INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Charles Richards
Complainant
v.
Florence Township Police Department (Burlington)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 Findings and Recommendations of the Council Staff 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:


2. The Custodian unlawfully denied access to the subpoenas contained within his criminal files. N.J.S.A. 47:1A-6. Since subpoenas are required by law to be made under R. 1:9-1 to -2, they do not fall under the criminal investigatory records exemption under OPRA. N.J.S.A. 47:1A-1.1; North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017). The Custodian shall therefore disclose the responsive records, with redactions where applicable.

3. The Custodian shall comply with conclusion Nos. 1 & 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.
² “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”
³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been made available to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.
4. The Custodian lawfully denied access to the photographs contained within the Complainant’s criminal case files. N.J.S.A. 47:1A-6. Such records are expressly prohibited from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); Executive Order No. 69 (Gov. Whitman, 1997); Leak v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009).

5. The Custodian lawfully denied access to the portions of the requested case files consisting of investigative and supplemental reports, evidence receipts, contact sheets, logs, handwritten notes, disposition letters, discovery lists, and inventory lists, video footage, and correspondence to and from the prosecutor’s office. N.J.S.A. 47:1A-6. Specifically, the aforementioned records are contained within the Complainant’s criminal case files and are not required by law to be made, maintained, or kept on file. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017); Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Nance v. Scotch Plains Twp. Police Dep’t, GRC Complaint No. 2003-125 (January 2005); Mawhinney v. Egg Harbor City Police Dep’t (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015); Boretsky v. Middlesex Cnty. Prosecutor’s Office, GRC Complaint No. 2016-220 (February 2018).

6. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request Item No. 2 seeking CAD reports pertaining to his criminal cases, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Interim Order Rendered by the Government Records Council
On The 12th Day of November 2019

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 14, 2019
STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting

Charles Richards\textsuperscript{1} Complainant

\textbf{v.}

Florence Township Police Department (Burlington)\textsuperscript{2} Custodial Agency

\textbf{Records Relevant to Complaint:} Hard copies of:


2) Copy of any and all CAD reports that relates to case no. 2014-0679/2014-0968.

\textbf{Custodian of Record:} Nancy L. Erlston

\textbf{Request Received by Custodian:} September 1, 2017

\textbf{Response Made by Custodian:} September 8, 2017

\textbf{GRC Complaint Received:} November 13, 2017

\textbf{Background}\textsuperscript{3}

\textbf{Request and Response:}


\textbf{Denial of Access Complaint:}

On November 13, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian improperly

\textsuperscript{1} No legal representation listed on record.

\textsuperscript{2} Represented by Kelly Grant, Esq., of Capehart Scatchard, P.A. (Trenton, NJ).

\textsuperscript{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.

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denied access to his request as exempt from access.

**Statement of Information:**

On November 24, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 1, 2017. The Custodian certified that she contacted the Township Administrator and Police Chief to review the request. The Custodian certified that she responded in writing on September 8, 2017, stating that the records were exempt from disclosure as criminal investigatory records.

For Item No. 1, the Custodian maintained that the responsive records contained within the case files were exempt as criminal investigatory records under OPRA. N.J.S.A. 47:1A-1.1, citing in part N. Jersey Media Grp., Inc., 229 N.J. at 541; Bent, 381 N.J. Super. at 37; and Janeczko, GR 2002-79, et al. The Custodian broke down each record contained within the case files in the SOI’s Item No. 9 Index. For Item No. 2, the Custodian certified that no CAD reports exist for either criminal case.

**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 v. Twp. of West Milford, 410 N.J. Super. at 371 (App. Div. 2009).

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc., 229 N.J. at 556. 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 551. 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,” Id. at 565, the Court refused to conclude that records retention schedules adopted by the State Records Committee meet OPRA’s “required by law” standard. Id. at 568.

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).4 Therefore, the Court reasoned that determining whether such records pertain to a criminal investigation requires a “case-by-case analysis.” Ibid. 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. Ibid. (emphasis added).

The Council has also long held that once a record is determined to be a criminal investigatory record, it is exempt from access. See Janeczko, GRC 2002-79 et al., 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.”5 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.”

Further, N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant’s record of convictions because judicial notice could have been taken of the records of any court in New Jersey, and appellant’s record of convictions were exclusively in New Jersey. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

Here, the GRC must determine whether the records sought meet the two-prong test required to be considered exempt under the criminal investigatory exemption. Regarding the first prong, the Complaint sought access to “full case print-outs” for two (2) cases. The Custodian denied access to the responsive records contained within the case files under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. Although the Custodian noted that all of the records reference indictable offenses, details are not provided. Accordingly, the GRC takes judicial notice of information provided from the New Jersey Department of Correction’s Offender Search (“Search”). The Search indicates that the Complainant was convicted and incarcerated for unlawful weapons possession and multiple counts of robbery.6 Thus, the totality of the evidence supports that the records at issue meet the criminal investigation prong.

