



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 24, 2018 Government Records Council Meeting

Jamel Lewis
Complainant

Complaint No. 2016-131

v.

Union County Prosecutor's Office
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council ("Council") considered the April 17, 2018 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 complied with the Council's March 27, 2018 Interim Order because he responded in the prescribed time frame disclosing those records requiring disclosure and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian's failure to timely respond resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to responsive arrest reports, warrants, and a judgement of conviction. However, the Custodian lawfully denied access to pre-sentencing reports, investigative reports, and criminal rap sheets. Also, the Custodian timely complied with the Council's March 27, 2018 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 24th Day of April, 2018

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: April 26, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
April 24, 2018 Council Meeting**

**Jamel Lewis¹
Complainant**

GRC Complaint No. 2016-131

v.

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

Records Relevant to Complaint: Copies of arrest reports, judgment of convictions, warrants, and investigatory reports, including "Pre[-]Sentencing Reports, Arrest(s) Records, Investigative Reports, Judgement(s) of Conviction(s), and Criminal Rap Sheets related" (sic) to the Complainant's arrest in Indictment No. 10-03-002861.

Custodian of Record: Mark Spivey
Request Received by Custodian: Unknown
Response Made by Custodian: None
GRC Complaint Received: April 25, 2016

Background

March 27, 2018 Council Meeting:

At its March 27, 2018 public meeting, the Council considered the March 20, 2018 Findings and Recommendations of the Council Staff 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. 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 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).
2. The Custodian has not provided adequate proof that he was under no obligation to provide records already in the Complainant's possession. Henry, Esq. (O.B.O. Joseph Cordaro) v. Twp. of Hamilton Police Dep't (Atlantic), GRC Complaint No. 2015-155

¹ No legal representation listed on record.

² Represented by April Bauknight, Esq. Previously represented by Brian P. Trelease, Esq. (Elizabeth, NJ).

- (Interim Order dated November 15, 2016). However, as opposed to referring this complaint to the Office of Administrative Law based on “contested facts” at this juncture, the Council should first determine the general disclosability of the requested records and provide the Custodian a chance to supplement the record.
3. The Custodian may have unlawfully denied access to the requested arrest reports, warrants, and judgment of convictions. N.J.S.A. 47:1A-6; Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008); Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall either: 1) disclose these responsive records, with redactions where applicable; 2) certify to whether no records existed; and/or 3) provide additional certifications (with supporting documentation) that the Complainant was in possession of these records at the time of his OPRA request.
 4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,³ to the Council Staff.⁴**
 5. The Custodian lawfully denied access to the portion of the Complainant’s OPRA request seeking pre-sentencing reports, investigative reports, and criminal rap sheets. N.J.S.A. 47:1A-6. Specifically, pre-sentencing reports are exempt as “inter-agency, intra-agency advisory, consultative, or deliberative” material. See Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014). Further, investigative reports in this instance fall within the definition of a criminal investigatory record because they are not required to be made, are in the possession of a law enforcement agency, and pertain to a criminal investigation. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541 (2017). Finally, Executive Order No. 9 (Gov. Hughes, 1963) provides that criminal rap sheets are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).
 6. 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.

Procedural History:

On March 28, 2018, the Council distributed its Interim Order to all parties. On April 2, 2018, the Custodian responded to the Council’s Interim Order. Therein, the Custodian certified that he was providing to the Complainant the responsive arrest reports, warrants, and judgment of

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."

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

conviction (with applicable redactions for social security numbers) via certified mail.

Analysis

Compliance

At its March 27, 2018 meeting, the Council ordered the Custodian to either: 1) disclose the responsive arrest reports, warrants, and judgement of convictions, with redactions where applicable; 2) certify to whether no records existed; and/or 3) provide additional certifications (with supporting documentation) that the Complainant was in possession of these records at the time of his OPRA request. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On March 28, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on April 5, 2018.

