



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Mark L. Tompkins
Complainant

Complaint No. 2018-116

v.

Essex County Prosecutor's Office
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council ("Council") considered the December 10, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian bore her burden of proof that she timely responded to the Complainant's OPRA request on the fifth (5th) business day after receipt of same. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial of access to the subject OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The requested police reports, notes, and written statements are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 569 (2017); 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). Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6. Further, the GRC declines to address the Custodian's remaining asserted exemptions because it has found the requested records to be exempt on one basis.

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 7th Day of January 2020

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: January 9, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Mark L. Tompkins¹
Complainant**

GRC Complaint No. 2018-116

v.

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

Records Relevant to Complaint: Copies of:

1. Police reports ("filed [or] unfiled") by Officer Kevin Wright, Sr., Officer David Fortenberry, and Officer Bonnie Leverett "include[ing] but not limited to" eluding reports, and property reports regarding "W#2002-034287."
2. All "'notes' filed and unfiled" by Officers Wright, Fortenberry, and Leverett, "include[ing] but not limited to" Officer Wright's "NOTE" of documenting a license plate number on Route 78 in Newark, NJ on October 24, 2002. (Emphasis in original.)
3. All written statements "signed or unsigned," or memoranda summarizing oral statements of all persons "having relevant information" under Indictment No. 03-03-893.

Custodian of Record: LeeAnn Cunningham
Request Received by Custodian: June 6, 2018
Response Made by Custodian: June 13, 2018
GRC Complaint Received: June 28, 2018

Background³

Request and Response:

On May 21, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 13, 2018, the fifth (5th) business day after receipt of the OPRA request, the Custodian responded in writing via certified mail denying the Complainant's OPRA request for multiple reasons. First, the Custodian stated that responsive records were exempt under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 591 (2011); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 569 (2017). Second, the Custodian stated that the

¹ No legal representation listed on record.

² Represented by Courtney M. Gaccione, Esq. (Newark, 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.

Complainant's OPRA request intended to circumvent the discovery process, which is not OPRA's intent. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546-549 (App. Div. 2005). Third, the Custodian stated that the responsive records constituted unfiled discovery material exempt from disclosure. N.J.S.A. 47:1A-9(b); Drinker, Biddle & Reath, LLP v. N.J. Dep't of Law & Pub. Safety, Div. of Law, 421 N.J. Super. 489 (App Div. 2011). Fourth, the Custodian stated that the records also constituted "inter-agency or intra-agency advisory, consultative, or deliberative material" exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1.

On June 25, 2018, the Essex County Prosecutor's Office ("ECPO") received the Custodian's response letter back "Refused." On June 26, 2018, the Custodian resent her response via certified mail.

Denial of Access Complaint:

On June 28, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted he previously submitted OPRA requests for records like those at issue here and was denied each time. The Complainant contended that regarding the subject OPRA request, the Custodian failed to timely respond to it. The Complainant further argued that the Custodian knowingly failed to respond in order to conceal the non-existence of certain requested records.

The Complainant contended that the records sought were disclosable and "also discoverable." N.J. Court Rules, R. 3:13-3(c)(8). The Complainant contended that "notes" cannot be destroyed, even if a final report is prepared. The Complainant further argued there was no protective order in place on the requested records. The Complainant thus requested that the Council order disclosure of the records or a certification if some of the records no longer existed.

Statement of Information:

On July 11, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on June 6, 2018. The Custodian certified that her search included reviewing the trial and appellate files in State v. Tomkins, Indictment No. 03-03-0893. The Custodian certified that she responded in writing via certified mail on June 13, 2018 denying the Complainant's OPRA request. The Custodian also noted that she resent her response via certified mail on June 26, 2018 after the first mailing was returned "Refused."

The Custodian stated that, by way of background, the Complainant was found guilty by a trial jury of second-degree eluding. The Custodian averred that the guilty verdict resulted in the Complainant receiving an extended term of fifteen (15) years with the possibility of parole. The Custodian argued that she lawfully denied access to the Complainant's OPRA request for all the reasons stated in her June 13, 2018 response.

