

INITIAL DECISION

OAL DKT. NO. GRC 4680-05

AGENCY DKT. NO. 2004-108

ROBERT GORMAN,

Petitioner,

v.

GLOUCESTER COUNTY

CITY POLICE DEPARTMENT,

Respondent.

Robert Gorman, petitioner, pro se

Emily Givens, Esq., for respondent (Malley & Associates, attorneys)

Record Closed: March 10, 2006

Decided: March 13, 2006

BEFORE **DOUGLAS H. HURD**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 1, 2004, Petitioner Robert Gorman, the former Mayor of Gloucester City, requested a "copy of videotape from patrol vehicle assigned to Officer William Johnson on November 24, 2003. If for legal reasons, portions are not public info as per OPRA [Open Public Records Act] then, I still would like all other portions and reasons other portions are not public records." This request also included 13 other items.

On July 7, 2004, an office memo from Police Chief William Johnson was sent to Paul Kain, Gloucester City Clerk, explaining that Gorman's July 1 request had been forwarded to Assistant Prosecutor Cheryl Cohen of the Camden County Prosecutor's

Office for review.¹ On July 23, 2004, Respondent James Maley, Esq., Solicitor for Gloucester City, sent a letter response to Gorman answering Gorman's records request, and denying most of the requested documents.² The letter does not mention the requested videotape. On August 2, 2004, Maley responded to the videotape request by letter, stating:

[T]hese materials are not deemed public records as they contain personal information regarding persons with whom the officers make contacts during their work. These videotapes contain audio and visual references of social security numbers, driver license information, criminal records and other information which is not a matter of public domain. For this reason, these requested tapes are not public records under the statute.

On August 3, 2004, the Petitioner filed a Denial of Access Complaint with the New Jersey Government Records Council ("GRC"). On September 1, 2004, Maley responded to the complaint. Regarding the videotape, Maley said in the form response to the complaint, "Videotape of police stop – contains confidential information including drivers license numbers, social security numbers, criminal records and other confidential information that could be redacted – see attached correspondence dated August 2, 2004." The letter of August 2 states that the videotape is not a public record because it contains personal information regarding persons the officers have contact with during their work. On November 8, 2004, Petitioner sent an email to the GRC saying that the city was able to redact the video tape for his court hearing, so the city should be able to redact the tape for him as well. Maley responded to this email at the request of the GRC on November 22, 2004, saying the city used the complete section of the tape dealing with Gorman's traffic stop in the prosecution of his case, but the city lacked the expertise to edit out confidential information, or to provide video without audio.

At the GRC meeting on December 9, 2004, the council approved the recommendation of the executive director of the GRC, and informed Maley that the city should disclose the videotape "assessing a special service if necessary." Further, if the

¹ Paul Kain is Robert Gorman's brother-in-law.

² The city solicitor is the records custodian.

city was unable to release the tape after outsourcing the cost, then the city was ordered to certify why it was unable to do so. Maley was told to comply within 30 days of receipt.

On December 27, 2004, Maley sent a letter to Gorman stating that the city had contacted the Camden County Prosecutor, the New Jersey Attorney General, and the FBI, and no agency was capable of fulfilling the request to edit the tape. On February 22, 2005, Maley sent Gorman another letter stating that only law enforcement personnel could edit the tape to remove the confidential information it contained, and the Gloucester City Police Department was incapable of doing so. He further stated that the Camden County Prosecutor's Office, the New Jersey Attorney General's Office, and the local office of the FBI refused the request to edit the tape because they only edit tapes for law enforcement purposes.

On March 17, 2005, DAG Debra Allen sent a memo to Paul Dice, the Executive Director of the GRC, regarding the OPRA videotape request. She stated that the city had not "successfully demonstrated that its claim of impossibility excuse[d] its obligation under OPRA to provide to Gorman the redacted videotape." Allen suggested that the city might hire a private vendor to redact the tape, perhaps with a confidentiality agreement, or the city could work with a different municipality.

