



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

January 7, 2020 Government Records Council Meeting

Charles Richards
Complainant

Complaint No. 2017-219

v.

Florence Township Police Department (Burlington)
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 17, 2019 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 did not fully comply with the Council’s November 12, 2019 Interim Order. Specifically, although the Custodian responded within the prescribed time frame providing records to the Complainant, she failed to provide the certified confirmation of compliance to the Executive Director within the deadline.
2. The Custodian unlawfully denied access to a portion of the Complainant’s OPRA request and failed to fully comply with the Council’s November 12, 2019 Interim Order. However, the Custodian lawfully denied access to the remainder of the Complainant’s request and provided the withheld records within the allotted time frame. Additionally, the evidence of record does not indicate that the Custodian’s violation 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 7th Day of January 2020

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: January 9, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Charles Richards¹
Complainant**

GRC Complaint No. 2017-219

v.

**Florence Township Police Department (Burlington)²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

- 1) Florence Township Police Department full case print-out for case nos. 2014-0679/2014-0968, from January 27, 2014 and February 7, 2014.
- 2) Copy of any and all CAD reports that relates to case no. 2014-0679/2014-0968.

Custodian of Record: Nancy L. Erlston

Request Received by Custodian: September 1, 2017

Response Made by Custodian: September 8, 2017

GRC Complaint Received: November 13, 2017

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 *In Camera* 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, found that:

1. The Custodian unlawfully denied access to the arrest reports contained within his criminal files. 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). Additionally, the Custodian unlawfully denied access to the complaints. Bell v. Hudson Cnty. Prosecutor's Office, GRC Complaint No. 2017-86 (Interim Order dated May 21, 2019). The Custodian shall therefore disclose the responsive records, with redactions where applicable.
2. The Custodian unlawfully denied access to the subpoenas contained within his criminal files. N.J.S.A. 47:1A-6. Since subpoenas are required by law to be made under R. 1:9-

¹ No legal representation listed on record.

² Represented by Kelly Grant, Esq., of Capehart Scatchard, P.A. (Trenton, NJ).

1 to -2, they do not fall under the criminal investigatory records exemption under OPRA. N.J.S.A. 47:1A-1.1; North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017). The Custodian shall therefore disclose the responsive records, with redactions where applicable.

3. **The Custodian shall comply with conclusion Nos. 1 & 2 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, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.**⁵
4. The Custodian lawfully denied access to the photographs contained within the Complainant's criminal case files. N.J.S.A. 47:1A-6. Such records are expressly prohibited from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); Executive Order No. 69 (Gov. Whitman, 1997); Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009).
5. The Custodian lawfully denied access to the portions of the requested case files consisting of investigative and supplemental reports, evidence receipts, contact sheets, logs, handwritten notes, disposition letters, discovery lists, and inventory lists, video footage, and correspondence to and from the prosecutor's office. N.J.S.A. 47:1A-6. Specifically, the aforementioned records are contained within the Complainant's criminal case files and are not required by law to be made, maintained, or kept on file. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017); Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005); Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015); Boretsky v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2016-220 (February 2018).
6. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request Item No. 2 seeking CAD reports pertaining to his criminal cases, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. 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 certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "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."

⁵ 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.

7. 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 November 14, 2019, the Council distributed its Interim Order to all parties. On November 25, 2019, the Custodian responded to the Council's Interim Order. The Custodian certified that on November 15, 2019, she mailed copies of the responsive records subject to disclosure under OPRA in accordance with the Interim Order.

Analysis

Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian to disclose the subpoenas, arrest reports, and complaint warrants contained within the Complainant's criminal files. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 14, 2019, 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 November 21, 2019.

On November 25, 2019, the seventh (7th) business day after receipt of the Council's Order, the Custodian responded in writing certifying that copies of the subpoenas, arrest reports, and complaint warrants contained in the Complainant's criminal files were mailed to the Complainant on November 15, 2019. However, although the Custodian simultaneously copied the Government Records Council ("GRC") and signed the certification on November 15, 2019, the GRC did not receive the certification until November 25, 2019. The first footnote in the Interim Order states that while the certified confirmation of compliance may be sent by a variety of mediums at the Custodian's discretion, the GRC must "physically receive[] it by the deadline."

Therefore, the Custodian did not fully comply with the Council's November 12, 2019 Interim Order. Specifically, although the Custodian responded within the prescribed time frame providing records to the Complainant, she failed to provide the certified confirmation of compliance to the Executive Director within the deadline.

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)).

