



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 29, 2013 Government Records Council Meeting

Ricky A. Pursley
Complainant

Complaint No. 2011-137

v.

Township of Hardyston Police Department (Sussex)
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 Supplemental 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 provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on October 3, 2012. However, the Custodian failed to include the required document index. Therefore, the Custodian failed to comply with the Council’s September 25, 2012 Interim Order.
2. The Custodian did not unlawfully deny the Complainant access to Ms. Morales’s victim statement because said statement was used as part of the criminal investigation and there is no evidence in the record that the victim statement responsive to the request is required to be “made, maintained or kept on file” pursuant to N.J.S.A. 47:1A-1.1.
3. The Custodian failed to comply with the Council’s September 25, 2012 Order because he did not include the required document index. However, the victim statement responsive to the Complainant’s OPRA request is considered a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 January, 2013

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: February 6, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting**

**Ricky A. Pursley¹
Complainant**

GRC Complaint No. 2011-137

v.

**Township of Hardyston Police Department (Sussex)²
Custodian of Records**

Records Relevant to Complaint: Copy of written statement of Ms. Tanya R. Morales (“Ms. Morales”) referenced in Investigation Report I-H2011-002494.

Request Made: April 12, 2011

Response Made: April 20, 2011

Custodian: Bret Aemy

GRC Complaint Filed: April 21, 2011³

Records Submitted for *In Camera* Examination: Ms. Morales’s voluntary written statement referenced in Investigation Report I-H2011-002494.⁴

Background

September 25, 2012

Government Records Council’s Interim Order. At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 Executive Director’s Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record (written statement of Ms. Morales referenced in Investigation Report I-H2011-002494) to determine the validity of the Custodian’s assertion that the written statement contains personal identifying information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-2.2 as well as the Complainant’s statement that the requested record may be appropriately redacted.

¹ No legal representation listed on record.

² Represented by Fred Semrau, Esq., of Dorsey & Semrau, Attorneys at Law (Boonton, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Custodian includes additional submissions not relevant to the adjudication of this complaint.

2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

September 26, 2012

Council's Interim Order ("Order") distributed to the parties.

October 2, 2012

Certification of the Custodian in response to the Council's Interim Order attaching Ms. Morales's voluntary written statement referenced in Investigation Report I-H2011-002494.⁸

The Custodian certifies that pursuant to the Interim Order he must deliver in a sealed envelope, Ms. Morales's voluntary written statement referenced in Investigation Report No. I-H2011-002494. The Custodian also certifies that he enclosed a true copy of the record requested.⁹

Analysis

Whether the Custodian complied with the Council's September 25, 2012 Interim Order?

At its September 25, 2012 public meeting, the Council determined that because the Custodian has asserted that the requested voluntary statement was lawfully denied because said statement was part of the investigation report and thus exempt from disclosure pursuant to N.J.S.A. 47:1A-3(b), the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ The Custodian includes additional submissions not relevant to the adjudication of this complaint.

⁹ The Custodian fails to include a document index as required by the Council's September 25, 2012 Interim Order.

determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on October 3, 2012.

The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on October 3, 2012. However, the Custodian failed to include the required document index. Therefore, the Custodian failed to comply with the Council's September 25, 2012 Interim Order.

Whether the Custodian unlawfully denied the Complainant access to the requested records?

OPRA provides in pertinent part that:

"A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA] ... criminal investigatory records ..." N.J.S.A. 47:1A-1.1.

Further, a criminal investigatory record is defined in OPRA 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.

Thus, 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 is encompassed within the definition of a criminal investigatory record set forth at N.J.S.A. 47:1A-1.1 and is therefore exempt from disclosure under OPRA.

The Custodian responded to the Complainant's OPRA request via letter stating that access to the written statement is denied pursuant to N.J.S.A. 47:1A-3(b) because said statement is a criminal investigatory record. The Custodian argued in the Statement of Information ("SOI") that the Complainant sought records that are the subject of a completed criminal investigation with the Police Department involving a domestic violence dispute.

In Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (October 2008), the Council held in pertinent part that "[t]he record requested ... a police arrest report, is required to be maintained or kept on file by the [RMS], therefore it is a government record subject to disclosure pursuant to N.J.S.A. 47:1A-1.1." *See also* Bart v.

City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008).

