



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

January 30, 2015 Government Records Council Meeting

Ubay K. Lumumba
Complainant

Complaint No. 2014-193

v.

NJ Office of the Public Defender
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the January 20, 2015 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 a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(k); Gaines v. NJ Office of the Public Defender, GRC Complaint No. 2012-261 (August 2013). The Council should not address whether the Custodian’s search for responsive records was sufficient, because under OPRA all responsive records sought are exempt from disclosure.

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 30th Day of January, 2015

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: February 4, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**U'Bay K. Lumumba¹
Complainant**

GRC Complaint No. 2014-193

v.

**NJ Office of the Public Defender²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

“[T]he Essex County Public Defender’s Office/Public Defender Ms. Verna G. Leath Pre-Trial/Trial files pertaining to my November 7, 1986 Indictment 4005-11-86/Michael Chavis AKA Branch – please include any/all hand written notes on documents.”

Custodian of Record: Dale Jones

Request Received by Custodian: February 21, 2014

Response Made by Custodian: March 13, 2014

GRC Complaint Received: May 14, 2014

Background³

Request and Response:

On February 21, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 13, 2014, the Custodian responded, in writing, stating that his request is denied pursuant to N.J.S.A. 47:1A-5(k). The Custodian further stated that a search in response to a previous OPRA request by the Complainant did not locate any responsive records.

Denial of Access Complaint:

On May 14, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he cannot accept the Custodian’s prior and current responses that he could not locate the Complainant’s records. The

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

Custodian added that if the records were lost or destroyed, it would be in violation of New Jersey's retention schedule proffered by the Division of Archives and Records Management.

Statement of Information:

On May 21, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that the Complainant had previously requested these records in 2010. The Custodian further certified that despite the legal objection pursuant to N.J.S.A. 47:1A-5(k), he believed that the NJ Office of the Public Defender ("OPD") had an ethical obligation to its clients. Therefore he conducted a search of the OPD's three (3) regional offices, archival storage facility, and microfilm files. The Custodian certified that the Complainant's requested file(s) were not located. The Custodian maintains this position in the current matter.

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 further provides that "[t]he files maintained by the Office of the Public Defender that relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender." N.J.S.A. 47:1A-5(k).

In Gaines v. NJ Office of the Public Defender, GRC Complaint No. 2012-261 (August 2013), the complainant sought access to attorney time sheets in his record. The Custodian denied access pursuant to N.J.S.A. 47:1A-5(k) but still located and produced responsive records in furtherance of the OPD's ethical duty to its clients. The Council found that the Custodian's denial of access was lawful based upon the plain language of N.J.S.A. 47:1A-5(k), prohibiting all access to OPD's files unless authorized by statute, court order, or the State Public Defender. The complainant failed to produce evidence of any such authorization.

Here, the Complainant sought all files pertaining to his indictment, #4005-11-86 under his former name "Michael Chavis." The Custodian denied access to the Complainant's OPRA request, and stated that a search conducted in 2010 failed to locate the requested records. Like the complainant in Gaines, the Complainant failed to provide any evidence of a law, court order or State Public Defender authorization, as required in the plain language of N.J.S.A. 47:1A-5(k), which would allow access to his records under OPRA. GRC No. 2012-261.

The Custodian has borne his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(k); Gaines, GRC No. 2012-261. The Council

should not address whether the Custodian's search for responsive records was sufficient, because under OPRA all responsive records sought are exempt from disclosure.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(k); Gaines v. NJ Office of the Public Defender, GRC Complaint No. 2012-261 (August 2013). The Council should not address whether the Custodian's search for responsive records was sufficient, because under OPRA all responsive records sought are exempt from disclosure.

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

Approved By: Dawn R. SanFilippo, Esq.
Deputy Executive Director

January 20, 2015