



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 30, 2023 Government Records Council Meeting

Gregory Edward Mantell
Complainant

Complaint No. 2021-189

v.

Jersey City Police Department (Hudson)
Custodian of Record

At the May 30, 2023 public meeting, the Government Records Council (“Council”) considered the May 23, 2023 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The responsive police report is exempt under the criminal investigation exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 569 (2017); Janezko v. N.J. Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Thus, the Custodian lawfully denied access to the responsive report. 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 30th Day of May 2023

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: June 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 30, 2023 Council Meeting**

**Gregory Edward Mantell¹
Complainant**

GRC Complaint No. 2021-189

v.

**Jersey City Police Department (Hudson)²
Custodial Agency**

Records Relevant to Complaint: A copy of the police report regarding the “murder of Officer Joseph Seals on or about Tuesday, December 10, 2019.”³

Custodian of Record: Sean Gallagher

Request Received by Custodian: June 4, 2021

Response Made by Custodian: June 4, 2021

GRC Complaint Received: August 10, 2021

Background⁴

Request and Response:

On June 4, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing acknowledging receipt of the OPRA request and seeking an additional “thirty (30) days” due to the current COVID-19 pandemic.

On July 26, 2021, the Complainant e-mailed the Custodian stating that it was “[t]ime to respond” and that he was contacting “the state” regarding the lack of response. On July 29, 2021, Ms. Amanda Bransky responded in writing on behalf of the Custodian denying access to the responsive report under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. On the same day, the Complainant e-mailed Ms. Bransky disputing the response. The Complainant asserted that the report could not be investigatory “at this point in time” and all parties involved “are deceased.”

¹ No legal representation listed on record.

² Represented by Jeremy Jacobsen, Esq., of the City of Jersey City (Jersey City, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

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.

Denial of Access Complaint:

On August 10, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he is a reporter investigating “certain aspects of murders of police officers nationwide.” The Complainant noted that the Custodian extended the response time frame but did not respond thereafter, prompting him to seek a status update. The Complainant contended that once the City of Jersey City (“City”) did respond, it denied access to the responsive police report. The Complainant asserted that the record sought was part of a “high profile mass shooting” and the public has a significant interest in disclosure.⁵

Statement of Information:

On September 3, 2023, the Custodian filed a Statement of Information (“SOI”) attaching a legal certification from Director of Public Safety, James Shea. The Custodian certified that he received the Complainant’s OPRA request on June 4, 2021. The Custodian certified that he responded in writing on the same day obtaining a thirty (30) day extension to respond due to the COVID-19 pandemic. The Custodian certified that his search included gathering records “previously provided to” OPRA requests regarding the same incident. The Custodian certified that it was determined that the responsive report was exempt from disclosure under OPRA. The Custodian certified that Ms. Bransky responded in writing on his behalf on July 29, 2021 denying access to the responsive report under N.J.S.A. 47:1A-1.1.

The Custodian stated that the incident in question occurred on December 10, 2019, wherein two (2) individuals committed an act of domestic terrorism that left six (6) dead, including Officer Seals and the suspects. Shea Cert. ¶ 2. The Custodian averred that during the incident, the Federal Bureau of Investigation (“FBI”) and Office of the Attorney General (“OAG”) assumed command of the investigation and the FBI directed the City to not disclose any records pursuant to OPRA without first receiving approval due to the ongoing investigation. Shea Cert. ¶ 3-4. The Custodian stated that Director Shea communicated the FBI’s instructions to the City and added that it would be improper to disclose investigatory records because such disclosure could jeopardize “the integrity of the investigation.” Shea Cert. ¶ 5. The Custodian noted that the City received multiple OPRA requests for records related to the incident: it denied most in whole or part utilizing the personal privacy, criminal investigatory, or investigation in progress exemption. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-3(a).

The Custodian contended that he lawfully denied access to the responsive report under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. The Custodian argued that the responsive report, entitled “Investigative Report” and/or “Supplemental Investigation Report,” meets the two-prong test necessary to qualify as a criminal investigatory record. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 569 (2017). The Custodian argued that relevant case law has supported that police reports are not required by law to be made or maintained. Grossman v. Office of the Ocean Cnty. Prosecutor, 2013 N.J. Super. Unpub. LEXIS 1999 (July 26, 2013). The

⁵ The Complainant’s assertion of public “interest” invokes a common law condition for disclosure of records. However, the GRC will not address any common law claims as it has no authority over same. N.J.S.A. 47:1A-7(b); see also Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).

Custodian further argued that the responsive report clearly related to a criminal investigation and was shared among multiple agencies, including the FBI, as part of a high-profile investigation of murder, terrorism, and possible hate crimes.