However, in response to recent legal developments, the Council now reverses its decision in Morgano, *supra*, and Bart, *supra*, and determines that the RMS record retention schedules do not operate as “law” under OPRA pursuant to N.J.S.A. 47:1A-1.1 to render criminal investigatory records disclosable under OPRA. The GRC’s order for disclosure of arrest reports in Morgano, *supra*, still rests on the observation that most information subject to disclosure under N.J.S.A. 47:1A-3(b) and thus arrest reports should be disclosed with appropriate redactions for ease of disclosure.

Prior to the 2002 passage of the OPRA, individuals seeking access to government documents could file pursuant to the Right-to-Know Law (previously codified at N.J.S.A. 47:1A-1 *et seq.*) or the common law. Under the Right-to-Know Law, individuals had the right to inspect and copy records “required by law to be made, maintained or kept on file by public officials.” State v. Marshall, 148 N.J. 89, 272 (1997). In the context of criminal investigatory records, the New Jersey Supreme Court held that “[t]he Right-to-Know Law does not provide ... the right to inspect the law-enforcement files ... because no law or regulation requires that such files ‘be made, maintained or kept.’” *Id.*; *see also* Daily Journal v. Police Dep’t of the City of Vineland, 351 N.J. Super. 110, 121 (App. Div. 2002); River Edge Savings & Loan Ass’n v. Hyland, 165 N.J. 540, 545 (App. Div. 1979). Thus, the Court considered criminal investigatory records outside of the set of documents required to be produced under the Right-to-Know Law.

The pre-OPRA case law permitted production of some of these criminal investigatory records only after balancing the State’s interest against the individual’s and the public’s interest in disclosure. Marshall, 148 N.J. at 273-74; Daily Journal, 351 N.J. Super. at 122-23. This common law “balancing test” required that the person seeking access demonstrate standing by showing an interest in the subject matter of the material, and then an “exquisite weighing process” involving six non-dispositive factors. Daily Journal, 351 N.J. Super. at 123 (quoting Beck v. Bluestein, 194 N.J. Super. 247, 263 (App. Div. 1984)); *see also* Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).

This background framed the legislature’s passage of OPRA in 2002. The bills originally introduced in the Assembly and Senate did not contain a general exemption for “criminal investigatory records.” Senate No. 2003, 209th Sess. (N.J. 2000); Assembly No. 1309, 209th Sess. (N.J. 2000). However, at a public hearing on March 9, 2000 before the Senate Judiciary Committee, several witnesses expressed concern over the lack of clarity in the original OPRA legislation as to whether, as a general matter, prior exemptions that had been enacted by Executive Order or through case law under the Right-to-Know law would survive the passage of OPRA. *See, e.g.*, Transcript of Public Hearing on Senate Bill Nos. 161, 351, 573, and 866, at 23 (Mar. 9, 2000), *available at* <http://www.njleg.state.nj.us/legislativepub/Pubhear/030900gg.PDF> (statement of William J. Kearns, Esq., N.J. State League of Municipalities). The Judiciary Committee members unequivocally suggested that these exemptions would survive or would be provided for in a contemporaneously passed Executive Order. *Id.* at 29-30 (“In other words, we contemplated this as all of those protections that are provided in statutes, in legislative resolutions, and executive orders would remain in place.”)(statement of Sen. Martin).

The exemption from disclosure for “criminal investigatory records” was then introduced in a May 3, 2001 floor amendment to the Senate bill by OPRA’s co-sponsor, Senator Martin, and remains in that form in the law. In Senator Martin’s statement accompanying the floor amendment he noted that “[t]he amendments *exempt criminal investigatory records of a law enforcement agency from the statutory right of access.* However, a common law right of access could be asserted to these and other records not accessible under the statute.” (Emphasis added.) Statement to Senate No. 2003, 209th Sess. (N.J. May 3, 2011). This statement was reflected in the final structure of OPRA, which provided an exemption for “criminal investigatory records,” but noted that “[n]othing contained in [OPRA] ... shall be ... construed as limiting the common law right of access to a government record, *including criminal investigatory records of a law enforcement agency.*” (Emphasis added.) N.J.S.A. 47:1A-8.

In addition, the May 3, 2001 floor amendment adopted the definition of “criminal investigatory records” in terms that mimicked the language used by the prior Right-to-Know Law. Specifically, a “criminal investigatory record” was defined to entail “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.” (Emphasis added.) Senate No. 2003 § 2, 209th Sess. (N.J. as amended, May 3, 2011).

