



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 12, 2019 Government Records Council Meeting

Robert Byrd
Complainant

Complaint No. 2018-57

v.

Essex 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, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the requested police and lab reports regarding a handgun used in the commission of multiple incidents are 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, 569 (2017); Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009). Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6. Further, the GRC declines to address the Custodian's remaining asserted exemptions because it has found the requested records to be exempt on one basis.

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



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert Byrd¹
Complainant**

GRC Complaint No. 2018-57

v.

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

Records Relevant to Complaint: Copies of "police records and lab reports on the .22 caliber handgun used in" Case Numbers 23646, 23897, and 23882.

Custodian of Record: LeeAnn Cunningham

Request Received by Custodian: January 29, 2018

Response Made by Custodian: February 7, 2018

GRC Complaint Received: April 2, 2018

Background³

Request and Response:

On January 18, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On February 7, 2018 the Custodian responded in writing stating that she was unable to locate the three (3) case numbers identified in the subject OPRA request. The Custodian noted that the Essex County Prosecutor's Office ("ECPO") assigns prosecution cases an eight-digit number beginning with the two (2) numbers of the year that same was created. The Custodian thus sought clarification to include a defendant name or birth date.

On February 20, 2018, the Complainant responded providing the Custodian the number "84" representing the year the cases were created. The Complainant further provided incident dates where "the handgun . . . was used" and three (3) defendant names, inclusive of himself.

On March 12, 2018, the Custodian responded in writing to the Complainant's clarified OPRA request. The Custodian initially noted that the identified case numbers were still inaccurate

¹ No legal representation listed on record.

² Represented by Courtney M. Gaccione, Esq. (Newark, NJ).

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.

because they only contained seven digits. The Custodian nonetheless stated that she believed she identified the correct case numbers based on the defendants and incident dates.

The Custodian stated that she was denying access to the Complainant's OPRA request for multiple reasons. The Custodian first stated that the subject OPRA request was invalid. Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian next stated that responsive records were exempt 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, 569 (2017). The Custodian also stated that the responsive records constituted unfiled discovery material exempt from disclosure. N.J.S.A. 47:1A-9(b); Drinker, Biddle & Reath, LLP v. N.J. Dep't of Law & Pub. Safety, Div. of Law, 421 N.J. Super. 489 (App Div. 2011). The Custodian finally stated that the records also constituted "inter-agency or intra-agency advisory, consultative, or deliberative material" exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On April 2, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that the Custodian sought clarification of his OPRA request, which he provided on February 20, 2018. The Complainant stated that the Custodian subsequently denied him access to responsive records under the criminal investigatory exemption. The Complainant provided no additional arguments refuting the denial.

Statement of Information:

On April 9, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on January 29, 2018. The Custodian certified that she searched the Promis Gavel system and was unable to locate the identified cases. The Custodian certified that she responded in writing on February 7, 2018 seeking clarification, which she received on March 2, 2018. The Custodian affirmed that she was able to locate cases thereafter based on the Complainant's clarification. The Custodian certified that she responded in writing on March 12, 2018 denying access on multiple bases.

The Custodian argued that she lawfully denied access to the Complainant's OPRA request for all the reasons stated in her March 12, 2018 response.

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 provides that:

[A] government record shall not include . . . any copy, reproduction or facsimile of any photograph, negative or print, including instant photographs and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner.

[N.J.S.A. 47:1A-1.1.]

Moreover, 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).

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.

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 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 (Governor Whitman, 1997). In determining whether the custodian lawfully denied access to the responsive records, the Council contemplated the term “ballistics” as defined in the Merriam Webster dictionary.⁶ Id. at 5. Further, the Council considered how law enforcement agencies applied ballistics to criminal investigations involving the use of a firearm. Based on the forgoing, the Council determined that the custodian lawfully denied access to the responsive records. Id. at 6.

Here, the Complainant sought access to “police records and lab reports” regarding a firearm used in three (3) incidents in 1984. The Custodian denied access to the requested records on multiple bases, including the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. The Complainant disputed this denial but did not provide any additional arguments to support his position. In the SOI, the Custodian maintained her position that the requested records were exempt from disclosure.

Upon review of this complaint, the Council is persuaded that the Custodian lawfully denied access to the requested “police . . . and lab reports” under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., 229 N.J. 541. As to the first prong of the test, there is no evidence in the record that the requested reports were required by law to be made. As to the second prong of the test, the records clearly pertain to a criminal investigation. Notably, the Complainant, who is incarcerated at Northern State Prison, identified himself as a defendant in at least one (1) of the cases where the “handgun . . . was used.” Further, the requested reports could easily fall within the “ballistics” category as described in Leak, GRC 2007-184 to the extent that investigators tested the gun to connect it to each incident. Thus, a conclusion on par with Leak, GRC 2007-148 is appropriate here.

Accordingly, the requested police and lab reports regarding a handgun used in the commission of multiple incidents are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., 229 N.J. 541; Leak, GRC 2007-148. Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6. Further, the GRC declines to address the Custodian's remaining asserted exemptions because it has found the requested records to be exempt on one basis.

⁵ The GRC's ruling was affirmed in an unpublished opinion of the Appellate Division.

⁶ Merriam Webster defines “ballistics” as “the firing characteristics of a firearm or cartridge.” <http://www.merriam-webster.com/dictionary/ballistics>.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the requested police and lab reports regarding a handgun used in the commission of multiple incidents are 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, 569 (2017); Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009). Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6. Further, the GRC declines to address the Custodian's remaining asserted exemptions because it has found the requested records to be exempt on one basis.

Prepared By: Frank F. Caruso
Executive Director

October 30, 2019