Here, the Custodian unlawfully denied access to a portion of the Complainant’s OPRA request and failed to fully comply with the Council’s November 12, 2019 Interim Order. However, the Custodian lawfully denied access to the remainder of the Complainant’s request and provided the withheld records within the allotted time frame. Additionally, the evidence of record does not indicate that the Custodian’s violation 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 Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council’s November 12, 2019 Interim Order. Specifically, although the Custodian responded within the prescribed time frame providing records to the Complainant, she failed to provide the certified confirmation of compliance to the Executive Director within the deadline.
2. The Custodian unlawfully denied access to a portion of the Complainant’s OPRA request and failed to fully comply with the Council’s November 12, 2019 Interim Order. However, the Custodian lawfully denied access to the remainder of the Complainant’s request and provided the withheld records within the allotted time frame. Additionally, the evidence of record does not indicate that the Custodian’s violation 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: Samuel A. Rosado
Staff Attorney

December 17, 2019



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

INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Charles Richards
Complainant

Complaint No. 2017-219

v.

Florence Township Police Department (Burlington)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council ("Council") considered the October 30, 2019 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 unlawfully denied access to the arrest reports contained within his criminal files. 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). Additionally, the Custodian unlawfully denied access to the complaints. Bell v. Hudson Cnty. Prosecutor's Office, GRC Complaint No. 2017-86 (Interim Order dated May 21, 2019). The Custodian shall therefore disclose the responsive records, with redactions where applicable.
2. The Custodian unlawfully denied access to the subpoenas contained within his criminal files. N.J.S.A. 47:1A-6. Since subpoenas are required by law to be made under R. 1:9-1 to -2, they do not fall under the criminal investigatory records exemption under OPR. N.J.S.A. 47:1A-1.1; North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017). The Custodian shall therefore disclose the responsive records, with redactions where applicable.
3. **The Custodian shall comply with conclusion Nos. 1 & 2 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, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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.

4. The Custodian lawfully denied access to the photographs contained within the Complainant's criminal case files. N.J.S.A. 47:1A-6. Such records are expressly prohibited from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); Executive Order No. 69 (Gov. Whitman, 1997); Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009).
5. The Custodian lawfully denied access to the portions of the requested case files consisting of investigative and supplemental reports, evidence receipts, contact sheets, logs, handwritten notes, disposition letters, discovery lists, and inventory lists, video footage, and correspondence to and from the prosecutor's office. N.J.S.A. 47:1A-6. Specifically, the aforementioned records are contained within the Complainant's criminal case files and are not required by law to be made, maintained, or kept on file. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017); Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005); Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015); Boretsky v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2016-220 (February 2018).
6. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request Item No. 2 seeking CAD reports pertaining to his criminal cases, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
7. 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 12th Day of November 2019

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: November 14, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Charles Richards¹
Complainant**

GRC Complaint No. 2017-219

v.

**Florence Township Police Department (Burlington)²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

- 1) Florence Township Police Department full case print-out for case nos. 2014-0679/2014-0968, from January 27, 2014 and February 7, 2014.
- 2) Copy of any and all CAD reports that relates to case no. 2014-0679/2014-0968.

Custodian of Record: Nancy L. Erlston

Request Received by Custodian: September 1, 2017

Response Made by Custodian: September 8, 2017

GRC Complaint Received: November 13, 2017

Background³

Request and Response:

On September 1, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 8, 2017, the Custodian responded in writing stating that the responsive records are exempt from disclosure as criminal investigatory records, citing in part N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015), rev’d in part, 229 N.J. 541 (2017); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005); and Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

Denial of Access Complaint:

On November 13, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian improperly

¹ No legal representation listed on record.

² Represented by Kelly Grant, Esq., of Capehart Scatchard, P.A. (Trenton, 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.

Charles Richards v. Florence Township Police Department (Burlington), 2017-219 – Findings and Recommendations of the Executive Director

denied access to his request as exempt from access.

Statement of Information:

On November 24, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 1, 2017. The Custodian certified that she contacted the Township Administrator and Police Chief to review the request. The Custodian certified that she responded in writing on September 8, 2017, stating that the records were exempt from disclosure as criminal investigatory records.

For Item No. 1, the Custodian maintained that the responsive records contained within the case files were exempt as criminal investigatory records under OPRA. N.J.S.A. 47:1A-1.1, citing in part N. Jersey Media Grp., Inc., 229 N.J. at 541; Bent, 381 N.J. Super. at 37; and Janeczko, GRC 2002-79, *et al.* The Custodian broke down each record contained within the case files in the SOI’s Item No. 9 Index. For Item No. 2, the Custodian certified that no CAD reports exist for either criminal case.

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.

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. at 556. 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 551. 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,” Id. at 565, the Court refused to conclude that records retention schedules adopted by the State Records Committee meet OPRA’s “required by law” standard. Id. at 568.

