



State of New Jersey
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 14, 2017 Government Records Council Meeting

James L. Baxter
Complainant

Complaint No. 2016-137

v.

Mercer County Prosecutor's Office
Custodian of Record

At the November 14, 2017 public meeting, the Government Records Council ("Council") considered the November 8, 2017 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 the Custodian did not unlawfully deny access to the responsive investigative reports. N.J.S.A. 47:1A-6. Specifically, the responsive records regarding Indictment No. 90-01-0093 are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 2017 N.J. LEXIS 745 (N.J. July 11, 2017); Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

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 14th Day of November, 2017

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 17, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 14, 2017 Council Meeting**

**James L. Baxter¹
Complainant**

GRC Complaint No. 2016-137

v.

**Mercer County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of each investigative report and/or "document" generated by the Trenton Police Department, including photographic or other line-ups, for Indictment No. 90-01-0093 (Prosecutor's File No. 890000596).

Custodian of Record: Angelo J. Onofri
Request Received by Custodian: November 23, 2015
Response Made by Custodian: November 25, 2015
GRC Complaint Received: May 6, 2016

Background³

Request and Response:

On November 18, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On November 25, 2015, the Custodian responded in writing, denying access to the responsive records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.⁴

Denial of Access Complaint:

On May 6, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that OPRA reflects the State's commitment to transparency in government. Renna v. Cnty. of Union, 407 N.J. Super. 230, 238 (App. Div. 2009). The Complainant, acknowledging himself as the defendant in the indictment, contended that New Jersey Court Rule R. 3:13-3(c) provides a criminal defendant the right to inspect, copy, or photograph multiple types of records related to a conviction. The

¹ No legal representation listed on record.

² Represented by Paul Adezio, Esq. (Trenton, 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁴ The Custodian also noted that his office would release criminal investigatory files upon receipt of a subpoena or court order.

Complainant also noted that a defendant's right to post-indictment discovery is automatic. R. 3:9-1(a); R. 3:13-3(b). The Complainant also noted that "relevant evidence" and "newly discovered evidence" are disclosable in post-conviction proceedings. N.J.R.E. 401 (defining "relevant evidence"); R. 3:20-1 (providing that "newly discovered evidence" is grounds for a new trial).

The Complainant contended that the Custodian unlawfully denied access to the responsive records because: 1) the Complainant is the subject of the records; and 2) non-disclosure would result in a "fundamental injustice." The Complainant contended that he was entitled to the contents of his indictment file per the Court's discovery rules.

Statement of Information:

On May 25, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on November 23, 2015. The Custodian certified that he responded in writing on November 25, 2015, denying access to the responsive records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.

The Custodian certified that the responsive records included investigative reports from Bristol Township, Trenton Police Department, and the Mercer County Prosecutor's Office.⁵ The Custodian contended that the records were exempt as criminal investigatory records. O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 2017 N.J. LEXIS 745 (N.J. July 11, 2017). The Custodian argued that no law compelled these records, which were produced as part of a criminal investigation, to be maintained.

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 defines a criminal investigatory record 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." N.J.S.A. 47:1A-1.1. Therefore, for a record to be considered exempt from disclosure under OPRA as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1, that record must meet both prongs of a two-prong test. See O'Shea, 410 N.J. Super. 371.

⁵ The Custodian initially advised that he would supplement the document index after receiving the relevant file from archives. The Custodian submitted his supplemental document index on June 2, 2016.

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc., 2017 N.J. LEXIS 745, on appeal from N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015). In the appeal, the Court affirmed that OPRA’s criminal investigatory records exemption applies to police records which originate from a criminal investigation. However, the court stated that “to qualify for the exception — and be exempt from disclosure — a record (1) must not be ‘required by law to be made,’ and (2) must ‘pertain[] to a criminal investigation.’ N.J.S.A. 47:1A-1.1.” Id. at 31.

The Court made it clear that if the first prong cannot be met because such a record is required by law to be made, then that record “cannot be exempt from disclosure under OPRA’s criminal investigatory records exemption. N.J.S.A. 47:1A-1.1.” Id. at 32-33. Although the Court agreed with the Appellate Division’s analysis in O’Shea, 410 N.J. Super. at 382, that a clear statement of policy to police officers from the State Attorney General has “the force of law for police entities,” it refused to conclude that records retention schedules adopted by the State Records Committee meet OPRA’s “required by law” standard.

The Court also noted that even if a record is not required by law to be made, it must still be found to pertain to a criminal investigation. The Court reiterated the Appellate Division’s observation that “some police records relate to an officer’s community-caretaking function; others to the investigation of a crime.” Id. at 37 (*citing* N. Jersey Media Grp., 441 N.J. Super. at 105).⁶ Therefore, the Court reasoned that determining whether such records pertain to a criminal investigation requires a “case-by-case analysis.” However, the Court pointed out that police records that stem from “an investigation into *actual or potential* violations of criminal law,” such as “detailed investigative reports and witness statements,” will satisfy the second prong of OPRA’s criminal investigatory records exemption. Id. at 38 (emphasis added).

The Council has long held that once a record is determined to be a criminal investigatory record, it is exempt from access. *See* Janeczko v. NJ Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), holding that “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.”⁷ Moreover, with respect to concluded investigations, the Council pointed out in Janeczko that, “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete.”

Here, the Complainant sought access investigation reports, including photographs and lineups, regarding Indictment No. 90-01-0093. The Custodian denied access to the responsive records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. In the Denial of Access Complaint, the Complainant acknowledged that the indictment, in which he was the defendant, was a criminal matter. In the SOI, the Custodian certified that he located investigative reports from three (3) law enforcement agencies. The Custodian argued that each was exempt as a

⁶This is instructive for police agencies because it underscores the fact that their role in society is multi-faceted; hence, not all of their duties are focused upon investigation of criminal activity. And only those records created in their capacity as criminal investigators are subject to OPRA’s criminal investigatory records exemption.

⁷ The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

criminal investigatory record because it met the two-prong test as discussed in O’Shea, and N. Jersey Media Grp.

The evidence of record supports that the Custodian lawfully denied access to the responsive reports. Specifically, both parties’ statements clearly show that Indictment No. 90-01-0093 was a criminal matter and that the Complainant was the convicted defendant. Further, the evidence of record supports that the records meet the criminal investigatory test set forth in N. Jersey Media Grp.

Accordingly, the Custodian did not unlawfully deny access to the responsive investigative reports. N.J.S.A. 47:1A-6. Specifically, the responsive records regarding Indictment No. 90-01-0093 are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; O’Shea, 410 N.J. Super. 371; N. Jersey Media Grp., Inc., 2017 N.J. LEXIS 745; Janeczko, GRC 2002-79, *et seq.*

Finally, the Complainant made several assertions regarding his right to access under the discovery process. The GRC notes, however, that requests made under discovery are not OPRA requests. Discovery requests may be served upon a public agency for access to government records pursuant to R. 3:13-3 and R. 7:7-7. Requests for discovery do not affect a requestor’s right to request the same records under OPRA. Also, the OPRA rules and exemptions do not apply to discovery requests. *See* Brunson v. State of NJ, Office of the Attorney General, GRC Complaint No. 2013-248 (November 2013)(footnoting that the GRC has no authority to adjudicate discovery complaints).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to the responsive investigative reports. N.J.S.A. 47:1A-6. Specifically, the responsive records regarding Indictment No. 90-01-0093 are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 2017 N.J. LEXIS 745 (N.J. July 11, 2017); Janeczko v. NJ Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

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November 8, 2017