



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 30, 2020 Government Records Council Meeting

Fred Snowflack
Complainant

Complaint No. 2018-308

v.

NJ Transit
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 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 the Custodian lawfully denied access to the requested investigatory report because it met both prongs of the criminal investigatory test and are exempt under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 556 (2017); Janeczko v. N.J. Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Mella v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2016-217 (August 2018). Further, the GRC declines to address whether the other asserted objections apply to the subject OPRA request item because same was properly denied under the criminal investigatory exemption.

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 June 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 2, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

**Fred Snowflack¹
Complainant**

GRC Complaint No. 2018-308

v.

**N.J. Transit²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. Mail of the incident report of August 9, 2018, where a man was fatally struck by a N.J. Transit train at or near the Metuchen Train Station.

Custodian of Record: Orlando Cor-Dova
Request Received by Custodian: August 13, 2018
Response Made by Custodian: November 29, 2018
GRC Complaint Received: December 14, 2018

Background³

Request and Response:

On August 13, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 22, 2018, the Custodian responded in writing, advising that an extension until September 12, 2018, was necessary to process the OPRA request appropriately. On September 12, 2018, the Custodian responded in writing, advising that an extension until October 1, 2018, was necessary to process the OPRA request appropriately. On October 1, 2018, the Custodian responded in writing, advising that an extension until October 19, 2018, was necessary to process the OPRA request appropriately. On October 19, 2018, the Custodian responded in writing, advising that an extension until October 30, 2018, was necessary to process the OPRA request appropriately. On October 30, 2018, the Custodian responded in writing, advising that an extension until November 19, 2018, was necessary to process the OPRA request appropriately. On November 19, 2018, the Custodian responded in writing, advising that an extension until December 11, 2018, was necessary to process the OPRA request appropriately. On November 29, 2018, the Custodian

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Sharon Price-Gates.

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.

responded in writing denying access stating the requested records were considered “criminal investigatory records” not subject to disclosure under OPRA. N.J.S.A. 47:1A-1.

Denial of Access Complaint:

On December 14, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he had not sought any investigatory records through his OPRA request. The Complainant argued that his OPRA request merely sought the police incident report from the incident. The Complainant further disputed the classification of the requested records as “criminal investigatory” given the fact that the alleged trespasser was deceased.

Statement of Information:

On February 5, 2019, the Custodian filed a Statement of Information (“SOI”) attaching a certification from Deputy Chief Edward Iandoli (“Iandoli Cert.”). The Custodian certified that he received the Complainant’s OPRA request on August 13, 2018. The Custodian certified that he responded in writing on November 29, 2018, denying access to an investigation report pursuant to the “criminal investigatory” exemption. N.J.S.A. 47:1A-1.1.

The Custodian asserted that instant complaint was of no merit because the Complainant’s OPRA request sought “criminal investigatory records.” The Custodian asserted that the Complainant was not entitled to any record that pertained to any criminal investigation and are not required by law to be made, maintained or kept on file. Paff v. Ocean Cty. Prosecutor’s Office, 235 N.J. 1 (2018) (citing N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 556 (2017)). The Custodian further asserted that as in Lyndhurst, the same applied here in that the Complainant was not entitled to investigative reports. The Custodian further certified that the N.J. Transit Police Department (“NJTPD”) and multiple agencies investigated the incident criminally. Iandoli Cert. ¶ 5-6. The Custodian also certified that the responsive report contained witnesses’ statements among other details of that investigation. Id. The Custodian further noted that criminal investigation commenced immediately after the fatality was reported.

The Custodian further argued that the subject OPRA request’s wording of “incident report” was “unclear and vague” and the instant complaint should therefore be dismissed. The Custodian asserted that “[i]t is the requestor’s obligation under OPRA to identify the documents sought.” Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 237 (App. Div. 2015); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super 166, 178 (App. Div. 2007). The Custodian noted that notwithstanding the forgoing, N.J. Transit separately reviewed its records and disclosed two (2) reports to the Complainant.

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.

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.” Id. 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 (App. Div. 2009).

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 v. N.J. Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), 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

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.

pointed out in Janeczko that, “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete.”

Additionally, in Mella v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2016-217 (August 2018), item No. 1 of the complainant’s OPRA request sought police reports stemming from an incident that resulted in a suicide. The custodian denied access, stating the responsive records were 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). The Council held that the custodian lawfully denied access to said reports. N.J.S.A. 47:1A-6.

In the instant complaint, the Complainant requested a copy of the incident report regarding the fatality of an alleged trespasser at a N.J. Transit rail station. The Custodian denied access under OPRA’s criminal investigatory exemption. N.J.S.A. 47:1A-1.1. In the Denial of Access Complaint, the Complainant contended that he merely requested a police report and not investigatory records. The Complainant further disputed that a criminal investigation occurred given the alleged trespasser’s demise. In the SOI, the Custodian provided details of the investigation and included Deputy Chief Iandoli’s certification confirming that the requested report pertained to a criminal investigation.

The GRC is persuaded that the Custodian lawfully denied access to the responsive investigation report. First, the Custodian (as well as NJTPD) certified in the SOI that the responsive investigation report was not required by law to be made, and was created in the course of a criminal investigation. N. Jersey Media Grp., Inc., 229 N.J. 541. Second, the record was exempt from disclosure regardless of the fate of the alleged trespasser or whether the criminal investigation concluded prior to the subject OPRA request. Janeczko, GRC 2002-79 *et seq.* Third, the Council’s decision in Mella, GRC 2016-217 is on point with the facts of the present complaint. Thus, it follows that the responsive report is a criminal investigatory record and, as such, is exempt from disclosure under OPRA.

Therefore, the Custodian lawfully denied access to the requested investigatory report because it met both prongs of the criminal investigatory test and are exempt under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; N. Jersey Media Grp., Inc., 229 N.J. 541 (2017); Janeczko, GRC 2002-79 *et seq.*; Mella, GRC 2016-217. Further, the GRC declines to address whether the other asserted objections apply to the subject OPRA request item because same was properly denied under the criminal investigatory exemption.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to the requested investigatory report because it met both prongs of the criminal investigatory test and are exempt under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 556 (2017); Janeczko v. N.J. Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Mella v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2016-217 (August 2018). Further, the GRC declines to address whether the other asserted objections apply

to the subject OPRA request item because same was properly denied under the criminal investigatory exemption.

Prepared By: Brandon Garcia
Case Manager

June 23, 2020