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).⁴ Therefore, the Court reasoned that determining whether such records pertain to a criminal investigation requires a “case-by-case analysis.” Ibid. 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. Ibid. (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, GRC 2002-79 *et al.*, 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.”⁵ 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).

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 first prong, the Complaint sought access to “full case print-outs” for two (2) cases. The Custodian denied access to the responsive records contained within the case files under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. Although the Custodian noted that all of the records reference indictable offenses, details are not provided. Accordingly, the GRC takes judicial notice of information provided from the New Jersey Department of Correction’s Offender Search (“Search”). The Search indicates that the Complainant was convicted and incarcerated for unlawful weapons possession and multiple counts of robbery.⁶ Thus, the totality of the evidence supports that the records at issue meet the criminal investigation prong.

⁴This 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.

⁵ The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

⁶ “Offender Details.” New Jersey Department of Corrections,

https://www20.state.nj.us/DOC_Inmate/details?x=1525639&n=0 (last accessed October 10, 2019).

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Arrest Reports/Complaints

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, although decided during the pendency of this complaint, Bell v. Hudson Cnty. Prosecutor's Office, GRC Complaint No. 2017-86 (Interim Order dated May 21, 2019) is instructive. In that case, the complainant sought among other records, complaints contained within his criminal file. The Council held that since Complaint-Warrants were required by law to be made pursuant to R. 3:2-3(a), they did not fall under the criminal investigatory exemption and were thus subject to disclosure.

Here, the Custodian withheld arrest reports and complaints contained within the Complainant's criminal files under the criminal investigatory exemption. However, in accordance with Morgano and Bell, such records are subject to disclosure under OPRA.

Accordingly, the Custodian unlawfully denied access to the arrest reports contained within his criminal files. N.J.S.A. 47:1A-6; Morgano, GRC 2007-156. Additionally, the Custodian unlawfully denied access to the complaints. Bell, GRC 2017-86. The Custodian shall therefore disclose the responsive records, with redactions where applicable.

Subpoenas

The GRC has previously held that a request for subpoenas, with accompanying identifiers, was sufficiently specific to be a valid request under OPRA. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2011-128, 2011-129, 2011-130, 2011-131, & 2011-132 (Interim Order dated July 31, 2012). However, whether subpoenas are exempt from access under the criminal investigatory records exemption is an issue of first impression.

As mentioned previously, the subpoenas identified by the Custodian in her SOI's Item 9 Index are all contained within the Complainant's criminal files. Therefore, the remaining issue is whether subpoenas are required by law to be made, maintained, or kept on file. In accordance with R. 1:9-1 to -2, subpoenas are required by law to be made. Therefore, they are inapplicable to the criminal investigatory records exemption. N. Jersey Media Grp., Inc., 229 N.J. at 551.

Accordingly, the Custodian unlawfully denied access to the subpoenas contained within his criminal files. N.J.S.A. 47:1A-6. Since subpoenas are required by law to be made under R. 1:9-1 to -2, they do not fall under the criminal investigatory records exemption under OPRA. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. at 551. The Custodian shall therefore disclose the responsive records, with redactions where applicable.

Photographs

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of

either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order. [N.J.S.A. 47:1A-9(a) (emphasis added).]

Executive Order No. 69 (Gov. Whitman, 1997) (“EO 69”), which superseded Executive Order No. 9 (Gov. Hughes, 1963) (“EO 9”), states that:

The following records shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the provisions of [OPRA], as amended: fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.

[Id.]

In Leak v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009), the complainant sought, among other records, crime scene photographs from a 1994 trial. The custodian denied access to the photographs pursuant to N.J.S.A. 47:1A-1.1 and EO 69. The Council stated in relevant part:

Request Item No. 3 seeks crime scene photographs relating to a criminal trial in 1994 . . . EO 69, enacted on May 15, 1997, modified [EO 9] and Executive Order No. 123 (Gov. Kean, 1983). EO 69 holds that:

“[t]he following records shall not be deemed to be public records... pursuant to [OPRA], as amended: fingerprint cards, plates and photographs and similar criminal investigatory records . . . required to be made, maintained or kept by any State or local governmental agency.” (Emphasis added.)

N.J.S.A. 47:1A-9(a) recognizes exemptions from disclosure included in state and federal statutes, regulations and executive orders. In this complaint, EO 69 explicitly states that criminal investigatory photographs shall not be deemed to be public records. Therefore, the crime scene photographs responsive to request Item No. 3 of the Complainant’s May 5, 2007 OPRA request are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9(a) and EO 69.

[Leak, GRC 2007-148 at 5-6.]

