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 28, 2021 Government Records Council Meeting

Beth Schwartzapfel
Complainant
v.
NJ Department of Law & Public Safety,
Division of Criminal Justice
Custodian of Record

Complaint No. 2020-81

At the September 28, 2021 public meeting, the Government Records Council ("Council") considered the September 21, 2021 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 portion of the Complainant's request item Nos. 1 and 2 seeking "investigations" are invalid because they fail to identify a specific record and would require research to determine which records would be associated with "investigations." N.J.S.A. 47:1A-6; MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). However, the remainder of the Complainant's OPRA request is valid, and the Custodian unlawfully denied access to them on this basis. Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).

2. The Custodian has borne her burden of proof that she lawfully denied access to OPRA request item No. 1 seeking "findings" because he certified in the Statement of Information, and the record reflects, that no responsive records exist. 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 responsive reports and memoranda pertaining to the Shooting Response Team's investigation into the August 2019 incident are exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017). Thus, the Custodian lawfully denied access to this portion of the subject OPRA request. N.J.S.A. 47:1A-6.

4. The e-mails between the Division of Criminal Justice and the Federal Bureau of Investigation identified by the Custodian in the Statement of Information were not responsive to the Complainant's OPRA request item No. 2 seeking "communications" between the Division of Criminal Justice, New Jersey Department of Corrections, and U.S. Department of Justice. Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

5. The Custodian unlawfully denied access to portions of the Complainant's OPRA request on the basis that same was invalid. N.J.S.A. 47:1A-6. However, the Custodian ultimately lawfully denied access to the OPRA request because certain portions were invalid, no findings existed, reports and memoranda were exempt from disclosure, and the e-mails between the Division of Criminal Justice and Federal Bureau of Investigation were not responsive to the subject OPRA request. 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.

6. The Complainant has not achieved "the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian lawfully denied access to the subject OPRA request because portions of it were invalid, no records existed, those records that did exist are exempt from disclosure, and additional identified records are not responsive to the subject OPRA request. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 28th Day of September 2021

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: September 30, 2021

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
September 28, 2021 Council Meeting

Beth Schwartzapfel[1] **GRC Complaint No. 2020-81**
Complainant

v.

N.J. Department of Law & Public Safety,
Division of Criminal Justice[2]
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of:[3]

1. Any investigations, memoranda, reports, or findings regarding "Use of Force" incidents involving D.S. in August 2019.
2. Any communications between the Division of Criminal Justice ("DCJ") and New Jersey Department of Corrections ("DOC") and/or the United States Department of Justice ("DOJ") regarding the "Use of Force" incident "or any investigations, memoranda, reports, or findings thereof."

Custodian of Record: Jana Robinson, Esq.
Request Received by Custodian: January 28, 2020
Response Made by Custodian: February 6, 2020
GRC Complaint Received: April 26, 2020

Background[4]

Request and Response:

On January 28, 2020, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On February 6, 2020, the Custodian responded in writing extending the time frame to respond through February 20, 2020 in order to "research[]" the subject OPRA request. On February 20, 2020, the Custodian responded in writing again extending the time frame to respond through March 5, 2020 to continue "researching" the subject OPRA request.

[1] Represented by Jeremiah Kerstein, Esq., of Covington & Burling, LLP (New York, NY).
[2] Represented by Deputy Attorney General Suzanne Davies.
[3] The Complainant sought access to additional records that are not at issue in this complaint.
[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.

On March 5, 2020, the Custodian responded in writing disclosing two (2) "Use of Force" reports ("UFR") and a Special Custody Report, all with redactions. The Custodian denied access to the remainder of the subject OPRA request. The Custodian stated that the "findings" portion of OPRA request item No. 1 was denied because no records existed; however, partial or incomplete investigative findings are exempt from disclosure under N.J.S.A. 47:1A-3. See N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182 (App. Div. 2016). The Custodian further contended that the "investigations, memoranda, [and] reports" portion of request item No. 1 was invalid because it did not seek identifiable "government records" and required research. The Custodian further asserted that the "reports" portion of the item sought records exempt from disclosure under the criminal investigatory exemption. N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017).