Finally, in his message upon signing the final version of OPRA, Governor McGreevey mentioned only limited exemptions explicitly but included “exemptions for victims’ records, emergency and security information, *criminal investigatory records and other appropriate areas that warrant confidentiality.*” (Emphasis added.) Statement of Gov. James E. McGreevey upon passage of OPRA at 1 (Aug. 13, 2002).

The Legislature’s specific statement that the floor amendment was intended to keep criminal investigatory records as exempt from disclosure and its mimicking of the Right-to-Know Law in the definition of “criminal investigatory records” strongly suggests its intent to maintain the prior exemption as defined by the courts.

The courts’ subsequent interpretation of OPRA confirms this view. In Daily Journal v. Police Department of the City of Vineland, one of the last cases decided under the Right-to-Know Law, the Appellate Division analyzed the then-recently enacted OPRA statute as part of its application of the common law balancing test. The Court noted the exemption for and definition of “criminal investigatory records” under OPRA and found that the preservation of the common law balancing test was a “clear legislative acknowledgement that a compelling public interest is served by protecting the private interests of such citizens.” 351 N.J. Super. at 130. In other words, the Appellate Division viewed OPRA’s exemption from disclosure for criminal investigatory records as an endorsement of the common law balancing test as the means to gain access to criminal investigatory records. The courts have continued to apply the pre-OPRA exemption and common-law balancing test as developed under the Right-to-Know Law. *See, e.g., R.O. v. Plainsboro Police Dep’t*, No. A-5906-07T2, 2009 N.J. Super. Unpub. LEXIS 1560 (App. Div. June 17, 2009); Bent v. Township of Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005).

The definition of “criminal investigatory records” under OPRA excludes documents that are required to be “maintained or kept on file” by a public official from the scope of the exemption. This definition becomes problematic because the New Jersey State Records Committee has, pursuant to statutorily granted authority, created a record retention schedule through the RMS that requires police and other agencies to “maintain” various criminal investigatory records. N.J.S.A. 47:3-20; N.J.A.C. 15:3-2.1(b); *see also* N.J. Land Title Ass’n v. State Records Comm., 315 N.J. Super. 17, 26 (App. Div. 1998)(discussing the Legislature’s delegation of authority to the Committee in order to “centraliz[e] control of the State’s public records in a single agency whose expertise would assure uniformity in the decision-making process concerning the retention and disposition of those records.”).

Although the RMS schedule is likely sufficient to make the retention of such records mandatory,¹⁰ there are two strong arguments that the Legislature intended criminal investigatory records to be exempted from disclosure under OPRA despite the RMS requirements. First, the directive for the creation of the RMS schedules was passed by the legislature in 1953. Thus, when the New Jersey Supreme Court decided State v. Marshall, 148 N.J. 89, 272 (1997), the RMS schedules were in place, but the Court still concluded that “no law or regulation requires that [criminal investigatory records] ‘be made, maintained or kept.’” Marshall, 148 N.J. at 272. The Legislature’s passage of OPRA with this language can be construed as its acquiescence to the Marshall decision and the Court’s holding that no law requires that criminal investigatory records be maintained. *See, e.g.*, Dep’t of Children & Families v. T.B., 207 N.J. 294, 307 (2011)(noting that “acquiescence on the part of Legislature,” or its “continued use of same language” is evidence that the legislature intended to maintain the construction given to a statute by prior case law)(*citing* Asbury Park Press, Inc. v. City of Asbury Park, 19 N.J. 183, 190 (1955)).

Additionally, the apparently wide scope of the RMS schedules would potentially take all documents that could be classified as “criminal investigatory records” outside of the definition set in OPRA and would therefore render the exemption meaningless. The courts have disfavored statutory constructions that render portions of a statute superfluous. *See, e.g.*, N.J. Ass’n of School Administrators v. Schundler, 211 N.J. 535, (2012) at 553 (“[L]egislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless.”)(*quoting* Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 613 (1999)).

Therefore, it can be concluded that in passing OPRA, the Legislature intended to preserve the then-existing state of the law with respect to the disclosure of criminal investigatory records, *i.e.*, that the RMS record retention schedules do not operate to render criminal investigatory records disclosable under OPRA.

