



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Kevin M. Barry
Complainant

v.

NJ Transit
Custodian of Record

Complaint No. 2014-264

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 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 because the Custodian certified that the record responsive to the request is a criminal investigatory record that is a part of a criminal investigatory file, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification, 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; and Janeczko v. NJ Dep’t of Law and Public Safety, Div. 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 30th Day of June, 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: July 2, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Kevin M. Barry¹
Complainant**

GRC Complaint No. 2014-264

v.

**New Jersey Transit²
Custodial Agency**

Records Relevant to Complaint: Copies via mail delivery of any documents related to a database search of the record of Kevin M. Barry conducted by the New Jersey Transit Police on January 9, 2014 through the Law Enforcement Data Systems.

Custodian of Record: Joyce Zuczek

Request Received by Custodian: July 3, 2014

Response Made by Custodian: July 11, 2014 and July 16, 2014

GRC Complaint Received: July 23, 2014

Background³

Request and Response:

On July 3, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 11, 2014, the fifth (5th) business day following receipt of said request, the Custodian responded in writing, requesting a seven (7) business day extension of time to gather responsive information. On July 16, 2014, three (3) business days after the request for an extension of time, the Custodian responded in writing, informing the Complainant that the requested records were exempt from access as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On July 23, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he submitted his OPRA request to the Custodian on July 3, 2014, and the Custodian denied his request on July 16, 2014,

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Kenneth M. Worton.

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.

because they were exempt from access as criminal investigatory records.⁴ The Complainant states that he is at a loss to understand how the exemption applies because he previously requested records regarding any investigations on him conducted by the same agency and was informed that no such records exist.⁵ The Complainant further states that even if an investigation was conducted, he cannot understand how disclosure of the requested records would be inimical to the public interest.

Statement of Information:

On August 8, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 3, 2014, and that she responded in writing on July 11, 2014, and July 16, 2014. The Custodian certified that the Deputy Chief of the New Jersey Transit Police Department located a one (1) page record responsive to the request; however, said record is a report that was obtained during a criminal investigation and is a part of a criminal investigative file. The Custodian certified that because the record responsive to the request is a criminal investigatory record, exempt from access pursuant to N.J.S.A. 47:1A-1.1, access to the record was denied. The Custodian certified that the Complainant’s assertion that he cannot understand how disclosure of the requested record would be “inimical to the public interest” is misplaced because criminal investigatory records are always confidential.

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 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. 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.

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 Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004),

⁴ There is disparity between the records requested and the records the Complainant asserted were denied. In the OPRA request, the Complainant sought records “related to” a database search of his name; on the Records Denied List of the complaint, the Complainant alleged he was denied “records documenting database search” of his name. The GRC will analyze this complaint based upon the records described in the OPRA request.

⁵ Such other OPRA requests are not relevant to the instant complaint.

and affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004. In Janeczko, 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 for documents determined to be criminal investigatory records was denied.

Here, the Complainant requested records maintained through the Law Enforcement Data Systems. The Custodian certified that the record found to be responsive to the request was a criminal investigatory record exempt from access pursuant to N.J.S.A. 47:1A-1.1. The Complainant did not provide any competent evidence to refute the Custodian’s certification; however, he questioned how disclosure of the requested record could be inimical to the public interest. The Complainant is confusing OPRA’s criminal investigatory records exemption under N.J.S.A. 47:1A-1.1 with access to records of an investigation in progress under N.J.S.A. 47:1A-3(a), one element of which allows for denial of records pertaining to an investigation in progress if disclosure would be inimical to the public interest. The criminal investigatory records exemption pursuant N.J.S.A. 47:1A-1.1 continues to survive the conclusion of the investigation. As the Council pointed out in Janeczko, GRC 2002-79 and 80:

[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.

Id.

Accordingly, because the Custodian certified that the record responsive to the request is a criminal investigatory record that is a part of a criminal investigatory file, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification, 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; and Janeczko, GRC 2002-79 and 80.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian certified that the record responsive to the request is a criminal investigatory record that is a part of a criminal investigatory file, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification, 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; and Janeczko v. NJ Dep’t of Law and Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

Prepared By: John E. Stewart

Reviewed By: Joseph D. Glover
Executive Director

April 21, 2015⁶

⁶ This complaint was prepared for adjudication for the Council's April 28, 2015 meeting, but could not be adjudicated due to lack of quorum.