



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

March 28, 2017 Government Records Council Meeting

Stephen O. Gethange
Complainant

Complaint No. 2015-294

v.

Middlesex County Prosecutor's Office
Custodian of Record

At the March 28, 2017 public meeting, the Government Records Council ("Council") considered the March 21, 2017 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:

1. Because the records responsive to the Complainant's OPRA request item Nos. 1 through 6 and 8 are criminal investigatory records, the Custodian has borne his burden of proof that the denial of access was lawful. 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); Solloway v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-39 (January 2013); Reitzler v. Egg Harbor Police Dep't (Atlantic), GRC Complaint No. 2011-85 (January 2013); Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013). *See also* Crook v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2010-92 (March 2011); Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item No. 7 because he certified in the SOI, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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 28th Day of March, 2017

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 31, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting**

**Stephen O. Gethange¹
Complainant**

GRC Complaint No. 2015-294

v.

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

Records Relevant to Complaint: Hardcopies via U.S. mail of the following records relating to State v. Gethange, Indictment No. 08-08-01323:

1. Evidence log.
2. Evidence receipt.
3. Chain of possession or custody forms.
4. Investigation reports.
5. Detective notes.
6. Evidence log and tracking register.
7. "Request for Examination of Evidence."
8. Supplementary investigation reports.³

Custodian of Record: James O'Neill

Request Received by Custodian: July 16, 2015

Response Made by Custodian: July 20, 2015

GRC Complaint Received: September 4, 2015

Background⁴

Request and Response:

On June 19, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On July 20, 2016, the second (2nd) business day after receipt of the OPRA request, the Custodian responded in writing denying access to all responsive records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; Janeczko v. NJ Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-

¹ No legal representation listed on record.

² Represented by Benjamin Liebowitz, Esq. (New Brunswick, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ 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.

79, *et seq.* (June 2004); Bent v. Stafford Police Dep't, 381 N. J. Super. 30, 37 (App. Div. 2005); Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581 (2011).

Denial of Access Complaint:

On September 4, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian failed to bear his burden of proving a lawful denial of access. N.J.S.A. 47:1A-6. Specifically, the Complainant argued that there is no on-going investigation in this matter; thus, item Nos. 4 and 8 should not be exempt. Further, the Complainant asserted that the records are not deliberative in nature and that no court order declaring the records exempt exists. Finally, the Complainant contended that there is no evidence that disclosure would pose any risk to the alleged victims or witnesses.⁵

Statement of Information:

On October 16, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 16, 2015. The Custodian certified that his search included locating and retrieving the file box relating to the Complainant’s case. The Custodian certified that he responded in writing on July 20, 2015, denying access to a number of records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.

The Custodian asserted that he lawfully denied access to the responsive records because they fit within the definition of criminal investigatory records. N.J.S.A. 47:1A-1.1; Bent, 381 N.J. Super. at 38-39; Kovalcik, 206 N.J. at 591. The Custodian argued that the designation remains, regardless of whether any investigation was “resolved or unresolved.” Janeczko, GRC 2002-79, *et seq.*

Additional Submissions:

On December 13, 2016, the GRC sought additional information from the Custodian. Specifically, the GRC questioned whether a “Request for Examination of Evidence” form was required by law to be made, maintained, or kept on file. Thus, the GRC requested that the Custodian submit a legal certification to answer the following:

1. Are “Request for Examination of Evidence” forms required by law to be made, maintained, or kept on file?

The GRC requested that the Custodian provide the requested legal certification by close of business on December 16, 2016.

On December 16, 2016, Deputy First Assistant Prosecutor Brian D. Gillet sent a letter to

⁵ The Complainant also makes what appear to be common law arguments regarding his need for access. However, pursuant to N.J.S.A. 47:1A-7, the GRC only has the authority to adjudicate requests made pursuant to OPRA. *See also Rowan, Jr. v. Warren Hills Reg'l Sch. Dist. (Warren)*, GRC Complaint No. 2011-347 (January 2013).

the GRC, advising that no “Request for Examination of Evidence” form existed in the file containing the responsive records. Prosecutor Gillet thus asserted that the Middlesex County Prosecutor’s Office (“MCPO”) could not provide a certification in response to the GRC’s request for additional information.

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 request item Nos. 1 through 6 and 8

Criminal investigatory records are exempt from disclosure. N.J.S.A. 47:1A-1.1. A criminal investigatory record is defined 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” Id.

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). 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.” *See also* Solloway v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-39 (January 2013); Reitzler v. Egg Harbor Police Dep’t (Atlantic), GRC Complaint No. 2011-85 (January 2013); Hwang v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-348 (January 2013). Moreover, the Council has previously found that investigative reports were exempt as criminal investigatory records. *See* Crook v. Atlantic Cnty. Prosecutor’s Office, GRC Complaint No. 2010-92 (March 2011). Finally, the Council has previously determined that evidence logs and receipts were exempt under OPRA for the same reason. *See* Mawhinney v. Egg Harbor City Police Dep’t (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015).

In the instant matter, the Complainant sought several records resulting from Indictment No. 08-08-01323, which ultimately led to his incarceration. Thus, it is clear that the records at issue were part of a criminal investigation. Additionally, there is no evidence in the record to support that any of the records at issue are “required by law to be made, maintained or kept on file” For this reason, the GRC is satisfied that the records sought in item Nos. 1 through 6 and 8 meet the two-prong test necessary to be exempt as criminal investigatory records.

Therefore, because the records responsive to the Complainant’s OPRA request item Nos. 1 through 6 and 8 are criminal investigatory records, the Custodian has borne his burden of proof

that the denial of access was lawful. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko, GRC 2002-79 and GRC 2002-80; Solloway, GRC 2011-39; Reitzler, GRC 2011-85; Hwang, GRC 2011-348. *See also* Crook, GRC 2010-92; Mawhinney, GRC 2015-85.

OPRA request item No. 7

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Custodian initially denied access to item No. 7 seeking a "Request for Examination of Evidence" under the criminal investigatory exemption. However, the Custodian certified to the records presence in the Complainant's case file box; this record was not among them. Further, Assistant Prosecutor Gillet confirmed to the GRC by letter dated December 16, 2016, that the MCPO did not maintain such a record. Additionally, there is no evidence in the record to refute the Custodian's certification or Assistant Prosecutor Gillet's supporting statement.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item No. 7 because he certified in the SOI, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See* Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the records responsive to the Complainant's OPRA request item Nos. 1 through 6 and 8 are criminal investigatory records, the Custodian has borne his burden of proof that the denial of access was lawful. 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); Solloway v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-39 (January 2013); Reitzler v. Egg Harbor Police Dep't (Atlantic), GRC Complaint No. 2011-85 (January 2013); Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013). *See also* Crook v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2010-92 (March 2011); Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item No. 7 because he certified in the SOI, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

March 21, 2017