



**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**

**June 25, 2019 Government Records Council Meeting**

Robert Bell  
Complainant

Complaint No. 2017-86

v.

Hudson County Prosecutor's Office  
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council ("Council") considered the June 18, 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. Mr. Cho complied with the Council's May 21, 2019 Interim Order because he responded in the prescribed time frame providing records. Mr. Cho also simultaneously provided certified confirmation of compliance to the Council Staff.
2. Although the Custodian unlawfully denied access to a portion of the Complainant's request, she lawfully denied access to other portions. Further, Mr. Cho fully complied with the Council's May 21, 2019 Interim Order. 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 25<sup>th</sup> Day of June 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: June 28, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
June 25, 2019 Council Meeting**

**Robert Bell<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-86**

v.

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

**Records Relevant to Complaint:** Hard copies of:

- 1) Complainant's "Bill of Particulars."
- 2) "All police reports and statements."
- 3) Complainant's "Y-STR DNA results."
- 4) "The original 'Defendant's' copy of my complaint/warrant(s) #906-W-2012-004123 and the probable cause sheet and affidavit and/or affirmation pertaining to said warrant(s)."
- 5) "[R.A.] 'DNA' results and [R.A.]'s outcome and/or plea agreement(s) and any 'favors' and statements he gave to the prosecutor(s) pertaining to my case and his charges that [were] pending in 'Feb. 2014.'"

**Custodian of Record:** Dawn K. Scala

**Request Received by Custodian:** January 13, 2017

**Response Made by Custodian:** January 17, 2017

**GRC Complaint Received:** April 25, 2017

**Background**

**May 21, 2019 Council Meeting:**

At its May 21, 2019 public meeting, the Council considered the May 14, 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 the amended findings and recommendations. The Council, therefore, found that:

1. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request Item No. 1 seeking a 'Bill of Particulars,' and to the portion of OPRA request No. 5 seeking 'favors' given to R.A. Specifically, 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).

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

<sup>2</sup> Represented by Neil Carroll, Assistant County Counsel (Jersey City, NJ).

2. The Custodian lawfully denied access to the portion of the Complainant's OPRA request seeking police statements, R.A.'s DNA results, R.A.'s statements and plea agreements, and R.A.'s list of criminal charges. N.J.S.A. 47-1A-6. Specifically, aforementioned records were contained within the Complainant's criminal file and therefore pertained to a criminal investigation. The records are also not required by law to be made and are in the possession of a law enforcement agency. N.J.S.A. 47:1A-1.1.; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017).
3. The Custodian unlawfully denied access to the arrest report and requested complaint. 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 may have unlawfully denied access to the requested warrant. Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall either: 1) disclose the responsive records, with redactions where applicable; 2) certify to whether no records existed; and/or 3) certify as to whether the requested warrant is part of another record.
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,<sup>3</sup> to the Council Staff.<sup>4</sup>**
5. 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 May 22, 2019, the Council distributed its Interim Order to all parties. On May 30, 2019, Charles Cho ("Mr. Cho"), on behalf of the Custodian, responded to the Council's Interim Order. Mr. Cho certified that copies of the withheld arrest report and complaint-warrant were provided to the Complainant via regular mail within the allotted time period. Mr. Cho also certified that the Complainant's Social Security number was redacted from both records and included a document index providing the lawful basis thereto.

On June 12, 2019, the GRC received a letter from the Complainant. The Complainant stated that he received a copy of his arrest report and arrest warrant on June 4, 2019, in accordance with the Interim Order. However, the Complainant argued that the records he received were not what

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<sup>3</sup> "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."

<sup>4</sup> 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.

he requested. The Complainant also contended that he did not receive other records that he sought from his original request.

## Analysis

### Compliance

At its May 21, 2019 meeting, the Council ordered the Custodian to disclose the arrest report and complaint-warrant and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On May 22, 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 May 30, 2019

On May 30, 2019, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, Mr. Cho responded on behalf of the Custodian to the Council's Interim Order, certifying that copies of the arrest report and complaint-warrant were provided to the Complainant with redactions. Mr. Cho also included a document index providing the lawful basis for said redactions.

The Complainant subsequently contended that the copies of the arrest report and warrant he received were not the versions he requested. However, the Complainant did not produce further evidence to refute the Custodian's certification. The Complainant also argued that he did not receive other records, however access to those records was addressed as part of the Council's Interim Order.

Therefore, Mr. Cho complied with the Council's May 21, 2019 Interim Order because he responded in the prescribed time frame providing records. Mr. Cho also 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)).

Although the Custodian unlawfully denied access to a portion of the Complainant's request, she lawfully denied access to other portions. Further, Mr. Cho fully complied with the Council's May 21, 2019 Interim Order. 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 Council Staff respectfully recommends the Council find that:

1. Mr. Cho complied with the Council's May 21, 2019 Interim Order because he responded in the prescribed time frame providing records. Mr. Cho also simultaneously provided certified confirmation of compliance to the Council Staff.
2. Although the Custodian unlawfully denied access to a portion of the Complainant's request, she lawfully denied access to other portions. Further, Mr. Cho fully complied with the Council's May 21, 2019 Interim Order. 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

June 18, 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**

**May 21, 2019 Government Records Council Meeting**

Robert Bell  
Complainant

Complaint No. 2017-86

v.

