



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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FINAL DECISION

February 28, 2007 Government Records Council Meeting

Darin Hickson
Complainant
v.

Complaint No. 2006-172

NJ Department of Law & Public Safety,
Division of Criminal Justice
Custodian of Record

At the February 28, 2007 public meeting, the Government Records Council (“Council”) considered the February 21, 2007 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 there was no unlawful denial of access as the requested records are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure.

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 February, 2007

Vincent P. Maltese, Chairman
Government Records Council



I attest the foregoing is a true and accurate record of the Government Records Council.

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: March 7, 2007

**Findings and Recommendations of the Executive Director
February 28, 2007 Council Meeting**

Darin Hickson¹

GRC Complaint No. 2006-172

Complainant

v.

NJ Department of Law & Public Safety, Division of Criminal Justice²
Custodian of Records

Records Relevant to Complaint:

1. All documents and affidavits in the case of the State of New Jersey v. Darin Hickson, Ind. #S-1863-92-01, that were submitted to the Acting Attorney General, Frederick DeVesa, for immunity of two state witnesses named Kimberly and Richard Wagner at or around December 1993- January 19, 1994.
2. Affidavits that the Prosecutor of Bergen County, Fred Schwanwede, submitted to the Acting Attorney General DeVesa in his request for immunity for the above listed witnesses, as well as the signed petitions in which such immunity was in fact granted.

Request Made: August 10, 2006

Response Made: August 31, 2006

Custodian: Dale Perry

GRC Complaint Filed: September 13, 2006

Background

August 10, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above.

August 21, 2006

Custodian's first response to the Complainant's OPRA request. The Custodian responds to the Complainant's request seven (7) business days following the date the request was received. The Custodian asserts that the Division of Criminal Justice is currently processing the OPRA request. The Custodian also asserts that the requested documents are currently located in storage and will need to be retrieved for review prior

¹ No legal representation listed.

² Represented by DAG E. Robbie Miller, on behalf of the New Jersey Attorney General.

to determining if the request meets the OPRA requirements, and therefore, an extension has been requested until August 30, 2006 for an OPRA response.

August 31, 2006

Custodian's second response to the Complainant's OPRA request. The Custodian states that the Complainant's request has been reviewed and denied because the records are criminal investigatory records.

September 13, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachment:

- Complainant's OPRA request receipt including the Custodian's response dated August 31, 2006.

The Complainant asserts that he is the sole defendant whom has been charged and convicted of an indictable offense in the matter of the State of New Jersey v. Darin Hickson under indictment # S 1863-92-01. The Complainant also asserts that the records requested are not being sought for disclosure of any personal information pertaining to the victim in the case against him.

September 19, 2006

Offer of Mediation sent to both parties.

September 20, 2006

Custodian declined mediation.

September 20, 2006

Request for Statement of Information sent to the Custodian.

September 22, 2006

Complainant agreed to mediation.

September 27, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated July 24, 2006.³
- Complainant's OPRA request receipt, including the Custodian's response dated August 31, 2006.

³ Both parties acknowledge that the request was made on August 10, 2006.

The Custodian asserts that the Division of Criminal Justice received the request on August 10, 2006 and an initial search for the requested documents revealed that they were in storage and would have to be retrieved. The Custodian also asserts pursuant to N.J.S.A. 47:1A-5.i., a letter dated August 21, 2006 was sent to the Complainant requesting an extension of the due date for the request until August 30, 2006. The Custodian further asserts that the records requested were denied because the records are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

The Custodian attests that OPRA provides that government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions pursuant to N.J.S.A. 47:1A-1. The Custodian also attests that OPRA defines a government record as any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file or that has been received in the course of his or its official business pursuant to N.J.S.A. 47:1A-1.1. The Custodian further attests that OPRA, however, also provides that a government record shall not include the following information which is deemed to be confidential, and identifies among those confidential records, criminal investigatory records, pursuant to N.J.S.A. 47:1A-1.1. In addition, the Custodian attests that criminal investigatory records are 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 pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies that there are five (5) documents that are potentially responsive to the Complainant's request which include internal Division of Criminal Justice memoranda, correspondence between a county prosecutor and the Division of Criminal Justice and petitions to compel testimony (commonly referred to as immunity petitions). The Custodian also certifies that all of these documents are part of the criminal investigation file which pertains to the prosecution of the Complainant, and that these documents fit within the definition of criminal investigatory records.

The Custodian further certifies that these documents contain attorney work product and are protected pursuant to Court Rule 3:12-3 governing discovery in criminal cases. The Custodian states that subsection (e) of the rule provides that neither party is entitled to discovery of the other's work product, and according to the rule, work product includes "internal reports, memoranda or documents made by that party or the party's attorney or agents, in connection with the investigation, prosecution or defense of the matter..." *Id.* The Custodian also states that this provision is recognized as encompassing attorney work product and includes internal office memoranda and documents that contain an attorney's thoughts and impressions concerning a particular case. The Custodian makes reference to State v. Montague, 55 N.J. 387, 402 (1970).

