



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Lawrence Thomas
Complainant

Complaint No. 2018-44

v.

Bergen County Prosecutor's Office
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council ("Council") considered the December 10, 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 lab reports N11-00242 and BS-11-000208 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; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); 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); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); McKinney v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-149 (June 2018); Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009).

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 7th Day of January 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: January 9, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Lawrence Thomas¹
Complainant**

GRC Complaint No. 2018-44

v.

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

Records Relevant to Complaint: Copies via U.S. Mail of:

OPRA Request No. 1: Controlled dangerous substance ("CDS") laboratory report # N11-00242.

OPRA Request No. 2: Ballistics lab report # BS-11-000208.

Custodian of Record: Thomas McGuire³

Request Received by Custodian: February 20, 2018

Response Made by Custodian: February 23, 2018

GRC Complaint Received: March 19, 2018

Background⁴

Request and Response:

On February 16, 2018, the Complainant submitted two (2) Open Public Records Act ("OPRA") requests to the Custodian seeking the above-mentioned records. On February 23, 2018, the Custodian responded in writing denying both OPRA requests under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On March 19, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he requested the above-mentioned lab reports under OPRA because they were not disclosed in the pre-trial discovery for his criminal case. The Complainant argued that said lab reports had "now become the subject of

¹ No legal representation listed on record.

² Represented by Craig Bossong, Esq., Florio Perrucci Steinhardt & Cappelli, LLC (Rochelle Park, N.J.).

³ The original Custodian of Record was Frank Puccio. The interim Custodian of Record was Dennis Calo.

⁴ 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.

exculpatory evidence.” The Complainant further asserted that he was challenging the denial of access to these records under OPRA.

Statement of Information:

On April 2, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the original Custodian received both of the Complainant’s OPRA requests on February 20, 2018. The Custodian certified that the original Custodian responded in writing on February 23, 2018 denying the Complainant’s OPRA requests under the criminal investigatory exemption. The Custodian asserted that his office was in possession of both requested lab reports, N11-00242 and BS-11-000208.

The Custodian asserted that both requested lab reports were part of a criminal investigation where the Complainant, along with co-defendants, were tried, convicted and sentenced to incarceration. The Custodian further averred that both lab reports were criminal investigatory records exempt from disclosure even after the investigation has concluded. N.J.S.A. 47:1A-1.1; Janecko v. N.J. Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Solloway v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-39 (January 2013); Hwang v. Bergen Cnty. Prosecutor’s Office, Custodian of Records, GRC Complaint No. 2011-348 (January 2013); Johnson/Press of Atlantic City v. N.J. Div. of State Police, GRC Complaint No. 2004-46 (May 2004).

Finally the Custodian stated that “[c]riminal discovery is not a public record.” See R. 1:38-3(c)(1). The Custodian also averred that the Complainant was not entitled to obtain a record he had already received. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).

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.” 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 (App. Div. 2009).

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017), 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 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).⁵ 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, *et. seq.*, 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.”⁶ 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 McKinney v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2016-149 (June 2018), the complainant sought a copy of the marijuana laboratory test results obtained in the course of an investigation. The custodian certified that the toxicology report at issue here was not required to be made and that there was no dispute that it pertained to a criminal investigation. The Council held that the responsive record was a criminal investigatory record, and the custodian had borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; N. Jersey Media Grp. Inc., 229 N.J. at 541; Janeczko, GRC 2002-79, *et. seq.*; See Crook v. Atlantic Cnty. Prosecutor’s Office, GRC Complaint No. 2010-92 (March 2011); Grossman v. Ocean Cnty. Prosecutor Office, 2013 N.J. Super. Unpub. LEXIS 1999 (July 26, 2013).

Additionally, in Leak v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009), the complainant sought, among other records, “ballistics results from a 1994 trial.” The custodian responded denying access to responsive records pursuant to N.J.S.A. 47:1A-1.1 and Executive Order No. 69 (Gov. Whitman, 1997). In determining whether the custodian lawfully denied access to the responsive records, the Council interpreted the term “ballistics” as defined in the Merriam Webster dictionary.⁷ Id. at 5. Further, the Council considered how law enforcement agencies applied ballistics to criminal investigations involving the use of a

⁵ This 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.

⁶ The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

⁷ Merriam Webster defines “ballistics” as “the firing characteristics of a firearm or cartridge.” <http://www.merriamwebster.com/dictionary/ballistics>.

firearm. Because ballistics testing is conducted to determine whether a particular firearm was used in the commission of a crime, a ballistics report can be considered criminal investigatory in nature and not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. Based on the forgoing, the Council determined that the custodian lawfully denied access to the responsive records. Id. at 6.

In the instant complaint, the Complainant submitted two separate OPRA requests for copies of lab reports that were part of a criminal investigation against the Complainant. The Custodian certified that he was able to locate both the CDS lab report (N11-00242) and the ballistics report (BS-11-00208). The Custodian denied both OPRA requests stating that the records were criminal investigatory records exempt under OPRA. N.J.S.A. 47:1A-1.1.

The GRC is persuaded that the Custodian lawfully denied access to the responsive records. First, the Custodian certified in the SOI that both lab reports were obtained during the course of a criminal investigation. N. Jersey Media Grp., Inc., 229 N.J. at 541. Second, the responsive records were not required by law to be made. Third, the records were exempt from disclosure regardless of whether the criminal investigation concluded prior to the subject OPRA request. Janeczko, GRC 2002-79, *et. seq.* Finally, the Council's decisions in McKinney, GRC 2016-149 and Leak, GRC 2007-148 are 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 lab reports N11-00242 and BS-11-000208 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. at 541; Janeczko, GRC 2002-79, *et. seq.*; McKinney, GRC 2016-149; Leak, GRC 2007-148.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to lab reports N11-00242 and BS-11-000208 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; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); 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); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); McKinney v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-149 (June 2018); Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009).

Prepared By: Brandon Garcia
Case Manager

December 10, 2019