On April 2, 2018, the second (2nd) business day after receipt of the Council's Order, the Custodian sent to the Complainant via certified mail copies of the responsive records (redacting social security numbers). The Custodian also simultaneously provided certified confirmation of compliance to Council Staff. Thus, the Custodian timely complied with the Council's Order.

Therefore, the Custodian complied with the Council's March 27, 2018 Interim Order because he responded in the prescribed time frame disclosing those records requiring disclosure and simultaneously provided certified confirmation of compliance to the Council Staff.

Knowing & Willful

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 “. . . [i]f 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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

In the instant matter, the Custodian's failure to timely respond resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to responsive arrest reports, warrants, and a judgement of conviction. However, the Custodian lawfully denied access to pre-sentencing reports, investigative reports, and criminal rap sheets. Also, the Custodian timely complied with the Council's March 27, 2018 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's March 27, 2018 Interim Order because he responded in the prescribed time frame disclosing those records requiring disclosure and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian's failure to timely respond resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to responsive arrest reports, warrants, and a judgement of conviction. However, the Custodian lawfully denied access to pre-sentencing reports, investigative reports, and criminal rap sheets. Also, the Custodian timely complied with the Council's March 27, 2018 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

April 17, 2018



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DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
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INTERIM ORDER

March 27, 2018 Government Records Council Meeting

Jamel Lewis
Complainant

Complaint No. 2016-131

v.

Union County Prosecutor's Office
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council ("Council") considered the March 20, 2018 Findings and Recommendations of the Council Staff 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 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).
2. The Custodian has not provided adequate proof that he was under no obligation to provide records already in the Complainant's possession. Henry, Esq. (O.B.O. Joseph Cordaro) v. Twp. of Hamilton Police Dep't (Atlantic), GRC Complaint No. 2015-155 (Interim Order dated November 15, 2016). However, as opposed to referring this complaint to the Office of Administrative Law based on "contested facts" at this juncture, the Council should first determine the general disclosability of the requested records and provide the Custodian a chance to supplement the record.
3. The Custodian may have unlawfully denied access to the requested arrest reports, warrants, and judgment of convictions. N.J.S.A. 47:1A-6; Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008); Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall either: 1) disclose these responsive records, with redactions where applicable; 2) certify to whether no records existed; and/or 3) provide additional certifications (with supporting documentation) that the Complainant was in possession of these records at the time of his OPRA request.



4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Council Staff.²**
5. The Custodian lawfully denied access to the portion of the Complainant's OPRA request seeking pre-sentencing reports, investigative reports, and criminal rap sheets. N.J.S.A. 47:1A-6. Specifically, pre-sentencing reports are exempt as "inter-agency, intra-agency advisory, consultative, or deliberative" material. See Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2013-299 (September 2014). Further, investigative reports in this instance fall within the definition of a criminal investigatory record because they are not required to be made, are in the possession of a law enforcement agency, and pertain to a criminal investigation. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541 (2017). Finally, Executive Order No. 9 (Gov. Hughes, 1963) provides that criminal rap sheets are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).
6. 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.

Interim Order Rendered by the
Government Records Council
On The 27th Day of March, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 28, 2018

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
March 27, 2018 Council Meeting**

**Jamel Lewis¹
Complainant**

GRC Complaint No. 2016-131

v.

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

Records Relevant to Complaint: Copies of arrest reports, judgment of convictions, warrants, and investigatory reports, including "Pre[-]Sentencing Reports, Arrest(s) Records, Investigative Reports, Judgement(s) of Conviction(s), and Criminal Rap Sheets related" (sic) to the Complainant's arrest in Indictment No. 10-03-002861.

Custodian of Record: Mark Spivey
Request Received by Custodian: Unknown
Response Made by Custodian: None
GRC Complaint Received: April 25, 2016

Background³

Request and Response:

On February 20, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On April 25, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that he was incarcerated and did have a criminal record, but argued that neither prevented him from accessing records under OPRA. The Complainant asserted that the Custodian failed to respond to his OPRA request.

Statement of Information:

On May 19, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he did not recollect receiving the Complainant's OPRA request. The Custodian

¹ No legal representation listed on record.

