



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**May 23, 2017 Government Records Council Meeting**

Jorge Nunez  
Complainant

v.

City of Hackensack (Bergen)  
Custodian of Record

Complaint No. 2015-300

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 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. Notwithstanding the Custodian’s production of the requested photograph in redacted and unredacted form, she was not obligated to provide the record pursuant to Executive Order No. 69 (Gov. Whitman, 1997) and N.J.S.A. 47:1A-9(a). *See also* Reitzler v. Egg Harbor Police Dep’t (Atlantic), GRC Complaint No. 2011-85 (January 2013). As such, there was no unlawful denial of access. N.J.S.A. 47:1A-6.
2. Notwithstanding the Custodian’s production of redacted copies of an arrest report and investigation report, such records are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. The records pertain to a Code of Criminal Justice violation, thus pertaining to a criminal investigation. *See* North Jersey Media Group, Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 106 (App. Div. 2015) appeal docketed, A-35-15 North Jersey Media Group, Inc. v. Twp. of Lyndhurst (076184). As such, there was no unlawful denial of 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 23<sup>rd</sup> Day of May, 2017

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: May 30, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 23, 2017 Council Meeting**

**Jorge Nuñez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-300**

v.

**City of Hackensack (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

1. “The identification photograph of [AJ] taken in connection with his arrest on 8/11/15”
2. “The police report generated by the arresting officer/s”
3. “The sworn statement ‘if any’ of representatives of the Stop and Shop related to [AJ]’s arrest.”
4. “Any and all police reports taken by the Hackensack Police Department in which [AJ] is listed as a complainant, a witness, subject of complaint or arrest for the time period of January 1, 2010 to present.”

**Custodian of Record:** Deborah Karlsson

**Request Received by Custodian:** September 4, 2015

**Response Made by Custodian:** September 16, 2015; September 17, 2015; September 18, 2015; September 22, 2015; September 25, 2015

**GRC Complaint Received:** September 23, 2015

**Background<sup>3</sup>**

**Request and Response:**

On September 4, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 16, 2015, the seventh (7<sup>th</sup>) business day after receipt, the Custodian issued a partial response in writing, providing a redacted investigation report involving AJ, and sought two (2) additional days to provide a full response. On September 17, 2015, the Custodian provided a redacted arrest report for AJ, which included a mugshot of AJ. However, the mugshot was redacted. Additionally, the Custodian stated that the Complainant would need to reach out to the municipal

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Alexander H. Carver, III, Esq. of Harwood Lloyd, LLC (Hackensack, NJ).

<sup>3</sup> 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.

court to obtain a copy of the complaint. That same day, the Complainant expressed dissatisfaction with the Custodian's response and requested a copy of the mugshot without redactions.

On September 18, 2015, the Custodian provided another copy of the arrest report but with a partial redaction made to AJ's arrest number within his mugshot. The Complainant responded that day, stating that the mugshot should be disclosed completely without redactions, or he would consider the arrest report unresponsive. The Custodian explained that the redacted portion is AJ's arrest number, which is used internally by the Hackensack Police Department ("HPD") to coordinate with the Federal Bureau of Investigation. Upon subsequent e-mail exchanges, the Custodian provided the Complainant with an enlarged photograph of AJ on September 18, 2015. However, the Complainant noted that the photograph was not the same as the mugshot contained in the arrest report.

On September 22, 2015, the Custodian provided the Complainant with an enlarged version of the mugshot photograph via e-mail, containing the same redaction as before. On September 24, 2015, the Complainant stated that his request sought "all materials" related to the arrest and sought a copy of related video recordings that he believes existed. On September 25, 2015, the Custodian provided store receipts related to the arrest and informed the Complainant that the HPD does not possess any surveillance video related to the arrest.

#### Denial of Access Complaint:

On September 23, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he sought the following from the Custodian:

1. Mug shot or any photos related to the arrest
2. Copy of receipts associated with arrest
3. Any or all other items that fall within the public records domain

Regarding the first and third items, the Complainant claimed that the Custodian provided only partial responses. On the second item, the Complainant claimed that the Custodian failed to provide a response. The Complainant did not provide any additional arguments regarding his complaint.

#### Statement of Information:

On October 14, 2015, the Custodian filed a Statement of Information ("SOP"). The Custodian certified that she received the Complainant's OPRA request on September 4, 2015. The Custodian certified that she provided a partial response in writing on September 16, 2015, and extended the time to provide a complete response for two (2) additional business days. On September 17, 2015, the Custodian responded via e-mail, providing additional responsive records containing redactions.

The Custodian certified that subsequent to the September 17, 2015 response, the Complainant and the Custodian exchanged communications via telephone and e-mail, where the Complainant sought an unredacted copy of the photograph/mugshot. The Custodian provided the Complainant with electronic and hard copies of two (2) photographs/mugshots of AJ through subsequent communications and in-person.

On September 25, 2015, the Custodian responded to the Complainant's September 24, 2017 request for video and receipts related to the incident at issue. The Custodian provided copies of store receipts and informed the Complainant that the HPD does not possess any surveillance video related to the incident.

The Custodian argued that, of the records the Complainant claimed he was denied in his September 4, 2015 OPRA request, the mugshot, receipts, and "any and all other items that fall within the public records domain," were not part of that request. The Custodian maintained that the Complainant sought those records after the Custodian's September 18, 2015 response. Therefore, the Custodian argued that she could not have unlawfully denied access to those records as they were not part of the Complainant's September 4, 2015 OPRA request.

