



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

September 29, 2020 Government Records Council Meeting

Kaitlynn M. Giordano
Complainant

Complaint No. 2019-56

v.

Lodi Police Department (Bergen)
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s August 25, 2020 Interim Order because the Custodian in a timely manner (1) forwarded certified confirmation of compliance to the Executive Director, wherein he stated that on September 2, 2020, he sent to the Complainant copies of records in compliance with paragraph 2 of said Order; and (2) in compliance with paragraph 4 of the Order, delivered to the Council in a timely manner nine (9) copies of the requested unredacted record, a document index, and a legal certification that the record provided is the record requested by the Council for the *in camera* inspection and that the record is not required by law to be made, maintained, or kept on file.
2. The *in camera* examination of the responsive Drinking and Driving Report revealed that said record is exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Thus, the Custodian lawfully denied access to the requested Drinking and Driving Report. N.J.S.A. 47:1A-6.
3. Although the Custodian denied the Complainant access to records, or portions thereof, that the Council subsequently determined via an *in camera* examination should have been disclosed, the Custodian did disclose all records, or portions thereof, in compliance with the Council’s March 28, 2017 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 29th Day of September 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: October 1, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 29, 2020 Council Meeting**

**Kaitlynn M. Giordano¹
Complainant**

GRC Complaint No. 2019-56

v.

**Lodi Police Department (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of reports for the following violations alleged to have been committed by Danny Hanna on February 1, 2019:

- N.J.S.A. 39:3-4
- N.J.S.A. 39:3-40
- N.J.S.A. 39:4-49.1
- N.J.S.A. 39:4-50
- N.J.S.A. 39:4-88
- N.J.S.A. 39:4-97
- N.J.S.A. 2C:35-10A(4)³

Custodian of Record: Captain Robert Salerno
Request Received by Custodian: February 12, 2019
Response Made by Custodian: February 15, 2019
GRC Complaint Received: March 12, 2019

Records Submitted for *In Camera* Examination: The requested Drinking and Driving Report.

Background

August 25, 2020 Council Meeting:

At its August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 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 No legal representation listed on record.

² No legal representation listed on record.

³ This is a disorderly offense for “possession of 50 grams or less of marijuana, including any adulterants or dilutants, or five grams or less of hashish.”

Kaitlynn M. Giordano v. Lodi Police Department (Bergen), 2019-56 – Supplemental Findings and Recommendations of the Executive Director

1. The Custodian must disclose to the Complainant a copy of the arrest report containing the arrestee's date of birth. N.J.S.A. 47:1A-6; Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2012-34 (Interim Order dated April 30, 2013); Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2013-244 (Interim Order dated April 29, 2014). The Custodian must also either disclose the vehicle plate number, identification number, make, model and year on the arrest report and on page 4 of the incident report or submit to the GRC a legal certification providing a legal explanation or statutory citation for denying said information.
2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document or redaction index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the responsive Drinking and Driving Report to determine the validity of the Custodian's assertion that the record constitutes a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record, a document index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the record provided is the record requested by the Council for the *in camera* inspection and that the record is not required by law to be made, maintained, or kept on file. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 August 26, 2020, the Council distributed its August 25, 2020 Interim Order to all parties. On September 1, 2020, the Custodian telephoned the GRC with some questions regarding procedures for compliance. The GRC was unable to immediately reply to the Custodian's questions; therefore, by e-mail dated September 3, 2020, the GRC granted an extension of time until September 10, 2020 for the Custodian to comply with the Council's Interim Order. During a telephone conversation on September 8, 2020, the GRC answered questions the Custodian had with respect to compliance, and the Custodian informed the GRC that he would comply with the Council's Interim Order no later than the extended date of September 10, 2020.

On September 8, 2020, the Custodian delivered to the GRC nine (9) copies of the requested unredacted record and a document index. On September 9, 2020, the Custodian submitted to the GRC via e-mail a certification averring that the record provided is the record requested by the Council for the *in camera* inspection and that the record is not required by law to be made, maintained, or kept on file. Also on September 9, 2020, the Custodian via e-mail responded to paragraph 2 of the Council's Interim Order by providing certified confirmation of compliance to the Executive Director.

Analysis

Compliance

On August 25, 2020, the Council ordered the above-referenced compliance. On August 26, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On September 1, 2020, the Custodian telephoned the GRC with some questions regarding procedures for compliance. Because the GRC was unable to immediately reply to the Custodian's questions, the GRC e-mailed the Custodian on September 3, 2020, granting an extension of time until September 10, 2020 for the Custodian to comply with the Council's Interim Order. During a telephone conversation on September 8, 2020, the GRC answered questions the Custodian had with respect to compliance.