¹⁰ *See* O’Shea v. Township of W. Milford, 410 N.J. Super. 371 (App. Div. 2009), wherein the Appellate Division found that the Attorney General’s guidance document requiring the completion of Use of Force Reports had the “force of law” for police departments because the Attorney General has the authority to issue such policy and directives. *Id.* at 382.

However, in North Jersey Media Group, Inc. v. Paramus, Docket No. BER-L-2818-11 (June 15, 2011), the Law Division was tasked with determining whether the responsive records were exempt as criminal investigatory records based on retention schedules set forth by RMS. The Court noted that:

“... in establishing legal support ‘[a] decision of the [GRC] shall not have value as a precedent for any case initiated in Superior Court.’ N.J.S.A. 47:1A-7. However, ‘we review final agency decisions with deference and that we will not ordinarily overturn such determinations unless they were arbitrary, capricious or unreasonable, or violated legislative policies expressed or implied in the act of governing the agency.’ Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003)(citing Campbell v. Dep’t of Civil Serv., 39 N.J. 556, 562 (1963)).” *Id.* at pg. 12.

Thus, in order to make a determination whether retention schedules effectively had the force of law, the Court looked to the Appellate Division’s decision in N.J. Land Title, *supra*, and the GRC’s decision in Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008)(holding that arrest reports are government records under N.J.S.A. 47:1A-1.1. because they are required to be retained until the final disposition of a relevant case per Records Series No. 0007-0000).

Regarding N.J. Land Title, the Court noted that although case law is sparse on the issue of the effect of retention schedules, this case appears to have answered the question of whether retention schedules carry the force of law in the affirmative. The Court reasoned that although it the Appellate Division “... did not directly state that [RMS] requirements, as approved by the State Records Committee, are law, based on the holding and reasons for the holding, the requirements at the least *appear* to carry the force of law.” (Emphasis added.) *Id.* at pg. 28.

Regarding Bart, *supra*, the Court reasoned that RMS is responsible for ensuring that “government records are maintained in accordance with the State’s public records laws ...” and thus developed retention schedules requiring police departments to maintain the responsive records for a certain amount of time. The Court further noted that, in Bart, *supra*, the Council determined that records required by RMS to be maintained or kept on file are considered government records as they are required by law to be made, maintained or kept on file. The Court reasoned that the Council’s holding in Bart, *supra*, “has not been contradicted by any court of competent jurisdiction.” *Id.* at pg. 17.

The NJMG Court thus held that the records “... are government records as they are required by [RMS] to be kept on file. N.J.S.A. 47:1A-1.1.; [RMS] Municipal Police Departments M900000-004, Records Series No. 0010-0000 ...; [RMS] Municipal Police Departments M900000-004, Records Series No. 0102-0001 through No. 0102-0003 ... they are not criminal investigatory records” *Id.* at pg. 22. The Court finally held that “[a]s defendants ... have failed to satisfy their burden to show the denial of access was proper, N.J.S.A. 47:1A-6, access to the requested records is not precluded pursuant to the criminal investigatory exemption.” *Id.* at Pg. 29.

In an unpublished decision in North Jersey Media Group, Inc. v. Paramus, 2012 N.J. Super. Unpub. Lexis 1685 (App. Div. 2012), the Appellate Division subsequently affirmed the Law Division's decision "... substantially for the reasons articulated ..." therein that the requested police dispatch audio recordings and police video recordings were not considered "criminal investigatory" records because said records were required to be maintained by defendants pursuant to their retention schedules set forth by RMS. The Appellate Division further noted that the Court "concluded the [RMS] requirements carry the force of law." *Id.* at 5.

However, N.J. Court Rule 1:36-3 states that:

"No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by *res judicata*, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel."

Therefore, although North Jersey, *supra*, stands for the proposition that records retention schedules carry the force of law, this unpublished opinion does not constitute precedent, nor is it binding upon the GRC.

Although N.J.S.A. 47:1A-2.2 seems to apply because the victim statement contains personal identifying information and thus that information should be redacted, the victim statement as a whole is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as a criminal investigatory record. The Custodian certified in the SOI that the victim statement was part of the criminal investigation report and there is no evidence in the record that the statement is required to be "made, maintained or kept on file" pursuant to N.J.S.A. 47:1A-1.1.

