



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 28, 2020 Government Records Council Meeting

Al-Qaadir Green
Complainant

Complaint No. 2018-218

v.

Essex County Prosecutor's Office
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council ("Council") considered the April 21, 2020 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. The reports sought in OPRA request item No. 1, as well as the notes and e-mails sought in OPRA request item No. 2, are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. N.J. Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79, *et seq.* (June 2004). Thus, the Custodian lawfully denied access to the requested reports. N.J.S.A. 47:1A-6. Further, the GRC declines to address whether any of the other asserted exemptions apply to the instant request item because same was properly denied under the criminal investigatory exemption.
2. Because the remaining portion of the Complainant's OPRA request item No. 2 sought access to juvenile delinquency records maintained by the courts and law enforcement, same are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); N.J.S.A. 2A:4A-60. Thus, the Custodian lawfully denied access to the remaining portion of this request item. N.J.S.A. 47:1A-6; Rivera v. Cliffside Park Police Dep't (Bergen), GRC Complaint No. 2010-275 (Interim Order dated April 25, 2012). Further, the GRC declines to address whether any of the other asserted exemptions apply to the relevant portion of the request item.

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 April 2020

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: April 30, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2020 Council Meeting**

**Al-Qaadir Green¹
Complainant**

GRC Complaint No. 2018-218

v.

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

Records Relevant to Complaint: Hardcopies via U.S. mail of the following related to State v. Green, Indictment No. 01-10-4345:

1. Any and all reports by Detective Keith Sheppard of the Newark Police Department ("NPD") and Investigator Robert D. Harris of the Essex County Prosecutor's Office ("ECPO") regarding statements obtained "from the person(s) that provided information that [led] to learning the name and location of Kysheal Andrell Ivery . . ." from May 19, 2001.
2. Notes, e-mails, arrest warrants, search warrants, affidavits, criminal juvenile background checks, and requests to unseal records through "Essex County Juvenile Courts" of Ms. Ivery by Det. Sheppard and Investigator Harris, or anyone in either the NPD or ECPO, "before, on or after" January 29, 2002.

Custodian of Record: LeeAnn Cunningham, Esq.

Request Received by Custodian: None.

Response Made by Custodian: None.

GRC Complaint Received: October 9, 2018

Background³

Request:

On August 14, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records.

¹ No legal representation listed on record.

² Represented by Courtney M. Gaccione, Esq. (Newark, 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On October 9, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to the subject OPRA request within the statutory response time.

Offer of Mediation:

On October 17, 2018, the Custodian responded to the GRC’s offer of mediation letter stating that she never received the Complainant’s OPRA request. The Custodian asked whether she should respond to the subject OPRA request now that she received same.

Statement of Information:

On October 18, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she never received the Complainant’s OPRA request. The Custodian thus certified that she did not respond to the subject OPRA request because she did not receive it.

Response:

On October 22, 2018, the Custodian responded in writing stating that she did not receive the Complainant’s OPRA request until receiving the instant Denial of Access Complaint on October 12, 2018. The Custodian further stated that although the instant complaint was pending adjudication, she decided to respond to the subject OPRA request. The Custodian sought an extension of time through November 14, 2018 to allow for retrieval of the relevant case file from off-site storage.

On November 9, 2018, the Custodian responded in writing denying access to the Complainant’s OPRA request under multiple bases. The Custodian first stated that she was denying access under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 591 (2011); Janeczko v. N.J. Dep’t of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79, *et seq.* (June 2004). The Custodian next stated that the Complainant’s request sought juvenile information exempt from disclosure under N.J.S.A. 2A:4A-60. The Custodian also stated that the request was denied because the requested records, if they exist, constitute unfiled discovery materials. N.J.S.A. 47:1A-9(b); Drinker, Biddle & Reath, LLP v. N.J. Dep’t of Law & Pub. Safety, Div. of Law, 421 N.J. Super. 489, 497-98 (App. Div. 2011). The Custodian further stated that, to the extent that records existed, the request was denied under the “inter-agency or intra-agency advisory, consultative, or deliberative” exemption. N.J.S.A. 47:1A-1.1.

