



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 30, 2018 Government Records Council Meeting

Boris Boretsky
Complainant

Complaint No. 2016-219

v.

Middlesex County Examiner's Office
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council ("Council") considered the January 23, 2018 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 request Item No. 2 is an invalid request for information that fails to seek identifiable government records. Specifically, the Complainant asks the Custodian to list and describe the procedures performed during a specific autopsy, which is not a request for a government record under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Thus, the Custodian did not unlawfully deny access to same. N.J.S.A. 47:1A-6; LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Accordingly, the GRC declines to address whether the records would be denied under N.J.S.A. 47:1A-2.2(a).
2. The Custodian lawfully denied access to Item No. 3 of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, notes taken by medical examiners and law enforcement personnel pertaining to the Complainant's criminal case are exempt from disclosure as criminal investigatory records under N.J.S.A. 47:1A-1.1. N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 564 (2017); O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); and Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).
3. The Custodian lawfully denied access to Item No. 1 of the Complainant's OPRA request seeking audio recordings taken during the autopsy performed upon Saoule Moukhametova. N.J.S.A. 47:1A-6. The evidence in the record demonstrates that the Complainant was convicted of an indictable offense, that his victim was Saoule



Moukhametova, and thus prohibited from obtaining records pertaining to her under OPRA. N.J.S.A. 47:1A-2.2(a).

4. Although the Custodian denied access to Item Nos. 4 & 5 on a separate basis, the records were lawfully denied, as autopsy photographs and prints are not government records pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6. Accordingly, the GRC declines to address whether the records would be denied under N.J.S.A. 47:1A-2.2(a).

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 30th Day of January, 2018

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: February 2, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
January 30, 2018 Council Meeting**

**Boris Boretsky¹
Complainant**

GRC Complaint No. 2016-219

v.

**Middlesex County Examiner's Office²
Custodial Agency**

Records Relevant to Complaint:

1. Audio tape (Certified copy and transcript) of contemporaneous recording of procedures performed by Assistant Medical Examiner, Middlesex County, Dr. Andrew L. Falzon, ME: No. A-02-063, during the Autopsy of the body of Saoule Moukhtametova conducted on March 4, 2002, Case ID No. 12-02-0316.
2. List and describe the sequence of all procedures performed at the above referenced autopsy proscribed by the Forensic Autopsy protocol.
3. All notes, if any, taken by either: Medical Examiner Dr. Falzon; Investigator James O'Brien of the Middlesex County Prosecutor's Office; Detective James Ryan of the South Brunswick Police Department; and Forensic Technician James C. Jones of the Middlesex County Medical Examiner Office.
4. All Autopsy photographs in color.
5. Single frontal view chest X-Ray of Saoule Moukhametova.

Custodian of Record: Jeanne-Marie Scollo, Esq.

Request Received by Custodian: June 17, 2016³

Response Made by Custodian: June 26, 2016

GRC Complaint Received: August 10, 2016

Background⁴

Request and Response:

On June 10, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 24, 2016 the Custodian

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The OPRA request was received by the Medical Examiner's Office on June 17, 2016, then forwarded to the Custodian. The record is unclear as to when the Custodian received the request.

⁴ 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

responded in writing, denying access to responsive records under N.J.S.A. 47:1A-2.2(a), which restricts persons convicted of an indictable offense from access records containing personal information pertaining to the person's victim. Additionally, the Custodian denied access to the records under N.J.S.A. 47:1A-1.1, asserting that the requested documents are criminal investigatory records.

Denial of Access Complaint:

On August 10, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant did not elaborate on his claim of an unlawful denial of access.

Statement of Information:

On December 7, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that the Medical Examiner's Office received the Complainant's OPRA request on June 17, 2016, and subsequently forwarded to her. The Custodian certified that she responded in writing on June 24, 2016, denying access to the requested records.

The Custodian certified that the Complainant was charged and convicted of, among other crimes, first-degree murder under N.J.S.A. 2C:11-3(a)(2). The Custodian also certified that the Complainant's victim was Saoule Moukhametova, and is the subject of this OPRA request.

The Custodian argued that the Complainant is not entitled to any the records sought pursuant to N.J.S.A. 47:1A-2.2(a), which prohibits a convicted felon from accessing records pertaining to his victim(s) via OPRA. Moreover, the Custodian claimed that the records are criminal investigatory records under N.J.S.A. 47:1A-1.1, and therefore not subject to disclosure.

Analysis

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.

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, No. A-2122-05T2, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. Apr. 2, 2007), certify. denied, 193 N.J. 292 (2007).⁵ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Slip op. at 3. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. Ibid. 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. Id. at 2. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. Paff, supra, slip op. at 2. The complainant argued that the

⁵ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. Id. at 3-4. 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.”

[Id. at 4.]

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).

[Id. at 4-5.]

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

[MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007).

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004).

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant's request was a request for information, holding that ". . . because request item no. 2 of the complainant's June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to [MAG] . . ." Id. at 6. See also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).

Item No. 2

Here, the Complainant requested that the Custodian "list and describe" the procedures performed on the autopsy referenced in Item No. 2. Notwithstanding the fact that the request involves the Complainant's victim, the request seeks information and asks the Custodian to create a record by listing and describing the process performed by the medical examiner. Similar to LaMantia, the Item No. 2 fails to seek specific, identifiable records, and asks the Custodian to create a new record.

Therefore, the Complainant's request Item No. 2 is an invalid request for information that fails to seek identifiable government records. Specifically, the Complainant asks the Custodian to list and describe the procedures performed during a specific autopsy, which is not a request for a government record under OPRA. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180. Thus, the Custodian did not unlawfully deny access to same. N.J.S.A. 47:1A-6; LaMantia, GRC 2008-140; Ohlson, GRC 2007-233. Accordingly, the GRC declines to address whether the records would be denied under N.J.S.A. 47:1A-2.2(a).