The Custodian further denied access to the Complainant's OPRA request item No. 2 as invalid because it did not contain any defined senders or recipients. The Custodian argued that DCJ was not required to review every communication sent to and from every employee over a six-month period to determine whether any were responsive to the request item. See Bart v. Passaic Cnty. Pub. Hous. Auth., 406 N.J. Super. 445, 451 (App. Div. 2009); Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian also noted that any communications, to the extent they existed, were exempt from disclosure under the "inter-agency or intra-agency advisory, consultative, or deliberative [("ACD")] material" exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 286 (2009).

Denial of Access Complaint:

On April 26, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian unlawfully denied access to OPRA request item No. 1 for several reasons. The Complainant first contended that, contrary to the Custodian's response, the request item was valid because she identified D.S., the incident in question, and the time frame within which the incident took place. The Complainant noted that this information was enough for the Custodian to locate a "Use of Force" report ("UFR"). The Complainant further argued that the records sought were not criminal investigatory in nature because the Attorney General's Use of Force Policy 7 (Apr. 1985, rev. Jun 2000) requires creation of "[a]ny reports made necessary by the nature of the underlying incident." Id. The Complainant also argued that her OPRA request sought "Use of Force" process documents that are required to be created through Attorney General Law Enforcement Directive No. 2019-4 (Dec. 2019).[5] The Complainant additionally argued that because the Custodian failed to prove that there was an ongoing investigation, N.J.S.A. 47:1A-3 did not apply here. The Complainant argued that to the extent that an investigation was ongoing, OPRA still requires disclosure of certain basic information regarding the underlying crime. Id. at 3(b).

The Complainant further argued that the Custodian unlawfully denied access to OPRA request item No. 2 because it was valid. The Complainant contended that the request item was like the request contemplated in Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012) in that

[5] The Complainant also advanced common law arguments regarding her need for access. However, pursuant to N.J.S.A. 47:1A-7, the GRC only has the authority to adjudicate requests made pursuant to OPRA. See also Rowan, Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).

it contained the subject and a time frame. The Complainant also contended that the ACD exemption did not apply to the requested communications because the Custodian made no showing that the records met the two-prong test set forth in Educ. Law Ctr., 198 N.J. 274. The Complainant also contended that the ACD exemption does not apply to DOJ or any other federal agencies or departments.

Statement of Information:

On June 25, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on January 28, 2020. The Custodian averred that he was unable to search for responsive records because the request items were overly broad. The Custodian certified that following two (2) extensions of time, he responded in writing on March 5, 2020 denying the subject OPRA request for several reasons but releasing two (2) UFRs and a Special Custody Report with redactions.

The Custodian argued that he lawfully denied access to "any findings" sought in OPRA request item No. 1 because the incident is still part of an on-going investigation and no findings existed. N.J.S.A. 47:1A-3(a); Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian stated that the Shooting Response Team ("SRT") is vested with the obligation to investigate any situation where an individual's interaction with law enforcement results in their death. N.J.S.A. 52:17B-107(a)(2). The Custodian averred that D.S.'s death occurred while in DOC custody; thus, the SRT was still investigating the incident. The Custodian further argued that the New Jersey Supreme Court has long applied confidentiality to information received by law enforcement regarding potential criminal activity. State v. Marshall, 148 N.J. 89, 273 (1997); N. Jersey Media Grp., Inc., 447 N.J. Super. at 203. The Custodian argued that this confidentiality is imperative to ensuring the SRT can conduct a thorough and effective investigation. The Custodian also argued that contrary to the Complainant's Denial of Access Complaint assertion, N.J.S.A. 47:1A-3(b) does not apply here because the SRT's investigation did "not result from a crime that has been reported." The Custodian reiterated that instead, the SRT investigates all deaths of individuals in law enforcement custody. N.J.S.A. 52:17B-107(a)(2).