The Custodian asserts that in this matter, the requested documents regarding immunity for witnesses in the Complainant's case meet the above requirements. The Custodian also asserts that the requested records include internal memoranda and

documents prepared by the prosecutor and Division of Criminal Justice attorneys, reflecting, among other things, their thoughts concerning the evidence in the case and the need for immunized testimony. The Custodian further asserts that the nature of the documents and the fact that they were prepared in connection with the prosecution of the Complainant's criminal matter, clearly indicate that they are protected attorney work and are not subject to disclosure. The documents for which the Custodian claims an exemption are as follows:

List of all Documents Responsive to Complainant's August 10, 2006 OPRA Request	Documents Provided to Complainant, in Whole or in Part and the Date(s) Provided	Documents Not Provided to Complainant, in Whole or in Part w/ General Nature Description	Legal Explanation and Citation for Non-Disclosure
January 4, 1994 letter from Bergen County Assistant Prosecutor to Division of Criminal Justice ("DCJ") DAG requesting Attorney General grant of immunity and attaching draft Petition (3 pages)		Not Provided	Criminal Investigatory Record <u>N.J.S.A.</u> 47:1A-1.1; Attorney Work Product
Draft Petition to Compel Testimony (2 pages)		Not Provided	Criminal Investigatory Record <u>N.J.S.A.</u> 47:1A-1.1; Attorney Work Product
January 7, 1994 Memorandum from DCJ DAG to Deputy Director attaching Petition for Attorney General approval (3 pages)		Not Provided	Criminal Investigatory Record <u>N.J.S.A.</u> 47:1A-1.1; Attorney Work Product
January 10, 1994 letter from DCJ DAG to Bergen County Prosecutor enclosing Petition		Not Provided	Criminal Investigatory Record <u>N.J.S.A.</u> 47:1A-1.1; Attorney Work Product

(1 page)			
January 9, 1994 Petition to Compel Testimony (5 pages)		Not Provided	Criminal Investigatory Record <u>N.J.S.A.</u> 47:1A-1.1; Attorney Work Product

October 17, 2006

Letter from the Complainant to the GRC. The Complainant asserts that the Custodian denied disclosure of the requested records because of attorney work product pursuant to N.J.S.A. 47:1A-1.1. The Complainant states that the immunity petitions were in fact signed by the Acting Attorney General, Frederick DeVesa, granting immunity to the two witnesses, in which one of the witnesses is one of the State's key witnesses.

The Complainant states that there are several cases that prohibit non-disclosure where documents or information of favorable treatment of leniency have been given to State witnesses.⁴ The Complainant further states that there are a host of U.S. Supreme Court cases, as well.

The Complainant asserts that non-disclosure is prohibited in this case for several reasons such as 1) the disclosed or non-disclosed materials are in regards to witnesses for the State, 2) one of the witnesses actually testified for the State, and 3) although there was no court ordered immunity granted, the fact that one of the witnesses that testified was never charged with any crime shows that the witness was given favorable treatment in exchange for his testimony.

November 1, 2006

Letter from the Complainant to the GRC. The Complainant asserts that according to the New Jersey Court Rules R.3:13-3.4., discovery by the defense of information within the State's possession of such facts relating to a material State's witness is permitted. The Complainant also asserts that there are other Supreme Court cases in which a State's key witness was given immunity.⁵ The Complainant further asserts that in his case, the witness was given immunity or favorable treatment in exchange for his testimony.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

⁴ See State v. Satkin 127 N.J. Super. 306 at 309, State v. Jones 239 N.J. Super. 460 at 467, State v. Tull 234 N.J. Super. 486 at 497, and State v. Rasch 197 N.J. Super. 184 at 188.

⁵ See State v. Taylor, 49 N.J. Super. 440, State v. Blue, 124 N.J. Super. 276.

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“ ... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* ... or that has been *received* ... A government record shall not include the following information which is deemed to be confidential... *criminal investigatory records* ... ‘*Criminal investigatory record*’ means 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...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The Custodian certifies that there are five (5) documents that are potentially responsive to the Complainant’s request which include internal Division of Criminal Justice memoranda, correspondence between a county prosecutor and the Division of Criminal Justice and petitions to compel testimony (commonly referred to as immunity petitions). The Custodian also certifies that all of these documents are part of the criminal investigation file which pertains to the prosecution of the Complainant, and that these documents fit within the definition of criminal investigatory records.

In Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), the Council found that the records being sought were considered criminal investigatory records and therefore exempt from disclosure. Specifically, 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. The Council stated that it is also important to note that the 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 current active investigations and release those where the matter is resolved or closed. The Council’s decision in this matter was appealed and

affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004.

OPRA places the burden of proving that a denial of access is lawful on the public agency. In this case, the Custodian has born his burden by certifying that the requested records are criminal investigatory records exempt from disclosure. Therefore, there was no unlawful denial of access as the requested records are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that there was no unlawful denial of access as the requested records are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure.

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

February 21, 2007