² Represented by Brian P. Trelease, Esq. (Elizabeth, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.
Jamel Lewis v. Union County Prosecutor's Office, 2016-131 – Findings and Recommendations of the Council Staff

affirmed that at the time of the OPRA request, he was transitioning into the custodial position and phasing out the practice of several individuals processing OPRA requests. The Custodian certified that he did not realize that the Union County Prosecutor's Office ("UCPO") did not respond to the subject OPRA request until receiving the instant complaint.

The Custodian stated that the Complainant's OPRA request sought records regarding the UCPO's criminal prosecution of him. The Custodian stated that the Complainant was arrested and charged on December 10, 2009. The Custodian averred that the criminal trial began in January 2015 and resulted in the Complainant's conviction on May 18, 2015. The Custodian averred that the UCPO provided Alan D. Bowman, Esq., Complainant's criminal defense attorney, with multiple boxes of documents, including those records sought in the subject OPRA request, during the pendency of the trial.

The Custodian argued that the Complainant had access to all responsive records when he submitted the subject OPRA request. The Custodian contended that, in accordance with Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), he was under no obligation to again disclose the records. The Custodian requested that the GRC determine that no unlawful denial of access occurred.

Further, the Custodian contended that his inadvertent failure to respond did not rise to the level of a knowing and willful violation of OPRA. He noted that he was amenable to disclosing records again; however, some would fall within the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.

The Custodian included a legal certification from Deputy First Assistant Prosecutor ("AP") Ann M. Luvera. Therein, AP Luvera certified that she received the Complainant's OPRA request on or about February 20, 2016. AP Luvera certified that she forwarded the OPRA request to the Custodian. AP Luvera affirmed that upon receipt of the Denial of Access Complaint, she advised the Custodian that he had inadvertently failed to respond to the request. AP Luvera certified that, notwithstanding the UCPO's failure to respond, Mr. Bowman received a complete copy of the State's file during the trial. AP Luvera affirmed that the file was voluminous and included charging documents, investigatory reports, witness statements, telephone records, criminal history information, *etc.*

Additional Submissions:

On May 29, 2016, the Complainant sent a letter to the GRC. Therein, the Complainant alleged that he never received any of the requested records from Mr. Bowman. The Complainant also contended that the Custodian failed to identify "the records available" as part of the SOI.⁴

⁴ Complainant also argued that AP Luvera should not have participated in this complaint because she was the prosecuting attorney in Indictment No. 10-03-002861. To the extent that this argument relates to alleged ethical and conflict of interest issues, OPRA does not expressly afford the GRC the authority to adjudicate such issues. N.J.S.A. 47:1A-7(b); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-288 (Interim Order dated October 29, 2013). Jamel Lewis v. Union County Prosecutor's Office, 2016-131 – Findings and Recommendations of the Council Staff

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).⁵ 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).

The Complainant filed this complaint alleging that the Custodian failed to respond to his OPRA request. In the SOI, the Custodian acknowledged that the UCPO received the OPRA request. However, the Custodian also certified that he was transitioning into the custodian position at that time and ending the practice of several individuals processing OPRA requests. To add additional clarity to the facts, AP Luvera provided a certification in the SOI. Therein, she certified that she received the OPRA request and forwarded it to the Custodian. Both the Custodian and AP Luvera certified that the Custodian did not realize that he failed to respond until receipt of the Denial of Access Complaint. Ultimately, the evidence of record supports that a "deemed" denial occurred here.

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 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, GRC 2007-11.

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.

Initially, the GRC will address the Custodian's argument that the Complainant was already in possession of the responsive records when he submitted the OPRA request.

⁵ 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.

The Appellate Division has held that a complainant could not have been denied access to a requested record if already possessing the record sought at the time of the OPRA request. Bart, 403 N.J. Super. 609. The Appellate Division noted that “requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not . . . advance the purpose of OPRA, which is to ensure an informed citizenry.” Bart, 403 N.J. Super. at 618 (citations omitted). The Appellate Division’s decision in Bart, however, turns upon the specific facts of that case. The Court stated it was “undisputed that [complainant] at all times had within his possession a copy of [the requested record] . . . [i]n indeed, he attached a copy to the complaint he filed with the Council.” Id.

