



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 28, 2020 Government Records Council Meeting

Mario Crispin
Complainant

Complaint No. 2018-274

v.

Middlesex County Prosecutor's Office
Custodian of Record

At the July 28, 2020 public meeting, the Government Records Council ("Council") considered the July 21, 2020 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 access to his "complete discovery or whatever material is available" is invalid because it was a blanket request that failed to identify the specific records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 171 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.
2. The responsive witness statements 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); Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010). Thus, the Custodian lawfully denied access to the requested audio/video of witness interviews. 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 28th Day of July 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: July 30, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Mario Crispin¹
Complainant**

GRC Complaint No. 2018-274

v.

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

Records Relevant to Complaint: Hardcopies via U.S. mail of the Complainant's "complete discovery or whatever material is available" in Indictment No. 12-10-1615 to include the audio and/or video of the interview of "W.T., J.J., and A.T."

Custodian of Record: Andrea Boulton
Request Received by Custodian: September 26, 2018
Response Made by Custodian: October 2, 2018
GRC Complaint Received: November 19, 2018

Background³

Request and Response:

On September 14, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On October 2, 2018, the Custodian responded in writing disclosing a complaint-warrant, indictment document, and the Judgement of Conviction with redactions of victim names under OPRA. The Custodian denied access to the audio/video of witness interviews under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 591 (2011); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 38-39 (App. Div. 2005); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015) (certif. granted 223 N.J. 553 (2015)); Janeczko v. N.J. Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq.* (June 2004).

Denial of Access Complaint:

On November 19, 2018, the Complainant filed a Denial of Access Complaint with the

¹ legal representation listed on record.

² Represented by Jeanne-Marie Scollo, Esq. (New Brunswick, 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.

Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied access to his OPRA request. The Complainant contended that the Custodian’s citation to Kovalcik was erroneous because that case addressed personnel records. The Complainant further contended that the Custodian cited to N. Jersey Media Grp., Inc., 441 N.J. Super. 70 but failed to acknowledge that the Supreme Court later affirmed in part and reversed in part. N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017). The Complainant contended that the Lyndhurst Court’s ruling made a few points relevant to the instant matter.

The Complainant first stated that the Court ordered disclosure of reports “required by law to made or maintained” and stated that they did not meet the criminal investigatory exemption. The Complainant argued that the interview records could not meet the criminal investigatory exemption. The Complainant contended that “interviews and interrogations of suspects and witnesses are required to be recorded.” The Complainant also asserted that because there was no physical evidence in the case against him, his charges derived from the interviews. The Complainant thus argued that those interview records were required to be made because there would not have been anything on which to base the charges.

The Complainant next stated that the Court held that witness statements, among other records, were not disclosable from the outset of the investigation because N.J.S.A. 47:1A-3(b) allowed law enforcement agencies twenty-four (24) hours to provide records. The Complainant contended that this holding did not apply here because the investigation was closed “many years ago” and the Complainant served his sentence.

The Complainant finally argued that he was not seeking any personal information and that his file did not contain a protective order. The Complainant asserted that he ultimately sought records previously in his possession. The Complainant noted that he lost the CD containing the records at some point during one his moves between different institutions. The Complainant noted that he used OPRA as a last resort because he could not obtain the records from his trial attorney, the prosecutor’s office, or the public defender. The Complainant asserted that the Custodian’s denial was generic and failed to balance the interest of both parties.⁴

Statement of Information:⁵

On January 17, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 26, 2020. The Custodian certified that her search included reviewing the relevant case file. The Custodian certified that she responded in writing on October 3, 2018 disclosing three (3) records and denying access to the remainder of the request under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.

⁴ The Complainant also makes common law arguments regarding his need for access. However, pursuant to N.J.S.A. 47:1A-7, the GRC only has the authority to adjudicate requests made pursuant to OPRA. See also Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).

⁵ On December 10, 2018, this complaint was referred to mediation. On January 9, 2019, this complaint was referred back to the GRC for adjudication.

The Custodian argued that she lawfully denied access to the Complainant's OPRA request for the reasons cited in her denial. The Custodian noted that the indictment related to a "case which is sexual in nature."

The Custodian also contended that the portions of request seeking "complete discovery" and "whatever material is available" were invalid because they were overly broad. Bart v. Passaic Cnty. Pub. Hous. Agency, 406 N.J. Super. 445, 451-452 (App. Div. 2009). The Custodian contended that she was not required to perform research in order to respond to the Complainant's OPRA request, nor were they obligated to create records. N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 171 (App. Div. 2007); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007); Librizzi v. Twp. of Verona Police Dep't (Essex), GRC Complaint No. 2009-213 (Final Decision dated August 24, 2010). The Custodian also argued that OPRA was not intended to replace or supplement discovery. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005).

