



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Aswad Ayinde
Complainant

Complaint No. 2018-52

v.

Passaic 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:

1. The portion of the Complainant's request seeking "data basis" is an invalid request that fails to specifically identify records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of 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, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Franklin v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2016-308 (August 2018). Thus, the Custodian did not unlawfully deny access. N.J.S.A. 47:1A-6.
2. The portion of the Complainant's request seeking DNA and saliva samples is an invalid request that fails to meet the definition of a government record and does not seek specifically identifiable records. N.J.S.A. 47:1A-1.1; MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37, 39 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Miller v. N.J. Dep't of Corr., GRC Complaint No. 2009-226 (October 2010). Thus, the Custodian did not unlawfully deny access. N.J.S.A. 47:1A-6.
3. The portion of the Complainant's OPRA request seeking e-mails regarding his criminal indictment is invalid. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2007-07 (April 2010). See also Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016). Thus, there was no unlawful denial of access to this portion of the request. N.J.S.A. 47:1A-6.
4. The Custodian lawfully denied access to the portion of the Complainant's request seeking arrest reports and investigatory reports under Indictment No. 06-10-1238-I. N.J.S.A. 47:1A-6. Specifically, the indictment pertains to criminal convictions on

charges of various forms of sexual assault, and the disclosure of reports and statements pertaining to same are restricted from access under N.J.S.A. 2A:82-45. See N.J.S.A. 47:1A-9(a).

5. The Custodian lawfully denied access to the portion of the Complainant's OPRA request seeking handwritten notes pertaining to his criminal case. N.J.S.A. 47:1A-6. Specifically, handwritten notes made during the course of a criminal investigation are not subject to access under OPRA's criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Boretsky v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2016-220 (February 2018).
6. The Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking Fingerprint Cards, Photo Arrays, Crime Scene Photos, DVDs, CDs, microfilm and computer diskettes, and Grand Jury Tally Sheets pertaining to his criminal case, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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**

**Aswad Ayinde¹
Complainant**

GRC Complaint No. 2018-52

v.

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

Records Relevant to Complaint:³ Regarding State v. Ayinde, Indictment No. 06-10-1238-I: All arrest reports, investigative reports, DNA samples, saliva samples, finger print cards, photo arrays, crime scene photos, DVD's, CD's microfilm, data basis, computer diskettes, e-mails, handwritten notes, and Grand Jury tally sheets.

Custodian of Record: Lisa A. Verlardi, Esq.
Request Received by Custodian: October 11, 2017
Response Made by Custodian: December 15, 2017
GRC Complaint Received: March 26, 2018

Background⁴

Request and Response:

On October 2, 2017, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On October 17, 2017, Matthew P. Jordan, Esq. responded in writing on behalf of the Custodian seeking an extension of time to respond to until November 17, 2017. On November 17, 2017, Mr. Jordan sought another extension in writing to until December 15, 2017.

On December 15, 2017, the Custodian responded in writing, denying access to the requested records on various grounds. The Custodian categorized the response as follows:

Regarding arrest reports and investigative reports, the Custodian stated that such records are exempt from disclosure as criminal investigatory records, citing N.J.S.A. 47:1A-1.1 and N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015), aff'd in part,

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant requested other records that are not at issue in the instant matter.

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.

rev'd on other grounds, 229 N.J. 541 (2017). The Custodian also cited Newman v. New Jersey State Police, GRC Complaint No. 2013-347 (July 2014), Maniscalco v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2012-247, Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005), and 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).

Additionally, the Custodian asserted that statements of child victims of sexual assault or abuse may not be released publicly without a court order, citing N.J.S.A. 47:1A-9(a) and N.J.S.A. 2A:82-46. The Custodian also referenced the agency obligations to protect a citizen's personal information. N.J.S.A. 47:1A-1.

Regarding DNA samples and saliva samples, the Custodian stated that the records were physical evidence and not subject to OPRA. The Custodian added that even if the items were considered as "records" under OPRA, they would fall under the criminal investigatory records exemption.

