



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**

**April 25, 2017 Government Records Council Meeting**

Dane R. Ellis  
Complainant

Complaint No. 2016-168

v.

Middlesex County Prosecutor's Office  
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council ("Council") considered the April 18, 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 the Custodian did not unlawfully deny access to the records relevant to this complaint because the Custodian certified that such records do not exist and because the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *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 25<sup>th</sup> Day of April, 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: April 27, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 25, 2017 Council Meeting**

**Dane R. Ellis<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-168**

v.

**Middlesex County Prosecutor's Office<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies via regular mail of “all recordings by sound or visual communication of the interrogations on Dept. Case No. 99-000870 dated May 17 + 23, 1999 from North Brunswick PD/Middlesex County Prosecutor’s Office.”<sup>3</sup>

**Custodian of Record:** James E. O'Neill  
**Request Received by Custodian:** April 14, 2015  
**Response Made by Custodian:** April 15, 2015  
**GRC Complaint Received:** June 17, 2016

**Background<sup>4</sup>**

**Request and Response:**

On April 14, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records.<sup>5</sup> On April 15, 2015, the first (1<sup>st</sup>) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that the requested records are exempt from access as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Thomas Minnion, Esq., of Middlesex County Prosecutor's Office (New Brunswick, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint. It should be noted that although the Complainant alleged a denial of only the first requested item, he added the following concluding sentence to that request item, which was not part of the original OPRA request: "Or any copy thereof made." However, because the Custodian in the Statement of Information certified that no recording was made, *a fortiori*, no copy of a recording could have been made.

<sup>4</sup> 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.

<sup>5</sup> To elucidate, the Complainant is seeking a record of his interrogation in a homicide investigation (see Custodian's Statement of Information).

### Denial of Access Complaint:

On June 17, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that he filed the OPRA request on April 7, 2015, and the Custodian responded to the request on April 15, 2015. The Complainant contends the records he is seeking are not confidential, do not pose a threat to anyone, "nor does it disrupt any agency official business."

### Statement of Information:

On July 29, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on April 14, 2015, and responded in writing on April 15, 2015. The Custodian certifies that when he first received the Complainant's request, he accepted the Complainant's representation that the Middlesex County Prosecutor's Office ("MCPO") was in possession of the records, and they were therefore denied as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. The Custodian further certifies that he subsequently determined that when the Complainant was interrogated by a MCPO detective in 1999, the detective requested an audiotaped statement; however, the Complainant declined to provide an audiotaped statement unless he had an attorney present. The Custodian certifies that the Complainant then changed his mind and stated that he did not want an attorney present as long as an audiotaped statement was not made. The Custodian states that because the Complainant insisted his statement not be recorded, no such recording was made. The Custodian certifies that, as such, no records responsive to the Complainant's request exist.

The Custodian also certifies that an eight (8) page written record identified as "99001084 INV99-196 Death Investigation - homicide North Brunswick, N.J." does exist. The Custodian states that the record constitutes the report of a detective who investigated the homicide. The Custodian further states that, although he was interrogated, the Complainant declined to consent to an audio recording of his interrogation and said that he would only answer questions as long as there was no electronic recording being made. The Custodian certifies that this written record is exempt from disclosure as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.

### Additional Submissions:

On August 31, 2016, the Complainant responded to the Custodian's SOI. The Complainant states that the Custodian's SOI lacks credibility because the requested records have already been acknowledged by Ms. Russo in a certification provided with her SOI submitted to the GRC as part of GRC Complaint Number 2015-184.<sup>6</sup>

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<sup>6</sup> The Complainant misconstrued what the custodian, Lisa Russo, stated in the SOI that was submitted in Ellis v. North Brunswick Police Dep't., GRC Complaint No. 2015-184 (May 2016). An examination of the SOI in that complaint reveals that Ms. Russo said nothing about the existence of recordings by sound or visual communication. With respect to the MCPO, what she did state is, "the contents of North Brunswick's criminal investigatory file, open or closed, that was forwarded to the Middlesex County Prosecutor's Office is not a public record and is exempt from disclosure under N.J.S.A. 47:1A-1.1, *et seq.*"

## 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.

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the records responsive to the Complainant's request, which are "recordings by sound or visual communication of the interrogations" do not exist because the Complainant expressly declined to consent to an audio recording of his interrogation and said that he would only answer questions as long as there was no electronic recording being made.

As such, the Custodian did not unlawfully deny access to the records relevant to this complaint because the Custodian certified that such records do not exist and because the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer*, GRC 2005-49.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to the records relevant to this complaint because the Custodian certified that such records do not exist and because the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart

April 18, 2017