



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

October 30, 2018 Government Records Council Meeting

David E. Gross, Esq.
(o/b/o The Estate of Marci C. Strager)
Complainant

Complaint No. 2016-275

v.
Bergen County Prosecutor's Office
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council ("Council") considered the October 23, 2018 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 in order to prevent the unnecessary expenditure of administrative costs by the GRC in pursuing this matter, said complaint should be dismissed because the Complainant abandoned the complaint, and thereafter failed to cooperate with the GRC in its efforts to continue adjudication of the complaint. Moreover, the GRC has attempted to contact substituted counsel or other party in interest to no avail. See Swindell v. NJ Dep't of Env'tl. Prot. and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993). See, e.g. Siddeeq v. NJ Dep't of Corr., GRC Complaint No. 2009-182 and 2009-183 (November 2009), and Taylor v. NJ Dep't of Corr., GRC Complaint No. 2010-319 (November 2009).

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 October, 2018

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: November 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
October 30, 2018 Council Meeting**

David E. Gross, Esq.
(o/b/o The Estate of Marci C. Strager)¹
Complainant

GRC Complaint No. 2016-275

v.

Bergen County Prosecutor's Office²
Custodial Agency

Records Relevant to Complaint: Copies of the following records related to a house fire that occurred on November 24, 2015 at 23-10 Berkshire Road, Fair Lawn, New Jersey:

1. Any/all photos taken as a result of the above mentioned incident.
2. Any and all statements, investigations and reports generated as a result of this incident.

Custodian of Record: Maureen Parenta
Request Received by Custodian: May 23, 2016
Response Made by Custodian: May 24, 2016
GRC Complaint Received: October 14, 2016

Background³

Request and Response:

The Complainant submitted an Open Public Records Act (“OPRA”) request dated May 17, 2016, to the Custodian seeking the above-mentioned records. On May 24, 2016, the first (1st) business day following receipt of said request, Acting Executive Assistant Prosecutor Frank Puccio, on behalf of the Custodian, responded in writing informing the Complainant that several records responsive to the request were located by the Custodian but access to the records is denied because they are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. Mr. Puccio further informed the Complainant that, with respect to the medical records, it is the responsibility of county prosecutors to ensure that all medical records obtained by means of a grand jury subpoena are kept strictly confidential and are used solely for criminal investigatory purposes. Mr. Puccio advised the Complainant that their investigation ultimately determined that the fire was accidental; however, that fact did not change the status of the records as criminal investigatory records.

¹ Represented by Finkelstein & Partners, LLP (Newburgh, NY).

² Represented by John M. Carbone, Esq., of Carbone and Faasse, LLC (Ridgewood, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

David E. Gross (o/b/o The Estate of Marci C. Strager) v. Bergen County Prosecutor's Office, 2016-275 – Findings and Recommendations of the Council Staff

Mr. Puccio informed the Complainant that the Complainant may be able to obtain the requested records through means other than OPRA, and that to explore such possibility he should contact Acting Assistant Prosecutor Thomas McGuire. The Custodian stated that Mr. McGuire handles all requests for civil discovery.

Denial of Access Complaint:

On October 14, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he submitted a request for the above-mentioned records on May 17, 2016 and received a response from the Prosecutor’s Office on May 24, 2016. The Complainant stated that the records were denied as criminal investigatory records.

The Complainant further stated that he sent a follow up letter and made several telephone calls to Thomas McGuire at the Prosecutor’s Office in June, July, August and September of 2016 seeking the status of his request. The Complainant also stated that, other than a call back from Maria informing the Complainant that she would leave a message for Mr. McGuire, no one from the Prosecutor’s Office replied to the several phone calls and letter.

Statement of Information:

On May 15, 2017, the Custodian, through Counsel, filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 23, 2016, and that her office responded in writing on May 24, 2016.

The Custodian certified that Fair Lawn Police Department police reports and photographs, victims’ medical records, and a Bergen County Investigations Unit Arson Cause and Origin report are the records responsive to the request. The Custodian further certified that the records are exempt from access as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. The Custodian cites N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 109-111 (App. Div. 2015); North Jersey Media Group v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182 (App. Div. 2016); and Solloway v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-39 (January 2013) in support of the denial.