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 v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁶ N.J. Builders Ass’n, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

In Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008), the complainant filed an OPRA request for two entire prosecutor’s office files. The Council relied upon MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; and Asarnow v. Dep’t of Labor, GRC Complaint No. 2006-24 (May 2006), in determining that the request was overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific government record. As such, the Council found that the custodian met her burden of proof in denying access to the responsive records.

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in [MAG], [Bent] and the Council’s decisions in [Asarnow, GRC 2006-24] and [Morgano, GRC 2007-190].

Here, the Complainant’s request sought, in part, his “complete discovery or whatever material is available” for Indictment No. 12-10-1615. This portion of the request essentially sought an entire file or universe of records deemed “discovery.” As in Feiler-Jampel, GRC 2007-190, the Council has repeatedly determined that requests for entire files are invalid. See also Randazzo-Thompson v. City of Vineland (Cumberland), GRC Complaint No. 2010-76 (May 2011); Bragg v. N.J. Dep’t of Corr., GRC Complaint No. 2010-145 (March 2011); Bradley-Williams v. Atlantic Cnty. Jail (Atlantic), GRC Complaint No. 2011-232 (December 2012). The GRC is satisfied that this portion of the request at issue here was invalid and that the Custodian lawfully denied access to it. This portion of the request was also very similar to the requests at issue in Morgano, GRC

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

2010-145 and Feiler-Jampel, GRC 200-190. Thus, a holding consistent with prevailing case law is warranted here.

Accordingly, the portion of the Complainant's request seeking access to his "complete discovery or whatever material is available" is invalid because it was a blanket request that failed to identify the specific records sought. MAG, 375 N.J. Super. at 549; Bent, 381 N.J. Super. at 37; N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Morgano, GRC 2010-145; Feiler-Jampel, GRC 200-190. Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.

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 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., 441 N.J. Super. 70. 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).⁷ 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.”

In noting that the N. Jersey Media Grp., Inc. Court held that the witness statements at issue there were exempt under OPRA, the Council has previously found the same. In Parker v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2009-225 (October 2010), the complainant requested seven witness statements. Determining that the statements were made by witnesses obtained during the course of a criminal investigation, the Council held that they were exempt from disclosure under OPRA as criminal investigatory records and that the custodian did not violate OPRA by denying the request. See also Walker v. City of Newark, Div. of Police (Essex), GRC Complaint No. 2016-6 (July 2017).

In the matter before the Council, a portion of the Complainant’s OPRA request sought video and audio of three (3) witness interviews. The Custodian responded denying access under the criminal investigatory exemption. The Complainant argued in the Denial of Access Complaint that the responsive records could not meet the definition of the criminal investigatory record because they were required to be kept as the sole evidence in the case against him. The Complainant further argued that the investigation was closed a long time ago and he was only attempting to obtain records he previously maintained but lost. In the SOI, the Custodian maintained her position that the records were exempt under 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 portion of the OPRA request, the GRC is satisfied that the Custodian lawfully denied access to the responsive records. Of pertinent note, the responsive records relate to a criminal investigation resulting in the Complainant being tried of multiple offenses against minors that were sexual in nature, convicted, and sentenced to time in jail.⁸ The GRC gleans this from the warrants disclosed to the Complainant and attached to SOI. Therein, each of the three (3) warrants identifies the probable cause for arrest as “victim’s sworn taped statement.” Thus, it is logical to conclude that the responsive records were recordings of the minors’ interviews wherein they discussed the Complainant’s alleged criminal conduct. Parker, GRC 2009-225. Further, and contrary to the Complainant’s general assertion, there is no evidence

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 https://www20.state.nj.us/DOC_Inmate/details?x=1494821&n=0.

in the record indicating that any of the interviews 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. N. Jersey Media Grp., Inc., 229 N.J. 541. See also Janeczko, GRC 2002-79, *et seq.*

Accordingly, the responsive witness statements 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.*; Parker, GRC 2009-225. Thus, the Custodian lawfully denied access to the requested audio/video of witness interviews. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The portion of the Complainant's request seeking access to his "complete discovery or whatever material is available" is invalid because it was a blanket request that failed to identify the specific records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 171 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.
2. The responsive witness statements 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); Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010). Thus, the Custodian lawfully denied access to the requested audio/video of witness interviews. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

July 21, 2020