Additional Submissions:

On July 21, 2018, the Complainant submitted a letter rebutting the Custodian's SOI.

Therein, the Complainant stated that for records to be exempt from disclosure under the criminal investigatory exemption, they must meet the two-prong test. N.J.S.A. 47:1A-1.1. The Complainant argued that the criminal investigatory exemption did not apply to the requested records here because ECPO maintained them. The Complainant also contended that the “investigation” had been closed for “decades.”

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

In this matter, the Complainant alleged that the Custodian failed to timely respond to his OPRA request. In the SOI, the Custodian certified that she received the subject OPRA request on June 6, 2018. The Custodian further certified that she responded in writing via certified mail on June 13, 2018, five (5) business days after receiving the subject OPRA request, denying the Complainant access to the requested records. The Custodian affirmed that her response was refused by the Complainant’s place of commitment and returned, requiring her to resend same to the Complainant via certified mail on June 26, 2018. The Custodian provided as part of her SOI documentation supporting this certification. Thus, the evidence of record supports that the Custodian initially responded to the Complainant’s OPRA request in a timely manner.

Therefore, the Custodian bore her burden of proof that she timely responded to the Complainant’s OPRA request on the fifth (5th) business day after receipt of same. N.J.S.A. 47:1A-6. As such, there was no “deemed” denial of access to the subject OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

⁴ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

OPRA provides that:

[A] government record shall not include . . . any copy, reproduction or facsimile of any photograph, negative or print, including instant photographs and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner.

[N.J.S.A. 47:1A-1.1.]

Moreover, 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.” Id. 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. 371 (App. Div. 2009).

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc., 229 N.J. 541, 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 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).

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.

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 v. N.J. 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.”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 the instant complaint, the Complainant sought several records associated to a 2002 eluding charge of which he was subsequently convicted and sentenced to fifteen (15) years with parole eligibility. Those records included police reports, “notes,” and written statements from persons “having relevant information.” The Custodian denied access to the subject OPRA request on multiple bases to include the criminal investigatory exemption. In the Denial of Access Complaint, the Complainant contended that the requested records were disclosable and “discoverable.” In the SOI, the Custodian maintained her position that the requested records were criminal investigatory in nature. The Complainant subsequently refuted the SOI, arguing that the ECPO could not meet the two-prong criminal investigatory test because it maintained responsive records and that the investigation had been closed for “decades.”

A review of the evidence of record here, however, clearly supports that the Custodian’s denial was lawful. The records at issue clearly related to the criminal investigation into the Complainant’s eluding charge, of which he was later convicted. Further, there is no evidence to suggest that the requested records “were required by law” to be made. Thus, the records at issue clearly meet the two-prong test necessary to be considered criminal investigatory.

Additionally, the Complainant’s arguments against the Custodian’s denial of access are without merit. First, and as provided in N. Jersey Media Grp., Inc., the fact that ECPO may have maintained responsive records does not alone prove they were “required by law to be made”: retention schedules do not have the force of law. Id. at 568. Second, the GRC has long held that criminal investigatory records maintain their exempt status regardless of whether an investigation was complete. Janeczko, GRC 2002-79, *et seq.* Third, whether the requested records are “disclosable” in accordance with R. 3:13-3(c)(8) is of no moment because the Complainant sought them under OPRA. The GRC’s authority is limited to determining disclosability under OPRA and not discovery. N.J.S.A. 47:1A-7(b).

Accordingly, the requested police reports, notes, and written statements are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541; Janeczko, GRC 2002-79, *et seq.* Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6. Further, the GRC declines to address the Custodian’s remaining asserted exemptions because it has found the requested records to be exempt on one basis.

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian bore her burden of proof that she timely responded to the Complainant's OPRA request on the fifth (5th) business day after receipt of same. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial of access to the subject OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The requested police reports, notes, and written statements are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 569 (2017); 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). Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6. Further, the GRC declines to address the Custodian's remaining asserted exemptions because it has found the requested records to be exempt on one basis.

Prepared By: Frank F. Caruso
Executive Director

December 10, 2019