The Custodian certified that the victims’ medical records cannot be released due to a privacy interest, and references New Jersey Attorney General Directive “Use of Grand Jury Subpoena to Produce Medical Records” dated December 2, 2002. The Custodian also cites Burnett v. Bergen County, 198 N.J. 408 (2009) in support of her denial of the responsive medical records.

The Custodian further certified that, despite the assertions of the Complainant, there is no record that the Prosecutor’s Office received numerous follow up telephone calls from the Complainant.

Additional Submissions:

On October 3, 2018, in response to a GRC inquiry, Complainant David E. Gross, Esq., informed the GRC that he no longer represented the estate. The GRC replied asking if another attorney was now handling the complaint and the Complainant responded by stating, “[n]ot that I am aware of.” Thereafter, the GRC e-mailed the Complainant informing him that the GRC was in the process of adjudicating the complaint he had filed, and asked him to let the GRC know how he wished to proceed. The Complainant, in a reply e-mail stated, “[w]e are no longer the complainant. Thanks.” The GRC, in another e-mail this same date, asked the Complainant to “[p]lease provide the GRC with the law firm, executor or administrator handling the estate. If you also have an e-mail address or telephone number it would be helpful.” The Complainant never responded to the GRC.

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 Government Records Council shall...receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian...” N.J.S.A. 47:1A-7(b).

In this matter, the Complainant filed a Denial of Access complaint on behalf of an estate and subsequently stated that he no longer represents the estate and is not the complainant. Although the GRC attempted to determine if another attorney was substituted, the Complainant was not responsive to the GRC’s request, and just maintained that he was no longer the complainant in this matter. Moreover, when the GRC made an effort to determine the name and contact information for the executor or administrator of the estate, the Complainant was uncooperative.

In Swindell v. NJ Dep’t of Env’tl. Prot. and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993), the petitioner appealed the assessment of a penalty pursuant to the Waterfront Development Statute. In response to said appeal, the Office of Administrative Law scheduled a mandatory early settlement conference at which the petitioner failed to appear. In the Administrative Law Judge’s (“ALJ”) Initial Decision, the ALJ found that:

“[a]fter having given petitioner Swindell every opportunity to contact either the deputy attorney general or this tribunal to afford an explanation for his nonappearance and noncontact regarding this matter subsequent to the filing of his appeal, I **FIND** that petitioner Swindell has unilaterally disregarded his obligations in this matter even though it was he who initiated the process in the first instance.

In the process, I **FIND** that petitioner Swindell has, for reasons unknown to this tribunal, caused the expenditure of unnecessary funds in order to prepare for a defense of his appeal, as well as the administrative costs generated at the Office of Administrative Law in order to process this matter for the benefit of the parties.”

Id.

The New Jersey Department of Environmental Protection accepted the ALJ’s Initial Decision on March 1, 1993.

Here, the Complainant abandoned the complaint, and thereafter failed to cooperate with the GRC in its efforts to continue adjudication of the complaint. Further, the GRC has attempted to contact substituted counsel or other party in interest to no avail.

Therefore, in order to prevent the unnecessary expenditure of administrative costs by the GRC in pursuing this matter, said complaint should be dismissed because the Complainant abandoned the complaint, and thereafter failed to cooperate with the GRC in its efforts to continue adjudication of the complaint. Moreover, the GRC has attempted to contact substituted counsel or other party in interest to no avail. See Swindell, supra. See, e.g. Siddeeq v. NJ Dep’t of Corr., GRC Complaint No. 2009-182 and 2009-183 (November 2009), and Taylor v. NJ Dep’t of Corr., GRC Complaint No. 2010-319 (November 2009).

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that in order to prevent the unnecessary expenditure of administrative costs by the GRC in pursuing this matter, said complaint should be dismissed because the Complainant abandoned the complaint, and thereafter failed to cooperate with the GRC in its efforts to continue adjudication of the complaint. Moreover, the GRC has attempted to contact substituted counsel or other party in interest to no avail. See Swindell v. NJ Dep’t of Env’tl. Prot. and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993). See, e.g. Siddeeq v. NJ Dep’t of Corr., GRC Complaint No. 2009-182 and 2009-183 (November 2009), and Taylor v. NJ Dep’t of Corr., GRC Complaint No. 2010-319 (November 2009).

Prepared By: John E. Stewart
Staff Attorney

October 23, 2018