The Custodian argued that she disclosed all reports required to be disclosed that do not fall within the criminal investigatory exemption. The Custodian further argued that all remaining records sought in OPRA request item No. 1 were exempt under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. The Custodian argued that it is well-settled case law that written police "investigations" are not subject to disclosure. Serrano v. South Brunswick Twp., GRC Complaint No. 2002-33 (January 2003). The Custodian also asserted that, contrary to the Complainant's argument, the N. Jersey Media Grp., Inc. court found that UFRs are disclosable because they were required to be made through the Policy but did not similarly hold the same for all resulting investigative reports. The Custodian asserted that the N. Jersey Media Grp., Inc. court instead distinguished those additional records as presenting "more of a risk to an investigation if disclosed." Id. 578. The Custodian thus argued that she lawfully denied access to those remaining records sought in OPRA request item No. 1 because they clearly fall within the criminal investigatory exemption.

The Custodian finally contended that any communications responsive to OPRA request item No. 2 was also exempt under the criminal investigatory exemption. The Custodian argued that any communications between DOC, DOJ, and any additional law enforcement agencies pertain to the SRT's investigation and are not required to be made or maintained by any law. The Custodian thus contended that she lawfully denied access to fifteen (15) e-mails between DCJ and the Federal Bureau of Investigation ("FBI").

Analysis

Validity of Request

The New Jersey Appellate Division has held that:

> While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information*. *Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination." N.J.S.A. 47:1A-1.*

[MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The court reasoned that:

> Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. (emphasis added). Bent, 381 N.J. Super. at 37;[6] N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

[6] Affirmed on appeal regarding Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad ("any and all," requests seeking "records" generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm'n, GRC Complaint No. 2008-97 (December 2008).

Regarding requests for communications, including e-mails, text messages, and written correspondence, the GRC has established criteria deemed necessary under OPRA to request them. In Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), the Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

Moreover, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the Appellate Division found a request for "EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority" to be valid under OPRA because it "was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and] was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally." Id. at 172, 176. The court noted that the complainant had "narrowed the scope of the inquiry to a discrete and limited subject matter," and that fulfilling the request would involve "no research or analysis, but only a search for, and production of," identifiable government records. Id. at 177-78.

Regarding requests requiring research, the distinction between search and research is fact sensitive. That is, there are instances where the very specificity of a request requires only a search, as would be with OPRA requests for communications properly containing all three (3) criteria set forth in Elcavage, GRC 2009-7. To that end, the Council has provided guidance on how requests containing the Elcavage criteria do not require research:

> [A] valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails or documents stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to correspondence, a custodian may be required to search an appropriate file relevant to the subject. In both cases, e-mails and correspondence, a completed "subject" or "regarding" line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA

> request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails and correspondence to determine if same is responsive: in other words, conduct research.
>
> [Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).]

Here, a portion of the Complainant's request item No. 1 sought "investigations, reports, or findings" related to "use of force" incidents against D.S. in August 2009. Further, the Complainant's request item No. 2 sought "any communications" between DCJ and DOC or DOJ regarding the incident or "any investigations, memoranda, reports, or findings thereof." The Custodian responded denying access to the above as invalid but also proffered additional reasons for her denial of access. In the Denial of Access Complaint, the Complainant disagreed with the validity denial, arguing that her request contained sufficient identifiers and did not require research. In the SOI, the Custodian maintained her position that the subject request was invalid, among other reasons proffered for denial.

Upon review of the subject request compared to MAG and its progeny, the GRC is persuaded that the Custodian lawfully denied access to the portion of OPRA request item Nos. 1 and 2 seeking "investigations" because they were invalid. These portions of the OPRA request appear to seek a type of action (an investigation into the incident) as opposed to an actual record (incident or investigative report). Thus, the GRC does not agree that the term "investigations" independently identifies a specific type of record.

However, the GRC is not persuaded that the remainder of the request is invalid. The remaining item portions seek certain records regarding that investigation, such as reports, findings, memoranda, and communications related specifically to the incident involving D.S. and, where required, including all necessary criteria in accordance with Elcavage and Burke affording a search as contemplated in Verry, GRC 2013-43, *et seq.* For these items, the Custodian could not rely on the validity denial.