Regarding Fingerprint ID cards, photo arrays and crime scene photos, the Custodian stated that the Passaic County Prosecutor's Office ("PCPO") did not possess any responsive records. The Custodian added that even if the PCPO were in possession of such records, they would be exempt from access as criminal investigatory records, as well as the other access restrictions pertaining to sexual assault victims and personal privacy. The Custodian noted that the PCPO possessed photographs pertaining to the identified matter but would not qualify as "crime scene photos." The Custodian again stated that the records would remain exempt for the same reasons as mentioned previously.

Regarding DVDs, CDs, microfilm and computer diskettes, the Custodian stated that the PCPO did not possess any responsive records. The Custodian added that the agency did possess a cassette tape containing a recorded copy of the Complainant's interview/statement but maintained that the record would be exempt from disclosure for the same reasons as the request for arrest and investigative reports.

Regarding "data basis," the Custodian denied the request stating it was unclear what records the Complainant was seeking. The Custodian noted that an OPRA request must identify with reasonable clarity the specific records being sought, citing Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37, 39 (App. Div. 2005). The Custodian added that OPRA did not require him to conduct research to discern which records may be responsive to a request, citing MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005).

Regarding e-mails, the Custodian denied access as overly broad. The Custodian noted that the Government Records Council ("GRC") has held that in a request for e-mail records, the request must include the content and/or subject matter, a specific date or range of dates, and the identity of the sender and/or recipient. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2007-07 (April 2010). The Custodian also referred back to the cases regarding the request for "data basis."

Regarding handwritten notes, the Custodian also denied access as overly broad. Lastly, for the request seeking “Grand Jury Tally Sheets,” the Custodian stated that the PCPO did not possess any responsive records. The Custodian added that even if the PCPO possessed them, the records would be exempt from access under N.J. Court Rules, R. 1:38-3 and 3:6-7.

Denial of Access Complaint:

On March 26, 2018, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserted that his request was denied in violation of OPRA.

Statement of Information:

On May 4, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 11, 2017. The Custodian certified that she looked through the physical and digital versions of the relevant file for responsive records. The Custodian certified that she responded in writing on December 15, 2017 denying access to the requested records.

The Custodian maintained the same basis for denying access to each record as stated in her December 15, 2017 response.

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, 381 N.J. Super. at 37,⁵ N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); 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. at 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).

Data Basis

The Council also addressed the search/research question in Donato, GRC 2005-182. There, the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor’s OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

Pursuant to [MAG], the Custodian is obligated to search her files to find the identifiable government records listed in the Complainant’s OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word search is defined as “to go or look through carefully in order to find something missing or lost.” The word research, on the other hand, means “a close and careful study to find new facts or information.” (Footnotes omitted.)

[Id.]

In the instant matter, the Complainant sought access to all “data basis” in relation to his criminal indictment. The Custodian responded by stating that the request was unclear, and that she was not obligated to conduct research to discern what records the Complainant was seeking.

⁵ Affirmed on appeal from Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004).

In Franklin v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2016-308 (August 2018), the Council held that the complainant's request for "Promis Gavel" regarding six (6) individuals was invalid, stating that "promis gavel" was not a type of record, but a searchable database by which information could be ascertained. The Council found that the request was invalid as it sought a system and not a record.

Upon review, the GRC is satisfied that the Custodian lawfully denied access. "Data basis" is not included under OPRA's definition of a government record. See N.J.S.A. 47:1A-1.1. Moreover, to the extent that the Complainant is seeking "databases" in relation to his criminal indictment, the request is still invalid in accordance with the Council's holding in Franklin, GRC 2016-308.

Accordingly, the portion of the Complainant's request seeking "data basis" is an invalid request that fails to specifically identify records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Franklin, GRC 2016-308. Thus, the Custodian did not unlawfully deny access. N.J.S.A. 47:1A-6.

DNA Samples and Saliva Samples

In Miller v. N.J. Dep't of Corr., GRC Complaint No. 2009-226 (October 2010), the complainant sought a DNA sample taken by the agency in accordance with state law. The Council held that when measured against OPRA's definition of a "government record" a sample of DNA did not match what is identified under N.J.S.A. 47:1A-1.1, as it was not a "paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof . . ." Therefore, the Council found that the complainant's request did not seek a specific, identifiable government record.

