



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
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**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**March 27, 2018 Government Records Council Meeting**

Olajuwon Herbert  
Complainant

Complaint No. 2016-51

v.

Essex 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, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian did not unlawfully deny access to any responsive records beyond those provided. N.J.S.A. 47:1A-6. Specifically, the responsive records regarding Indictment No. 12-11-2693 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, 564 (2017); Janeczko v. N.J. Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

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 27<sup>th</sup> 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 29, 2018**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Olajuwon Herbert<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-51**

v.

**Essex County Prosecutor's Office<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies via U.S. mail of the following from Indictment No. 12-11-2693:

1. Record Series<sup>3</sup> No. 0004-0000 – Discovery Report
2. Record Series No. 0007-0000 – Evidence Report
3. Record Series No. 0012-0000 – Intelligence File: Reference
4. Record Series No. 0013-0002 – Investigation Report File

**Custodian of Record:** Debra G. Simms, Esq.<sup>4</sup>  
**Request Received by Custodian:** November 2, 2015  
**Response Made by Custodian:** November 9, 2015  
**GRC Complaint Received:** February 5, 2016

**Background<sup>5</sup>**

**Request and Response:**

On October 27, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 9, 2015, the Custodian responded in writing advising that an extension until December 7, 2015 was necessary to respond to the subject OPRA request.

On December 7, 2015, the Custodian responded in writing denying the Complainant’s OPRA request. First, the Custodian stated that Essex County Prosecutor Office (“ECPO”) files are exempt from disclosure as criminal investigatory records regardless of their status. N.J.S.A. 47:1A-

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

<sup>2</sup> Represented by Courtney Gaccione, Esq. (Newark, NJ).

<sup>3</sup> The term “Record Series” derives from the State of New Jersey’s “Records Retention and Disposition Schedule” administered by Records Management Services.

<sup>4</sup> The current Custodian of Record is LeeAnn Cunningham.

<sup>5</sup> 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.

1.1; Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 591 (2011); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 38-39 (App. Div. 2005); 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). Second, the Custodian stated that responsive records were exempt due to privacy interest. N.J.S.A. 47:1A-1. Third, the Custodian stated that to the extent that responsive records contained opinions, deliberations, and advice about agency policy, said records would be exempt under the "inter-agency or intra-agency advisory consultative or deliberative ["ACD"] material" exemption. N.J.S.A. 47:1A-1.1.

Fourth, the Custodian advised that the request was denied because OPRA was not intended to circumvent the discovery process. The Custodian further stated that OPRA was not intended to replace or supplement discovery by private litigants. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). Finally, the Custodian averred that the request was invalid because it represented a blanket request seeking non-specific sets of records. Id.; Reda v. Twp. of West Milford, GRC Complaint No. 2002-58 (January 2003); Asarnow v. Dep't of Labor & Workforce Dev., GRC Complaint No. 2006-24 (May 2006); Bent, 381 N.J. Super. 38-39; Bart v. Passaic Cnty. Hous. Agency, 406 N.J. Super. 445 (App. Div. 2009).

Notwithstanding the forgoing, the Custodian stated that she was disclosing the following records with redactions in accordance with N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1:

- Complaint/Warrant W2012-013148
- Arrest Report
- Indictment No. 12-11-2693
- Autopsy/Toxicology Report
- Ballistics Report
- NJ State Police DNA Lab Report
- NJ State Police Criminalistics Lab Report
- Judgment of Conviction in Indictment No. 12-11-2693

#### Denial of Access Complaint:

On February 5, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant did not assert a claim; however, he noted that he needed the records for an upcoming post-conviction relief appeal.

#### Statement of Information:

On February 24, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on November 2, 2015. The Custodian certified that her search for responsive records involved retrieving and examining the case file for Indictment No. 12-11-2693. The Custodian certified that she initially responded in writing on November 9, 2015 seeking an extension of time through December 7, 2015 to respond to the OPRA request. The Custodian affirmed that she subsequently responded on December 7, 2015, denying access to the Complainant's OPRA request under five (5) separate bases. However, the Custodian affirmed that she disclosed multiple records to the Complainant with redactions of

social security numbers and telephone numbers in accordance with N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1. The Custodian affirmed that all disclosed records comprised a portion of the Investigation Report file sought in OPRA request item No. 4.

The Custodian contended that she properly denied access to records responsive to OPRA item Nos. 1 through 3 of the Complainant's OPRA request under the criminal investigatory exemption. N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015); Kovalcik, 206 N.J. at 591; Bent, 381 N.J. Super. 38-39; Solloway v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-39 (January 2013). The Custodian also contended that request item Nos. 2 and 4 failed to identify specific records and would have required research to locate responsive records. MAG, 375 N.J. Super. at 546; Asarnow, GRC 2006-24. The Custodian contended that a portion of the file responsive to OPRA request item No. 4 contained records falling within the criminal investigatory and/or ACD exemptions. The Custodian noted that she disclosed several records in response to this request item with redactions in accordance with OPRA. Finally, the Custodian contended that OPRA was not intended to circumvent discovery.