The Custodian argued in the SOI that the victim statement responsive to the request was exempt pursuant to N.J.S.A. 47:1A-3(b). However, N.J.S.A. 47:1A-3(b) is not applicable in the instant complaint because N.J.S.A. 47:1A-3(b) discusses what information shall be made available to the public within twenty-four (24) hours.¹¹

¹¹ N.J.S.A. 47:1A-3(b) states: Notwithstanding the provisions of [OPRA]...the following information concerning a criminal investigation shall be available to the public within 24 hours...where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon...if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule... information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule; information as to the identity of the investigating and arresting personnel and agency and the length of the investigation; information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of Ricky A. Pursley v. Township of Hardyston Police Department (Sussex), 2011-137 – Supplemental Findings and Recommendations of the Executive Director 8

However, N.J.S.A. 47:1A-1.1 is applicable to the instant complaint. As previously stated, the Custodian certified in the SOI that the Complainant sought a victim statement which was the subject of a criminal investigation report involving a domestic violence dispute. Further, there is no evidence in the record that the victim statement responsive to the request is required to be “made, maintained or kept on file” pursuant to N.J.S.A. 47:1A-1.1.

Therefore, the Custodian did not unlawfully deny the Complainant access to Ms. Morales’s victim statement because said statement was used as part of the criminal investigation and there is no evidence in the record that the victim statement responsive to the request is required to be “made, maintained or kept on file” pursuant to N.J.S.A. 47:1A-1.1.

Whether the Custodian’s failure to comply with the Council’s September 25, 2012 Order rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11(a).

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely

negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996)).

The Custodian failed to comply with the Council's September 25, 2012 Order because he did not include the required document index. However, the victim statement responsive to the Complainant's OPRA request is considered a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on October 3, 2012. However, the Custodian failed to include the required document index. Therefore, the Custodian failed to comply with the Council's September 25, 2012 Interim Order.
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Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

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Township of Hardyston Police Department (Sussex)
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At the September 25, 2012 public meeting, the Government Records Council ("Council") considered the September 18, 2012 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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record (written statement of Ms. Morales referenced in Investigation Report I-H2011-002494) to determine the validity of the Custodian's assertion that the written statement contains personal identifying information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-2.2 as well as the Complainant's statement that the requested record may be appropriately redacted.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 25th Day of September, 2012

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: September 26, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting**

**Ricky A. Pursley¹
Complainant**

GRC Complaint No. 2011-137

v.

**Township of Hardyston Police Department (Sussex)²
Custodian of Records**

Records Relevant to Complaint: Copy of written statement of Ms. Tanya R. Morales (“Ms. Morales”) referenced in Investigation Report I-H2011-002494.

Request Made: April 12, 2011

Response Made: April 20, 2011

Custodian: Bret Alemy

GRC Complaint Filed: April 21, 2011³

Background

April 12, 2011

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is to pick up a copy of the written statement.

April 20, 2011

Custodian’s response to the OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the written statement is denied pursuant to N.J.S.A. 47:1A-3.b. because it is a criminal investigatory record.

April 21, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) with no attachments.

The Complainant states that he filed his OPRA request on April 12, 2011, requesting a copy of a written statement by Ms. Morales referenced in Investigation Report I-H2011-002494. The Complainant also states that the Custodian denied his request on April 20, 2011 via letter pursuant to N.J.S.A. 47:1A-3.b.

¹ No legal representation listed on record.

² Represented by Fred Semrau, Esq., of Dorsey & Semrau, Attorneys at Law (Boonton, NJ).

³ The GRC received the Denial of Access Complaint on said date.

The Complainant agrees to mediate this complaint.

April 28, 2011

Offer of Mediation sent to the Custodian.

May 5, 2011

The Custodian declines mediation.

May 5, 2011

Request for the Statement of Information (“SOI”) sent to the Custodian.

May 12, 2011

E-mail from Custodian’s Counsel to the GRC. Counsel requests an extension until May 17, 2011 to complete the SOI.

May 12, 2011

E-mail from the GRC to Custodian’s Counsel. The GRC grants Counsel’s request for an extension until May 17, 2011 to file the SOI.

May 17, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated April 12, 2011
- Letter from the Custodian to the Complainant dated April 20, 2011.