On September 8, 2020, pursuant to paragraph 4 of the Council's Interim Order, the Custodian delivered to the GRC nine (9) copies of the requested unredacted Drinking and Driving Report to determine the validity of the Custodian's assertion that the record constitutes a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. On September 9, 2020, the Custodian submitted to the GRC a certification averring that the Drinking and Driving Report provided to the GRC is the record requested by the Council for the *in camera* inspection and that the record is not required by law to be made, maintained, or kept on file. On September 9, 2020, the Custodian also submitted to the GRC certified confirmation of compliance with paragraph 2 of the Council's Interim Order, wherein the Custodian certified that on September 2, 2020, the Custodian sent to the Complainant a copy of the arrest report disclosing the arrestee's date of birth, vehicle plate number, identification number, make, model and year, as well as a copy of page 4 of the incident report disclosing the vehicle plate number, identification number, make, model and year.⁴

Therefore, the Custodian complied with the Council's August 25, 2020 Interim Order because the Custodian in a timely manner (1) forwarded certified confirmation of compliance to the Executive Director, wherein he stated that on September 2, 2020, he sent to the Complainant copies of records in compliance with paragraph 2 of said Order; and (2) in compliance with paragraph 4 of the Order, delivered to the Council in a timely manner nine (9) copies of the requested unredacted record, a document index, and a legal certification that the record provided is the record requested by the Council for the *in camera* inspection and that the record is not required by law to be made, maintained, or kept on file.

⁴ The Custodian attached to the certification of compliance copies of the records he mailed to the Complainant. Kaitlynn M. Giordano v. Lodi Police Department (Bergen), 2019-56 – Supplemental Findings and Recommendations of the Executive Director

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. N.J.S.A. 47:1A-6.

The GRC conducted an *in camera* examination of the submitted Drinking and Driving Report to determine the validity of the Custodian’s assertion that the record constitutes a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.

OPRA defines a criminal investigatory record as “a record which is not required by law to be made, maintained, or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” N.J.S.A. 47:1A-1.1. Therefore, for a record to be considered exempt from disclosure under OPRA as a criminal 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, 380-381 (App. Div. 2006).

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).⁵ 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

⁵ Not all police duties are focused upon investigation of criminal activity. Only those records created in a police officer’s capacity as a criminal investigator are subject to OPRA’s criminal investigatory records exemption. Kaitlynn M. Giordano v. Lodi Police Department (Bergen), 2019-56 – Supplemental Findings and Recommendations of the Executive Director

law,” such as “detailed investigative reports and witness statements,” will satisfy the second prong of OPRA’s criminal investigatory records exemption. Id. (emphasis added).

The Council has also long held that once a record is determined to be a criminal investigatory record, it is exempt from access. See Janeczko v. 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.” Moreover, with respect to concluded investigations, the Council pointed out in Janeczko that, “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete.”

Here, the Custodian certified that the Drinking and Driving Report is not required by law to be made. Further, the *in camera* examination of said record revealed that the record not only contains a narrative concerning the drinking and driving law violations, but also contains information concerning the investigation of a disorderly persons offense. And because the GRC treats disorderly persons offenses as criminal offenses, the *in camera* examination revealed that the record “pertains to [a] criminal investigation.”⁶ As such, in applying the two prongs of the criminal investigatory exemption found in N. Jersey Media Grp., Inc., 229 N.J. 541 to this portion of the OPRA request, the GRC is satisfied that the Custodian lawfully denied access to the responsive Drinking and Driving Report. N. Jersey Media Grp., Inc., 229 N.J. 541. See also Janeczko, GRC 2002-79, *et seq.*

Accordingly, the *in camera* examination of the responsive Drinking and Driving Report revealed that said record is exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541; Janeczko, GRC 2002-79, *et seq.* Thus, the Custodian lawfully denied access to the requested Drinking and Driving Report. N.J.S.A. 47:1A-6.

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).

⁶ See Nance v. Scotch Plains Twp. Police Dep’t, GRC Complaint No. 2003-125 (January 2005), in which the Council held that “. . . records pertaining to disorderly persons offenses, including petty offenses, which are not required by law to be made, maintained or kept on file that [are] held by a law enforcement agency involving a criminal investigation are deemed to be ‘criminal investigatory records,’ and are not disclosable, pursuant to OPRA.”