Hudson County Prosecutor's Office  
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council ("Council") considered the May 14, 2019 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:

1. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request Item No. 1 seeking a 'Bill of Particulars,' and to the portion of OPRA request No. 5 seeking 'favors' given to R.A. Specifically, 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).
2. The Custodian lawfully denied access to the portion of the Complainant's OPRA request seeking police statements, R.A.'s DNA results, R.A.'s statements and plea agreements, and R.A.'s list of criminal charges. N.J.S.A. 47-1A-6. Specifically, aforementioned records were contained within the Complainant's criminal file and therefore pertained to a criminal investigation. The records are also not required by law to be made and are in the possession of a law enforcement agency. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017).
3. The Custodian unlawfully denied access to the arrest report and requested complaint. 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 may have unlawfully denied access to the requested warrant. Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall either: 1) disclose the responsive records, with redactions where applicable; 2) certify to whether no records existed; and/or 3) certify as to whether the requested warrant is part of another record.
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,<sup>1</sup> to the Council Staff.<sup>2</sup>**

5. 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 21<sup>st</sup> Day of May 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: May 22, 2019**

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<sup>1</sup> "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."

<sup>2</sup> 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  
May 21, 2019 Council Meeting**

**Robert Bell<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-86**

v.

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

**Records Relevant to Complaint:** Hard copies of:

- 1) Complainant's "Bill of Particulars."
- 2) "All police reports and statements."
- 3) Complainant's "Y-STR DNA results."
- 4) "The original 'Defendant's' copy of my complaint/warrant(s) #906-W-2012-004123 and the probable cause sheet and affidavit and/or affirmation pertaining to said warrant(s)."
- 5) "[R.A.] 'DNA' results and [R.A.]'s outcome and/or plea agreement(s) and any 'favors' and statements he gave to the prosecutor(s) pertaining to my case and his charges that [were] pending in 'Feb. 2014.'"

**Custodian of Record:** Dawn K. Scala

**Request Received by Custodian:** January 13, 2017

**Response Made by Custodian:** January 17, 2017

**GRC Complaint Received:** April 25, 2017

**Background<sup>3</sup>**

**Request and Response:**

On January 8, 2017, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 17, 2017, the Custodian responded in writing, stating that the records the Complainant requested were part of his or R.A.'s criminal file, and therefore were exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1. The Custodian added that the records sought should have been provided by the Complainant's attorney, and to contact him to obtain copies. The Custodian also provided a copy of the Complainant's indictment and judgement of conviction, stating that those were public records.

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

<sup>2</sup> Represented by Neil Carroll, Assistant County Counsel (Jersey City, NJ).

<sup>3</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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

### Denial of Access Complaint:

On April 25, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant did not elaborate on the circumstances of the Custodian’s denial.

### Statement of Information:

On May 25, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 13, 2017. The Custodian certified that she obtained the Complainant’s criminal file from the Hudson County Prosecutor’s Office’s (“HCPO”) records room and made copies of the indictment and judgment of conviction. The Custodian then certified that she provided the records to the Complainant on January 17, 2017.

The Custodian asserted that there were no responsive records for Item No. 1, but she instead provided a copy of the indictment. The Custodian also stated that complaints are supplanted by indictments, and therefore the indictment served as the responsive record for that portion of the Complainant’s request.

Regarding the request for police reports and statements, and DNA results, the Custodian asserted that such records were exempt from disclosure as criminal investigatory records under N.J.S.A. 47:1A-1.1. The Custodian argued that the requested records were provided to the Complainant’s attorney during his trial. Additionally, the Custodian contended that the Complainant was appealing his criminal case, and that discovery had been provided to his appellate attorney.

As to the Complainant’s request for R.A.’s criminal records, the Custodian contended that such records were also exempt as criminal investigatory records. As to any records of “favors” provided to R.A., the Custodian asserted that no such records exist. The Custodian concluded by arguing that the records the Complainant was entitled to within his file were the indictment and judgment of conviction.

### Additional Submissions:

On May 30, 2017, the Complainant sent correspondence to the GRC. The Complainant attached a copy of a letter received from Marcia Blum (“Ms. Blum”) of the Office of the Public Defender dated May 25, 2017. The Complainant stated that the letter referenced the four (4) batches of discovery material he received from Ms. Blum on April 4, and 5, 2017.

The Complainant asserted that the batches of discovery material referenced by the letter did not contain a Bill of Particulars (Item No. 1), police reports (Item No. 2), complaint/warrants and probable cause sheet and affidavit (Item No. 4). The Complainant also noted that he had not received R.A.’s DNA results and any plea agreements or favors obtained from the prosecution pertaining to his case (Item No. 5).

