



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**April 26, 2016 Government Records Council Meeting**

Andre Herd  
Complainant

Complaint No. 2016-49

v.

Essex County Prosecutor's Office  
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council ("Council") considered the March 22, 2016 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 the Custodian did not unlawfully deny access to the records responsive to the Complainant's request because the Custodian certified that such records do not exist, and 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 26<sup>th</sup> Day of April, 2016

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: May 2, 2016**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 26, 2016 Council Meeting**

**Andre Herd<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2016-49**

v.

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

**Records Relevant to Complaint:** "I am requesting all arrest reports, promis gavals, and investigatory reports in the matter(s) of State v. Craig Nixon, a.k.a. Craig Zimmerman, D.O.B. 10-10-66; address 147 Clifton Place, Brooklyn, NY, SS# [deleted], W258082, Essex County, D.O.A. 11-27-85; And (sic) State v. Ronald Carter a.k.a. Treas Carter a.k.a. Ronnie Ward, D.O.B. 3/13/68, SS# [deleted], address 607 Gates Ave., Brooklyn, NY, CA#85-6162, Sheriffs (sic) File #7274-85, D.O.A. 11-27-85. I now make the request to have access to all criminal records files related to Mr. Nixon and Mr. Carter. I request under OPRA to have access to all Pre Sentencing Reports, Arrest(s) records, Investigative Reports, Judgment(s) of Conviction(s), and Criminal Rap Sheets related to Mr. Nixon and Mr. Carter."

**Custodian of Record:** Debra G. Simms, Esq.  
**Request Received by Custodian:** January 8, 2016  
**Response Made by Custodian:** January 14, 2016  
**GRC Complaint Received:** February 5, 2016

**Background<sup>3</sup>**

**Request and Response:**

On December 27, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 14, 2016, the fourth (4<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that one (1) case file was determined to contain records responsive to the Complainant's request; however said file was destroyed pursuant to records retention schedule series #0018-0003. The Custodian further informed the Complainant that because the records were destroyed, there are no records responsive to his request.

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

<sup>2</sup> Represented by Courtney Gaccione, Esq., of the Office of the Essex County Counsel (Newark, NJ).

<sup>3</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.

### Denial of Access Complaint:

On February 5, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). On every page of the complaint, the Complainant wrote “see attached sheet;” however, the Complainant failed to attach a “sheet.”<sup>4</sup>

### Statement of Information:

On March 1, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 8, 2016, and that she responded in writing on January 14, 2016.

The Custodian certifies that the records responsive to the Complainant’s request were determined to be all arrest reports, promis gavel, and investigatory reports in the matter of State v. Craig Nixon, aka Craig Zimmerman (identifiers provided); and State v. Ronald Carter aka Trea Carter, aka Ronnie Ward (identifiers provided).

The Custodian further certifies that the case containing the records responsive to the request was administratively dismissed on or about July 19, 1991, and the file was destroyed on November 24, 2008. The Custodian certifies that retention schedule series #0018-0003 provides that the file could have been destroyed on July 19, 1996, five years after dismissal, but it was instead destroyed twelve years later. The Custodian certifies that, with respect to the promis gavel records, the GRC stated in Barkley v. Essex County Prosecutor’s Office, GRC Complaint No. 2013-244, that the promis gavel computer system is an automated criminal case tracking system that captures base information concerning defendants and in which only certain information is available to the public at public access terminals. The Custodian certifies that the GRC concluded that a promis gavel is not a record but a system by which basic information can be retrieved.<sup>5</sup> The Custodian contends that by seeking “promis gavel” the Complainant is seeking a system and not a record.

### 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

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<sup>4</sup> The only attachment to the complaint was the Custodian’s response dated January 14, 2016. For this reason, the complaint will be prepared for adjudication based only on the information submitted in the Statement of Information.

<sup>5</sup> This statement was contained in Barkley, GRC 2013-244 (Interim Order April 29, 2014).

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 determined to be responsive to the Complainant's request were lawfully destroyed pursuant to retention schedule series #0018-0003 on November 24, 2008; therefore, the requested record does not exist. Moreover, the record is devoid of any evidence refuting the Custodian's certification.

As such, the Custodian did not unlawfully deny access to the records responsive to the Complainant's request because the Custodian certified that such records do not exist, and 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 responsive to the Complainant's request because the Custodian certified that such records do not exist, and 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

March 22, 2016<sup>6</sup>

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<sup>6</sup> This complaint was prepared for adjudication at the Council's March 29, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum.