



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

August 28, 2018 Government Records Council Meeting

Josephine V. Mella
Complainant

Complaint No. 2016-217

v.

Passaic County Prosecutor's Office
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council ("Council") considered the August 21, 2018 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 investigative reports responsive to a portion of the Complainant's OPRA request item No. 1 are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. N.J. Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79, *et seq.* (June 2004). The Custodian thus lawfully denied access to said reports. N.J.S.A. 47:1A-6.
2. The Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant OPRA request No. 1 seeking recordings and videos, OPRA request No. 2 seeking specific policies and procedures, and the clarification seeking additional audio and video recordings. Specifically, the Custodian initially responded that no records existed, certified to these facts in the Statement of Information, and the record reflects that no responsive records existed. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian appropriately responded to the Complainant's OPRA request item No. 3 disclosing those "credentials and training certificates" required for government employment and denying access to the remainder under N.J.S.A. 47:1A-10. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). Thus, the Custodian thus borne her burden of proving that no unlawful denial of access occurred. 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 28th Day of August, 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: August 30, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Josephine V. Mella¹
Complainant**

GRC Complaint No. 2016-217

v.

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

Records Relevant to Complaint: Hardcopies via pickup of:

1. All written reports, audio, and video documenting an incident involving the Complainant's brother on May 3, 2016.
2. All departmental policies and procedures on barricaded individuals, emotionally disturbed persons, and sudden death/suicide protocols.
3. All credentials and training certificates for all departmental personnel directly involved and that responded to the incident on May 3, 2016.

Custodian of Record: Lisa Verlardi
Request Received by Custodian: July 11, 2016
Response Made by Custodian: July 20, 2016
GRC Complaint Received: August 4, 2016

Background³

Request and Response:

On July 9, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On July 20, 2016, the Complainant e-mailed Secretary Patricia Ring seeking a status update. Further, the Complainant clarified her OPRA request to seek police car audio, "camera video all 911 and regular calls . . . all police radio transmissions" (sic) pertaining to the May 3, 2016 incident. On the same day, the Custodian responded in writing obtaining a one (1) week extension until July 27, 2016.

On July 27, 2016, the Custodian responded in writing addressing each OPRA request as follows:

¹ No legal representation listed on record.

² Represented by William J. Pascrell, III, Esq. (Paterson, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Josephine V. Mella v. Passaic County Prosecutor's Office, 2016-217 – Findings and Recommendations of the Council Staff

1. Written reports are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; Newman v. N.J. State Police, GRC Complaint No. 2013-347 (July 2014); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2012) Additionally, no audio or video recordings existed.
2. The Passaic County Prosecutor's Office ("PCPO") did not possess any policies or procedures relevant to barricaded individuals, emotionally disturbed persons, and sudden deaths/suicide protocols. Notwithstanding, the Complainant's portion of the request seeking "all departmental policies and procedures" is overly broad and thus invalid. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 38 (App. Div. 2005).
3. Credentials and training certifications are denied as "personnel" records with the exception of the following attached sixteen (16) training certifications, which are disclosable under N.J.S.A. 47:1A-10. Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581 (2011).
4. The PCPO did not maintain any audio or video recordings responsive to the Complainant's July 20, 2016 amended OPRA request. Specifically, the PCPO did not possess any car audio or video, telephone calls, 911 calls, or radio transmissions regarding the incident.

In a follow-up e-mail, the Custodian provided the Complainant a sample Court Order regarding the disclosure of reports in a civil matter.⁴

Denial of Access Complaint:

On August 4, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that she sought access to the requested records as her brother's "Administrator of the Estate." The Complainant noted that her brother's death was labeled as a suicide, thus making the incident a civil matter. The Complainant asserted that she repeatedly attempted to obtain records by other means in June 2016, but was eventually told to file an OPRA request. The Complainant averred that the Custodian, after a brief extension, denied access to multiple records, but also provided her a "Notice of Motion to Compel Discovery." The Complainant provided no additional arguments.

Statement of Information:⁵

On January 6, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on July 11, 2016. The Custodian certified that her search included consulting with personnel involved in the incident and personnel involved in policies and procedures, as well as administrative staff familiar with the requested personnel records. The Custodian certified that during her search, the Complainant clarified her request. The Custodian certified that she responded in writing on July 20, 2016 obtaining a one (1) week extension until July 27, 2016. The Custodian affirmed that she subsequently located three (3) reports prepared by the PCPO totaling seven (7) pages and sixteen (16) training certificates.

