



State of New Jersey
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 12, 2019 Government Records Council Meeting

Darrell T. Scott
Complainant

Complaint No. 2018-33

v.

Mercer County Prosecutor's Office
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council ("Council") considered the October 30, 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 the Custodian lawfully denied access to Mr. Jones' statement to police because the responsive records meet 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 (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); Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010).

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 12th Day of November 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: November 15, 2019

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Darrell T. Scott¹
Complainant**

GRC Complaint No. 2018-33

v.

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

Records Relevant to Complaint: “. . .[C]opy of Keith Jones' statement that he made to the detectives that was in my case.”

Custodian of Record: Christopher M. Malikschnitt

Request Received by Custodian: January 23, 2018

Response Made by Custodian: January 30, 2018

GRC Complaint Received: February 28, 2018

Background³

Request and Response:

On January 15, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 30, 2018, the Custodian responded in writing denying the Complainant’s request. The Custodian asserted that the requested records were criminal investigatory records exempt under OPRA. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 106 (App. Div. 2015) (aff’d., 229 N.J. 541)

Denial of Access Complaint:

On February 28, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he was denied the requested records because they were criminal investigatory records exempt from disclosure under OPRA. The Complainant did not provide any additional arguments in favor of disclosure.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

Statement of Information:

On March 8, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 23, 2018. The Custodian affirmed that his search located the Complainant’s entire case file, comprised of two banker’s boxes of files as well as digital files. The Custodian certified that he recovered responsive records to include: “[o]ne 46 page police report dated May 10, 2011 containing statements Mr. Jones made to police” and “[o]ne digital video file recording of a June 26, 2007 police interview of Mr. Jones.” The Custodian certified that he responded in writing on January 30, 2018 denying the Complainant’s OPRA request.

The Custodian affirmed that the records were not required by law to be made and pertained to an ongoing investigation in State v. Scott, Prosecutor File No. 10-2144. The Custodian thus argued that the records were criminal investigatory records exempt under OPRA. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541.

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

Additionally, in Parker v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2009-225 (October 2010), the Council held that the requested witness statements, as well as other records, were exempt from disclosure under OPRA as criminal investigatory records. The Council further held that the Custodian did not violate OPRA in denying the Complainant’s OPRA request. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A6; Janeczko, GRC 2002-79 *et. seq.* See also Brewer v. N.J. Dep’t of Law and Pub. Safety, Div. of N.J. State Police, GRC Complaint No. 2006-204 (October 2007).

In the instant complaint, the Complainant requested copies of a statement given by Mr. Jones to police as part of a criminal investigation against the Complainant. The Custodian was able to locate both a hardcopy report and digital copy of a police interview of Mr. Jones. The Custodian denied the Complainant’s OPRA request stating that the records were criminal investigatory records exempt under OPRA. N.J.S.A. 47:1A-1.1. The Custodian subsequently certified in the SOI that the responsive records are associated with the criminal matter State v. Scott, Prosecutor File No. 10-2144.

The GRC is persuaded that the Custodian lawfully denied access to the responsive witness records. First, the Custodian certified in the SOI that the responsive records were not required by law to be made, and were obtained during the course of a criminal investigation. N. Jersey Media Grp., Inc., 229 N.J. 541. Second, the records were exempt from disclosure regardless of whether

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.

the criminal investigation concluded prior to the subject OPRA request. Janeczko, GRC 2002-79 *et. seq.* Third, the Council's decision in Parker, GRC 2009-255 is on point with the facts of the present complaint. Thus, it follows that the responsive records are criminal investigatory records and, as such, are exempt from disclosure under OPRA.

Therefore, the Custodian lawfully denied access to Mr. Jones' statement to police because the responsive records meet 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.*; Parker, GRC 2009-255.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to Mr. Jones' statement to police because the responsive records meet 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 (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); Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010).

Prepared By: Brandon Garcia
Case Manager

October 30, 2019