



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

Shawn Custis
Complainant

Complaint No. 2018-76

v.

Essex 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, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that 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 case history of State's witnesses named in his indictment. N.J.S.A. 47:1A-6. See also Lewis v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018); Franklin v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2016-308 (April 2018); Hamid Abdul-Shabazz, GRC Complaint No. 2017-41 (April 2019); Tyler v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 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 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**

**Shawn Custis¹
Complainant**

GRC Complaint No. 2018-76

v.

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

Records Relevant to Complaint: Hardcopies via U.S. Mail of: “ the following documents from the Essex County Prosecutor’s Office as they relate to Essex County Indictment Number 14-01-0204:”

1. Criminal record history pertaining to State’s witness Denise N. Sanders.
2. Criminal record history pertaining to State’s witness Yolanda Newman.

Custodian of Record: LeeAnn Cunningham
Request Received by Custodian: April 12, 2018
Response Made by Custodian: April 16, 2018
GRC Complaint Received: April 30, 2018

Background³

Request and Response:

On April 12, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 16, 2018, the Custodian responded in writing denying access the Complainant’s OPRA request on two separate grounds:

1. Criminal case histories are not public records pursuant to the National Crime Prevention and Privacy Compact (“NCPPC”), codified as N.J.S.A. 53:1-32. See also N.J.S.A. 53:1-20.5 through -20.37 and N.J.A.C. 13:59-1.1 through -2.4.
2. OPRA is not intended to be tool for discovery nor to supplement discovery by private litigants. See MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-549 (App. Div. 2005).

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.

Denial of Access Complaint:

On April 30, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant alleged that the records sought were not provided as part of the pre-trial discovery for his criminal case. The Complainant did not elaborate further on the Custodian’s denial of access.

Statement of Information:

On May 21, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 12, 2018. The Custodian certified that she responded in writing on April 16, 2018, denying access to the Complainant’s OPRA request on two separate grounds. The first was that criminal case histories are not public records pursuant to the NCPPC. The Custodian asserted that access to criminal case histories “. . . is controlled not only in terms of who may obtain them, but also in terms of which governmental agencies may disseminate them, to whom and under what circumstances.” The second was that OPRA “. . . is not meant to be tool for discovery,” and “[i]t is not intended to replace or supplement discovery by private litigants.” See MAG, 375 N.J. Super. at 546.

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.

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 with regard to rap sheets 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 State Bureau of Identification (“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 rap sheet information, State agencies have promulgated regulations limiting dissemination to a specific process (with multiple limitations) or outright exempting access to them. See N.J.A.C. 13:59-1, *et seq.* (New Jersey State Police regulations providing for the specific process of obtaining background checks and the limitations on who can access this information); 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 rap sheets support that they are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).

In Lewis v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018) the complainant requested, inter alia, criminal “rap sheets.” The Council held that the requested “rap sheets” contained criminal history information exempt from disclosure under EO 9 and N.J.S.A. 47:1A-9(a). See also Tyler v. Passaic Cnty. Prosecutor’s Office, 2017-30 (March 2019).

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 NCPPC 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 “rap sheets” were exempt from disclosure under N.J.S.A. 47:1A-9(a) and EO 9.

The Council relied upon this same analysis in Hamid Abdul-Shabazz v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2017-41 (April 2019). Although decided during the pendency of this complaint, the Council’s holding is instructive here. The complainant sought the “rap sheet” for one individual, a witness in his indictment. The custodian denied access under the NCPPC, N.J.S.A. 53:1-20.5 through -20.37, and EO 9. Specifically, EO 9 provides that said records are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); Lewis, GRC 2016-131; Franklin, GRC 2016-308. Accordingly, the Council held that the Custodian lawfully denied access to the portion of the Complainant’s OPRA request seeking “rap sheets.”

In the instant complaint, the Complainant sought the “criminal record history” of two (2) State’s witnesses named in his indictment. The Custodian denied the Complainant’s OPRA request under the NCPPC. In accordance with prevailing case law, the Custodian lawfully denied access to the requested criminal record histories as they are not subject to disclosure pursuant to EO 9. N.J.S.A. 47:1A-9(a).

The GRC notes that because the Custodian lawfully denied access to the requested records under EO 9, it declines to address the Custodian’s other reasons for denial.

Therefore, because EO 9 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 State’s witnesses named in his indictment. N.J.S.A. 47:1A-6. See also Lewis, GRC 2016-131; Franklin, GRC 2016-308; Abdul-Shabazz, GRC 2017-41; Tyler, GRC 2017-30.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that 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 case history of State's witnesses named in his indictment. N.J.S.A. 47:1A-6. See also Lewis v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018); Franklin v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2016-308 (April 2018); Hamid Abdul-Shabazz, GRC Complaint No. 2017-41 (April 2019); Tyler v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2017-30 (March 2019).

Prepared By: Brandon Garcia
Case Manager

December 10, 2019