4 This 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.
5 The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.
6 “Offender Details.” New Jersey Department of Corrections, https://www20.state.nj.us/DOC_Inmate/details?x=1525639&n=0 (last accessed October 10, 2019).
**Arrest Reports/Complaints**

The Council has held that arrest reports are disclosable, with redactions for information otherwise exempt under OPRA. See *Morgano v. Essex Cnty. Prosecutor’s Office*, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008). Further, although decided during the pendency of this complaint, *Bell v. Hudson Cnty. Prosecutor’s Office*, GRC Complaint No. 2017-86 (Interim Order dated May 21, 2019) is instructive. In that case, the complainant sought among other records, complaints contained within his criminal file. The Council held that since Complaint-Warrants were required by law to be made pursuant to R. 3:2-3(a), they did not fall under the criminal investigatory exemption and were thus subject to disclosure.

Here, the Custodian withheld arrest reports and complaints contained within the Complainant’s criminal files under the criminal investigatory exemption. However, in accordance with *Morgano* and *Bell*, such records are subject to disclosure under OPRA.

Accordingly, the Custodian unlawfully denied access to the arrest reports contained within his criminal files. N.J.S.A. 47:1A-6; *Morgano*, GRC 2007-156. Additionally, the Custodian unlawfully denied access to the complaints. *Bell*, GRC 2017-86. The Custodian shall therefore disclose the responsive records, with redactions where applicable.

**Subpoenas**

The GRC has previously held that a request for subpoenas, with accompanying identifiers, was sufficiently specific to be a valid request under OPRA. See *Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint Nos. 2011-128, 2011-129, 2011-130, 2011-131, & 2011-132 (Interim Order dated July 31, 2012). However, whether subpoenas are exempt from access under the criminal investigatory records exemption is an issue of first impression.

As mentioned previously, the subpoenas identified by the Custodian in her SOI’s Item 9 Index are all contained within the Complainant’s criminal files. Therefore, the remaining issue is whether subpoenas are required by law to be made, maintained, or kept on file. In accordance with R. 1:9-1 to -2, subpoenas are required by law to be made. Therefore, they are inapplicable to the criminal investigatory records exemption. *N. Jersey Media Grp., Inc.*, 229 N.J. at 551.

Accordingly, the Custodian unlawfully denied access to the subpoenas contained within his criminal files. N.J.S.A. 47:1A-6. Since subpoenas are required by law to be made under R. 1:9-1 to -2, they do not fall under the criminal investigatory records exemption under OPRA. N.J.S.A. 47:1A-1.1; *N. Jersey Media Grp., Inc.*, 229 N.J. at 551. The Custodian shall therefore disclose the responsive records, with redactions where applicable.

**Photographs**

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of
either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order. [N.J.S.A. 47:1A-9(a) (emphasis added).]

Executive Order No. 69 (Gov. Whitman, 1997) ("EO 69"), which superseded Executive Order No. 9 (Gov. Hughes, 1963) ("EO 9"), states that:

The following records shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the provisions of [OPRA], as amended: fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.

[Id.]

In *Leak v. Union Cnty. Prosecutor’s Office*, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009), the complainant sought, among other records, crime scene photographs from a 1994 trial. The custodian denied access to the photographs pursuant to N.J.S.A. 47:1A-1.1 and EO 69. The Council stated in relevant part:

Request Item No. 3 seeks crime scene photographs relating to a criminal trial in 1994 . . . EO 69, enacted on May 15, 1997, modified [EO 9] and Executive Order No. 123 (Gov. Kean, 1983). EO 69 holds that:

"[t]he following records shall not be deemed to be public records . . . pursuant to [OPRA], as amended: fingerprint cards, plates and photographs and similar criminal investigatory records . . . required to be made, maintained or kept by any State or local governmental agency." (Emphasis added.)

N.J.S.A. 47:1A-9(a) recognizes exemptions from disclosure included in state and federal statutes, regulations and executive orders. In this complaint, EO 69 explicitly states that criminal investigatory photographs shall not be deemed to be public records. Therefore, the crime scene photographs responsive to request Item No. 3 of the Complainant’s May 5, 2007 OPRA request are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9(a) and EO 69.