⁴ The Custodian also provided additional records not at issue in this complaint.

⁵ On August 24, 2016, this complaint was referred to mediation. On December 12, 2016, this complaint was referred back to the GRC for adjudication.

The Custodian certified that she responded on July 27, 2016 disclosing the certificates responsive to item No. 3 and denying access to all other request items.

Regarding item No. 1, the Custodian contended that she lawfully denied access to the responsive reports because they were criminal investigatory in nature: they were not required by law to be made and pertained to a criminal investigation. The Custodian asserted that the reports were still exempt even though the case was closed and resulted in a non-criminal finding. Janeczko v. N.J. Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79, *et seq.* (June 2004). The Custodian further certified that no audio or video recordings existed.

Regarding item No. 2, the Custodian affirmed that no responsive policies or procedures on the specific topics identified existed. The Custodian also argued that the “all policies and procedures” portion of the request item was invalid because it did not specify a record.

Regarding item No. 3, the Custodian certified that she requested administrative staff to perform a search of trainings and certificates conforming with the “experiential, education, or medical qualifications required for government employment . . .” exception in N.J.S.A. 47:1A-10. The Custodian affirmed that this search resulted in sixteen (16) certificates that she provided to the Complainant on July 27, 2016. The Custodian affirmed that the disclosed certificates represented the completed training that the involved officers were required to take in order to remain employed. The Custodian noted that she did not obtain a detailed list of the numerous remaining credentials and training certificates for those officers because they were exempt under N.J.S.A. 47:1A-10. Regarding the Complainant’s July 20, 2016 clarification, the Custodian affirmed that no records existed.

Additional Information:

On August 7, 2018, the GRC sought additional information from the Custodian. The GRC stated that police reports were denied under the “criminal investigatory” exemption, but it was unclear whether the incident in question resulted in such an investigation. Further, the GRC stated that the Custodian disclosed sixteen (16) training certificates in accordance with N.J.S.A. 47:1A-10, but alluded to multiple other certificates. The GRC averred that it was unclear whether these unidentified certificates were lawfully withheld. The GRC thus requested that the Custodian provide a legal certification answering the following:

1. Regarding the police reports at issue in this complaint, does the PCPO treat an incident involving a suicide as a criminal investigation?
 - a. If so, is this the result of an internal PCPO policy, or at the behest of another State policy?
 - b. Also, was a criminal investigation conducted regarding the incident in question? If so, what is the present status of said investigation?
2. Regarding the training certificates, please provide a list of those in existence and whether said trainings were “required for government employment or for receipt of a public pension.” N.J.S.A. 47:1A-10.

The GRC required the Custodian to submit his legal certification by close of business on August 10, 2018.

On August 10, 2018, Chief Assistant Prosecutor Mary Catherine Ryan e-mailed the GRC advising that the Custodian was out on leave for an extended period of time. Ms. Ryan sought an extension to provide a response in order to allow her to further familiarize herself with the complaint and provide a comprehensive response. The GRC responded on the same day granted an extension until August 15, 2018.

On August 15, 2018, Ms. Ryan responded to the GRC's request for additional information. Therein, Ms. Ryan certified that the PCPO treats a potential suicide as a criminal investigation through protocols, legislation, and based on past experiences in investigation all manners of death. See "Notification and Investigation Protocol for Homicides and Suspicious Deaths;" N.J.S.A. 52:17B-86, et seq.,⁶ State v. Morgan, Indictment No. 17-02-00126-I. Ms. Ryan also affirmed that a criminal investigation was conducted for the incident in question here. Ms. Ryan certified that the Passaic County Sheriff's Office Crime Scene Investigation Unit ("CSI") responded to the scene. Further, Ms. Ryan certified that a criminal investigation into the potential that a weapon was unlawfully used, whether other persons were in danger, or whether other persons caused injury to the decedent.