Here, the Complainant also sought "DNA samples" and "saliva samples" pertaining to his indictment. In her SOI, the Custodian certified that she located one (1) package marked "processed DNA samples" located in the evidence vault. The Custodian asserted in her response and SOI that the Complainant was seeking physical evidence, and not records as defined under OPRA. N.J.S.A. 47:1A-1.1. Like the request in Miller, GRC 2009-226, the Complainant's request seeks records which do not meet OPRA's definition of a government record.

Therefore, the portion of the Complainant's request seeking DNA and saliva samples is an invalid request that fails to meet the definition of a government record and does not seek specifically identifiable records. N.J.S.A. 47:1A-1.1; MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders Ass'n, 390 N.J. Super. at 180; Miller, GRC 2009-226. Thus, the Custodian did not unlawfully deny access. N.J.S.A. 47:1A-6.

E-mails

Regarding requests for e-mails and correspondence, the GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage, GRC 2009-07. The Council determined that to be valid, such requests must contain: (1) the content

and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. Elcavage, GRC 2009-07; Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011). Further, the Council has previously determined that a request failing to contain all appropriate criteria set forth in Elcavage, GRC 2009-07, was invalid. See e.g. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010) (invalid request omitting the “subject and/or content”); Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016) (invalid request omitting “date or range of dates”).

Here, the Complainant’s OPRA request sought e-mails pertaining to his criminal indictment. The e-mail request failed to identify a sender and/or recipient and failed to include a date or range of dates. Therefore, the request failed to satisfy the elements required to be a valid request for e-mails under Elcavage.

Accordingly, the portion of the Complainant’s OPRA request seeking e-mails regarding his criminal indictment is invalid. Elcavage, GRC 2009-07. See also Inzelbuch, GRC 2015-68. Thus, there was no unlawful denial of access to this portion of the 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.

Arrest Reports/Investigative Reports

The Council has held that arrest reports are disclosable, with redactions for information otherwise exempt under OPRA. See Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008).

However, OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; *any other statute*; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

N.J.S.A. 2A:82-46 states in relevant part:

a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, human trafficking involving sexual activity, a crime involving domestic violence as defined in section 3 of P.L.1991, c.261 (C.2C:25-19) which involves sexual activity, endangering the welfare of children under N.J.S.2C:24-4, abuse or neglect of a child pursuant to R.S.9:6-3, or in any action alleging an abused or neglected child under P.L.1974, c.119 (C.9:6-8.21 et seq.), the name, address, and identity of a victim who was under the age of 18 at the time of the alleged commission of an offense shall not appear on the indictment, complaint, or any other public record as defined in P.L.1963, c.73 (C.47:1A-1 et seq.). In its place initials or a fictitious name shall appear.

b. Any report, statement, photograph, court document, indictment, complaint or any other public record which states the name, address and identity of a victim shall be confidential and unavailable to the public. Unless authorized pursuant to subsection c. of this section, any person who purposefully discloses, releases or otherwise makes available to the public any of the above-listed documents which contain the name, address and identity of a victim who was under the age of 18 at the time of the alleged commission of an offense enumerated in subsection a. of this section shall be guilty of a disorderly persons offense.

Additionally, N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

Here, the Custodian asserted that the Complainant's request for arrest reports and investigatory reports were not subject to access in part because the Complainant's indictment involved charges of sexual assault, and reports and statements thereto are not subject to disclosure. Accordingly, the GRC takes judicial notice of information provided from the New Jersey Department of Correction's Offender Search ("Search"). The Search indicates that the Complainant was convicted and incarcerated on multiple counts of sexual assault (N.J.S.A. 2C:14-2(c)(2)), aggravated sexual assault (N.J.S.A. 2C:14-2(a)(1)) and sexual assault against a victim under thirteen (13) years of age (N.J.S.A. 2C:14-2(b)(2)).⁶ Thus, there is sufficient evidence to conclude that the requested arrest reports and investigatory reports are subject to the access restrictions under N.J.S.A. 2A:82-46.

Accordingly, the Custodian lawfully denied access to the portion of the Complainant's request seeking arrest reports and investigatory reports under Indictment No. 06-10-1238-I. N.J.S.A. 47:1A-6. Specifically, the indictment pertains to criminal convictions on charges of

⁶ "Offender Details." New Jersey Department of Corrections, https://www20.state.nj.us/DOC_Inmate/details?x=1468272&n=0 (last accessed November 22, 2019).

various forms of sexual assault, and the disclosure of reports and statements pertaining to same are restricted from access under N.J.S.A. 2A:82-45. See N.J.S.A. 47:1A-9(a).