Accordingly, the portion of the Complainant's request item Nos. 1 and 2 seeking "investigations" are invalid because they fail to identify a specific record and would require research to determine which records would be associated with "investigations." N.J.S.A. 47:1A-6; MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180. However, the remainder of the Complainant's OPRA request is valid, and the Custodian unlawfully denied access to them on this basis. Burke, 429 N.J. Super. at 172, 176; Elcavage, GRC 2009-07.

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 GRC first sets forth the events underlying the subject OPRA request gleaned from the evidence herein, as well as a newspaper article[7] on a lawsuit stemming from the incident, to inform its analysis of whether a lawful denial of access occurred here. In late August 2019, D.S. was involved in altercation with DOC officers in which he suffered significant injuries. Multiple days after the incident, D.S. was taken to the hospital and succumbed to his injuries. Shortly thereafter, according to DCJ, the SRT initiated an investigation into the incident per N.J.S.A. 52:17B-107(a)(2). On January 28, 2020, the Complainant submitted the subject OPRA request seeking access to various records related to the incident. Following the OPRA request and interaction between the Complainant and Custodian, DOC spokesperson Liz Velez is quoted in a March 3, 2021 article stating that "is being investigated by [DCJ] and is currently pending grand jury."[8]

Findings

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. In the matter before the Council, the Custodian initially responded to the portion of OPRA request item No. 1 seeking "findings" by stating that no records existed. The Custodian maintained her position in the SOI and noted that the SRT was still conducted the investigation. Ms. Velez's statement made over almost fourteen (14) months later that an investigation was still on-going and "pending grand jury" supports this position. Thus, the GRC is satisfied that no unlawful denial of access occurred here.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to OPRA request item No. 1 seeking "findings" because he certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Reports and Memoranda

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.

[7] https://www.nj.com/news/2021/03/nj-inmate-brutally-beaten-by-officers-left-in-own-feces-lawsuit-alleges-he-died-days-later.html (accessed June 10, 2021).
[8] Ibid.

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).[9] 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. In Janeczko v. N.J. Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq*. (June 2004), the Council held 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."[10] 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." Id.

Further, with respect to records subject to an investigation in progress, OPRA provides that "where it shall appear that the record or records . . . pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA] . . . may be denied if the inspection, copying, or examination of such record or records shall be inimical to the public interest . . .." N.J.S.A. 47:1A-3(a). In N. Jersey Media Grp., Inc., the Court stated that in order for the exemption to apply, a public agency "must show that (1) the requested records 'pertain to an investigation in progress by any public agency,' (2) disclosure will 'be inimical to the public interest,' and (3) the records were not available to the public before the investigation began." Id. at 573. Further, the Court acknowledged that "[f]ew reported decisions have analyzed the exception" but that those few cases provided that records coming into existence prior to the investigation could not fall under the exemption. Id. at 573-574 (citing Serrano v. South Brunwick Twp., 358 N.J. Super. 352, 367 (App. Div. 2003); Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003); and Paff v. Ocean Cnty. Prosecutor's Office, 446 N.J. Super. 163, 189-190 (App. Div. 2016) (rev'd 235 N.J. 1 (2018)).

[9] 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.

[10] The GRC's ruling was affirmed in an unpublished opinion of the Appellate Division.

Finally, a public agency has an obligation to disclose certain information regarding a criminal investigation "within 24 hours or as soon as practicable." N.J.S.A. 47:1A-3(b). "Where a crime has been reported, but no arrest made," agencies are required to disclose "information as to the type of crime, time, location and type of weapon, if any." Id. This provision contains a caveat allowing for nondisclosure where "disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety." Id.

