



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 28, 2020 Government Records Council Meeting

Charles Richardson
Complainant
v.
NJ State Police
Custodian of Record

Complaint No. 2018-319

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 Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because Executive Order No. 9 (Gov. 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 the Complainant access to the criminal record history of four (4) individuals purportedly involved in to Indictment No. 07-02-001681. N.J.S.A. 47:1A-6; Franklin v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2016-308 (April 2018). See also Lewis v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018); 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 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**

**Charles Richardson¹
Complainant**

GRC Complaint No. 2018-319

v.

**NJ State Police²
Custodial Agency**

Records Relevant to Complaint: Copies of all criminal histories of four (4) individuals involved in Indictment No. 07-02-001681.

Custodian of Record: Lieutenant David Robbins

Request Received by Custodian: October 20, 2016

Response Made by Custodian: November 7, 2016

GRC Complaint Received: December 31, 2018

Background³

Request and Response:

On an unknown date, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 7, 2016, the twelfth (12th) business day after receipt of the OPRA request, Trooper Kristina Pados responded in writing on behalf of the Custodian stating that New Jersey State Police (“NJSP”) is searching for responsive records and needed to extend the response time frame through November 18, 2016. Trooper Pados noted that should records be available prior to that day, she would disclose them accordingly.

On November 9, 2016, the Custodian responded in writing denying the subject OPRA request under N.J.A.C. 13:59-1, et seq., which prohibits the disclosure of computerized criminal histories with limited exceptions. The Custodian noted that the Complainant may contact the State Bureau of Identification (“SBI”), Criminal Information Unit.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Tasha Bradt.

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 December 31, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian sought an extension of time “but never complied.”

Statement of Information:

On February 20, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 20, 2016. The Custodian certified that his search included searching the computerized criminal history database for summaries on the identified individual. The Custodian certified that after properly requesting extensions,” he responded in writing on November 9, 2016 denying the request under N.J.A.C. 13:59-1, et seq. The Custodian noted that the Complainant filed this complaint over two (2) years later.

The Custodian argued that contrary to the Complainant’s assertion, he timely responded seeking an extension and subsequently denied the subject OPRA request within the extended time frame. The Custodian thus argued that the instant complaint should be deemed moot. N.J. Div. of Youth & Family Serv. v. W.F., 434 N.J. Super. 288, 297 (App. Div. 2014); Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660 (App. Div. 2008).

The Custodian further argued that he lawfully denied access to the requested records under OPRA. N.J.S.A. 47:1A-9(a). The Custodian contended that N.J.A.C. 13:59-1.2 identifies the individual allowed access to criminal histories. The Custodian asserted that the Complainant did not fall within any of those enumerated exceptions.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant complaint, the Complainant contended that although the Custodian sought an extension of time, he failed to respond thereafter. In the SOI, the Custodian confirmed that he

⁴ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

sought an extension (through Trooper Pados) on November 7, 2016. The Custodian also certified that he denied access to the Complainant's OPRA request on November 9, 2016. This evidence refutes the Complainant's claim that the Custodian "never complied."

However, the evidence of record also shows that twelve (12) business days passed between receipt of the request and Trooper Pados' response extending the time frame. Although the Custodian certified that he "properly request[ed] extensions," the evidence of record only supports a single extension request after the expiration of the seven (7) business day-time frame. For this reason, the GRC is persuaded that the Complainant's request was "deemed" denied prior to Trooper Pados' extension request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

Regarding criminal history background information, colloquially known as criminal "rap sheets," OPRA provides that it "shall not abrogate any exemption . . . made pursuant to . . . any . . . Executive Order of the Governor . . ." N.J.S.A. 47:1A-9(a). To this end, Executive Order No. 9 (Gov. Hughes, 1963) ("EO 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). EO 9 is relevant to criminal histories 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 N.J.S.A. 47:1A-9(a) and EO 9.

To further emphasize the confidential nature of criminal history sheet information, State agencies have promulgated regulations limiting dissemination to a specific process (with multiple limitations) or outright exempting access to them. Of relevance here is N.J.A.C. 13:59-1, et seq., which provides for the specific process of obtaining background checks and the limitations on who can access this information. See also N.J.A.C. 10A:22-2.3(a)(6) (New Jersey Department of Corrections regulation exempting from access "[c]omprehensive criminal history information (rap sheet) . . ."). Thus, all relevant statutes, regulations, and executive orders addressing criminal histories support that they are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).

In Franklin v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2016-308 (April 2018), the complainant sought access to "rap sheets" for six (6) individuals. The custodian asserted that N.J.A.C. 13:59-1.6(c) prohibited a public employee from permitting access to rap sheets beyond those exceptions cited specifically in the regulations. The custodian further noted that multiple statutes, regulations, executive orders, and case law supported her denial of access. The custodian specified that the National Crime Prevention and Privacy Compact was one such statute. N.J.S.A. 53:1-32. Additionally, the custodian noted that the New Jersey State Police, Department of Corrections, and Adult County Correctional Facilities all maintain regulations barring disclosure of criminal rap sheets. N.J.A.C. 13:59-1.6(c); N.J.A.C. 10A:22-2.3(a)(6); N.J.S.A. 10A:31-6.10(a)(6). The Council held that criminal histories were exempt from disclosure under N.J.S.A. 47:1A-9(a) and EO 9. See also Lewis v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018); Tyler v. Passaic Cnty. Prosecutor's Office, 2017-30 (March 2019).

In the instant complaint, the Complainant sought the "criminal record history" of four (4) individuals purportedly connected to Indictment No. 07-02-001681. The Custodian denied the Complainant's OPRA request under the N.J.A.C. 13:59-1, et seq. The Custodian's denial mirrors that of the custodian's denial in Franklin, GRC 2016-308. For this reason, the GRC is persuaded that it is logical to follow the Council's conclusion in Franklin and that a lawful denial of access occurred here. However, the GRC does note that this finding is appropriate under EO 9 with support from N.J.A.C. 13:59-1, et seq., as the Council held in Franklin.

Accordingly, because EO 9 provides that criminal records are exempt from disclosure, and because said EO is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), the Custodian lawfully denied the Complainant access to the criminal record history of four (4) individuals purportedly involved in to Indictment No. 07-02-001681. N.J.S.A. 47:1A-6; Franklin, GRC 2016-308. See also Lewis, GRC 2016-131; Tyler, GRC 2017-30.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because Executive Order No. 9 (Gov. 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 the Complainant access to the criminal record history of four (4) individuals purportedly involved in to Indictment No. 07-02-001681. N.J.S.A. 47:1A-6; Franklin v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2016-308 (April 2018). See also Lewis v.

Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018); Tyler v. Passaic Cnty. Prosecutor's Office, 2017-30 (March 2019).

Prepared By: Frank F. Caruso
Executive Director

July 21, 2020