



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 21, 2019 Government Records Council Meeting

Kafele K. Bomani
Complainant

Complaint No. 2017-174

v.

Atlantic County Prosecutor's Office
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council ("Council") considered the May 14, 2019 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 Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 1 through 3 seeking transcript for specific dates. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Records responsive to the Complainant's OPRA request item Nos. 4 through 6 are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. N.J. Dep't of Law & Pub. Safety, GRC Complaint No. 2002-79, *et seq.* (June 2004). The Custodian thus lawfully denied access to said records. 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 21st Day of May 2019

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 22, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
May 21, 2019 Council Meeting**

**Kafele K. Bomani¹
Complainant**

GRC Complaint No. 2017-174

v.

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

Records Relevant to Complaint: Copies of the following regarding Indictment No. 07-12-2712/09-08-2019:

1. September 15, 2009 transcript.
2. March 11, 2008 transcript.
3. April 8, 2008 transcript.
4. Any and all "surveillance stills."
5. Any and all statements written by Ganda Lameck.
6. Laminated "still image" containing "numerous amount[s] of stills."

Custodian of Record: Melinda A. Harrigan

Request Received by Custodian: August 10, 2017

Response Made by Custodian: August 14, 2017

GRC Complaint Received: August 25, 2017

Background³

Request and Response:

On August 4, 2017, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On August 14, 2017, the Custodian responded in writing stating that the Atlantic County Prosecutor's Office ("ACPO") did not possess any of the requested transcripts. The Custodian also denied access to the remaining request items under the criminal investigatory exemption. North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 223 N.J. 553 (2015);⁴ Janeczko v. N.J. Dep't of Law & Pub. Safety, GRC Complaint No. 2002-79, *et seq.* (June 2004).

¹ No legal representation listed on record.

² No legal representation listed on record.

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 Herein, the Supreme Court granted motion for leave to appeal N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015).

Denial of Access Complaint:

On August 25, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s denial of access but provided no additional arguments as to why he believed he was unlawfully denied access.

Statement of Information:

On September 20, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 10, 2017. The Custodian certified that her search included using the indictment number on ACPO’s InfoShare system, as well as searching the physical paper file. The Custodian certified that she responded in writing on August 14, 2017 denying the request on two (2) bases.

Regarding the requested transcripts requested in OPRA request item Nos. 1, 2, and 3, the Custodian affirmed that ACPO was not required to obtain or maintain transcripts. The Custodian certified that ACPO does not receive transcripts in many cases. The Custodian averred that in the instance ACPO does receive transcripts, they are scanned and saved in the InfoShare system with hard copies placed in the physical file. The Custodian certified that she searched both locations and was unable to find any responsive transcripts. The Custodian thus contended that she lawfully denied access to these request items.

Regarding the remaining OPRA request items, the Custodian argued that same were exempt because they met the two-prong test necessary to be criminal investigatory records as set forth in N. Jersey Media Grp., 229 N.J. 541 (2017) (citing O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 380-381 (App. Div. 2006)). The Custodian argued that this was regardless of the status of the investigation. Janeczko, GRC 2002-79. The Custodian averred that the requested stills and witness statement were not required by law to be maintained. Further, the Custodian averred that the records pertained to a criminal investigation that was the subject of a trial. The Custodian contended that even though the trial ended, the records remained criminal investigatory and thus not subject to disclosure under OPRA.

Additional Submissions:

On May 22, 2018, the Complainant sent a letter to the GRC requesting an update on this complaint. The Complainant also requested that the GRC explain why the requested records “are “considered criminal investigatory.” The Complainant also asserted that those records should have been provided as “discovery material under [New Jersey Court Rules R.] 3:13-3(b)(c).”⁵

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a

⁵ The GRC responded providing a status update and that it could not address the Complainant’s question because this complaint was currently pending adjudication.

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.

Transcripts

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 Nos. 1, 2, and 3 sought transcripts for different dates. The Custodian initially responded stating that the ACPO did not maintain any responsive transcripts. In the SOI, the Custodian certified that it was uncommon for the ACPO to receive transcripts, but any received would be saved in the ACPO’s InfoShare system and stored in the physical file. The Custodian affirmed that she searched both InfoShare and the physical file but did not locate any transcripts. Thus, the Custodian certified to the nonexistence of responsive transcripts. All the foregoing substantiates the Custodian’s denial on the basis that no records existed.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request item Nos. 1 through 3 seeking transcript for specific dates. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Surveillance stills, Statements, and Laminated still

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, 410 N.J. Super. 371.

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., 229 N.J. 541, 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.

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).⁶ 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 also long held that once a record is determined to be a criminal investigatory record, it is exempt from access. See Janeczko, GRC 2002-79, 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."⁷ 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."

Here, the Complainant's OPRA request item Nos. 4, 5, and 6 sought access surveillance stills, witness statements, and a laminated collage of stills shown during his trial in Indictment No. 07-12-2712. At the time of her denial, as well as in the SOI, the Custodian argued that the responsive reports were exempt as criminal investigatory records under N.J.S.A. 47:1A-1.1 because they were not required by law to be made and pertained to a criminal investigation. The Complainant did not provide additional arguments against the denial but did posit the question as to why he was not provided these records as "discovery material under [R.] 3:13-3(b)(c)."⁸

In accordance with N. Jersey Media Grp., the GRC must determine whether the reports meet the two-prong test necessary to be considered criminal investigatory records. As to the first prong, there is no evidence in the record to indicate that the records sought were required by law to be made in the ACPO's course of official business. As to the second prong, the Custodian certified in the SOI that these records related to a criminal investigation which resulted in the Complainant being on trial. The Custodian further averred that whether the requested records were shown during the trial or admitted into evidence did not abrogate the exemption. Further, the Complainant is currently incarcerated as a result of the indictment and the ensuing trial.⁹ Based on the foregoing, the GRC is satisfied that the records sought in ORPA request item Nos. 4 through 6 fell within the criminal-investigatory exemption and were not subject to disclosure.

Accordingly, records responsive to the Complainant's OPRA request item Nos. 4 through 6 are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., 229 N.J. 541; Janeczko, GRC 2002-79, *et seq.* The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6.

⁶This 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.

⁷ The GRC's ruling was affirmed in an unpublished opinion of the Appellate Division.

⁸ The GRC has not authority to adjudicate complaints regarding discovery. N.J.S.A. 47:1A-7(b). See also Brunson v. State of N.J., Office of the Attorney General, GRC Complaint No. 2013-248 (November 2013) at FN 1.

⁹ https://www20.state.nj.us/DOC_Inmate/details?x=1007165&n=0 (accessed May 2, 2019).

Kafele K. Bomani v. Atlantic County Prosecutor's Office, 2017-174 – Findings and Recommendations of the Council Staff

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 1 through 3 seeking transcript for specific dates. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Records responsive to the Complainant's OPRA request item Nos. 4 through 6 are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. N.J. Dep't of Law & Pub. Safety, GRC Complaint No. 2002-79, *et seq.* (June 2004). The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Acting Executive Director

May 14, 2019