The Custodian certifies that his search for the requested records included retrieving records from the police department files. The Custodian also certifies that no records were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that the Complainant was arrested by the Township of Hardyston Police Department (“Police Department”) and charged with possession of a weapon for an unlawful purpose, false imprisonment and harassment as the result of an investigation of a domestic violence incident. The Custodian also certifies that the third (3rd) degree weapons charge and the disorderly person false imprisonment charges were administratively dismissed at the Sussex County Prosecutor’s Office level. The Custodian further certifies that the harassment charge was remanded to Municipal Court, where the Complainant pled guilty.

The Custodian certifies that the Complainant filed an OPRA request on April 12, 2011 seeking a copy of a written statement by Ms. Morales referenced in Investigation Report I-H2011-002494. The Custodian also certifies that that the Complainant indicated on his OPRA request form that he was convicted of an indictable offense. The Custodian further certifies that he denied the Complainant’s request on April 20, 2011 via letter because the victim statement was part of the investigation report and thus exempt from disclosure pursuant to N.J.S.A. 47:1A-3.b. under OPRA. The Custodian argues that release of the victim statement would violate N.J.S.A. 47:1A-2.2, which prohibits the

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release of victim's records. The Custodian also argues that release of these records may place the victim and her children in further jeopardy.

The Custodian argues that the Complainant sought records which are the subject of a completed criminal investigation within the Police Department involving a domestic violence dispute. The Custodian also argues that these records were not disclosed in accordance with N.J.S.A. 47:1A-3.b.. The Custodian argues that pursuant to N.J.S.A. 47:1A-2.2(a), Janeczko v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004) and Tinsley v. New Jersey State Parole Board, GRC Complaint No. 2009-195 (November 2010), these decisions, protect from disclosure records which are the subject of a completed criminal investigation. The Custodian also argues that the legislators drafting the OPRA statute sought to balance the need of transparency against the compelling need to protect victims of criminal injustice from their antagonists. The Custodian further certifies that there is a clear and compelling need to comply with the provisions of N.J.S.A. 47:1A-2.2 because the Complainant has been convicted of indictable offenses and his victim is the author of the record being sought.

May 27, 2011

E-mail from the Complainant to the GRC. The Complainant states that he no longer resides in New Jersey and resides in a different state. The Complainant also states that he has no intention of returning to New Jersey nor does he have any intention of contacting Ms. Morales, her children or her employer. The Complainant further states that he is not seeking any of Ms. Morales' personal identifying information, only the narrative of her statement. The Complainant additionally states that redacting Ms. Morales' personal identifying information is a simple matter and will allow the Complainant access to her statement.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

Further, OPRA provides that:

“... where it shall appear that a person who is *convicted of any indictable offense* under the laws of this State, any other state or the United States is *seeking government records containing personal information pertaining to the person's victim or the victim's family*, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, *the right of access provided for in [OPRA] shall be denied.*” (Emphasis added.) N.J.S.A. 47:1A-2.2.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

In the instant complaint, the Custodian timely denied the Complainant access to the written statement pursuant to N.J.S.A. 47:1A-3.b, stating that said record is exempt from disclosure as a criminal investigatory record. The Custodian argued in the SOI that release of the written statement would violate N.J.S.A. 47:1A-2.2, which prohibits the release of victim’s records. The Custodian further argued that release of the written statement may place the victim and her children in further jeopardy. Conversely, the Complainant asserted that he is not seeking any of Ms. Morales’ personal identifying information, only the narrative of her statement. The Complainant also stated that redacting Ms. Morales’ personal identifying information is a simple matter and will allow the Complainant access to the written statement.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁴ in which the GRC dismissed the complaint by accepting the Custodian’s legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The court also stated that:

⁴ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7.f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7.f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the requested record (written statement of Ms. Morales referenced in Investigation Report I-H2011-002494) to determine the validity of the Custodian’s assertion that the written statement contains personal identifying information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-2.2 as well as the Complainant’s statement that the requested record may be appropriately redacted.

The Council defers analysis of whether the requested written statement is exempt from disclosure as a criminal investigatory record pursuant to N.J.S.A. 47:1A-3.b., pending the Council’s *in camera* review.

Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record (written statement of Ms. Morales referenced in Investigation Report I-H2011-002494) to determine the validity of the

Custodian's assertion that the written statement contains personal identifying information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-2.2 as well as the Complainant's statement that the requested record may be appropriately redacted.

2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

September 18, 2012

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."