The Custodian also stated that the request was invalid because it required research. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005). The Custodian also noted that stated that MAG supported a denial of the basis that OPRA was not meant to be a tool for discovery. Id. at 546-549. The Custodian additionally stated that with respect to the Complainant’s request item No. 2 seeking arrest warrants, the request was vague and overly broad. The Custodian

thus requested that the Complainant clarify this portion of the request by providing a defendant name, SBI number, or date of birth.

Additional Submissions:

On November 21, 2018, the Complainant sent a letter to the GRC advising that he received both responses from the Custodian. The Complainant stated that he wished to continue with the adjudication of the instant complaint.

Analysis

No Correspondence Received

In Krzywda v. Barnegat Twp. Sch. Dist. (Ocean), GRC Complaint No. 2008-138 (February 25, 2009), the complainant submitted an OPRA request to the athletic director and subsequently filed this complaint after receiving no response. In the SOI, the custodian certified that he did not receive the subject OPRA request prior to the filing of the complaint, but that no records responsive exist. The Council held that notwithstanding the fact that "... the Custodian was not given an adequate opportunity to respond . . ." prior to the filing of the denial of access complaint, "... the Custodian certified that no records . . . exist . . . [and] has borne his burden of proving a lawful denial of access." Id. at 4. See also Bell v. Paterson Pub. Sch. (Passaic), GRC Complaint No. 2013-04 (Interim Order dated October 29, 2013).

Here, the GRC acknowledges that the Custodian similarly certified in the SOI that she never received the Complainant's OPRA request. However, the Custodian subsequently provided a response to the Complainant's OPRA request on the basis that she received it as part of the Denial of Access Complaint. Thereafter, the Complainant acknowledged receipt of the Custodian's response and requested that the adjudication continue. Thus, notwithstanding the fact that the Custodian did not receive the Complainant's OPRA request prior to the filing of this complaint, the GRC will consider this complaint based on the Custodian's SOI response and the Complainant's request to continue with the adjudication. Krzywda, GRC 2008-138.

It should be noted that had the Custodian simply certified that she never received the OPRA request, and the Complainant did not provide evidence refuting the Custodian's certification, this complaint would have been administratively disposed of as no correspondence received. However, once the Custodian responded to each item of the OPRA request attached to the Denial of Access Complaint, she effectively placed the matter appropriately before the GRC for adjudication.

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.

OPRA Request Item No. 1: Any and All Reports

OPRA Request Item No. 2: Notes and E-mails

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, 380-381 (App. Div. 2006).

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc., 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).⁴ 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.”⁵ Moreover, with respect to concluded investigations, the Council pointed out in Janeczko that, “[the

⁴This 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.

⁵ 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 matter before the Council, the Complainant’s OPRA request item No. 1 sought access to reports recounting how Detective Sheppard located Ms. Ivery in connection with State v. Green, Indictment No. 01-10-4345. The Complainant’s OPRA request item No. 2 sought, in part, notes and e-mails regarding Ms. Ivery. The Custodian denied access under, among other bases, the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.

In applying the two prongs of the criminal investigatory exemption found in N. Jersey Media Grp., Inc., 229 N.J. 541 to this request item, the GRC is satisfied that the Custodian lawfully denied access to the requested reports. Of pertinent note, the requested reports relate to a criminal case wherein the Complainant was tried on multiple offenses, convicted, and sentenced to life in prison.⁶ Further, there is no evidence in the record indicating that any of the requested reports, notes or e-mails were required by law to be made. Thus, as discussed above, precedential case law supports the inclusion of these records under the criminal investigatory exemption when they meet the two-prong test, regardless of the investigation status. Janeczko, GRC 2002-79, *et seq.*

Accordingly, the reports sought in OPRA request item No. 1, as well as the notes and e-mails sought in OPRA request item No. 2, are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541; Janeczko, GRC 2002-79, *et seq.* Thus, the Custodian lawfully denied access to the requested reports. N.J.S.A. 47:1A-6. Further, the GRC declines to address whether any of the other asserted exemptions apply to the instant request item because same was properly denied under the criminal investigatory exemption.