Ms. Ryan also certified that multiple certificates were contained within the relevant employees' personnel files. Ms. Ryan listed each certificate located in the employees centrally maintained personnel file, but certified that only those issued by the Police Training Commission were disclosed in accordance with N.J.S.A. 47:1A-10 and N.J.S.A. 52:17B-68 (providing that no person shall "accept a permanent appointment as a police officer unless such person has successfully completed a police training course at an approved school . . ."). Ms. Ryan certified that those certificates meeting the Police Training Commission standard, as well as others, were the certificates disclosed to the Complainant.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Police Reports (OPRA request item No. 1)

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

⁶ Ms. Ryan noted that the "Revised State Medical Examiner Act," which was approved on July 13, 2018, repealed N.J.S.A. 52:17B-86 et seq. Ms. Ryan further noted that the new legislation would take effect on the first day of the second month following the date of enactment.

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, 410 N.J. Super. 371.

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 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). There, 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 long held that once a record is determined to be a criminal investigatory record, it is exempt from access. See Janeczko, GRC Complaint No. 2002-79, *et seq.*, holding that "criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed."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."

Here, a portion of the Complainant's OPRA request item No. 1 sought access to police reports, to which the Custodian identified three (3) responsive records in the SOI. At the time of her denial, as well as in the SOI, the Custodian argued that the responsive reports were exempt as criminal investigatory records under N.J.S.A. 47:1A-1.1 because they were not required by law to be made and pertained to a criminal investigation. The Complainant did not provide additional

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.

Josephine V. Mella v. Passaic County Prosecutor's Office, 2016-217 – Findings and Recommendations of the Council Staff

arguments against the denial, but did assert that incident resulted in a suicide that rendered the matter civil.

In conforming to Lyndhurst, 229 N.J. 541, the GRC must determine whether the reports meet the two-prong test necessary to be considered criminal investigatory records. As to the first prong, there is no evidence in the record to indicate that the reports were required by law to be made. As to the second prong, the GRC provides the following details regarding the incident in question. According to news reports,⁹ police were sent to the decedent's home after receiving information that he was distressed. After attempts to negotiate with the decedent, a SWAT team breached the home and found him with a self-inflicted gunshot wound. Further, Ms. Ryan submitted a legal certification on August 15, 2018 confirming that the instant matter was treated as a criminal investigation. Ms. Ryan confirmed that the PCPO conducted an investigation consistent with PCPO protocol and N.J.S.A. 52:17B-86, *et seq.*, and that CSI responded to the scene. Further, Ms. Ryan certified that a criminal investigation into the potential that a weapon was unlawfully used, whether other persons were in danger, or whether other persons caused injury to the decedent.

The question thus becomes whether the reports “pertain[ed] to any criminal investigation or related civil enforcement proceeding.” N.J.S.A. 47:1A-1.1. The Lyndhurst Court defined the term “pertain” as “to have some connection with or relation to something.” Lyndhurst, 229 N.J. at 569. Here, the dispatch of officers called to a residence alone may not satisfy the relation to a criminal investigation. However, the GRC is persuaded by Ms. Ryan's legal certification regarding how potential suicides are investigated, and how the PCPO handled this particular incident as a criminal investigation. Further, the GRC is satisfied that the use of a SWAT team, negotiations with the decedent while barricaded in his home, and the ensuing investigation upon finding the decedent “pertained to an investigation into actual or potential violations of criminal law.” *Id.* Based on this, the GRC is satisfied that the reports also meet the second prong of the criminal investigatory test.

Accordingly, the investigative reports responsive to a portion of the Complainant's OPRA request item No. 1 are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; Lyndhurst, 229 N.J. 541; Janeczko, GRC 2002-79, *et seq.* The Custodian thus lawfully denied access to said reports. N.J.S.A. 47:1A-6.

Recordings, Videos, Policies (OPRA request item Nos. 1, 2, and clarification)

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, a portion of the Complainant's OPRA request item No. 1 and her clarification sought recordings and videos regarding the incident. The Complainant's OPRA request item No. 2 sought policies and procedures regarding barricaded individuals, emotionally disturbed persons, and sudden death/suicide protocols. In her July 27, 2016 responsive, the Custodian denied access to these items stating that no records existed. The Custodian subsequently certified to this fact in the SOI. Additionally, there is no evidence in the

⁹ https://www.nj.com/passaic-county/index.ssf/2016/05/detective_kills_himself_during_standoff_with_swat.html (accessed July 12, 2018).

