STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Final Decision Order

THOMAS E. DURKIN, JR. ESQ.
Complainant
v.
NEW JERSEY STATE POLICE
Custodian of Record.

GRC Complaint No. 2002-30

Decision Issued: February 13, 2003
Decision Effective: February 28, 2003

At its February 13, 2003 public meeting, the Government Records Council considered Complaint #2002-30 filed pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq. This complaint alleges a denial of access to a "criminal intelligence record" gathered by the Intelligence Services Section of the State Police pursuant to the federal Omnibus Crime Control and Safe Streets Act of 1968, specifically, an interview of a criminal intelligence witness conducted by Detective Sergeant Wren of the New Jersey State Police on September 27, 1999.

The Council considered the Complaint, the custodian's Statement of Information, the Executive Director's Findings and Recommendations dated February 10, 2003, correspondence from the requester, a letter-brief from the custodian's attorney and accompanying certification of Lt. Serrao, New Jersey State Police, stating that the September 27, 1999 interview and other investigatory material contained in the report were confidential pursuant to 28 C.F.R. 23.20 and that the regulations contained no waiver provision in the event of unauthorized release of portions of the report.

By affirmative vote of four council members on February 13, 2003, the Council adopts the Findings and Recommendations of the Executive Director that the document sought is confidential pursuant to federal regulation and, thus, not accessible under OPRA pursuant to N.J.S.A. 47:1A-5a, and thereby dismisses the Complaint.

A copy of this Decision shall be provided to the requester, the Custodian, and all counsel of record.

VINCENT MALTESE, Chair
Government Records Council

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

Virginia Hook

Virginia Hook, Secretary
Government Records Council
Dated: February 21, 2003

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendation of Executive Director
February 10, 2003

Thomas E. Durkin, Jr. Esq.
Complainant
v. **GRC Complaint No. 2002-30**
New Jersey State Police
Custodian of Record.

Relevant Record(s) Requested: Portion of a State Police Intelligence Services Section report regarding a telephone conversation conducted on September 27, 1999 with a criminal intelligence witness
Request made: July 12, 2002
Custodian: Detective Sgt First Class Robert Wilk, Acting Custodian
Request denied: July 15, 2002
GRC Complaint filed: August 16, 2002

Executive Director's Recommendation

The Executive Director concludes that the record requested is a "criminal intelligence record" gathered pursuant to the federal Omnibus Crime Control and Safe Streets Act of 1968. Disclosure of the contents of this record is governed by operating principles related to confidentiality of criminal intelligence information established in 28 C.F.R. 23.20. The custodian of records properly determined that the requester does not meet the criteria for access to the information set forth in 28 C.F.R. 23.20(e). Because the record is exempt from disclosure pursuant to federal regulation, it is exempt from disclosure pursuant to OPRA. N.J.S.A. 47:1A-5(a). The Council should dismiss the Complaint.

Statements of Facts

On or about July 12, requester asked for the portion of a State Police Intelligence Services Section (ISS) Report created by Detective Sergeant George Wren regarding a telephone conversation with a specific, named criminal intelligence witness regarding that person's knowledge of organized crime ties to the requester's clients.

The requester appeared before the Casino Control Commission (CCC) concerning his clients' applications for casino service industry licensure. Requester submitted a transcript of portions of Sgt. Wren's testimony before the CCC concerning his clients allegedly provided by the criminal intelligence witness. Detective Sgt. Wren did not provide a copy of the report to the CCC not did any of the attorneys representing the CCC have a copy of the report. The requester seeks a copy of the intelligence report in order to confirm the accuracy and truthfulness of Sgt Wren's testimony.

On or about July 15, the custodian responded, "the record you have requested is part of an on-going criminal investigation. Release of the information contained therein would undermine the investigation, therefore your request is denied." The GRC Complaint was filed on August 16, 2002. Mediation was not successful in resolving the matter. Since that time, the custodian's attorney has provided a letter brief and certification of Lt. Stephen Serrao, NJSP, stating other reasons why denial of access is lawful.

Lt. Serrao states in his certification that:

(a) Dissemination of the contents of the report is limited pursuant to the Omnibus Crime Control and Safe Streets Act of 1968 [28 C.F.R. 23.20(e)(2002)] to any person who, in performance of a law enforcement activity, has both a need to know *and* a right to know the information; because the requester does not meet this criteria, federal regulations prohibit dissemination of the content of the report to the requester.

(b) EO 48 (1968) prohibits release of a State Police investigative files to anyone who is not a member of a recognized law enforcement agency unless ordered to do so by the Governor or a court of competent jurisdiction; and

(c) The record pertains to an investigation in progress by a public agency and, pursuant to N.J.S.A. 47:1A-3a, copying and inspection would be inimical to the public interest.