Similarly, the GRC has held that when the evidence of record supports that a complainant possessed records sought in an OPRA request concurrent with submission of the request, the custodian could not have unlawfully denied access by not again disclosing the records. Rodriguez v. Kean Univ., GRC Complaint No. 2014-121 (October 2014); Owoh (on behalf of O.R.) v. West-Windsor Reg’l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (February 2013). However, “[a]ny limitations on the right of access accorded by [OPRA] as amended and supplemented shall be construed in favor of the public’s right of access[.]” Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013). To this end, a custodian’s certification that a complainant possessed records simply because they were provided to legal representation does not always result in a finding consistent with Bart.

In Henry, Esq. (O.B.O. Joseph Cordaro) v. Twp. of Hamilton Police Dep’t (Atlantic), GRC Complaint No. 2015-155 (Interim Order dated November 15, 2016), the custodian argued that he was not required to provide records to the complainant because the complainant’s client was already in possession of the responsive records through the client’s former attorney. In determining that an unlawful denial of access may have occurred, the Council ordered the custodian to either disclose certain records or provide an affidavit demonstrating personal knowledge that the complainant possessed them. Henry, GRC 2015-155 (Interim Order dated May 24, 2016). Upon receiving the custodian’s affidavit, the Council found that there was still insufficient evidence to demonstrate that the complainant possessed the responsive records at the time of his OPRA request. Thus, the Council determined that contested facts existed and ordered a fact-finding hearing before the Office of Administrative Law (“OAL”). Henry, GRC 2015-155 (Interim Order dated November 15, 2016). Thereafter, the custodian sought reconsideration and maintained that the complainant possessed the responsive records through the former attorney, who “represented [the client].” Henry, GRC 2015-155 (Interim Order dated April 25, 2017) at 2. Thus, the custodian argued that “the [c]omplainant ‘constructively’ possessed all responsive records through [the client].” Id. The custodian also provided, for the first time, an affidavit from the former attorney. While rejecting the reconsideration, the Council noted that the former attorney’s certification, as well as supporting documentation showing correspondence between the former attorney, client, and Township, supported that the complainant reasonably possessed all records through his client.

Here, the Complainant sought access to multiple records from his criminal trial. In the SOI, the Custodian argued that the Complainant already possessed the responsive records through his trial court attorney; thus, he was not required to again provide them (citing Bart, 403 N.J. Super. 609). The Custodian also provided a certification from AP Luvera, the prosecutor in Indictment No. 10-03-002861. Assistant Prosecutor Luvera certified that she provided to the

Complainant's trial attorney a complete copy of the State's file during the trial. The Complainant responded to the SOI alleging that his attorney never gave him any records.

The threshold for determining whether a complaint falls reasonably within the purview of Bart, 403 N.J. Super. 609, rests on "undisputed" evidence that a complainant possessed the records sought at the time of the request. See Scutro v. City of Linden (Union), GRC Complaint No. 2012-219 (June 2013) (finding that the custodian was not required to disclose a record to the complainant because he admitted to being in possession of it at the time of his OPRA request). In comparing the facts here to Henry, the GRC finds that the evidence of record aligns with that complaint prior to its receipt of the former attorney's certification. Specifically, the Custodian and AP Luvera certified that they provided the Complainant's trial attorney with all records. However, the Complainant countered that he never received any records from the trial attorney. Absent from the record is a certification from Mr. Bowman and/or corroborating evidence that he provided these records to the Complainant and they remain in his possession. There is also no undisputed indication in the record that the Complainant possessed any of the records sought when he submitted the subject OPRA request.

