



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**January 29, 2013 Government Records Council Meeting**

Woojin Hwang  
Complainant

Complaint No. 2011-348

v.

Bergen County Prosecutor's Office  
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council ("Council") considered the January 22, 2013 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. Because the requested law enforcement reports (Request Item No. 1) constitute criminal investigatory files, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); and Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007).
2. Because the Custodian certified in the Statement of Information that the Bergen County Prosecutor's Office does not possess any records responsive to the Complainant's request, absent evidence in the record to refute the Custodian's certification, the Custodian has met her burden in proving that she has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and 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 29<sup>th</sup> 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 5, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Woojin Hwang<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-348**

v.

**Bergen County Prosecutor's Office<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. All reports by any law enforcement officers made on September 20, 2010 regarding the arrest and incident involving Marcello Castillo and Woojin Hwang. (Police case number BCP-1002349).
2. All police logs for September 20, 2010

**Request Made:** July 25, 2011

**Response Made:** August 1, 2011

**Custodian:** Frank Puccio, Esq.

**GRC Complaint Filed:** November 11, 2011<sup>3</sup>

**Background**

**November 11, 2011**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated July 25, 2011
- Letter from the Custodian to the Complainant dated August 1, 2011<sup>4</sup>

The Complainant states that he was unlawfully denied access to the requested records on the grounds that the requested records are criminal investigatory records. The Complainant disagrees with the proposition that police reports constitute exempt criminal investigatory records. The Complainant asserts that this case has resulted in his arrest and has since been closed.

However, in the attached letter from the Custodian to the Complainant dated August 1, 2011, the Custodian responds to the Complainant's request by stating that the requested police reports pertain to an open and ongoing criminal investigation and are thereby exempt from disclosure pursuant under OPRA. The Custodian states that the

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Christina A. D'Aloia, Esq. (Hackensack, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Complainant attaches additional information that is not relevant to the adjudication of this complaint.  
Woojin Hwang v. Bergen County Prosecutor's Office, 2011-348 – Findings and Recommendations of the Executive Director

reports are exempt because they present a narrative of the case against the requestor, who is also the codefendant in the criminal matter to which the requested police reports pertain. While denying the “narrative” police reports, the Custodian further states that arrest reports that merely record the basic factual data related to an arrest *are* subject to disclosure, and that they are available for disclosure at a total cost of \$0.35.

The Custodian further states that the Bergen County Prosecutor’s Office is not a police department and therefore does not keep logs. As a result, the Custodian maintains that the Prosecutor’s Office does not have any records responsive to Item No. 2 of the Complainant’s request.

The Complainant does not agree to mediate this complaint.

**November 17, 2011**

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated July 25, 2011
- Letter from the Custodian to the Complainant dated August 1, 2011

The Custodian certifies that his search for the requested records yielded a five (5) inmate commitment summary report and a four (4) page case investigation report. The Custodian certifies that there are no records responsive to Item No. 2 of the Complainant’s request and that no records have been destroyed. The Custodian certifies that the inmate commitment summary report was offered to the Complainant, but declined as non-responsive to his request.

The Custodian also certifies that although the Complainant’s request is dated July 25, 2011, the Prosecutor’s Office did not receive the request until July 28, 2011. The Custodian contends that the requested reports cannot be released due to their confidential and privileged status as criminal investigatory files pursuant to Executive Order No. 69 (Gov. Whitman, 1997), N.J.S.A. 47:1A-1.1, and River Edge Savings and Loan Ass’n. v. Hyland, 165 N.J. Super. 540, 543-544 (App. Div.).

**Analysis**

**Whether the Custodian unlawfully denied access to the requested police reports?**

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 ...[a] government record shall not include the following information which is deemed to be confidential ... criminal investigatory records[.]” (Emphasis added). N.J.S.A. 47:1A-1.1.

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.

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.

In the instant matter, Item No. 1 of the Complainant’s request seeks all law enforcement reports related to an incident and arrest. The Custodian certifies that the requested records are exempt from disclosure as criminal investigatory records.

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, 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, 209<sup>th</sup> 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, 209<sup>th</sup> 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,<sup>5</sup> 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.

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

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<sup>5</sup> *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.



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.

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004. In Janeczko, the complainant requested access to copies of records related to alleged criminal actions committed by her son, who was ultimately killed by police officers. The Council found that under OPRA, “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”. Consequently, the complainant’s request was denied.

It is important to note that the criminal investigatory records exemption continues to survive the conclusion of the investigation. As the Council pointed out in Janeczko, *supra*:

“[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete. The exemption applies to records that conform to the statutory description, without reference to the status of the investigation and the Council does not have a basis to withhold from access only currently active investigations and release those where the matter is resolved or closed.”

The finding in Janeczko concurs with the Council’s decision in Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint

Number 2006-204 (October 2007). In Brewer, the Complainant filed an OPRA request to obtain lab records that were in the custody of the New Jersey State Police for use in an investigation. The Council found that the requested records were part of a criminal investigative file and were exempt from disclosure under OPRA. Accordingly, the Council determined that the complainant's request was lawfully denied.

As stated, in the instant matter the Custodian has certified that Item No. 1 of the Complainant's request constitutes criminal investigatory files. The Complainant has not provided any competent evidence to refute this certification.

Therefore, because the requested law enforcement reports (Request Item No. 1) constitute criminal investigatory files, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); and Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007).

Because the Custodian did not unlawfully deny access to the requested records because they are criminal investigatory records which are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1, the Council declines to address the issue of whether such records are also exempt from disclosure pursuant to N.J.S.A. 47:1A-3(a).

### **Whether the Custodian unlawfully denied the Complainant access to the requested police logs?**

Item No. 2 of the Complainant's requests seeks a copy of all police logs for September 20, 2010. However, in response to the GRC's request for a Statement of Information, the Custodian certified that the Bergen County Prosecutor's Office does not possess any records that are responsive to this part of the Complainant's request. The Complainant has failed to submit any evidence disputing the Custodian's certification that said records do not exist.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed. The complainant failed to submit any evidence to refute the custodian's certification. The GRC held that the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the Statement of Information that the Bergen County Prosecutor's Office does not possess any records responsive to the Complainant's request, absent evidence in the record to refute the Custodian's certification, the Custodian has met her burden in proving that she has not unlawfully

denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the requested law enforcement reports (Request Item No. 1) constitute criminal investigatory files, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); and Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007).
2. Because the Custodian certified in the Statement of Information that the Bergen County Prosecutor's Office does not possess any records responsive to the Complainant's request, absent evidence in the record to refute the Custodian's certification, the Custodian has met her burden in proving that she has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and N.J.S.A. 47:1A-6.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

January 22, 2013