



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

March 25, 2014 Government Records Council Meeting

Roger L. Fidler (on behalf of Michael Lipkin)
Complainant

Complaint No. 2013-250

v.

NJ State Commission of Investigation
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 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 has borne his burden of proving that he lawfully denied access to the requested records because the Complainant sought “information acquired and . . . records created” by the Commission during an investigation. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a)-(b); N.J.S.A. 52:9M-15(d); I/M/O State Commission of Investigation, 108 N.J. 35, 43 (1987); Correctional Medical Services v. New Jersey, 426 N.J. Super. 106, 128 (App. Div. 2012); Levitt v. New Jersey State Commission of Investigation, GRC Complaint No. 2012-161 (May 2013).

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 25th Day of March, 2014

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: March 27, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 25, 2014 Council Meeting**

**Roger L. Fidler (on behalf of Michael Lipkin)¹
Complainant**

GRC Complaint No. 2013-250

v.

**NJ State Commission of Investigation²
Custodial Agency**

Records Relevant to Complaint: The Complainant requested “an opportunity to inspect or obtain copies of public records that pertain to any and all information in [the State of New Jersey Commission of Investigation’s (‘Commission’s’)] possession regarding Mr. Michael ‘Michail’ Lipkin; including but not limited to:

1. Investigative notes and reports upon which ‘Scenes from an Epidemic, A Report on the SCI’s Investigation of Prescription Pill and Heroin Abuse’ [‘Report’] is based;
2. Statements of witnesses named in the Report
3. Statements and names of witnesses not named in the Report;
4. Notices to Michael Lipkin of any Reports of Public Hearings;
5. Transcript of Public Hearing of Dr. Joseph W. Dituro, who is named in the Report;
6. Documents containing any allegations against Michael Lipkin;
7. All information upon which the statement, ‘Michael ‘Michail’ Lipkin – was a longtime Russian organized crime operative linked to a variety of criminal fraud schemes,’ . . . is based;
8. All information upon which the claim that Michael Lipkin operated the Passaic Medical Center in violation of regulations set forth by the New Jersey State Board of Medical Examiners . . . is based;
9. All information upon which the statement, ‘Dituro and Lipkin took steps to cloak their business relationship in a guise of legitimacy for the purpose of bilking government health insurance programs,’ . . . is based;
10. Any other information pertaining to Michael Lipkin.”

Custodian of Record: Robert Marasco

Request Received by Custodian: August 5, 2013

Response Made by Custodian: August 6, 2013

GRC Complaint Received: September 6, 2013

¹ The Complainant, an attorney, filed this complaint on behalf of his client, Michael Lipkin.

² No legal representation listed on record.

Background³

Request and Response:

On August 5, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 6, 2013, the Custodian responded in writing denying the Complainant’s request, aside from the public report issued in the referenced matter, based on N.J.S.A. 47:1A-9(a) and N.J.S.A. 52:9M-15(d).

Denial of Access Complaint:

On September 6, 2013, the Complainant, an attorney, filed a Denial of Access Complaint with the Government Records Council (“GRC”) on the behalf of his client, Mr. Lipkin. The Complainant asserts that the Custodian’s denial was overly broad and should have been accompanied by a sworn statement detailing the search undertaken, the documents responsive to the request, a determination of whether any such documents are confidential, information relating to the Commission’s document retention policy, and a detailed document index. *Citing Paff v. N.J. Dep’t of Labor*, 392 N.J. Super. 334 (App. Div. 2007).

Statement of Information:

On October 30, 2013, the Custodian filed a Statement of Information (“SOI”) wherein he certified that he received the Complainant’s OPRA request on or about August 5, 2013 and responded on or about August 6, 2013. The Custodian states that Request Item No. 4 above for “Notices to Michael Lipkin of any Reports or Public Hearings” was fulfilled when a letter was sent to Mr. Lipkin on June 19, 2013, during the course of the investigation to which he was a subject, pursuant to the Commission’s statutory obligation under N.J.S.A. 52:9M-12.2. The Custodian contends that all other categories of records sought by the Complainant constitute confidential materials relating to Commission investigations that are exempt from disclosure pursuant to N.J.S.A. 47:1A-9(a) and N.J.S.A. 52:9M-15(d). The Custodian notes that this exemption was most recently reaffirmed by the GRC in Levitt v. New Jersey State Commission of Investigation, GRC Complaint No. 2012-161 (May 2013).

The Custodian argues that the Legislature granted the Commission an exemption from OPRA requests because any compromise of the Commission’s confidentiality privilege would put at risk its capacity to fulfill its statutory mission. The Custodian emphasizes that the courts have recognized the Legislature’s intention that Commission documents and evidence remain protected to an even greater degree than records maintained by the Office of the Inspector General. *Citing I/M/O State Comm’n of Investigation*, 108 N.J. 35, 43 (1987); Corr. Med. Servs. V. N.J., 426 N.J. Super. 106, 128 (App. Div. 2012). The Custodian further contends that, based on the statutory protections granted to the Commission’s investigative material and Court’s interpretation of those protections, the Commission cannot be required to disclose any responsive material.

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.
Fidler v. N.J. State Commission of Investigation, GRC 2013-250 – Findings and Recommendations of the Executive Director

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 recognizes exemptions to disclosure and grants of confidentiality found in any other statute. *See* N.J.S.A. 47:1A-9(a)-(b). A section of New Jersey law governing the Commission, titled “Disclosure of information, violation, penalties; privilege, certain; OPRA not applicable,” states that “[n]othing in [OPRA], as amended and supplemented . . . , shall be construed to require the [C]ommission to disclose any information acquired or any records created” N.J.S.A. 52:9M-15(d); *see also* I/M/O State Comm’n of Investigation, 108 N.J. at 43 (recognizing necessity of maintaining confidentiality of information obtained during investigation and names of testifying witnesses); Levitt, GRC 2012-161.

Here, the Complainant requested records and information relating to his client that had been acquired and created during the course of the Commission’s investigation into prescription pill and heroin abuse in New Jersey. Specifically, the Complainant sought investigative notes and reports, witness statements, witness names, notices to Mr. Lipkin, a transcript of a public hearing, documents containing allegations, and “all information” supporting different portions of the final report. These requests plainly seek the types of materials that the Legislature purposefully exempted from disclosure. *See* N.J.S.A. 52:9M-15(d); Corr. Med. Sers., 426 N.J. Super. at 128.

Therefore, the Custodian has borne his burden of proving that he lawfully denied access to the requested records because the Complainant sought “information acquired and . . . records created” by the Commission during an investigation. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a)-(b); N.J.S.A. 52:9M-15(d); I/M/O State Comm’n of Investigation, 108 N.J. at 43; Corr. Med. Sers., 426 N.J. Super. at 128; Levitt, GRC 2012-161.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proving that he lawfully denied access to the requested records because the Complainant sought “information acquired and . . . records created” by the Commission during an investigation. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a)-(b); N.J.S.A. 52:9M-15(d); I/M/O State Commission of Investigation, 108 N.J. 35, 43 (1987); Correctional Medical Services v. New Jersey, 426 N.J. Super. 106, 128 (App. Div. 2012); Levitt v. New Jersey State Commission of Investigation, GRC Complaint No. 2012-161 (May 2013).

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel
March 18, 2014