Accordingly, the Custodian has not provided adequate proof that he was under no obligation to provide records already in the Complainant's possession. Henry, GRC 2015-155 (Interim Order dated November 15, 2016). However, as opposed to referring this complaint to the OAL based on "contested facts" at this juncture, the Council should first determine the general disclosability of the requested records and provide the Custodian a chance to supplement the record.

Arrest Reports, Judgment of Convictions, and Warrants

The Council has held that arrest reports are disclosable, with redactions for information otherwise exempt under OPRA. See Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008). Further, the Council has also held that warrants are subject to disclosure under OPRA. Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). Finally, the Council has seen limited complaints that included judgment of convictions;⁶ however, it has not addressed whether they were subject to disclosure under OPRA.

Here, the Complainant's OPRA request sought, among other records, arrest reports, warrants, and judgment of convictions. The Custodian argued in the SOI that, among other reasons, responsive records could be exempt under the criminal investigatory exemption. The Custodian also noted that he would be amenable to disclosing those records not falling within the exemption.

Regarding arrest reports and warrants, GRC precedent is clear that such records are disclosable. See Morgano, GRC 2007-156; Seabrooks, GRC 2012-230. As to the judgment of conviction, the default analysis should apply: if the record is made, maintained, received, or kept on file by the UCPO, then it is disclosable unless any exemptions apply. To this end, the current

⁶ The content of a judgment of conviction include "the complaint, the plea, the findings, the adjudication[,] and the sentence." N.J. Court Rules, R. 7:9-2.

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evidence of record does not support that an exemption applies to this type of record. Thus, it follows that disclosure of the requested judgment of conviction is required under OPRA.

Accordingly, the Custodian may have unlawfully denied access to the requested arrest reports, warrants, and judgment of convictions. N.J.S.A. 47:1A-6; Morgano, GRC 2007-156; Seabrooks, GRC 2012-230. The Custodian shall either: 1) disclose these responsive records, with redactions where applicable; 2) certify to whether no records existed; and/or 3) provide additional certifications (with supporting documentation) that the Complainant was in possession of these records at the time of his OPRA request.

Pre-Sentencing Reports, Investigative Reports, and Criminal Rap Sheets

The Council has previously held that pre-sentence reports were exempt from disclosure under the “inter-agency, intra-agency advisory, consultative, or deliberative [(“ACD”)]” material exemption. See Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014) (citing State v. DeGeorge, 113 N.J. Super. 542, 544 (App. Div. 1971)); Baker v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2014-262 (May 2015).

Regarding investigative reports, 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 (App. Div. 2009).

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc., 229 N.J. 541 (2017), 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 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).⁷ Therefore, the Court reasoned that determining whether such records pertain to a criminal investigation requires a “case-by-case analysis.” However, the Court pointed out that police records that stem from “an investigation into *actual or potential* violations of criminal law,” such as “detailed investigative reports and witness statements,” will satisfy the second prong of OPRA’s criminal investigatory records exemption. Id. (emphasis added).

The Council has also long held that once a record is determined to be a criminal investigatory record, it is exempt from access. See Janeczko v. N.J. Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), holding that “criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed.”⁸ Moreover, with respect to concluded investigations, the Council pointed out in Janeczko that, “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete.”

Initially, there is no evidence in the record supporting that the responsive investigative reports were required by law to be made. Thus, the records meet the first prong of the criminal investigatory test. Further, the evidence of record fully supports that reports relate to a criminal investigation and prosecution of the Complainant in Indictment No. 10-03-002861 and are in the possession of the UCPO. Thus, the requested reports satisfy the second prong of the criminal investigatory test (held on file by a law enforcement agency and relating to an criminal investigation). It follows that the responsive investigative reports are not subject to disclosure under OPRA. N.J.S.A. 47:1A-1.1.

