



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 28, 2020 Government Records Council Meeting

Bryden Williams
Complainant

Complaint No. 2019-21

v.

Union County Prosecutor's Office
Custodian of Record

At the July 28, 2020 public meeting, the Government Records Council ("Council") considered the July 21, 2020 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:

1. The portion of the Complainant's OPRA request seeking police reports is exempt from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 546 (2017); Janeczko v. N.J. Dep't of Law and Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 & 2002-80 (June 2004). Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.
2. The requested crime scene photographs responsive to the Complainant's OPRA request are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), and Executive Order No. 69 (Gov. Whitman, 1997). See Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009). Therefore, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

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 28th Day of July 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: July 30, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2020 Council Meeting**

**Bryden Williams¹
Complainant**

GRC Complaint No. 2019-21

v.

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

Records Relevant to Complaint: Hard copies via U.S. mail of:

1. Crime scene photographs from the 2006 shooting incident under docket number 07-02-0150; and
2. Any police reports concerning the residents of 517 East Sixth Street, Plainfield, N.J.

Custodian of Record: Mark Spivey

Request Received by Custodian: December 20, 2018

Response Made by Custodian: December 26, 2018

GRC Complaint Received: February 1, 2019

Background³

Request and Response:

On December 13, 2018 the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On December 26, 2018, the Custodian responded in writing denying the request for crime scene photographs as they sought criminal investigatory records. N.J.S.A. 47:1A-1.1. The Custodian also stated that although the police reports would also be exempt as criminal investigatory records, the Union County Prosecutor's Office ("UCPO") did not have the ability to search its files without access to a defendant's name.

Denial of Access Complaint:

On February 1, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he was not provided the

¹ No legal representation listed on record.

² Represented by April C. Bauknight, Esq., Assistant County Counsel (Elizabeth, N.J.).

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.

correct records from the prosecutor when requested in preparation for post-conviction relief. The Complainant asserted that because he did not obtain those records, he was denied post-conviction relief in 2017. The Complainant asserted that he subsequently sought the records through OPRA. The Complainant argued that the requested records were related to his case and should be released.

Statement of Information:⁴

On May 6, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 20, 2018. The Custodian certified that he responded in writing on December 26, 2018, denying access to the request.

The Custodian asserted that the Complainant appeared to be seeking discovery pertaining to his criminal case. The Custodian argued that the crime scene photographs were exempt from disclosure under N.J.S.A. 47:1A-3(b), which he asserted was OPRA’s criminal investigatory records exemption. The Custodian also maintained that the requested police reports would also be exempt from disclosure under the exemption, but UCPO also would not have the means of searching for said records without access to a defendant’s name.

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. 371 (App. Div. 2009).

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). 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.

⁴ On March 6, 2019, this complaint was referred for mediation. On March 29, 2019 this complaint was referred back to the GRC for adjudication.

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 v. N.J. Dep’t of Law and Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 & 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.”

Police Reports

The GRC has previously held that police reports 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). However, the Council has found these records can be disclosable where they did not meet the criminal investigatory test. See De La Cruz, Esq. v. City of Union City (Hudson), GRC Complaint No. 2015-14 (May 2017) (holding that certain incident reports were disclosable where they were not criminal investigatory, medical, or otherwise exempt under State regulations). In the instant complaint, the GRC must determine whether the responsive records meet the N. Jersey Media Grp. test and act accordingly based on the result.

Regarding the first prong, there is no evidence in the record to indicate that the records are required by law to be made in the Union County Prosecutor’s Office’s course of official business.

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.

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

As to the second prong, the Complainant asserts in his Denial of Access Complaint that he sought the requested police reports to aid in his post-conviction relief efforts. Based on the foregoing, the GRC is satisfied that the police reports fall under the criminal investigatory records exemption and are not subject to disclosure.

Accordingly, the portion of the Complainant's OPRA request seeking police reports is exempt from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., 229 N.J. at 546; Janeczko, GRC 2002-79, *et seq.* Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

Crime Scene Photographs

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.), certif. denied, 193 N.J. 292 (2007).⁷ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957).

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from

⁷ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

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. (emphasis added).]

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.]

In the matter before the Council, a portion of the Complainant’s OPRA request sought crime scene photographs pertaining to his criminal case. The GRC has already determined that the requested records pertain to a criminal investigation. Further, a plain reading of EO 69 and all relevant case law supports the conclusion that the photographs responsive to the subject OPRA

request are exempt from disclosure. Based on the forgoing, the GRC is satisfied that the Custodian lawfully denied access to this portion of the OPRA request.

Accordingly, the requested crime scene photographs responsive to the Complainant's OPRA request are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), and EO 69. See Leak, GRC 2007-148. Therefore, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The portion of the Complainant's OPRA request seeking police reports is exempt from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 546 (2017); Janeczko v. N.J. Dep't of Law and Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 & 2002-80 (June 2004). Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.
2. The requested crime scene photographs responsive to the Complainant's OPRA request are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), and Executive Order No. 69 (Gov. Whitman, 1997). See Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009). Therefore, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

Prepared By: Samuel A Rosado
Staff Attorney

July 21, 2020