



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 30, 2019 Government Records Council Meeting

Hamid Abdul-Shabazz
Complainant

Complaint No. 2017-41

v.

Passaic County Prosecutor's Office
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council ("Council") considered the April 23, 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 did not unlawfully deny access to request item number 1, plea offers regarding Indictment No. 04-01-0037-I, because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Because Executive Order No. 9 (Hughes, 1963) provides that criminal records are exempt from disclosure, and because said Executive Order is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), the Custodian lawfully denied access to request item number 2, a witness's criminal case history. N.J.S.A. 47:1A-6. See Lewis v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018). See also Tyler v. Passaic Cnty. Prosecutor's Office, 2017-30 (March 2019).

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 April 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 3, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

Hamid Abdul-Shabazz¹
Complainant

GRC Complaint No. 2017-41

v.

Passaic County Prosecutor's Office²
Custodial Agency

Records Relevant to Complaint: Copies of:

1. “. . . all plea offers regarding Indictment No. 04-01-0037-I. State v. Shabazz. Please forward a copy of offers 10 w/85%, 12 w/85%, 15 w/85% . . .”
2. “. . . criminal history report of witness . . . in Indictment No. 05-05-0638-I. Witness: Robert M. Ellis.”³

Custodian of Record: Lisa A. Verlardi

Request Received by Custodian: January 27, 2017

Response Made by Custodian: February 7, 2017

GRC Complaint Received: February 14, 2017

Background⁴

Request and Response:

On January 27, 2017, the Custodian received the Complainant's Open Public Records Act (“OPRA”) request seeking the above-mentioned records. On February 7, 2017, the seventh (7th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that request item number 1 was denied because, after searching the agency's files, she was unable to locate a record responsive to the request. The Custodian stated that she denied request item number 2 because a criminal case history is not a public record subject to OPRA. The Custodian stated that access to a criminal case history is controlled not only in terms of who may obtain it, but also in terms of which agencies may disseminate it (citations omitted).

¹ No legal representation listed on record.

² Represented by William J. Pascrell III, Esq. (Paterson, NJ).

³ There were other records requested that are not relevant to this complaint.

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.

Denial of Access Complaint:

On February 14, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). With respect to request item number 1, the Complainant stated that he believes the Prosecutor’s Office lied about the plea offers. The Complainant stated that he wants a certification from the Custodian averring that she was unable to locate responsive records. With respect to request item number 2, the Complainant stated that he is entitled to the record so he can use it to impeach the witness’s credibility.

Statement of Information:

On April 11, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 27, 2017, and responded in writing on February 7, 2017.

The Custodian certified that she was unable to locate any letters or documents containing a plea offer extended to the Complainant. The Custodian certified that she also discussed this request item with the assistant prosecutor who handled the most recent criminal motion filed by the Complainant, and the assistant prosecutor confirmed that he had been unable to locate any written plea offers in the file.

The Custodian further certified that she denied access to witness Robert M. Ellis’ criminal case history because the responsive record is prohibited from disclosure under the N.J.A.C. 13:59-1.2, which prohibits disclosure of a person’s criminal history for non-criminal justice purposes except to certain persons or entities. The Custodian asserted that N.J.A.C. 13:59-1.6(c) prohibits a public employee from permitting any other person to access information stored in the central repository of the State Bureau of Identification (“SBI”), National Crime Information Center (“NCIC”), or any other state’s repository of computerized criminal history record information. Additionally, the Custodian noted that the New Jersey State Police, the Department of Corrections, and adult county correctional facilities both maintain regulations designating criminal history information confidential.

The Custodian also cited N.J.S.A. 53:1-32 (“National Crime Prevention and Privacy Compact”)⁵, N.J.S.A. 53:1-20.5 through N.J.S.A. 53:1-20.37, and N.J.A.C. 13:59-1.1 through N.J.A.C. 13:59-2.4 (Law and Public Safety statutes and regulations, respectively) in support of her denial. The Custodian further cited Executive Order No. 9 (Hughes, 1963), and Executive Order No. 69 (Whitman, 1997), in support of her denial. The Custodian stated that the Executive Orders are applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). The Custodian referenced the Council’s decisions in The Westfield Leader v. N.J. Div. of State Police, GRC Complaint No. 2004-152 (July 2005) and Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008) as supporting her argument.

⁵ This compact limits the disclosure of NCIC printouts.

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.

Request item number 1 - plea offers regarding State v. Shabazz: Indictment No. 04-01-0037-I

In Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the records responsive to request item number 1 do not exist because after searching the agency’s files and checking with the assistant prosecutor who handled the most recent criminal motion filed by the Complainant, she was unable to locate any responsive plea offer records.

As such, the Custodian did not unlawfully deny access to request item number 1, plea offers regarding Indictment No. 04-01-0037-I, because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer, GRC 2005-49.

Request item number 2 - criminal history report of witness Robert M. Ellis.

OPRA provides that “[t]he provisions of this act ... shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to ... Executive Order of the Governor ...” N.J.S.A. 47:1A-9(a). Executive Order No. 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). Executive Order No. 9 is relevant with regard to criminal case history information 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 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 Executive Order No. 9 and N.J.S.A. 47:1A-9(a).

The Council relied upon this same analysis in Lewis v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018). Where the Complainant requested, *inter alia*, criminal “rap sheets,” the Council held that the requested “rap sheets”

contained criminal history information exempt from disclosure under Executive Order No. 9 and N.J.S.A. 47:1A-9(a). See also Tyler v. Passaic Cnty. Prosecutor's Office, 2017-30 (March 2019).

Therefore, because Executive Order No. 9 (Hughes, 1963) provides that criminal records are exempt from disclosure, and because said Executive Order is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), the Custodian lawfully denied access to request item number 2, a witness's criminal case history. N.J.S.A. 47:1A-6. See Lewis, GRC 2016-131. See also Tyler, GRC 2017-30.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to request item number 1, plea offers regarding Indictment No. 04-01-0037-I, because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Because Executive Order No. 9 (Hughes, 1963) provides that criminal records are exempt from disclosure, and because said Executive Order is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), the Custodian lawfully denied access to request item number 2, a witness's criminal case history. N.J.S.A. 47:1A-6. See Lewis v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018). See also Tyler v. Passaic Cnty. Prosecutor's Office, 2017-30 (March 2019).

Prepared By: John E. Stewart
Staff Attorney

April 30, 2019