## 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.

#### ‘Bill of Particulars’ and ‘Favors’ Given to R.A. (OPRA Request Item Nos. 1 and 5)

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. 1 of the Complainant’s OPRA request sought a ‘Bill of Particulars’, and a portion of Item No. 5 sought any ‘favors’ given to R.A. related to the Complainant’s criminal trial. In her January 17, 2017 response, the Custodian denied access to these records as exempt under the criminal investigatory exemption. However, the Custodian certified in the SOI that these records did not exist, but that a copy of the indictment was provided as an alternative to Item No. 1. Additionally, the Complainant provided no evidence 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 Complainant’s OPRA request Item No. 1 seeking a ‘Bill of Particulars,’ and to the portion of OPRA request No. 5 seeking ‘favors’ given to R.A. Specifically, 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.

#### Police Statements, R.A.’s DNA Results, R.A.’s Plea Agreements and Statements Made to Prosecutors, and R.A.’s Criminal Charges (OPRA Request Item No. 2 and 5)

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. 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). 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).<sup>4</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).

The Council has 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.”<sup>5</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).

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 Complainant sought access to police statements, and records pertaining to R.A. for use in obtaining post-conviction relief. The Custodian denied access to the responsive records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. Although the Custodian expressly stated that all of the aforementioned records originated from the Complainant’s criminal file, details are not provided. Accordingly, the GRC takes judicial notice of information provided from the New

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<sup>4</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>5</sup> The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

Jersey Department of Correction's Offender Search ("Search"). The Search indicates that the Complainant was convicted and incarcerated for aggravated sexual assault and other related charges.<sup>6</sup> Thus, the totality of the evidence supports that the records at issue meet the criminal investigation prong.

Regarding the required by law prong, there is no evidence to suggest that police statements, as well as R.A.'s DNA results, R.A.'s statements, or R.A.'s list of criminal charges were required by law to be made. The GRC does note that the Custodian disclosed two records to the Complaint from his criminal file. Among them, the Council has previously found that judgements of convictions are subject to disclosure. See Lewis v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018).

Therefore, the Custodian lawfully denied access to the portion of the Complainant's OPRA request seeking police statements, R.A.'s DNA results, R.A.'s statements and plea agreements, and R.A.'s list of criminal charges. N.J.S.A. 47-1A-6. Specifically, aforementioned records were contained within the Complainant's criminal file and therefore pertained to a criminal investigation. The records are also not required by law to be made and are in the possession of a law enforcement agency. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. at 541.

Arrest Reports, Complaint/Warrants, Probable Cause Sheets (OPRA Request Item Nos. 2, 3, and 4)

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).

Here, the Custodian withheld an arrest report that was part of the Complainant's file under the criminal investigatory record, notwithstanding the Complainant's request for police reports. Additionally, although the Custodian argued that the disclosed indictment supplanted criminal complaints, Item No. 9 of the SOI lists "Original Complaints" as a separate record within the file. In Seabrooks, GRC No. 2012-230, the Council found that "'arrest warrants' are required by law to be made pursuant to R. 3:2-3(a), which provides that '[a]n arrest warrant shall be made on a Complaint-Warrant (CDR2) form.'" Id. Additionally, R. 3:2-3(b) notes that any probable cause finding and/or affidavit would be part of the Complaint-Warrant form. It is unclear in the record as to whether the "Original Complaints" include the arrest warrant or if such record exists at all.

Accordingly, the Custodian unlawfully denied access to the arrest report and requested complaint. N.J.S.A. 47:1A-6; Morgano, GRC 2007-156. Additionally, the Custodian may have unlawfully denied access to the requested warrant. Seabrooks, GRC 2012-230. The Custodian shall either: 1) disclose the responsive records, with redactions where applicable; 2) certify to whether no records existed; and/or 3) certify as to whether the requested warrant is part of another record.

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<sup>6</sup> "Offender Details." New Jersey Department of Corrections, [https://www20.state.nj.us/DOC\\_Inmate/details?x=1060065&n=1](https://www20.state.nj.us/DOC_Inmate/details?x=1060065&n=1) (last accessed May 8, 2019).

## **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 has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request Item No. 1 seeking a 'Bill of Particulars,' and to the portion of OPRA request No. 5 seeking 'favors' given to R.A. Specifically, 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).
2. The Custodian lawfully denied access to the portion of the Complainant's OPRA request seeking police statements, R.A.'s DNA results, R.A.'s statements and plea agreements, and R.A.'s list of criminal charges. N.J.S.A. 47-1A-6. Specifically, aforementioned records were contained within the Complainant's criminal file and therefore pertained to a criminal investigation. The records are also not required by law to be made and are in the possession of a law enforcement agency. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017).
3. The Custodian unlawfully denied access to the arrest report and requested complaint. 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 may have unlawfully denied access to the requested warrant. Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall either: 1) disclose the responsive records, with redactions where applicable; 2) certify to whether no records existed; and/or 3) certify as to whether the requested warrant is part of another record.
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,<sup>7</sup> to the Council Staff.<sup>8</sup>**

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<sup>7</sup> "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."

<sup>8</sup> 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.

5. 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

May 14, 2019