record to refute the Custodian's certification. Thus, the GRC is satisfied that no unlawful denial of access occurred with respect to these request items.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant OPRA request No. 1 seeking recordings and videos, OPRA request No. 2 seeking specific policies and procedures, and the clarification seeking additional audio and video recordings. Specifically, the Custodian initially responded that no records existed, certified to these facts in the SOI, and the record reflects that no responsive records existed. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Credentials and Training Certificates (OPRA request No. 3)

Regarding personnel records, OPRA begins with a presumption against disclosure and "proceeds with a few narrow exceptions that . . . need to be considered." Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). Among those exceptions are:

[D]ata contained in information which disclose conformity with specific *experiential, educational* or medical qualifications *required for government employment or for receipt of a public pension*, but not including any detailed medical or psychological information, shall be a government record.

[N.J.S.A. 47:1A-10.]

In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), the complainant sought the "training records of Officer Tuttle." Id. The Council found that "training records relating to a police officer's public employment as a law enforcement official would be subject to public access" to the extent that the records contained information that disclosed conformity with the qualifications required for government employment. Merino, GRC 2003-110 (citing N.J.S.A. 47:1A-10); see also Wagner v. Twp. of Montclair Police Dep't (Essex), GRC Complaint No. 2013-222 (Interim Order dated March 25, 2014).

Here, the Complainant sought all credentials and training certificates for the PCPO personnel involved in the May 3, 2016 incident. The Custodian responded disclosing sixteen (16) training certificates and denying access to any remaining records in accordance with N.J.S.A. 47:1A-10. In the SOI, the Custodian certified that she utilized administrative staff to locate records. The Custodian further certified that she disclosed only those certificates confirming completion of training required for government employment as a detective in the PCPO. The Custodian also affirmed that she did not ask administrative personnel for a detailed list of the remaining credentials or training certificates because they were numerous and exempt as personnel records under N.J.S.A. 47:1A-10.

The GRC subsequently sought additional information regarding the disclosability of certificates that the Custodian did not identify. In response, Ms. Ryan certified that the PCPO disclosed those certificates the employees were required to obtain to maintain their position in accordance with N.J.S.A. 52:17B-68. Ms. Ryan also produced a comprehensive list of certificates maintained by the PCPO.

The GRC is persuaded that the facts, as compared to prior case law, support that no unlawful denial of access occurred. Specifically, the Custodian exhibited her awareness that certain credential and training records were required to be disclosed in accordance with N.J.S.A. 47:1A-10. Indeed, she disclosed those records and advised the Complainant that any remaining responsive records would be exempt under the personnel exemption. Ms. Ryan's comprehensive list also supports that the Custodian acted properly with regard to this OPRA request. Further, there is no evidence to suggest that the Custodian withheld any additional records that would fall within the definition of disclosable personnel record. Id.; Merino, GRC 2003-110.

Accordingly, the Custodian appropriately responded to the Complainant's OPRA request item No. 3 disclosing those "credentials and training certificates" required for government employment and denying access to the remainder under N.J.S.A. 47:1A-10. See Merino, GRC 2003-110. Thus, the Custodian thus borne her burden of proving that no unlawful denial of access occurred. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The investigative reports responsive to a portion of the Complainant's OPRA request item No. 1 are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. N.J. Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79, *et seq.* (June 2004). The Custodian thus lawfully denied access to said reports. N.J.S.A. 47:1A-6.
2. The Custodian has borne her burden of proof that the she lawfully denied access to the portion of the Complainant OPRA request No. 1 seeking recordings and videos, OPRA request No. 2 seeking specific policies and procedures, and the clarification seeking additional audio and video recordings. Specifically, the Custodian initially responded that no records existed, certified to these facts in the Statement of Information, and the record reflects that no responsive records existed. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian appropriately responded to the Complainant's OPRA request item No. 3 disclosing those "credentials and training certificates" required for government employment and denying access to the remainder under N.J.S.A. 47:1A-10. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). Thus, the Custodian thus borne her burden of proving that no unlawful denial of access occurred. N.J.S.A. 47:1A-6.

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

July 24, 2018¹⁰

¹⁰ This complaint was prepared for adjudication at the Council's July 31, 2018 meeting; however, the Council chose to table the matter for additional review.