Unlawful Denial of Access

Item No. 1

OPRA restricts requestors convicted of an indictable offense from access to records containing personally identifying information of the requestor's victim. N.J.S.A. 47:1A-2.2(a). Such information includes the victim's medical history. Id. The requestor may only access this information to aid in their defense via court motion. N.J.S.A. 47:1A-2.2(b).

In the instant matter, the Complainant sought any audio recording taken during an autopsy performed on Saoule Moukhametova. In her SOI, the Custodian certified that the Complainant was convicted of murdering Saoule Moukhametova. Therefore, the Complainant is seeking the medical information of his victim, which is prohibited under N.J.S.A. 47:1A-2.2(a).

Accordingly, the Custodian lawfully denied access to Item No. 1 of the Complainant's OPRA request seeking audio recordings taken during the autopsy performed upon Saoule Moukhametova. N.J.S.A. 47:1A-6. The evidence in the record demonstrates that the Complainant was convicted of an indictable offense, that his victim was Saoule Moukhametova, and thus prohibited from obtaining records pertaining to her under OPRA. N.J.S.A. 47:1A-2.2(a).

Item No. 3

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). The Court affirmed that OPRA’s criminal investigatory records exemption applies to police records which originate from a criminal investigation. N. Jersey Media Grp., 229 N.J. at 551. However, the Court held 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 565. Although the Court agreed with the Appellate Division’s finding 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. Id. at 567-68.

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. Id. at 569. 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. (*citing* N. Jersey Media Grp., 441 N.J. Super. at 105).⁷ Therefore, the Court reasoned that determining whether such records pertain to a criminal investigation requires a “case-by-case analysis.” Id. 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. NJ 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.”⁸ Moreover, with respect to concluded investigations, the Council pointed out in Janeczko that, “[the

⁷This 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.

⁸ The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete.”

In the instant matter, the Complainant sought any notes taken by medical examiners and law enforcement personnel regarding a criminal investigation, identified by the Complainant as “State v. Boris Boretsky, Case (ID No. 12050316).” In conjunction with the Custodian’s certification, any responsive records to Item No. 3 would satisfy the second prong of the N. Jersey Media Grp., in that they would pertain to a criminal investigation. 229 N.J. at 569. Additionally, there is no evidence in the record demonstrating that “notes” taken by the identified personnel are required to by law to be made, thereby satisfying the first prong of the test.

Therefore, the Custodian lawfully denied access to Item No. 3 of the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Specifically, notes taken by medical examiners and law enforcement personnel pertaining to the Complainant’s criminal case are exempt from disclosure as criminal investigatory records under N.J.S.A. 47:1A-1.1. N. Jersey Media Grp., 229 N.J. at 564; O’Shea, 410 N.J. Super. at 371; and Janeczko, GRC 2002-79, *et seq.*

Item Nos. 4 & 5

OPRA provides that photographs, negatives, prints, and video recordings of a deceased body taken by or for a medical examiner in the course of an autopsy are not government records under N.J.S.A. 47:1A-1.1. This provision is subject to specific exceptions:

- When used in a criminal action or proceeding in this State which relates to the death of that person,
- For the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred,
- For use in the field of forensic pathology or for use in medical or scientific education or research, or
- For use by any law enforcement agency in this State or any other state or federal law enforcement agency[.]

[Id.]

In the instant matter, the Complainant’s request Item Nos. 4 & 5 sought all autopsy photographs in color and an x-ray of the victim’s chest. As the Complainant was an incarcerated individual⁹ at the time, his OPRA request made in an individual capacity does not fall under any of the stated exceptions listed above.

Therefore, although the Custodian denied access to Item Nos. 4 & 5 on a separate basis, the records were lawfully denied, as autopsy photographs and prints are not government records

⁹ In addition to relying upon the Custodian’s certification, the GRC notes that the Complainant’s mailing address at the time of the OPRA request was at New Jersey State Prison.

pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6. Accordingly, the Council declines to address whether the records would be denied under N.J.S.A. 47:1A-2.2(a).

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Complainant's request Item No. 2 is an invalid request for information that fails to seek identifiable government records. Specifically, the Complainant asks the Custodian to list and describe the procedures performed during a specific autopsy, which is not a request for a government record under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Thus, the Custodian did not unlawfully deny access to same. N.J.S.A. 47:1A-6; LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Accordingly, the GRC declines to address whether the records would be denied under N.J.S.A. 47:1A-2.2(a).
2. The Custodian lawfully denied access to Item No. 3 of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, notes taken by medical examiners and law enforcement personnel pertaining to the Complainant's criminal case are exempt from disclosure as criminal investigatory records under N.J.S.A. 47:1A-1.1. N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 564 (2017); O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); and Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).
3. The Custodian lawfully denied access to Item No. 1 of the Complainant's OPRA request seeking audio recordings taken during the autopsy performed upon Saoule Moukhametova. N.J.S.A. 47:1A-6. The evidence in the record demonstrates that the Complainant was convicted of an indictable offense, that his victim was Saoule Moukhametova, and thus prohibited from obtaining records pertaining to her under OPRA. N.J.S.A. 47:1A-2.2(a).
4. Although the Custodian denied access to Item Nos. 4 & 5 on a separate basis, the records were lawfully denied, as autopsy photographs and prints are not government records pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6. Accordingly, the GRC declines to address whether the records would be denied under N.J.S.A. 47:1A-2.2(a).

Prepared By: Samuel A. Rosado
Staff Attorney

January 23, 2018