



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

August 28, 2018 Government Records Council Meeting

Anthony Franklin
Complainant

Complaint No. 2016-308

v.

Passaic County Prosecutor's Office
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council ("Council") considered the August 21, 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 portion of the Complainant's request seeking "Promis Gavel" represents an invalid request for information that fails to seek identifiable government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to these items. N.J.S.A. 47:1A-6; Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2013-244 (Interim Order dated April 29, 2014).
2. The Custodian lawfully denied access to the portion of the Complainant's OPRA request seeking "rap sheets." N.J.S.A. 47:1A-6. Specifically, Executive Order No. 9 (Gov. Hughes, 1963) provides that said records are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(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 28th Day of August, 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: August 30, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Anthony Franklin¹
Complainant**

GRC Complaint No. 2016-308

v.

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

Records Relevant to Complaint: Copies of criminal “rap sheets” and “Promis Gavel” for six (6) specifically identified individuals.

Custodian of Record: Lisa A. Verlardi
Request Received by Custodian: November 4, 2016
Response Made by Custodian: November 15, 2016
GRC Complaint Received: December 6, 2016

Background³

Request and Response:

On November 1, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request⁴ to the Custodian seeking the above-mentioned records. On November 15, 2016, the Custodian responded in writing denying access to the requested rap sheets pursuant to the National Crime Prevention and Privacy Compact (“Compact”). N.J.S.A. 53:1-32. See also N.J.S.A. 53:1-20.37; N.J.A.C. 13:59-1, *et seq.* The Custodian further denied the Complainant’s request for “Promis Gavel” because the request failed to identify any responsive records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); Asarnow v. Dep’t of Labor, GRC Complaint No. 2006-24 (May 2006) Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008); JBL v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2008-205 (June 2011).

¹ No legal representation listed on record.

² Represented by William J. Pascrell, III, Esq. (Paterson, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

⁴ The GRC notes that the Complainant submitted his request on a “New Jersey Judiciary Records Request Form.” Although the request did not cite to OPRA in any way, the Custodian responded to such as an OPRA request.
Anthony Franklin v. Passaic County Prosecutor’s Office, 2016-308 – Findings and Recommendations of the Council Staff

Denial of Access Complaint:

On December 6, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that each of the identified individuals was a witness in Indictment No. 00-08-0930-1. The Complainant argued that the Passaic County Prosecutor’s Office (“PCPO”) never provided him with this information, even though the United States Supreme Court held that they must disclose to him information favorable to his position. Brady v. Maryland, 373 U.S. 83 (1963); N.J.S.A. 53:1-20.6. The Complainant also noted that he wished to obtain the rap sheets as evidence in his United State District Court appeal regarding his unconstitutional conviction and confinement.

Statement of Information:

On January 10, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 4, 2016. The Custodian certified that she responded in writing on November 15, 2016 denying access to the Complainant’s OPRA request for multiple reasons.

Initially, the Custodian noted that she accidentally processed the Complainant’s request, which was on a “New Jersey Judiciary Records Request Form,” as an OPRA request. The Custodian stated that she realized the mistake when completing the SOI, so she forwarded the request to “correct department personnel.”

Regarding criminal rap sheets, the Custodian argued that she lawfully denied access to responsive records because they are exempt under N.J.A.C. 13:59-1.2. The Custodian asserted that N.J.A.C. 13:59-1.6(c) prohibited a public employee from permitting access to rap sheets beyond those exceptions cited specifically in the regulations. The Custodian further noted that multiple statutes, regulations, executive orders, and case law support her denial of access. The Custodian specified that the Compact is one such statute. N.J.S.A. 53:1-32. Additionally, the Custodian noted that the New Jersey State Police, Department of Corrections, and Adult County Correctional Facilities all maintain regulations barring disclosure of criminal rap sheets. N.J.A.C. 13:59-1.6(c); N.J.A.C. 10A:22-2.3(a)(6); N.J.S.A. 10A:31-6.10(a)(6). The Custodian finally argued that relevant case law and executive orders supported her denial of access, including Morgano, GRC 2007-156, Executive Order No. 9 (Gov. Hughes, 1963)(“EO 9”), and Executive Order No. 69 (Gov. Whitman, 1997).

Regarding the portion of the request seeking “Promis Gavel” for six (6) individuals, the Custodian argued that the Complainant’s OPRA request was invalid. The Custodian stated that the Promis Gavel was a computerized court information system. The Custodian contended that in accordance with Bent, 381 N.J. Super. 30, simply referring to the system was not akin to identifying a specific record. Further, the Custodian contended that OPRA did not require her to conduct research in order to respond to an OPRA request. MAG, 375 N.J. Super. 534, 546.