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 (Berg); 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 denied the Complainant access to segments of records that the Council determined should have been disclosed, the Custodian did disclose the denied segments in compliance with the Council's August 25, 2020 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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 complied with the Council's August 25, 2020 Interim Order because the Custodian in a timely manner (1) forwarded certified confirmation of compliance to the Executive Director, wherein he stated that on September 2, 2020, he sent to the Complainant copies of records in compliance with paragraph 2 of said Order; and (2) in compliance with paragraph 4 of the Order, delivered to the Council in a timely manner nine (9) copies of the requested unredacted record, a document index, and a legal certification that the record provided is the record requested by the Council for the *in camera* inspection and that the record is not required by law to be made, maintained, or kept on file.
2. The *in camera* examination of the responsive Drinking and Driving Report revealed that said record is exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Thus, the Custodian lawfully denied access to the requested Drinking and Driving Report. N.J.S.A. 47:1A-6.
3. Although the Custodian denied the Complainant access to records, or portions thereof, that the Council subsequently determined via an *in camera* examination should have been disclosed, the Custodian did disclose all records, or portions thereof, in compliance with the Council's March 28, 2017 Interim Order. Moreover,

the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: John E. Stewart

September 22, 2020



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

August 25, 2020 Government Records Council Meeting

Kaitlynn M. Giordano
Complainant

Complaint No. 2019-56

v.

Lodi Police Department (Bergen)
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 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 must disclose to the Complainant a copy of the arrest report containing the arrestee’s date of birth. N.J.S.A. 47:1A-6; Barkley v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2012-34 (Interim Order dated April 30, 2013); Barkley v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2013-244 (Interim Order dated April 29, 2014). The Custodian must also either disclose the vehicle plate number, identification number, make, model and year on the arrest report and on page 4 of the incident report or submit to the GRC a legal certification providing a legal explanation or statutory citation for denying said information.
2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document or redaction 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 Rule 1:4-4,² to the Executive Director.³**
3. Pursuant to Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the responsive Drinking and

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.

Driving Report to determine the validity of the Custodian's assertion that the record constitutes a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted record, a document index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the record provided is the record requested by the Council for the *in camera* inspection and that the record is not required by law to be made, maintained, or kept on file. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 25th Day of August 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: August 26, 2020

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Kaitlynn M. Giordano¹
Complainant**

GRC Complaint No. 2019-56

v.

**Lodi Police Department (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of reports for the following violations alleged to have been committed by Danny Hanna on February 1, 2019:

- N.J.S.A. 39:3-4
- N.J.S.A. 39:3-40
- N.J.S.A. 39:4-49.1
- N.J.S.A. 39:4-50
- N.J.S.A. 39:4-88
- N.J.S.A. 39:4-97
- N.J.S.A. 2C:35-10A(4)³

Custodian of Record: Lt. Robert Salerno

Request Received by Custodian: February 12, 2019

Response Made by Custodian: February 15, 2019

GRC Complaint Received: March 12, 2019

Background⁴

Request and Response:

On February 12, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.⁵ On February 15, 2019, the third (3rd) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the records responsive to the request were determined to

¹ No legal representation listed on record.

² No legal representation listed on record.

³ This is a disorderly offense for “possession of 50 grams or less of marijuana, including any adulterants or dilutants, or five grams or less of hashish.”

⁴ 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.

⁵ Although disputed, the evidence of record reveals that February 12, 2019 was the date the OPRA request was received.

be (1) the computer entry for police incident report 2019-002253, (2) arrest blank indicating the charges for Danny Hanna, and (3) copies of summonses issued. The Custodian stated that the records were being disclosed in their entirety.

Denial of Access Complaint:

On March 12, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that she provided the OPRA request to the Custodian on February 6, 2019; however, she did not provide the date she received the response from the Custodian. The Complainant asserted that in response to her request she only received copies of the summonses issued. The Complainant stated that she was denied access to the following records:

1. Police reports for violations of N.J.S.A. 39:4-49.1 and N.J.S.A. 39:4-50.
2. Drinking and Driving Report (“DD Report”).
3. CAD incident report (partially denied).
4. Arrest report (partially denied).

The Complainant attached to the complaint copies of the records that were disclosed in response to her OPRA request.

Statement of Information:

On March 21, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on February 13, 2019, and responded in writing on February 15, 2019. The Custodian certified that he disclosed copies of all of the summonses with appropriate redactions. The Custodian also certified that he disclosed to the Complainant a copy of the Lodi Police Department Incident and Arrest Reports in redacted form pursuant to OPRA. The Custodian certified that the DD Report was denied because it is the investigative report and is exempt from access as a criminal investigatory record. The Custodian attached copies of the records that were disclosed in response to the Complainant’s request.

