and Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581 (2011).

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

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

December 10, 2013