In a letter dated February 7, 2003, the requester's attorney argues that the State Police may have conducted the interview, but that it was arranged at the request of the Division of Gaming Enforcement (DGE). DGE intended the information for use in assessing applications for casino licensure. The requester made it clear that the requester seeks only the portion of the report concerning the testimony of Sgt. Wren to the CCC in the transcript provided.

In a letter dated February 10, 2003, the custodian's attorney notes that:

1. The requester's reason for seeking the report is irrelevant under OPRA;
2. Lt. Serrao certifies that the report contains intelligence information in addition to the interview; and that the report sought is an ISS report considered confidential under 28 C.F.R. 23.20;
3. The report remains confidential, regardless of whether it is shared with the Division of Gaming Enforcement, a law enforcement agency meeting the "need/right to know" criteria of 28 C.F.R. 23.20(e), or unauthorized persons.

Background on the Intelligence Services Section

The letter-brief and certification submitted on behalf of the custodian state that the New Jersey State Police Intelligence Services Section (ISS) operates through financial support of the federal government authorized by the Omnibus Crime Control and Safe Streets Act of 1968. Under this program, ISS acquires information concerning criminal activity from a variety of sources, including interviews of cooperating witnesses, in furtherance of its statutory mandate "to prevent

crime, to pursue and apprehend offenders and to obtain legal evidence necessary to insure conviction of such offenders in the courts." The ISS, considered a "project" under federal law, is subject to the policy standards set forth by the U.S. Department of Justice, Criminal Intelligence Systems Operating Policies, 28 C.F.R. 23.20.

In summary, the policy states that intelligence information (such as that contained in the report) can be released only to those with a need to know and a right to know the information in the performance of a law enforcement activity. Copies of the full text of the federal rule are attached as Appendix A. The basis and important elements of the policy are:

- " …that certain criminal activities… often involve some degree of regular coordination and permanent organization involving a large number of participants over a broad geographical area. The exposure of such ongoing networks of criminal activity can be aided by the pooling of information about such activities…" 28 C.F.R. 23.20

- 28 C.F.R. 23.20(a) states that "[a] project shall collect and maintain criminal intelligence information concerning an individual only if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity."

- 28 C.F.R. 23.20(e) provides that "[a] project or authorized recipient shall disseminate criminal intelligence information only where there is a need to know and a right to know the information in the performance of a law enforcement activity."

- 28 C.F.R. 23.20(f)(1) states "…a project shall disseminate criminal intelligence information only to law enforcement authorities who shall agree to follow procedures regarding information receipt, maintenance, security, and dissemination which are consistent with these principles."

28 C.F.R. 28.20(g) makes the ISS and all other projects collecting intelligence information responsible for establishing the existence of an inquirer's need to know and right to know the information being requested. Lt. Serrao is the person designated to make such a determination for the ISS in this case. Lt. Serrao concludes that the requester is not engaged in a law enforcement activity and has neither the need nor the right to know the information pursuant to 28 C.F.R. 28.20(e).

Analysis and Conclusion

The evidence in this case establishes that the interview the requester seeks was initiated by the ISS as part of its ongoing investigation of criminal activity in New Jersey and constitutes criminal intelligence information pursuant to 28 C.F.R. 23.20. Federal regulations mandate that such information can be released "only where there is a need to know and a right to know…in the performance of a law enforcement activity." 28 C.F.R. 23.20(e). Lt. Serrao states in his

certification that the requester is not engaged in a law enforcement activity and has neither the need or the right to know the information pursuant to 28 C.F.R. 28.20(e). Further, the requester has provided the Council no evidence that he is involved in the performance of a law enforcement activity and, thus, is not authorized to access the information requested.

While the custodian admits that Sgt. Wren provided the CCC some criminal intelligence information, the custodian is silent as to whether Sgt Wren's testimony was authorized pursuant to ISS policy and federal regulation. In any event, federal regulations do not provide that criminal intelligence reports become accessible if portions of their content are released to unauthorized persons. To the contrary, 28 C.F.R. 23.20(m) states that the ISS shall penalize "unauthorized release of confidential information."

In conclusion, OPRA (N.J.S.A. 47:1A-5(a)) provides that information exempt from access by federal regulation is confidential. Since the criminal intelligence record in question cannot be released to the requester under ISS operating procedures, the record is confidential under OPRA. Because the record is confidential pursuant to federal regulation, the Council need not address the custodian's claims to confidentiality pursuant to EO 48 or N.J.S.A. 47:1A-3a.

The requester may, of course, file an action in Superior Court seeking access to the report under principles of Common Law that would take into account factors such as the needs and interests of the parties in confidentiality or full disclosure of the information sought.

Marc H. Pfeiffer, Acting Executive Director
Government Records Council

Dated: February 10, 2003