Handwritten Notes

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., 229 N.J. at 541. 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., 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 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.”⁸ Moreover, with respect to concluded investigations, the Council pointed out in Janeczko that, “[the

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

criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete.”

In Boretsky v. Middlesex Cnty. Prosecutor’s Office, GRC Complaint No. 2016-220 (February 2018), the Council held that handwritten notes as well as correspondence by and between prosecutors and investigators created in the course of a criminal investigation also fell under the exemption. See also Richards v. Florence Twp. Police Dep’t (Burlington), GRC Complaint No. 2017-219 (Interim Order dated November 12, 2019).

Here, a portion of the Complainant’s October 11, 2017 OPRA request sought access to any “handwritten notes” contained within his criminal file. Notwithstanding the Custodian’s contention that the Complainant’s request was invalid as overly broad, the record falls under the criminal investigatory records exemption under OPRA based upon Boretsky, GRC 2016-220. Thus, even if the Complainant made a more particularized request for the handwritten notes, the record would remain exempt under OPRA.

Therefore, the Custodian lawfully denied access to the portion of the Complainant’s OPRA request seeking handwritten notes pertaining to his criminal case. N.J.S.A. 47:1A-6. Specifically, handwritten notes made during the course of a criminal investigation are not subject to access under OPRA’s criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., 229 N.J. at 541; Boretsky, GRC 2016-220.

Fingerprint Cards, Photo Arrays, Crime Scene Photos, DVDs, CDs, microfilm and computer diskettes, Grand Jury Tally Sheets

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant’s OPRA request sought Fingerprint Cards, Photo Arrays, Crime Scene Photos, DVDs, CDs, microfilm and computer diskettes, and Grand Jury Tally Sheets pertaining to his criminal indictment. On December 15, 2017, the Custodian responded that no responsive records exist for the aforementioned records. The Custodian reaffirmed his contention that no responsive records exist in his SOI. Additionally, the Complainant provided no evidence to refute the Custodian’s certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainant’s OPRA request seeking Fingerprint Cards, Photo Arrays, Crime Scene Photos, DVDs, CDs, microfilm and computer diskettes, and Grand Jury Tally Sheets pertaining to his criminal case, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The portion of the Complainant’s request seeking “data basis” is an invalid request that fails to specifically identify records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J.

Super. 534, 546 (App. Div. 2005); Bent v. Twp. of 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, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Franklin v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2016-308 (August 2018). Thus, the Custodian did not unlawfully deny access. N.J.S.A. 47:1A-6.

2. The portion of the Complainant's request seeking DNA and saliva samples is an invalid request that fails to meet the definition of a government record and does not seek specifically identifiable records. N.J.S.A. 47:1A-1.1; MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37, 39 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Miller v. N.J. Dep't of Corr., GRC Complaint No. 2009-226 (October 2010). Thus, the Custodian did not unlawfully deny access. N.J.S.A. 47:1A-6.
3. The portion of the Complainant's OPRA request seeking e-mails regarding his criminal indictment is invalid. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2007-07 (April 2010). See also Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016). Thus, there was no unlawful denial of access to this portion of the request. N.J.S.A. 47:1A-6.
4. The Custodian lawfully denied access to the portion of the Complainant's request seeking arrest reports and investigatory reports under Indictment No. 06-10-1238-I. N.J.S.A. 47:1A-6. Specifically, the indictment pertains to criminal convictions on charges of various forms of sexual assault, and the disclosure of reports and statements pertaining to same are restricted from access under N.J.S.A. 2A:82-45. See N.J.S.A. 47:1A-9(a).
5. The Custodian lawfully denied access to the portion of the Complainant's OPRA request seeking handwritten notes pertaining to his criminal case. N.J.S.A. 47:1A-6. Specifically, handwritten notes made during the course of a criminal investigation are not subject to access under OPRA's criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Boretsky v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2016-220 (February 2018).
6. The Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking Fingerprint Cards, Photo Arrays, Crime Scene Photos, DVDs, CDs, microfilm and computer diskettes, and Grand Jury Tally Sheets pertaining to his criminal case, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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