On March 24, 2005, the GRC requested the list of entities, which the city had asked to redact the tape, and the reason that the city had been unsuccessful. In addition, the GRC asked why the city had not commissioned a third party to redact the tape upon signing a confidentiality agreement.

On April 4, 2005, the city responded in much the same way as it had on December 27, 2004, adding that the city had not outsourced the tape because the information on it was confidential, and pursuant to N.J.S.A. 47:1A-1.1, the city did not wish to risk liability by disclosing the contents of the tape.

At the GRC public meeting on June 9, 2005, the Council voted unanimously to adopt the entirety of the Executive Director's findings and recommendations, dated June 3, 2005. Therefore, the Council referred the case to the Office of Administrative Law ("OAL") to determine four issues. The OAL received the case on July 1, 2005. Therefore, for the next few months, the parties engaged in extensive settlement negotiations, but they ultimately failed to reach an agreement. On December 20, 2005, the parties attended a pre-hearing conference to discuss the four issues. The parties resolved issues two, three and four. This fact is memorialized in respondent's March 10, 2006 correspondence received by this office on March 10, 2006, upon which the record closed. The parties agreed that there was no factual dispute as to issue number one regarding the videotape and subsequently filed cross-motions for summary decision. The sole issue to be decided is:

[w]hether the "copy of the videotape from the patrol vehicle assigned to Officer William Johnson on 1/24/03," is disclosable in whole or in part, pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5(g)?

Initial summary decision briefs were filed on January 17, 2006. The record closed on February 3, 2006, with the filing of reply briefs.³

ANALYSIS

The 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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority

³ Since the GRC already adopted the Executive Director's finding that the videotape was disclosable under OPRA and there are no factual issues in dispute, it is not clear why the matter was referred to the OAL for a hearing.

of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1]⁴

The City bears the burden of proving that denying Petitioner access to the videotape is authorized by law. N.J.S.A. 47:1A-6. The City contends that videotape is a Mobile Video Recording (“MVR”) tape. Such tapes are made by the Gloucester City Police Department for two purposes: (1) to assist in the criminal investigatory process and subsequent prosecution of crimes and (2) to utilize the tapes for inter-agency and intra-agency officer training and evaluation. Once generated, the tapes are filed with the Chief of Police or his designee for storage and/or reuse. If they deem a portion of the tape necessary for either objective above, the tape is maintained and stored. All other tapes are erased and reused.

The definition cited above for a government record explicitly states that “terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” Clearly, using the tapes for officer training and evaluation fits within the scope of this exclusion.

The next issue is whether the use of the MVR tapes for criminal investigatory purposes also makes them fall outside the government record definition. N.J.S.A. 47:1A-1.1 states that a government record does not include “criminal investigatory records”. A criminal investigatory record is one 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.” N.J.S.A. 47:1A-1.1.

In this matter, the MVR tape is “not required by law to be made, maintained or kept on file.” Petitioner has not cited any law claiming that the City has an obligation to make, maintain or keep such tapes. In Serrano v. South Brunswick Township, 358 N.J. Super.

352, 365 (App. Div. 2003) the appellate division held that 911 tapes should be available to the public because tapes of 911 calls are required by law to be recorded and retained for 31 days. Id. at 364 (see also Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003) (holding that 911 tape should be released in an ongoing criminal investigation). In this matter, on the other hand, there is no law that requires police departments to make MVR tapes. Since they are not required to be made, maintained or kept on file and they are used, in part, for criminal investigatory purposes then they fall outside the definition of a government record.

ORDER

Based on the foregoing, Respondent is not required under OPRA to disclose to Petitioner the MVR tape from the patrol vehicle assigned to Officer William Johnson on November 24, 2003.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

⁴ OPRA replaced the Right-to-Know Act of 1963, and became effective on July 7, 2002. Serrano v. South Brunswick Township, 358 N.J. Super. 352, 363 (App. Div. 2003).

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

DATE

GOVERNMENT RECORDS COUNCIL

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

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