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Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

Jason McKinnon
Complainant

Complaint No. 2018-92

v.

NJ Department of Law and Public Safety,
Division of Criminal Justice
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 2020 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 Custodian has borne his burden of proof that he lawfully denied access to Item No. 1 of the Complainant’s OPRA request. Specifically, the Custodian certified that no responsive records exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian lawfully denied access to records pertaining to Item No. 2 of the Complainant’s OPRA request because the responsive records meet both prongs of the criminal investigatory test and thus, are exempt under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; State v. Laurence, 259 N.J. Super. 225, 233 (August 4, 1992); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); 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).

Final Decision Rendered by the
Government Records Council
On The 26th Day of February 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: March 3, 2020

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2019 Council Meeting**

**Jason McKinnon¹
Complainant**

GRC Complaint No. 2018-92

v.

**New Jersey Department of Law and Public Safety,
Division of Criminal Justice²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. Mail of any and all Consensual Interception Authorization Requests pertaining to:

1. ESU consensual number H3206-34(c)
2. Division of Criminal Justice (“DCJ”) C-54(f)-2006-N in the matter of State v. Maddox and McKinnon, Indictment No. 07-09-00124.

Custodian of Record: Lt. Edward Augustyn
Request Received by Custodian: April 9, 2018
Response Made by Custodian: April 18, 2018
GRC Complaint Received: May 21, 2018

Background³

Request and Response:

On April 4, 2018 the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 18, 2018, the Custodian responded in writing denying access to the Complainant, advising his request sought criminal investigatory records exempt under OPRA. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On May 21, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that his OPRA request sought records from the State’s discovery in the matter of State v. Maddox and McKinnon, Indictment

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Adam Robert Gibbons.

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.

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No. 07-09-00124. The Complainant further asserted that the State's investigation was now closed and he needed the records for his appeal. The Complainant cited Bergen Cnty. Imp. Auth. v. N. Jersey Media Grp., Inc., 370 N.J. Super 504, 516 (App. Div. 2004) in support of disclosure.

Statement of Information:

On June 25, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on April 9, 2018. The Custodian certified that a search was conducted of DCJ's files and no records pertaining to "H320-06-34(c)" were located. The Custodian also certified that his search located a responsive record pertaining to the Consensual Interception Authorization No. C-54 (f)-2006-N. Finally, the Custodian certified that he responded in writing on April 18, 2018, stating that the Complainant's OPRA request sought criminal investigatory records specifically exempt under OPRA.

The Custodian stated that the number "H320-6-34(c)" was a New Jersey State Police ("NJSP") reference number for a record not made or maintained by DCJ. The Custodian argued that no unlawful denial of access occurred for "H320-6-34(c)" because the records sought did not exist. N.J.S.A. 47:1A-1.1. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); See also Bent v. Stafford Twp. Police, 381 N.J. Super. 30, 37 (App. Div. 2005).

The Custodian contended that "C-54 (f)-2006-N" was properly denied as a criminal investigatory record because it met both prongs of the criminal investigatory record exemption. N.J.S.A. 47:1A-1.1. The Custodian cited N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 565 (2017) asserting that "C-54 (f)-2006-N" would not have been created if not for the onset of a criminal investigation. The Custodian further asserted that there was no law that required the record to be made. N.J.S.A. 47:1A-1.1; State v. Laurence, 259 N.J. Super. 225, 233 (August 4, 1992).

Additionally, the Custodian stated that "the GRC does not have the jurisdiction to adjudicate denial of access to records under the common law." Ciesla v. N.J. Dep't of Health and Senior Serv., 429 N.J. Super. 127, 147-48 (App. Div. 2012).

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.