The Custodian contended that the Complainant's profession as an "investigative reporter" does not negate OPRA's criminal investigatory exemption. The Custodian further argued that the death of the victim and suspects has no impact on the application of the exemption because same applies regardless of the status of the investigation. 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); Boyd v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2012-253 (May 2013).

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

[Id.]

⁶ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Here, the Custodian initially responded in writing to the Complainant on June 4, 2021,⁷ the same business day as receipt of the OPRA request, obtaining an extension of thirty (30) days to respond to the OPRA request. The GRC has identified July 5, 2021 as the final response date based on a plain reading of the extension. However, the Custodian did not respond prior to the expiration of the extended time frame. It was not until July 29, 2021, and after the Complainant sought a status update on July 26, 2021, that Ms. Bransky again responded denying access to the responsive police report. Thus, in keeping with Kohn, GRC 2007-124, the Custodian’s failure to respond prior to the extension expiration resulted in a “deemed” denial.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124.

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 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, 380-381 (App. Div. 2006).

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc., 229 N.J. at 569, 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

⁷ The GRC notes that on the same day as receipt of the OPRA request, the moratorium on OPRA’s statutory response time period due to the COVID-19 pandemic per N.J.S.A. 47:1A-5(i)(2) was discontinued through P.L. 2021, c.103.

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).⁸ 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, 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.⁹ 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.” Moreover, the Council has previously found that investigative reports were exempt as criminal investigatory records. See Crook v. Atlantic Cnty. Prosecutor’s Office, GRC Complaint No. 2010-92 (March 2011).

Here, the Complainant sought access to police reports related to the murder of Officer Seals on December 10, 2019. The City ultimately denied access to the report on July 29, 2021 under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. This complaint ensued, wherein the Complainant disputed the denial and expressed a public interest to disclosure. In the SOI, the Custodian maintained his position that the police report was exempt from disclosure under the criminal investigatory exemption because it met the two-prong test set forth under N. Jersey Media Grp., Inc., 229 N.J. 541. The Custodian also included a certification from Director Shea averring that the FBI requested that no records be disclosed without their approval.¹⁰

Regarding the first prong of the criminal investigatory test, there is no evidence in the record proving that the responsive report was “required by law” to be made, maintained, or kept on file. Regarding the second prong, the December 10, 2019 incident involved two (2) suspects that shot and killed Officer Seals at Bayview Cemetery and then proceeded to JC Kosher Supermarket at 223 Martin Luther King Drive, where they killed three (3) additional victims. See “State Grand Jury Declines to Charge Officers Involved in Fatal Police Encounter With Two

⁸This 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.

⁹ The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

¹⁰ In Golden v. N.J. Inst. of Tech., 934 F.3d 302 (3rd Cir. 2019), the Court held that defendants violated OPRA by “unquestioningly obeying” the FBI’s request to withhold records, which did not impact the custodian’s obligation to determine their disclosability under OPRA. The GRC notes that this complaint is distinguishable in that although the FBI made such a request to the City, it ultimately denied access to the record complete with a specific lawful basis therefor.

Armed Assailants Who Killed Jersey City Detective Joseph Seals and Then Killed Three Civilians in JC Kosher Supermarket on December 10, 2019” OAG, November 17, 2021.¹¹ The incident concluded with officers killing the suspects after an hours-long standoff. *Id.* The incident, which has been characterized as “high-profile” by both parties, received coverage from national, regional, and local media outlets alike. The incident resulted in investigations launched by both the FBI and OAG. *Id.*; *see also* Caspani, Maria “FBI Investigating New Jersey Kosher Grocery Rampage as Domestic Terrorism,” Reuters, December 12, 2019.¹² The forgoing provides that criminal investigations were conducted by multiple agencies regardless of the death of both suspects. Thus, the responsive police report meets the two-prong standard necessary to be considered criminal investigatory under OPRA. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp. Inc., 229 N.J. 541; Janeczko, GRC 2002-79.

Accordingly, the responsive police report is exempt under the criminal investigation exemption. N.J.S.A. 47:1A-1.1; N.J. Media Grp., Inc., 229 N.J. 541; Janeczko, GRC 2002-79, *et seq.* Thus, the Custodian lawfully denied access to the responsive report. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The responsive police report is exempt under the criminal investigation exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 569 (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). Thus, the Custodian lawfully denied access to the responsive report. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

May 23, 2023

¹¹ <https://www.njoag.gov/state-grand-jury-declines-to-charge-officers-involved-in-fatal-police-encounter-with-two-armed-assailants-who-killed-jersey-city-detective-joseph-seals-and-then-killed-three-civilians-in-jc-kosher-sup/> (accessed April 28, 2023).

¹² <https://www.reuters.com/article/uk-new-jersey-shooting-idUKKBN1YG28O> (accessed April 28, 2023).