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.

The Complainant and the Custodian attached to their respective submissions to the GRC copies of all disclosed records. Upon inspection, the GRC determined that the attached records,

including all redactions, are identical. The Complainant asserted that she did not receive the incident report and the arrest report in their entirety.⁶

The Lodi Police Department Incident Report is a five (5) page report which contains dispatch information on the first three pages. Commencing on page 4 is information regarding the subject, vehicle and offenses. Some of the information on page 4 has been redacted. Under the subheading “vehicle information,” there are redactions of the plate number, vehicle make, model and year. The Custodian did not provide a legal explanation or statutory citation for the redactions, other than to certify that the information was redacted because such redaction is “required by the statute.” As such, the information may have been unlawfully redacted.⁷ For the same reason, the Lodi Police Department Arrest Report redactions of the vehicle plate number and identification number may have been unlawful. And the redaction of the arrestee’s date of birth is unlawful because that information is required under OPRA to be disclosed. See Barkley v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2012-34 (Interim Order dated April 30, 2013), holding that arrest reports containing, *inter alia*, the arrestee’s age, are government records subject to disclosure. See also Barkley v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2013-244 (Interim Order dated April 29, 2014), providing that N.J.S.A. 47:1A-3(b) delineates the specific information contained on an arrest report which must be disclosed to the public.

Accordingly, the Custodian must disclose to the Complainant a copy of the arrest report containing the arrestee’s date of birth. N.J.S.A. 47:1A-6; Barkley, GRC 2012-34; Barkley, GRC 2013-244. The Custodian must also either disclose the vehicle plate number, identification number, make, model and year on the arrest report and on page 4 of the incident report or submit to the GRC a legal certification providing a legal explanation or statutory citation for denying said information.

The GRC notes that the Complainant did not include a copy of the DD Report in her OPRA request. However, the Complainant’s request for reports for violations of N.J.S.A. 39:4-49.1 and N.J.S.A. 39:4-50 would, if separately addressed, be contained within the DD Report; therefore that record would be responsive to the request.⁸ The Custodian certified that he denied the DD Report in its entirety because it is the investigative report and is exempt from access as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.

The offense of operating a motor vehicle while intoxicated or with a blood alcohol content at or above the legal limit is a motor vehicle offense, not a criminal offense.⁹ However, here an arrest was made for N.J.S.A. 2C:35-10A(4), which is a disorderly offense and is treated as a criminal offense for purposes of OPRA. Therefore, the DD Report could be exempt as a criminal investigatory record if it “. . . is not required by law to be made, maintained, or kept on file [and] . . . pertains to any criminal investigation . . .” N.J.S.A. 47:1A-1.1.

⁶ The Custodian in the February 15, 2019 response stated that the records were being disclosed in their entirety; however, both records do contain redacted material.

⁷ The GRC notes that information concerning the vehicle make, model and year was not redacted on the arrest report.

⁸ N.J.S.A. 39:4-49.1 is “drug possession by motor vehicle operator” and N.J.S.A. 39:4-50 is “driving while intoxicated.”

⁹ Attorney General’s Law Enforcement Directive No. 2001-5.

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council¹⁰ dismissing the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The Court stated that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court also stated that:

The statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Therefore, pursuant to Paff, 379 N.J. Super. 346, the GRC must conduct an *in camera* review of the responsive DD Report to determine the validity of the Custodian's assertion that the record constitutes a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.

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.

¹⁰ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian must disclose to the Complainant a copy of the arrest report containing the arrestee's date of birth. N.J.S.A. 47:1A-6; Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2012-34 (Interim Order dated April 30, 2013); Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2013-244 (Interim Order dated April 29, 2014). The Custodian must also either disclose the vehicle plate number, identification number, make, model and year on the arrest report and on page 4 of the incident report or submit to the GRC a legal certification providing a legal explanation or statutory citation for denying said information.
2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document or redaction index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹¹ certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹² to the Executive Director.**¹³
3. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the responsive Drinking and Driving Report to determine the validity of the Custodian's assertion that the record constitutes a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver¹⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted record, a document index¹⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁶ that the record provided is the record requested by the Council for the *in camera* inspection and that the record is not required by law to be made, maintained, or kept on file. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹¹ 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.

¹² "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."

¹³ 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.

¹⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁶ "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. 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.

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August 18, 2020