[Leak, GRC 2007-148 at 5-6.]

Additionally, the Council has previously found that photographs pertaining to a criminal investigation, especially those of a decedent or victim, are exempt from disclosure under OPRA. See *e.g.* *Barkley v. Essex Cnty. Prosecutor’s Office*, GRC Complaint No. 2011-221 (February
In the matter before the Council, the Custodian identified several photographs pertaining to both criminal matters. Like the request in Leak, such records are expressly prohibited from disclosure under EO 69.

Therefore, the Custodian lawfully denied access to the photographs contained within the Complainant’s criminal case files. N.J.S.A. 47:1A-6. Such records are expressly prohibited from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); EO 69; Leak, GRC 2007-148.

Misc. Reports/Video

The Council has previously held that many of the identified records were exempt from disclosure where they met the two (2) prong test required to be a criminal investigatory record under OPRA. See Nance v. Scotch Plains Twp. Police Dep’t, GRC Complaint No. 2003-125 (January 2005) (holding that incident reports are exempt from disclosure under OPRA as criminal investigatory records); Mawhinney v. Egg Harbor City Police Dep’t (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015) (holding that evidence receipt records were exempt from disclosure). The Council’s application of the two-prong test was later supported in N. Jersey Media Grp., Inc., 229 N.J. at 551. Although decided during the pendency of this complaint, in Boretsky v. Middlesex Cnty. Prosecutor’s Office, GRC Complaint No. 2016-220 (February 2018), the Council held that handwritten notes as well as correspondence by and between prosecutors and investigators created in the course of a criminal investigation also fell under the exemption.

Here, the Custodian identified within each case file records comprising investigative and supplemental reports, evidence receipts, contact sheets, logs, handwritten notes, disposition letters, discovery lists, inventory lists, video footage, and correspondence to and from the prosecutor’s office. There is no evidence in the record to suggest that such records are required by law to be made, maintained, or kept on file.

Therefore, the Custodian lawfully denied access to the portions of the requested case files consisting of investigative and supplemental reports, evidence receipts, contact sheets, logs, handwritten notes, disposition letters, discovery lists, and inventory lists, video footage, and correspondence to and from the prosecutor’s office. N.J.S.A. 47:1A-6. Specifically, the aforementioned records are contained within the Complainant’s criminal case files and are not required by law to be made, maintained, or kept on file. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp. Inc., 229 N.J. at 541; Janeczko, GRC 2002-79, et seq.; Nance, GRC 2003-125; Mawhinney, GRC 2015-85; Boretsky, GRC 2016-220.

CAD Reports

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, Item No. 2 of the Complainant’s OPRA request sought CAD reports pertaining to his criminal cases. On September 8, 2017, the Custodian informed the Complainant the records were exempt as criminal investigatory records. N.J.S.A. 47:1A-1.1. However, in the SOI the Custodian certified that no CAD reports exist for those criminal cases. Additionally, the Complainant provided no evidence to refute the Custodian’s certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request Item No. 2 seeking CAD reports pertaining to his criminal cases, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:


2. The Custodian unlawfully denied access to the subpoenas contained within his criminal files. N.J.S.A. 47:1A-6. Since subpoenas are required by law to be made under R. 1:9-1 to -2, they do not fall under the criminal investigatory records exemption under OPRA. N.J.S.A. 47:1A-1.1; North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017). The Custodian shall therefore disclose the responsive records, with redactions where applicable.

3. The Custodian shall comply with conclusion Nos. 1 & 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for
The Custodian lawfully denied access to the photographs contained within the Complainant’s criminal case files. N.J.S.A. 47:1A-6. Such records are expressly prohibited from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); Executive Order No. 69 (Gov. Whitman, 1997); Leak v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009).

The Custodian lawfully denied access to the portions of the requested case files consisting of investigative and supplemental reports, evidence receipts, contact sheets, logs, handwritten notes, disposition letters, discovery lists, and inventory lists, video footage, and correspondence to and from the prosecutor’s office. N.J.S.A. 47:1A-6. Specifically, the aforementioned records are contained within the Complainant’s criminal case files and are not required by law to be made, maintained, or kept on file. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017); Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Nance v. Scotch Plains Twp. Police Dep’t, GRC Complaint No. 2003-125 (January 2005); Mawhinney v. Egg Harbor City Police Dep’t (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015); Boretsky v. Middlesex Cnty. Prosecutor’s Office, GRC Complaint No. 2016-220 (February 2018).

The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request Item No. 2 seeking CAD reports pertaining to his criminal cases, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

October 30, 2019

8 The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

9 “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

10 Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been made available to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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