



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 25, 2020 Government Records Council Meeting

Damon Williams
Complainant
v.
NJ State Police
Custodian of Record

Complaint No. 2019-58

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 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 Complainant’s OPRA request Item Nos. 1, 2, and 4 seeking fingerprints and information related to same maintained in New Jersey State Police’s Automated Fingerprint Identification System database seek records and information 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). Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6. Furthermore, the GRC declines to address whether any of the other asserted exemptions apply to the instant request items because same were lawfully denied on this basis.
2. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request Item No. 3 seeking New Jersey State Police’s Automated Fingerprint Identification System database manual, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 25th Day of August 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: August 27, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Damon Williams¹
Complainant**

GRC Complaint No. 2019-58

v.

**New Jersey State Police²
Custodial Agency**

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

1. “Current status of latent case (CC04891400055) . . . and any information regarding latent case (CC04891400055) in [Automated Fingerprint Identification System (“AFIS”)] data base.”
2. “Any associations of known finger to latent case (CC04891400055) in New Jersey [AFIS] data base.”
3. “New Jersey AFIS data base manual – SARAN MORPHO TRAK (Morpho Bis Latent Print submission manual) used by State agencies to identify and store latent prints in AFIS (latent) data base.”
4. “Any latent prints recovered from a crime scene identified as a known finger of Damon Williams SBI #244972C . . . recorded in any New Jersey AFIS file and/or record.”

Custodian of Record: DSFC Kristina Pados

Request Received by Custodian: February 4, 2019

Response Made by Custodian: February 27, 2019

GRC Complaint Received: March 15, 2019

Background³

Request and Response:

On February 4, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 13, 2019, the Custodian responded in writing stating that an extension of time to February 28, 2019 was needed to complete the request. On February 27, 2019, the Custodian responded in writing denying access to request as it did not seek access to specifically identifiable records, would require research, and

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Stephanie R. Dugger.

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.

was thus overbroad and improper, citing MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), and N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007).

The Custodian also stated that notwithstanding the above reasons for denial, Item Nos. 1, 2, and 4 would require access to the AFIS database, which could only be queried for law enforcement and criminal justice purposes. The Custodian stated that the request items were therefore exempt from access under OPRA's 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 (2017), aff'ing in part and rev'ing in part, N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015).

Lastly, the Custodian stated that a search was conducted for records responsive to Item No. 3, but later determined that the New Jersey State Police ("NJSP") did not make or maintain responsive records. The Custodian stated that therefore Item No. 3 was denied.

Denial of Access Complaint:

On March 15, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that pursuant to N. Jersey Media Grp., Inc., OPRA's criminal investigatory records exemption did not apply to latent fingerprints found at crime scenes or stored in AFIS databases because such records were required by law to be recorded. See N.J.S.A. 53:1-20.17 to -20.38, and N.J.A.C. 13:81-1.1(b). See also State v. Armour, 446 N.J. Super. 295 (App. Div.), certif. denied, 228 N.J. 239 (2016).

Statement of Information:⁴

On July 5, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on February 4, 2019. The Custodian certified that on February 13, 2019, she extended the deadline to respond to February 28, 2019. The Custodian certified that she responded in writing on February 27, 2019, stating that the request was invalid, that Item Nos. 1, 2, and 4 sought criminal investigatory records, and no responsive records exist for Item No. 3.

The Custodian, through Counsel, asserted that the requested records were properly withheld from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1. The Custodian asserted that this exemption encompasses records comprising the "work product" of law enforcement agency investigations, such as police reports, incident reports, and other investigation reports which pertained to a criminal investigation. See N. Jersey Media Grp., 229 N.J. at 569-70.

⁴ The Complaint was referred to mediation on April 4, 2019. The Complaint was referred back from mediation on June 14, 2019.

The Custodian asserted that in this matter, the Complainant's OPRA request Item Nos. 1, 2, and 4 sought the current status of his latent case, as well as any related information contained in the AFIS database. The Custodian argued that while fingerprints are required by law to be filed with the State Bureau of Identification, N.J.S.A. 53:1-13, the Complainant's request sought information and documentation related to his fingerprints, and therefore fell under the exemption. Additionally, the Custodian argued that if the Complainant was seeking copies of fingerprints themselves, such records would be exempt under OPRA's privacy exemption, N.J.S.A. 47:1A-1, and security exemption, N.J.S.A. 47:1A-1.1.

Regarding Item No. 3, the Custodian certified that she conducted a search for the requested AFIS manual. The Custodian further certified that no responsive records were located. The Custodian therefore argued that pursuant to Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), there was no unlawful denial of access based upon her certification that no responsive records exist.

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.

Item Nos. 1, 2, and 4

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., 229 N.J. 541. Therein, 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. In Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), the Council held 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.” Id.

Additionally, 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:

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.

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

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 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. (emphasis added).]

In the instant matter, the Complainant’s OPRA request Item Nos. 1 and 2 seek any information related to or associated with specifically identified latent fingerprints filed within NJSP’s AFIS database. Additionally, Item No. 4 seeks a copy of the fingerprints themselves.

It is not in dispute that the requested records pertain to a criminal investigation, as the Complainant’s request items reference fingerprints recovered from a crime scene. Additionally, the Custodian asserted in her response and SOI that the AFIS database referenced by the Complainant can only be queried for law enforcement and criminal justice purposes. Accordingly, a plain reading of EO 69 demonstrates that any records responsive to Item Nos. 1, 2, and 4 are exempt from disclosure, notwithstanding that fingerprints are required by law to be made pursuant to N.J.S.A. 53:1-13.

Therefore, the Complainant’s OPRA request Item Nos. 1, 2, and 4 seeking fingerprints and information related to same maintained in NJSP’s AFIS database seek records and information

exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), and EO 69. Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6. Furthermore, the GRC declines to address whether any of the other asserted exemptions apply to the instant request items because same were lawfully denied on this basis.

Item No. 3

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, the Complainant's OPRA request Item No. 3 sought the manual for NJSP's AFIS database. On February 27, 2019, the Custodian responded that a search did not locate any responsive records for the aforementioned records. The Custodian reaffirmed her contention that no responsive records exist in her SOI. Additionally, the Complainant provided no evidence to refute the Custodian's certification.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request Item No. 3 seeking NJSP's AFIS database manual, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant's OPRA request Item Nos. 1, 2, and 4 seeking fingerprints and information related to same maintained in New Jersey State Police's Automated Fingerprint Identification System database seek records and information 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). Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6. Furthermore, the GRC declines to address whether any of the other asserted exemptions apply to the instant request items because same were lawfully denied on this basis.
2. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request Item No. 3 seeking New Jersey State Police's Automated Fingerprint Identification System database manual, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado
Staff Attorney

August 18, 2020