



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

February 24, 2015 Government Records Council Meeting

Sheila Massoni
Complainant

Complaint No. 2014-253

v.

Bergen County Prosecutor's Office
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council ("Council") considered the February 17, 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 because the Report is a criminal investigatory record, the Custodian has borne his 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. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Brewer v. NJ Dep't of Law and Pub. Safety, GRC Complaint No. 2006-204 (October 2007), and Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013). Because the Report is determined to be exempt as a criminal investigatory record, the GRC need not address whether privacy interest is applicable to same.

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 24th Day of February, 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 26, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 24, 2015 Council Meeting**

**Sheila Massoni¹
Complainant**

GRC Complaint No. 2014-253

v.

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

Records Relevant to Complaint: Copies of the homicide report for Docket No. 04-0820 (Indictment No. 05-0590-001). Specifically, the names of the responding officers and their observations of the crime scene.

Custodian of Record: Frank Puccio

Request Received by Custodian: June 5, 2014

Response Made by Custodian: June 11, 2014

GRC Complaint Received: July 8, 2014

Background³

Request and Response:

On June 2, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 11, 2014, the Custodian responded in writing denying the request on the grounds that the requested documents were criminal investigatory records and exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. The Custodian further noted that the portion of the Complainant's request seeking information such as the names of the officers is invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). Finally, the Custodian stated that the Bergen County Prosecutor's Office ("BCPO") reserved its right to raise additional exemptions in the future.

Denial of Access Complaint:

On July 8, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian unlawfully

¹ No legal representation listed on record.

² Represented by John M. Carbone, Esq. (North Haledon, 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.

denied access of the records requested. The Complainant stated that as the mother of the victim, she should have access to the responsive records to give her some peace of mind.

Statement of Information:

On July 27, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on June 5, 2014. The Custodian certified that he responded in writing on June 11, 2014 denying access to the responsive records as falling under the criminal investigatory exemption.

The Custodian certified that the record responsive to the Complainant’s OPRA request is a fifteen (15) page crime scene investigator report (“Report”). The Custodian affirmed that this report related to a 2004 homicide involving the Complainant’s daughter. Further, the Custodian certified that the case is now closed.

The Custodian first argued that he properly denied access to the Report as criminal investigatory record. The Custodian noted that the Council previously held that a criminal investigatory record remains exempt even after the case is closed. Janeczko v. NJ Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Johnson v. NJ State Police, GRC Complaint No. 2004-46 (June 2004); Solloway v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-39 (January 2013); Hwang v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-348 (January 2013).

The Custodian stated that OPRA provides that a custodian has “an obligation to safeguard from the public access a citizen’s personal information . . . when disclosure . . . would violate the citizen’s reasonable expectation of privacy.” N.J.S.A. 47:1A-1; Burnett v.Cnty. of Bergen, 198 N.J. 408 (2009). Further, the Custodian stated that, although the Complainant has a special relationship with the victim, OPRA does not contemplate the identity of a requestor. The Custodian asserted that disclosure of the Report would violate the privacy rights of victims and their families if the BCPO were required to disclose same to any requestor. The Custodian also asserted that future disclosure could compel loved ones discovering a deceased individual to tamper with the crime scene to make the victim appear more presentable.

Additionally, the Custodian argued that, in applying the balancing test utilized to weigh disclosure, six (6) of the seven (7) factors weigh against disclosure. The Custodian contended that the Complainant’s stated need to get some peace of mind could be satisfied through a meeting with the investigator who wrote the report and his answering any questions she had, an option that would be kept open to her for so long as the investigator worked there.

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.

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. NJ Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). There, the complainant sought 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” and are not accessible under N.J.S.A. 47:1A-1.1. Consequently, the complainant’s request was denied and the Council found no violation by the Custodian, stating: “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete . . . 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”.

Similarly, in Brewer v. NJ Dep’t of Law and Pub. Safety, GRC Complaint No. 2006-204 (October 2007), the complainant sought lab records in the custody of the State Police for use in an investigation. As the records were part of a criminal investigative file, they were exempt from disclosure under OPRA and accordingly, the Council determined the complainant’s request was lawfully denied. *See also* Scott v. Red Bank Police Dep’t (Monmouth), GRC Complaint No. 2011-244 (February 2013)

Further, in Hwang v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-348 (January 2013), the complainant requested all reports by any law enforcement made for case number BCP0-1002349 regarding the September 20, 2010 arrest and incident report of Hwang and a codefendant. The complainant also requested all police logs for September 20, 2010. The custodian agreed to disclose the requested arrest report because it merely recorded the basic factual data for the arrest, which required only a 35 cents copy fee; however, he refused to disclose the “narrative” police logs as they pertained to an open and ongoing criminal investigation. The complainant disagreed with the proposition that police reports constitute exempt criminal investigatory records. The complainant asserted that the case has resulted in his arrest and has since been closed.

Relying on the holding in Janeczko, the GRC stated that:

[I]n the instant matter the Custodian has certified that Item No. 1 of the Complainant’s request constitutes criminal investigatory files. The Complainant has not provided any competent evidence to refute this certification. Therefore, because the requested law enforcement reports . . . constitute criminal investigatory files, the Custodian has borne his 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. [citations omitted].

Id.

Here, as occurred in Hwang, the Custodian certified that the Report was part of a criminal investigatory file. This fact is supported by the Complainant's affirmation that she sought investigatory records relating to a homicide. The GRC is thus satisfied that the Report is exempt as a criminal investigatory record.

Therefore, because the Report is a criminal investigatory record, the Custodian has borne his 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 2002-79 and GRC 2002-80; Brewer, GRC 2006-204, and Hwang, GRC 2011-348. Because the Report is determined to be exempt as a criminal investigatory record, the GRC need not address whether privacy interest is applicable to same.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that, because the Report is a criminal investigatory record, the Custodian has borne his 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. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Brewer v. NJ Dep't of Law and Pub. Safety, GRC Complaint No. 2006-204 (October 2007), and Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013). Because the Report is determined to be exempt as a criminal investigatory record, the GRC need not address whether privacy interest is applicable to same.

Prepared By: Ernest Bongiovanni
Staff Attorney

Approved By: Dawn R. SanFilippo
Deputy Executive Director

February 17, 2015