Here, the Complainant's OPRA request items also sought access to reports and memoranda regarding the incident with D.S. The Custodian denied access to this portion of the OPRA request, and this complaint ensured. Therein, the Complainant argued that the criminal investigatory exemption did not apply to the records sought because the Attorney General's Use of Force Policy required the creation of "[a]ny reports made necessary by the nature of the underlying incident." Id. The Complainant further argued that the Custodian failed to prove that any investigation was still on-going. In the SOI, the Custodian maintained her position that responsive reports and memoranda were exempt from disclosure under the criminal investigatory exemption. (citing N. Jersey Media Grp., Inc., 447 N.J. Super. at 203). The Custodian also certified that the SRT was still investigating the incident.

A review of all evidence against a backdrop of the incident and subsequent investigation by SRT supports the Custodian's lawful denial of access under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. In reaching this conclusion, the GRC notes that the incident (death of individual in custody) and the ensuing investigation presents a set of facts like those contemplated by the N. Jersey Media, Grp., Inc. Court. To wit, the Court only contemplated disclosure of the UFR but did not hold that any additional reports "necessary by the nature of the underlying incident" needed to be disclosed. Also, the records sought in this complaint clearly relate to the investigation conducted by SRT into D.S.'s death while in custody. Further, it is clear from Ms. Velez's published statement on March 3, 2021 that an investigation was still on-going and pending grand jury review. Thus, the investigation was clearly geared towards determining whether the officers involved in the incident in question committed a criminal offense. Moreover, there is no evidence in the record to support that the "reports" or "memoranda" were required by law to be made and no support in the record to identify them as those "necessary" for SRT's UFR investigation.

The GRC additionally notes that the Complainant's remaining arguments based on N.J.S.A. 47:1A-3(a) and 3(b) are insufficient to compel disclosure. Regarding the investigation in progress exemption, the Custodian's argued that disclosure would be inimical to the public interest because "there may still be potential witnesses to be interviewed." This justification is speculatory at best, with no support to prove that additional witness statements are needed to perform a more thorough investigation. Also, the N. Jersey Media Grp., Inc. Court addressed the potential for erosion of the exemption with the passage of time:

> We note that SRT investigations cannot continue indefinitely and invoke the protection of section 3(a). The risk of taint partly fades once the principal witnesses to an incident have made statements to law enforcement. After their statements are preserved, prosecutors and defense counsel can probe inconsistencies at trial under N.J.R.E. 613 and 803(a). As a result, although it may be appropriate to deny a

> request for investigative reports under section 3(a) early in an investigation — as in this case — the outcome might be different later in the process. Indeed, depending on the circumstances, section 3(a) may not justify withholding reports after a grand jury votes not to file charges.
>
> [229 N.J. at 575 (footnote omitted).]

The passage of time element discussed above may apply here because the incident, OPRA request, this complaint, and the SOI encompass a time period of approximately ten (10) months. However, the Court also footnoted that the diminishing of time does not render the records automatically disclosable; instead, "[a] separate analysis would be necessary under the criminal investigatory records exception." Id. (FN 7) (citation omitted). The GRC has employed such an analytical structure here and determined the criminal investigatory exemption applies.

Regarding the investigative information exception, the Complainant did not seek this basic information nor does the provision require an agency to disclose otherwise exempt documents because of said information's inclusion. In fact, the N. Jersey Media Grp., Inc. Court held that "the text simply requires disclosure of 'information'; it does not require an agency to release 'records.'" Id. at 572. Finally, while there is a tenuous balance here between reliance on the criminal investigatory exemption without an actual "crime" reported, the investigation in question fell within the purview of the SRT's statutory obligation to investigate any situation where an individual dies in custody and not as a result of a "crime that has been reported." Thus, it cannot be said that the provisions of N.J.S.A. 47:1A-3(b) would apply here, notwithstanding that it is likely that most of this information was disclosed within the UFRs and Special Custody Reports.

Accordingly, the responsive reports and memoranda pertaining to the SRT's investigation into the August 2019 incident are exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541. Thus, the Custodian lawfully denied access to this portion of the subject OPRA request. N.J.S.A. 47:1A-6.

