



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 29, 2020 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2019-44

v.

Essex County Prosecutor's Office
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council ("Council") considered the September 22, 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 the requested autopsy photographs are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Boretsky v. Middlesex Cnty. Examiner's Office, GRC Complaint No. 2016-219 (January 2018). Further, there is no evidence in the record to support that the Complainant fell within one of the exceptions present in OPRA. Thus, the Custodian lawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6.

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 29th Day of September 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: October 1, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2020 Council Meeting**

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2019-44

v.

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

Records Relevant to Complaint: Copies of autopsy pictures of victim in State v. Barkley, Indictment No. 13-4-93.

Custodian of Record: LeeAnn Cunningham

Request Received by Custodian: January 29, 2019

Response Made by Custodian: February 5, 2019

GRC Complaint Received: February 28, 2019

Background³

Request and Response:

On January 21, 2019, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On February 5, 2019, the Custodian responded in writing denying the Complainant's OPRA request on multiple bases. The Custodian stated that the requested records were exempt because they are photographs taken during an autopsy and constitute criminal investigatory records. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 591 (2011); Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30, 38-39 (App. Div. 2005). The Custodian further stated that the Complainant's OPRA request was denied because OPRA was not intended to "circumvent the discovery process and is not meant to be a tool for discovery." MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546-549 (App. Div. 2005). The Custodian finally stated that, to the extent that records exist, they fall under the "inter-agency or intra-agency advisory, consultative, or deliberative [("ACD")] material" exemption. N.J.S.A. 47:1A-1.1.

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.

Denial of Access Complaint:

On February 28, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”).⁴ The Complainant stated that N.J. Advanced Media recently published a story detailing a history of issues that the N.J. Medical Examiner experienced over a twenty-year period.⁵ The Complainant contended that he sought access to the requested autopsy photographs because it was possible that the Medical Examiner (“ME”) conspired with prosecutors to designate the victim’s death as a homicide. The Complainant argued that it was also possible that the ME was too incompetent to perform the autopsy given the revelations within the article. Shuttleworth v. City of Camden, 258 N.J. Super. 578 (App. Div. 1992).

Statement of Information:

On March 22, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 29, 2019. The Custodian certified that her search included reviewing the “voluminous homicide file” pertaining to Indictment No. 1390-4-93. The Custodian noted that the Complainant is serving a life sentence after being found guilty of felony murder, five (5) counts of robbery offenses, and other offenses. The Custodian certified that she responded in writing on February 5, 2019 denying the Complainant’s OPRA request citing N.J.S.A. 47:1A-1.1.

The Custodian contended that she lawfully denied access to the Complainant’s OPRA request for all the reasons set forth in her February 5, 2019 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’s provisions provide 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 except:

⁴ The Complainant stated in the Denial of Access Complaint that he was seeking access to an autopsy report. However, his OPRA request and “Records Denial List” both confirm that he sought copies of the photographs and not the report itself.

⁵ <https://www.nj.com/opinion/2017/12/time-to-reform-our-dismal-medical-examiner-system.html>.

- when used in a criminal action or proceeding in this State which relates to the death of that person,
- for the use as a court of this State permits, by order after good cause has been shown and after written notification of the request for the court order has been served at least five days before the order is made upon the county prosecutor for the county in which the post mortem examination or autopsy occurred,
- for use in the field of forensic pathology or for use in medical or scientific education or research, or
- for use by any law enforcement agency in this State or any other state or federal law enforcement agency.

[N.J.S.A. 47:1A-1.1 (emphasis added).]

In Boretsky v. Middlesex Cnty. Examiner’s Office, GRC Complaint No. 2016-219 (January 2018), the complainant sought, among other records, color photographs from an autopsy. The custodian denied access under N.J.S.A. 47:1A-1.1 and Executive Order No. 69 (Gov. Whitman 1997). The Council agreed, finding that the custodian lawfully denied access to the responsive records. Further, the Council noted that the complainant failed to meet any of the exceptions contained in N.J.S.A. 47:1A-1.1.

In the instant matter, the Complainant sought access to autopsy photographs related to Barkley. The Custodian denied access to the subject OPRA request under N.J.S.A. 47:1A-1.1, among other reasons. In the Denial of Access Complaint, the Complainant argued that he sought the records based on a published editorial detailing the ME’s checkered history over the last twenty years. The Complainant also cited to Shuttleworth, 258 N.J. Super. 578 in support for the disclosure of the requested photographs.⁶ In the SOI, the Custodian maintained her position that the responsive photographs were exempt from disclosure under OPRA.

A plain reading of the Complainant’s OPRA request, OPRA’s ME records exemption, and Boretsky, GRC 2016-219 confirm that the Custodian’s denial of access was lawful. OPRA expressly exempts access to photographs “of a deceased person . . . in the course of a post mortem examination or autopsy.” N.J.S.A. 47:1A-1.1. The forgoing is exactly the records the Complainant sought here. Additionally, there is no evidence in the record to support that the Complainant falls within any of the exceptions set forth in N.J.S.A. 47:1A-1.1. The GRC notes that the N.J. Advanced Media editorial, regardless of the misdealing detailed therein, does not carry any applicable weight in meeting those exceptions contained within the ME photograph exemption.

Accordingly, the requested autopsy photographs are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Boretsky, GRC 2016-219. Further, there is no evidence in the record to support that the Complainant fell within one of the exceptions present in OPRA. Thus, the Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6.

⁶ The GRC notes that in Shuttleworth, the court addressed the disclosability of an autopsy report and autopsy photographs under the common law right of access and Right To Know Law (“RTKL”), which preceded OPRA. The court held that while the autopsy report itself was subject to disclosure under the RTKL, the photographs were not. Id. at 595-596.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the requested autopsy photographs are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Boretsky v. Middlesex Cnty. Examiner's Office, GRC Complaint No. 2016-219 (January 2018). Further, there is no evidence in the record to support that the Complainant fell within one of the exceptions present in OPRA. Thus, the Custodian lawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

September 22, 2020