OPRA Request Item No. 2: Juvenile Records

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; *any other statute*; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

To this end, N.J.S.A. 2A:4A-60 provides that:

Social, medical, psychological, legal and other *records of the court* and probation division, and *records of law enforcement agencies*, pertaining to *juveniles charged as a delinquent* or found to be part of a juvenile-family crisis, *shall be strictly safeguarded from public inspection.*

⁶ https://www20.state.nj.us/DOC_Inmate/details?x=1031081&n=4 (accessed April 3, 2020).

[Id. (emphasis added).]

In Rivera v. Cliffside Park Police Dep't (Bergen), GRC Complaint No. 2010-275 (Interim Order dated April 25, 2012), the complainant sought multiple records inclusive of two (2) use of force reports. In the SOI, the custodian identified the responsive reports as juvenile records and argued they were exempt under from disclosure under N.J.S.A. 2A:4A-60. The Council agreed, finding that the custodian lawfully denied access to said reports. Id. at 11.

In the matter before the Council, a portion of the Complainant's OPRA request item No. 2 sought access to multiple types of records regarding Ms. Ivery "before, on, or after" January 29, 2002. Those records included arrest warrants, search warrants, affidavits, criminal juvenile background checks, and requests to unseal juvenile court records. The Custodian denied access to this request item under, among other bases, the criminal investigatory and juvenile records exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.S.A. 2A:4A-60.

A plain reading of this portion of the Complainant's OPRA request item No. 2 indicates that Ms. Ivery was a juvenile during the incident at the center of Indictment No. 01-10-4345. Further, N.J.S.A. 2A:4A-60 is clear that juvenile delinquency records of both the courts and law enforcement agencies are exempt from disclosure. Similar to the Council's decision in Rivera, GRC 2010-275, N.J.S.A. 2A:4A-60 applies here because the records sought in OPRA request item No. 2 plainly fall within the scope of a juvenile delinquency matter. Thus, to the extent that any such records sought existed, the Custodian lawfully denied access to them.

Accordingly, because the remaining portion of the Complainant's OPRA request item No. 2 sought access to juvenile delinquency records maintained by the courts and law enforcement, same are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); N.J.S.A. 2A:4A-60. Thus, the Custodian lawfully denied access to the remaining portion of this request item. N.J.S.A. 47:1A-6; Rivera, GRC 2010-275. Further, the GRC declines to address whether any of the other asserted exemptions apply to the relevant portion of the request item.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The reports sought in OPRA request item No. 1, as well as the notes and e-mails sought in OPRA request item No. 2, are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. N.J. Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79, *et seq.* (June 2004). Thus, the Custodian lawfully denied access to the requested reports. N.J.S.A. 47:1A-6. Further, the GRC declines to address whether any of the other asserted exemptions apply to the instant request item because same was properly denied under the criminal investigatory exemption.
2. Because the remaining portion of the Complainant's OPRA request item No. 2 sought access to juvenile delinquency records maintained by the courts and law enforcement,

same are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); N.J.S.A. 2A:4A-60. Thus, the Custodian lawfully denied access to the remaining portion of this request item. N.J.S.A. 47:1A-6; Rivera v. Cliffside Park Police Dep't (Bergen), GRC Complaint No. 2010-275 (Interim Order dated April 25, 2012). Further, the GRC declines to address whether any of the other asserted exemptions apply to the relevant portion of the request item.

Prepared By: Frank F. Caruso
Executive Director

April 21, 2020