Communications

In Carew v. Twp. of Willingboro (Burlington), GRC Complaint No. 2019-151 (May 2021), the complainant argued that the custodian should have provided access to records that were questionably not responsive to his OPRA request. Based on additional information obtained from the Township, the Council held that no unlawful denial of access occurred because "the application materials attached to the e-mails dated January 13, 2017 and January 14, 2017 were not responsive to the Complainant's June 21, 2019 OPRA request." Id. at 13-14.

Here, the Complainant's OPRA request item No. 2 sought communications between DCJ, DOC, and DOJ regarding the incident with D.S. The Custodian initially denied responsive communications as ACD material. However, in the SOI, the Custodian certified that the only responsive communications were fifteen (15) e-mails between DCJ and the FBI. This set of facts mirrors those in Carew; the e-mails the Custodian identified are not responsive to the Complainant's OPRA request because the FBI was not identified as a recipient therein. Based on this, the GRC is guided by Carew and holds accordingly.

Therefore, the e-mails between DCJ and the FBI identified by the Custodian in the SOI were not responsive to the Complainant's OPRA request item No. 2 seeking "communications" between DCJ, DOC, and DOJ. Thus, there was no unlawful denial of access. 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).

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 portions of the Complainant's OPRA request on the basis that same was invalid. N.J.S.A. 47:1A-6. However, the Custodian ultimately lawfully denied access to the OPRA request because certain portions were invalid, no findings existed, reports and memoranda were exempt from disclosure, and the e-mails between DCJ and the FBI were not responsive to the subject OPRA request. 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.

Prevailing Party Attorney's Fees

OPRA provides that:

> A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . .

> . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.
>
> [N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Appellate Division held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, *e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

> OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed $500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the $500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76 (2008).]

The Court in Mason, further held that:

> [R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved"; and (2) "that the relief ultimately secured by plaintiffs had a basis in law." Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).
>
> [Id. at 76.]

The Complainant submitted this complaint contending the Custodian unlawfully denied access to records responsive to the subject OPRA request. In the SOI, the Custodian argued that she lawfully denied access to the subject OPRA request on several bases. Ultimately, the Council had found that no unlawful denial of access has occurred, and this complaint did not bring about the desired relief. The foregoing thus supports that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees.

Therefore, the Complainant has not achieved "the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian lawfully denied access to the subject OPRA request because portions of it were invalid, no records existed, those records that did exist are exempt from disclosure, and additional identified records are not responsive to the subject OPRA request. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The portion of the Complainant's request item Nos. 1 and 2 seeking "investigations" are invalid because they fail to identify a specific record and would require research to determine which records would be associated with "investigations." N.J.S.A. 47:1A-6; MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). However, the remainder of the Complainant's OPRA request is valid, and the Custodian unlawfully denied access to them on this basis. Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).

2. The Custodian has borne her burden of proof that she lawfully denied access to OPRA request item No. 1 seeking "findings" because he certified in the Statement of

Information, and the record reflects, that no responsive records exist. 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 responsive reports and memoranda pertaining to the Shooting Response Team's investigation into the August 2019 incident are exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017). Thus, the Custodian lawfully denied access to this portion of the subject OPRA request. N.J.S.A. 47:1A-6.

4. The e-mails between the Division of Criminal Justice and the Federal Bureau of Investigation identified by the Custodian in the Statement of Information were not responsive to the Complainant's OPRA request item No. 2 seeking "communications" between the Division of Criminal Justice, New Jersey Department of Corrections, and U.S. Department of Justice. Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

5. The Custodian unlawfully denied access to portions of the Complainant's OPRA request on the basis that same was invalid. N.J.S.A. 47:1A-6. However, the Custodian ultimately lawfully denied access to the OPRA request because certain portions were invalid, no findings existed, reports and memoranda were exempt from disclosure, and the e-mails between the Division of Criminal Justice and Federal Bureau of Investigation were not responsive to the subject OPRA request. 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.

6. The Complainant has not achieved "the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian lawfully denied access to the subject OPRA request because portions of it were invalid, no records existed, those records that did exist are exempt from disclosure, and additional identified records are not responsive to the subject OPRA request. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Executive Director

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