Additionally, the Council has previously found that photographs pertaining to a criminal investigation, especially those of a decedent or victim, are exempt from disclosure under OPRA. See *e.g.* Barkley v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2011-221 (February

2013); Lynn v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2015-186 (January 2017).⁷

In the matter before the Council, the Custodian identified several photographs pertaining to both criminal matters. Like the request in Leak, such records are expressly prohibited from disclosure under EO 69.

Therefore, the Custodian lawfully denied access to the photographs contained within the Complainant's criminal case files. N.J.S.A. 47:1A-6. Such records are expressly prohibited from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); EO 69; Leak, GRC 2007-148.

Misc. Reports/Video

The Council has previously held that many of the identified records were exempt from disclosure where they met the two (2) prong test required to be a criminal investigatory record under OPRA. See Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005) (holding that incident reports are exempt from disclosure under OPRA as criminal investigatory records); Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015) (holding that evidence receipt records were exempt from disclosure). The Council's application of the two-prong test was later supported in N. Jersey Media Grp., Inc., 229 N.J. at 551. Although decided during the pendency of this complaint, in Boretsky v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2016-220 (February 2018), the Council held that handwritten notes as well as correspondence by and between prosecutors and investigators created in the course of a criminal investigation also fell under the exemption.

Here, the Custodian identified within each case file records comprising investigative and supplemental reports, evidence receipts, contact sheets, logs, handwritten notes, disposition letters, discovery lists, inventory lists, video footage, and correspondence to and from the prosecutor's office. There is no evidence in the record to suggest that such records are required by law to be made, maintained, or kept on file.

Therefore, the Custodian lawfully denied access to the portions of the requested case files consisting of investigative and supplemental reports, evidence receipts, contact sheets, logs, handwritten notes, disposition letters, discovery lists, and inventory lists, video footage, and correspondence to and from the prosecutor's office. N.J.S.A. 47:1A-6. Specifically, the aforementioned records are contained within the Complainant's criminal case files and are not required by law to be made, maintained, or kept on file. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp. Inc., 229 N.J. at 541; Janeczko, GRC 2002-79, *et seq.*; Nance, GRC 2003-125; Mawhinney, GRC 2015-85; Boretsky, GRC 2016-220.

⁷ Affirmed on appeal in Lynn v. Middlesex Cnty. Prosecutor's Office, 2018 N.J. Super. Unpub. LEXIS 370 (App. Div. 2018).

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CAD Reports

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, Item No. 2 of the Complainant's OPRA request sought CAD reports pertaining to his criminal cases. On September 8, 2017, the Custodian informed the Complainant the records were exempt as criminal investigatory records. N.J.S.A. 47:1A-1.1. However, in the SOI the Custodian certified that no CAD reports exist for those criminal cases. Additionally, the Complainant provided no evidence to refute the Custodian's certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request Item No. 2 seeking CAD reports pertaining to his criminal cases, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

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 Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the arrest reports contained within his criminal files. 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). Additionally, the Custodian unlawfully denied access to the complaints. Bell v. Hudson Cnty. Prosecutor's Office, GRC Complaint No. 2017-86 (Interim Order dated May 21, 2019). The Custodian shall therefore disclose the responsive records, with redactions where applicable.
2. The Custodian unlawfully denied access to the subpoenas contained within his criminal files. N.J.S.A. 47:1A-6. Since subpoenas are required by law to be made under R. 1:9-1 to -2, they do not fall under the criminal investigatory records exemption under OPRA. N.J.S.A. 47:1A-1.1; North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017). The Custodian shall therefore disclose the responsive records, with redactions where applicable.
3. **The Custodian shall comply with conclusion Nos. 1 & 2 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, if applicable. Further, the Custodian shall simultaneously deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰

4. The Custodian lawfully denied access to the photographs contained within the Complainant's criminal case files. N.J.S.A. 47:1A-6. Such records are expressly prohibited from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); Executive Order No. 69 (Gov. Whitman, 1997); Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009).
5. The Custodian lawfully denied access to the portions of the requested case files consisting of investigative and supplemental reports, evidence receipts, contact sheets, logs, handwritten notes, disposition letters, discovery lists, and inventory lists, video footage, and correspondence to and from the prosecutor's office. N.J.S.A. 47:1A-6. Specifically, the aforementioned records are contained within the Complainant's criminal case files and are not required by law to be made, maintained, or kept on file. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017); Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005); Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015); Boretsky v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2016-220 (February 2018).
6. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request Item No. 2 seeking CAD reports pertaining to his criminal cases, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
7. 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: Samuel A. Rosado
Staff Attorney

October 30, 2019

⁸ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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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