



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 26, 2018 Government Records Council Meeting

Shirreta McKinney
Complainant

Complaint No. 2016-149

v.

Union County Prosecutor's Office
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council ("Council") considered the June 19, 2018 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 responsive toxicology report is a criminal investigatory record, and the Custodian has borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. N.J. Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Crook v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2010-92 (March 2011); Grossman v. Ocean Cnty. Prosecutor Office, 2013 N.J. Super. Unpub. Lexis 1999 (July 26, 2013); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017).

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 26th Day of June, 2018

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: June 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Shirreta McKinney¹
Complainant**

GRC Complaint No. 2016-149

v.

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

Records Relevant to Complaint: Copy of the marijuana laboratory test results obtained from Benny Hill on the week of January 26, and February 16, 2015, submitted by Detective Jason Massimino.

Custodian of Record: Mark Spivey

Request Received by Custodian: December 16, 2015

Response Made by Custodian: January 14, 2016

GRC Complaint Received: May 24, 2016

Background³

Request and Response:

On December 16, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 14, 2016, the Custodian responded in writing, denying access to the responsive record under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.⁴

Denial of Access Complaint:

On May 24, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that she had previously received copies of an affidavit for a search warrant in relation to an alleged drug purchase in early 2015 by Mr. Hill. The Complainant, however, stated that she has since sought access to Mr. Hill's laboratory tests without disclosure.

¹ No legal representation listed on record.

² Represented by April Bauknight, Esq. (Elizabeth, NJ). Previously represented by Brian P. Trelease, Esq. (Elizabeth, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

⁴ Although the Custodian's response may have been untimely, the Complainant did not raise the issue as part of her Denial of Access Complaint.

The Complainant disputed the denial of access, contending that the laboratory tests were “public records.” Specifically, the Complainant contended that the requested reports were akin to police reports and are public under N.J.R.E. 803(c)(6) and N.J.R.E. 803(c)(8). The Complainant noted that a chemist would likely discuss the test results in open court, which rendered them “public.” Further, the Complainant alleged that laboratory test reports have always been public under OPRA. The Complainant thus requested that the GRC order disclosure of the requested records, based on her showing of good cause.

Statement of Information:

On June 14, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 16, 2015. The Custodian certified that he responded in writing on January 14, 2016, denying access to one (1) responsive toxicology report totaling two (2) pages under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.

The Custodian stated that in order for a record to be considered exempt under the criminal investigatory exemption, it must meet the two (2) prong test outlined in O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 381-382 (App. Div. 2009). The Custodian stated that the prongs are: 1) the record in question was “not required by law to be made, maintained, or kept on file;” and 2) the record must pertain “to any criminal investigation or related civil proceeding.” N.J.S.A. 47:1A-1.1.

The Custodian certified that the toxicology report at issue here was not required to be made and that there is no dispute that it pertained to a criminal investigation. The Custodian noted that the Complainant attached to her Denial of Access Complaint a copy of a related search warrant and affidavit of search warrant pertaining to the investigation of Mr. Gill. The Custodian further noted that both the New Jersey Courts and GRC previously decided that toxicology reports are exempt from disclosure under OPRA. Grossman v. Ocean Cnty. Prosecutor’s Office, 2013 N.J. Super. LEXIS 1999, 24 (July 26, 2013); Janeczko v. N.J. Dep’t of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79, *et seq.* (June 2004); Crook v. Atlantic Cnty. Prosecutor’s Office, GRC Complaint No. 2010-92 (March 2011).

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.

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017), on appeal from N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015). There, 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 564.

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 365. 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 569 (citing N. Jersey Media Grp., Inc., 441 N.J. Super. at 105).⁵ 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. (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, GRC Complaint No. 2002-79, *et seq.*, 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.”⁶ 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.”

In Grossman, 2013 N.J. Super. Unpub. at 24, as in Janeczko, GRC 2002-79 *et seq.*, the Appellate Division stated that long-standing case law supports that the criminal investigatory exemption survives the conclusion of a criminal matter. The court upheld defendant’s denial of access to several categories of records under the criminal investigatory exemption to include the

⁵This 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.

⁶ The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

contents of the investigation file and various lab reports. Grossman, 2013 N.J. Super. Unpub. at 25. However, the court provided access to a limited number of records under plaintiff's common law request.⁷

In this matter, the Complainant sought toxicology reports. The Complainant argued in the Denial of Access Complaint that the Custodian unlawfully denied access to the responsive records because they were "public records" pursuant to the New Jersey Rules of Evidence. N.J.R.E. 803(c)(6)-(8). The Complainant also argued that the reports were discussed in court; thus, they were "public." Finally, the Complainant asserts that laboratory tests were also "public" under OPRA. In the SOI, however, the Custodian argued that he properly denied access to the one (1) responsive report located because it met the two-prong test necessary to designate a record as criminal investigatory in nature. The Custodian cited to Grossman, Janeczko, GRC 2002-79, and Crook, GRC 2010-92 to support his denial of access.

Contrary to the Complainant's assertions, and in applying N. Jersey Media Grp., Inc., 229 N.J. 541, the evidence of record indicates that the responsive reports fall within the criminal investigatory exemption at N.J.S.A. 47:1A-1.1. The court's analysis in Grossman, although an unpublished opinion, is also instructive here. Specifically, the court upheld defendants' denial of the investigative file containing reports, either similar or comparable to the findings and field reports at issue here. Further, there is no evidence suggesting that toxicology reports are required by law to be made or maintained. For that reason, the Council's decision in Crook, GRC 2010-92, upholding a denial of access to toxicology reports, applies here. See also Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated June 30, 2015) (upholding a denial of access to, among other records, toxicology reports under the criminal investigatory exemption). The GRC should also note that disclosure of "government records" under OPRA is not governed by the Rules of Evidence. The GRC thus finds that the Custodian properly denied access to these records.

Accordingly, the responsive toxicology report is a criminal investigatory record, and the Custodian has borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; GRC Complaint 2002-79, *et seq.*; Crook, GRC 2010-92; Grossman, 2013 N.J. Super. Unpub. Lexis 1999; N. Jersey Media Grp., Inc., 229 N.J. 541.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the responsive toxicology report is a criminal investigatory record, and the Custodian has borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. N.J. Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Crook v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2010-92 (March 2011); Grossman v. Ocean Cnty. Prosecutor Office, 2013 N.J. Super. Unpub. Lexis 1999 (July 26, 2013); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017).

Prepared By: Frank F. Caruso
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June 19, 2018

⁷ Pursuant to N.J.S.A. 47:1A-7, the GRC only has the authority to adjudicate requests made pursuant to OPRA.