### 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.

Criminal investigatory records are exempt from disclosure. N.J.S.A. 47:1A-1.1. A criminal investigatory record is defined 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. For a record to be 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: that is, "not be required by law to be made," and the record must "pertain[] to any criminal investigation or related civil enforcement proceeding." O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 380-381, 982 A.2d 459 (App. Div. 2009). *See also* North Jersey Media Group, Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, (App. Div. 2015) appeal docketed, A-35-15 North Jersey Media Group, Inc. v. Twp. of Lyndhurst (076184).

Additionally, OPRA states that "[t]he provisions of this act . . . shall not abrogate any exemption of a public record or government record from public access . . . made pursuant to Executive Order of the Governor." N.J.S.A. 47:1A-9(a). In turn, Executive Order No. 69 (Gov. Whitman, 1997), continued by Executive Order No. 21 (Gov. McGreevey, 2002) states that:

[t]he 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.

[E.O. 69 (emphasis added).]

In Reitzler v. Egg Harbor Police Dep't (Atlantic), GRC Complaint No. 2011-85 (January 2013), complainant sought photographs taken in connection with a police investigation. The custodian certified that the investigation was criminal in nature and exempt from disclosure. The Council agreed with the custodian, finding that E.O. 69 expressly prohibits investigation photographs from being deemed public records for the purposes of OPRA.

In the instant matter, the Complainant sought the identifying photograph of AJ taken in connection with his arrest by the HPD. When the Custodian provided a redacted copy of the photograph, the Complainant objected, asserting that the Custodian is obligated to provide the photograph without redactions. The evidence in the record demonstrates that the photograph was taken as part of a criminal investigation, similar to the photographs sought in Reitzler, *supra*.

Therefore, notwithstanding the Custodian's production of the requested photograph in redacted and unredacted form, she was not obligated to provide the record pursuant to E.O. 69 and N.J.S.A. 47:1A-9(a). *See also* Reitzler, GRC No. 2011-85. As such, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

Regarding the remaining items in the Complainant's September 4, 2015 OPRA request, the Appellate Division discussed how and when a document "pertains" to a criminal investigation. N. Jersey Media, 441 N.J. Super. at 103. There, the court highlighted examples of police activity that would not pertain to a criminal investigation, such as assisting an injured citizen in an accident, which may be logged under a police report or incident report. Id. at 105. However, the court concluded that the plaintiff's request for incident reports and police reports are all exempt as criminal investigatory records:

[T]o the extent the entries concern or address an officer's involvement in the search for the attempted burglary suspect, the pursuit of Ashford and Bynes once they were identified as suspects, the shooting of Ashford and arrest of Bynes, the subsequent investigational activities related to Bynes's arrest, and the [Shooting Response Team] investigation of the fatal shooting."

[N. Jersey Media, *supra* at 106.]

The court held that the events described above constituted "criminal investigative activities" that sufficiently pertain to an investigation for the purposes of the criminal investigatory records exemption. Id. at 105-106. Therefore, arrest and investigation reports involving a violation under New Jersey's Code of Criminal Justice ("CCJ") invariably pertain to a criminal investigation and would fall under the exemption.

In the instant matter, the remainder of the Complainant's September 4, 2015 OPRA request sought police reports and sworn statements relating to AJ's August 11, 2015 arrest for a CCJ violation, as well as any police report involving AJ as a party or witness from January 1, 2010, to present. The Complainant's requests inherently seek criminal investigative records if an arrest occurred and the Complainant was an involved party or witness.

Therefore, notwithstanding the Custodian's production of redacted copies of an arrest report and investigation report, such records are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. The records pertain to a CCJ violation, thus pertaining to a criminal investigation. *See N. Jersey Media*, 441 N.J. Super. at 106. As such, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

Additionally, the Complainant asserted that the Custodian, in his response to the September 4, 2015 OPRA request, only partially provided photographs and mugshots related to the incident, failed to provide copies of store receipts, and failed to respond to a catchall request for "any and all other items that fall within the public records domain." However, the evidence in the record demonstrates that the requests for receipts and the catchall request for documents were not part of the Complainant's September 4, 2015 request. Moreover, the issue of the request for photographs related to the arrest has been addressed above. Thus, the GRC declines to address the merits of these requests and responses.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Notwithstanding the Custodian's production of the requested photograph in redacted and unredacted form, she was not obligated to provide the record pursuant to Executive Order No. 69 (Gov. Whitman, 1997) and N.J.S.A. 47:1A-9(a). *See also Reitzler v. Egg Harbor Police Dep't (Atlantic)*, GRC Complaint No. 2011-85 (January 2013). As such, there was no unlawful denial of access. N.J.S.A. 47:1A-6.
2. Notwithstanding the Custodian's production of redacted copies of an arrest report and investigation report, such records are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. The records pertain to a Code of Criminal Justice violation, thus pertaining to a criminal investigation. *See North Jersey Media Group, Inc. v. Twp. of Lyndhurst*, 441 N.J. Super. 70, 106 (App. Div. 2015) appeal docketed, A-35-15 North Jersey Media Group, Inc. v. Twp. of Lyndhurst (076184). As such, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

Prepared By: Samuel A. Rosado, Esq.  
Staff Attorney

May 16, 2017