Analysis

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, 375 N.J. Super. at 546 (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (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, 381 N.J. Super. at 37,⁵ N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Regarding the portion of the request seeking “Promis Gavel,” the Council has previously determined that such a request is invalid. In Barkley v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2013-244 (Interim Order dated April 29, 2014), the Council held that the complainant’s request items seeking “Promis Gave[e]” in two cases was invalid, reasoning that:

The promis gavel computer system is an automated criminal case tracking system that captures base information concerning defendants. The system is a searchable database in which only certain information is available to the public at public access terminals either on the Internet or at Superior courthouses in each County in the State. Thus, on its face, a promis gavel is not a record but a system by which basic

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004). Anthony Franklin v. Passaic County Prosecutor’s Office, 2016-308 – Findings and Recommendations of the Council Staff

information can be retrieved. To this end, the GRC is satisfied that these request items are invalid because they seek a system and not a record.

[Id. at 6 (footnote omitted). See also McClain v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2011-202 (July 2012).]

Here, the Complainant sought “Promis Gavel” for six (6) individuals. The Custodian responded denied this portion of the request as invalid because to identify a “government record.” The facts here are on point with those in Barkley; thus, the GRC is satisfied that the same outcome is appropriate.

Accordingly, the portion of the Complainant’s request seeking “Promis Gavel” represents an invalid request for information that fails to seek identifiable government records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to these items. N.J.S.A. 47:1A-6; Barkley, GRC 2013-244.

Finally, in light of the Supreme Court of New Jersey’s decision in Paff v. Twp. of Galloway, 227 N.J. 24 (2017),⁶ the GRC adds the following regarding the Custodian’s requirement to access the Promis Gavel system. The Promis Gavel system is available on the internet through the New Jersey Courts. While the system is accessible by anyone with an internet connection, the search engine is comprised of “computerized records in the custody and control of”⁷ the Judiciary. Thus, even if the Custodian had an obligation to provide “information stored or maintained electronically” as required in Paff, it is clear that the PCPO does not store or maintain the Promis Gavel system. Requiring the Custodian to utilize the Promis Gavel system to respond to this OPRA request would be akin to requiring an agency to retrieve and disclose GRC decisions from the GRC’s internet-based searchable database.

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.

Regarding criminal history background information, colloquially known as criminal “rap sheets,” OPRA provides that it “shall not abrogate any exemption . . . made pursuant to . . . any . . . *Executive Order of the Governor* . . .” N.J.S.A. 47:1A-9(a) (emphasis added). To this end, EO 9 provides that “criminal records required to be made, maintained[,] and kept pursuant to [N.J.S.A. 53:1-20.1] and [N.J.S.A. 53:1-20.2]” are exempt from disclosure. Id. at 2(f). EO 9 is relevant with regard to rap sheets because N.J.S.A. 53:1-20.1 requires this information be collected and submitted into the criminal history background check database through the State Bureau of

⁶ In Paff, the Court held that extracting basic electronic data from an e-mail account in the form of a log was not akin to creating a record because “information stored or maintained electronically” is a government record under OPRA

⁷ <https://portal.njcourts.gov/webe4/ExternalPGPA/CaptchaServlet> (accessed August 9, 2018).
Anthony Franklin v. Passaic County Prosecutor’s Office, 2016-308 – Findings and Recommendations of the Council Staff

Identification (“SBI”). Additionally, N.J.S.A. 53:1-20.2 provides that bureaus of identification are established in “the office of the sheriff and . . . prosecutors . . .” Id. Thus, it follows that any information coalesced by county and State SBIs are exempt from access under OPRA in accordance with N.J.S.A. 47:1A-9(a) and EO 9.

To further emphasize the confidential nature of rap sheet information, State agencies have promulgated regulations limiting dissemination to a specific process (with multiple limitations) or outright exempted access to them. See N.J.A.C. 13:59-1 et seq. (New Jersey State Police regulations providing for the specific process of obtaining background checks and the limitations on who can access this information); N.J.A.C. 10A:22-2.3(a)(6) (New Jersey Department of Corrections regulation exempting from access “[c]omprehensive criminal history information (rap sheet) . . .”). Thus, all relevant statutes, regulations, and executive orders addressing rap sheets support that they are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); EO 9.

Of additional note, the Council recently addressed the disclosability of “rap sheets” under OPRA in Lewis v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018). In that case, the Council held that “rap sheets” were exempt from disclosure under N.J.S.A. 47:1A-9(a) and EO 9. In the instant complaint, the Complainant sought access to “rap sheets” for six (6) individuals. The Custodian denied this portion of the OPRA request N.J.S.A. 53:1-20.5 and 20.37, as well as N.J.A.C. 13:59-1 et seq. In light of the above, the GRC is persuaded that the Custodian’s denial of access was lawful.

Accordingly, the Custodian lawfully denied access to the portion of the Complainant’s OPRA request seeking “rap sheets.” N.J.S.A. 47:1A-6. Specifically, EO 9 provides that said records are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The portion of the Complainant’s request seeking “Promis Gavel” represents an invalid request for information that fails to seek identifiable government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to these items. N.J.S.A. 47:1A-6; Barkley v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2013-244 (Interim Order dated April 29, 2014).
2. The Custodian lawfully denied access to the portion of the Complainant’s OPRA request seeking “rap sheets.” N.J.S.A. 47:1A-6. Specifically, Executive Order No. 9 (Gov. Hughes, 1963) provides that said records are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

August 21, 2018