Item No. 1:

The GRC has previously found that, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's

certification, no unlawful denial of access occurred. In Pusterhofer, GRC 2005-49, the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

In the matter before the Council, the Complainant's OPRA request sought ". . . any and all Consensual Interception Authorization requests pertaining to ESU Consensual No. H320-06-34(c) . . ." In the Denial of Access Complaint, the Complainant cited Bergen Cnty. Imp. Auth., 370 N.J. Super at 504 in favor of disclosure under common law. In the SOI, the Custodian certified that no responsive records existed. The Custodian certified that his search revealed that "H320-06-34(c)" was a NJSP reference number and any relevant records would be in the State Police's custody. The Custodian further certified that DCJ was not responsible for maintaining said records. The Custodian also argued that the GRC does not have the jurisdiction to adjudicate the Complainant's Denial of Access complaint under common law. Ciesla, 429 N.J. Super. at 127.⁴

After reviewing all the evidence on record, the GRC is satisfied that the Custodian lawfully denied access to the responsive record. The Custodian certified in the SOI that the responsive records were not maintained by DCJ, but instead fell under the jurisdiction of NJSP. The records sought do not exist within the custody of DCJ. The GRC is not persuaded that the Complainant provided competent, credible evidence to refute the Custodian's certifications.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to Item No. 1 of the Complainant's OPRA request. Specifically, the Custodian certified that no responsive records exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Item No 2:

The New Jersey Supreme Court considered the two-prong test for the criminal investigatory records exemption in N. Jersey Media Grp., 229 N.J. at 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 the 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 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

⁴ The GRC does not have the authority to address a requestor's common law right to access records. N.J.S.A. 47:1A-7(b); Rowan, Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013); Kelly v. N.J. Dep't of Transp., GRC Complaint No. 2010-215 (November 2011) at 2. Thus, the GRC cannot address any common law right of access to the responsive records.

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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 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.”⁶ Moreover, with respect to concluded investigations, the Council pointed out in Janeczko, GRC 2002-79 *et. seq.* that, “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete.”

In the instant complaint, the Complainant submitted an OPRA request for records pertaining to Consensual Interception Authorization No. “C-54 (f)-2006-N”. The Custodian denied the subject OPRA request asserting that the responsive records were exempt under the criminal investigatory exception. N.J.S.A. 47:1A-1.1. In the SOI, the Custodian certified that he was able to locate the responsive records. The Custodian certified that “C-54 (f)-2006-N” was created for the purpose of recording communications in the course of a criminal investigation. Additionally, the Custodian cited Superior and Appellate court case law that supports the non-necessity of a written form authorizing the recording of parties by law enforcement. Laurence, 259 N.J. Super. at 233; N. Jersey Media Grp., Inc., 441 N.J. Super. at 105.

The GRC is persuaded that the Custodian lawfully denied access to the responsive records. First, the Custodian certified in the SOI that “C-54 (f)-2006-N” was obtained during the course of a criminal investigation. N. Jersey Media Grp., Inc., 229 N.J. at 541. Also of import, the consensual authorization denotes one party’s cooperation with law enforcement to intercept and record communications. Second, the responsive records were not required by law to be made. Laurence, 259 N.J. Super. at 233. Third, the records were exempt from disclosure regardless of whether the criminal investigation concluded prior to the filing of the subject OPRA request. Janeczko, GRC 2002-79 *et. seq.* Thus, it follows that the responsive records met both prongs of the criminal investigatory exemption and, as such, are exempt from disclosure under OPRA.

Therefore, the Custodian lawfully denied access to records pertaining to Item No. 2 of the Complainant’s OPRA request because the responsive records meet both prongs of the criminal investigatory test and thus, are exempt under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Laurence, 259 N.J. Super. at 233; N. Jersey Media Grp., Inc., 229 N.J. at 541; Janeczko, GRC 2002-79 *et. seq.*

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.

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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he lawfully denied access to Item No. 1 of the Complainant's OPRA request. Specifically, the Custodian certified that no responsive records exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian lawfully denied access to records pertaining to Item No. 2 of the Complainant's OPRA request because the responsive records meet both prongs of the criminal investigatory test and thus, are exempt under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; State v. Laurence, 259 N.J. Super. 225, 233 (August 4, 1992); 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).

Prepared By: Brandon Garcia
Case Manager

February 19, 2020