Regarding criminal history background information, colloquially known as criminal rap sheets, OPRA provides that it “shall not abrogate any exemption . . . made pursuant to . . . any . . . *Executive Order of the Governor . . .*” N.J.S.A. 47:1A-9(a) (emphasis added). To this end, Executive Order No. 9 (Gov. Hughes, 1963)(“EO 9”) provides that “criminal records required to be made, maintained[,] and kept pursuant to [N.J.S.A. 53:1-20.1] and [N.J.S.A. 53:1-20.2]” are exempt from disclosure. Id. at 2(f). EO 9 is relevant with regard to rap sheets because N.J.S.A. 53:1-20.1 requires this information be collected and submitted into the criminal history background check database through the State Bureau of Identification (“SBI”). Additionally, N.J.S.A. 53:1-20.2 provides that bureaus of identification are established in “the office of the sheriff and . . . prosecutors . . .” Id. Thus, it follows that any information coalesced by county and State SBIs are exempt from access under OPRA in accordance with N.J.S.A. 47:1A-9(a) and EO 9.

To further emphasize the confidential nature of rap sheet information, State agencies have promulgated regulations limiting dissemination to a specific process (with multiple limitations) or outright exempted access to them. See N.J.A.C. 13:59-1 *et seq.* (New Jersey State Police regulations providing for the specific process of obtaining background checks and the limitations on who can access this information); N.J.A.C. 10A:22-2.3(a)(6) (New Jersey Department of Corrections regulation exempting from access “[c]omprehensive criminal history

⁷This 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.

⁸ The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

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information (rap sheet) . . .”). Thus, all relevant statutes, regulations, and executive orders addressing rap sheets support that they are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); EO 9.

Here, a portion of the Complainant’s OPRA request sought pre-sentencing reports, investigative reports, and criminal rap sheets. The Custodian argued in the SOI that, among other reasons, some of the records were exempt as criminal investigatory records. N.J.S.A. 47:1A-1.1. Above, the GRC has set forth how each of these records is exempt from disclosure under OPRA. That reasoning includes statutory and regulatory exemptions, as well as precedential case law.

Accordingly, the Custodian lawfully denied access to the portion of the Complainant’s OPRA request seeking pre-sentencing reports, investigative reports, and criminal rap sheets. N.J.S.A. 47:1A-6. Specifically, pre-sentencing reports are exempt as ACD material. See Pitts, GRC 2013-299. Further, investigative reports in this instance fall within the definition of a criminal investigatory record because they are not required to be made, are in the possession of a law enforcement agency, and pertain to a criminal investigation. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541. Finally, EO 9 provides that criminal rap sheets are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).

Knowing & Willful

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 Council Staff 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 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).
2. The Custodian has not provided adequate proof that he was under no obligation to provide records already in the Complainant’s possession. Henry, Esq. (O.B.O. Joseph Cordaro) v. Twp. of Hamilton Police Dep’t (Atlantic), GRC Complaint No. 2015-155 (Interim Order dated November 15, 2016). However, as opposed to referring this complaint to the Office of Administrative Law based on “contested facts” at this juncture, the Council should first determine the general disclosability of the requested records and provide the Custodian a chance to supplement the record.

3. The Custodian may have unlawfully denied access to the requested arrest reports, warrants, and judgment of convictions. N.J.S.A. 47:1A-6; Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008); Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall either: 1) disclose these responsive records, with redactions where applicable; 2) certify to whether no records existed; and/or 3) provide additional certifications (with supporting documentation) that the Complainant was in possession of these records at the time of his OPRA request.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Council Staff.¹⁰**
5. The Custodian lawfully denied access to the portion of the Complainant's OPRA request seeking pre-sentencing reports, investigative reports, and criminal rap sheets. N.J.S.A. 47:1A-6. Specifically, pre-sentencing reports are exempt as "inter-agency, intra-agency advisory, consultative, or deliberative" material. See Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2013-299 (September 2014). Further, investigative reports in this instance fall within the definition of a criminal investigatory record because they are not required to be made, are in the possession of a law enforcement agency, and pertain to a criminal investigation. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541 (2017). Finally, Executive Order No. 9 (Gov. Hughes, 1963) provides that criminal rap sheets are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).
6. 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: Frank F. Caruso
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March 20, 2018

⁹ "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."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.
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