### 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.

Initially, the GRC notes that the Complainant's OPRA request items sought certain records from Indictment No. 12-11-2693, identified categorically by terms used in a retention schedule. Thus, this request is invalid on its face because it failed to seek specific, identifiable records. However, in situations where a request was overly broad on its face but the custodian was able to locate records, the Council has followed Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), in determining that the request contained sufficient information for record identification. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (March 2011); Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014). Here, the Custodian was clearly able to locate the indictment file and responsive records, notwithstanding that the Complainant only provided generic retention terms. Based on this, and notwithstanding the Custodian's assertion that item Nos. 2 and 4 were invalid, the GRC declines to determine that the OPRA request is invalid. The GRC will thus proceed with a determination of whether the Custodian unlawfully denied access to any responsive records.

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. 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 565. 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).<sup>6</sup> 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).

Further, 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 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.”<sup>7</sup> 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.”

Further, N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant’s record of convictions because judicial notice could have been taken of the records of any court in New Jersey, and appellant’s record of convictions were exclusively in New Jersey. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

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<sup>6</sup>This 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.

<sup>7</sup>The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

Here, the GRC must determine whether the records sought meet the two-prong test required to be considered exempt under the criminal investigatory exemption. Regarding the criminal investigation prong, the Complainant sought access to records regarding Indictment No. 12-11-2693. As part of her initial response, the Custodian denied access to the responsive records under the criminal investigatory exemption, but did disclose multiple records otherwise. N.J.S.A. 47:1A-1.1. In the Denial of Access Complaint, the Complainant only stated that he wished to obtain the requested records for an upcoming post-conviction relief appeal. In the SOI, the Custodian maintained that responsive records, other than those provided, were exempt under the criminal investigatory exemption. However, neither the Complainant nor Custodian provided details regarding Indictment No. 12-11-2693. Accordingly, the GRC takes judicial notice of information provided in the New Jersey Department of Corrections' Offender Search ("Search"). The Search indicates that the Complainant was convicted and incarcerated for murder and various related weapons charges as a result of Indictment No. 12-11-2693.<sup>8</sup> Thus, all of the forgoing supports that the records at issue meet the criminal investigation prong of the criminal investigatory test.

Regarding the required by law prong, there is no evidence to suggest that any of the records denied were required by law to be made. The GRC does note that the Custodian did disclose several records to the Complainant. The Council has previously found a few of those record types to be exempt from disclosure under OPRA as criminal investigatory records. See Leak v. Union Cnty. Prosecutor's Office (Union), GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009) (ballistics reports are exempt from disclosure as criminal investigatory records); Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated June 30, 2015) (toxicology reports are exempt from disclosure as criminal investigatory records). Additionally the Council has found that a few of the other record types were disclosable. See Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008) (arrest reports are disclosable with redactions where applicable); Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013) (arrest warrants are subject to disclosure); Schulz, GRC 2014-390 (autopsy reports are disclosable because they are required by law to be made).

Based on all of the foregoing, the evidence of record supports that the Custodian lawfully denied access to all remaining records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. at 564. Specifically, Indictment 12-11-2693 involved a murder for which the Complainant was convicted. Further, there is no evidence in the record to suggest that any records beyond those already provided were required by law to be made. Thus, the GRC is satisfied that no violation of OPRA occurred here.

Accordingly, the Custodian did not unlawfully deny access to any responsive records beyond those provided. N.J.S.A. 47:1A-6. Specifically, the responsive records regarding Indictment No. 12-11-2693 are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. at 564; Janeczko, GRC 2002-79, *et seq.*

Finally, the GRC stresses that this decision does not represent a reversal of past case law regarding the status of those records the GRC determined to be exempt under the criminal

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<sup>8</sup> [https://www20.state.nj.us/DOC\\_Inmate/details?x=1508560&n=5](https://www20.state.nj.us/DOC_Inmate/details?x=1508560&n=5) (accessed on February 28, 2018).

investigatory exemption. Notwithstanding the Custodian's disclosure of toxicology and ballistics reports, they are still viewed as exempt under N.J.S.A. 47:1A-1.1. Further, the absence of any case law regarding DNA and criminalists lab reports provide that their disclosability under OPRA is still in question.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that the Custodian did not unlawfully deny access to any responsive records beyond those provided. N.J.S.A. 47:1A-6. Specifically, the responsive records regarding Indictment No. 12-11-2693 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, 564 (2017); Janeczko v. N.J. Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

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March 20, 2018