



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 26, 2017 Government Records Council Meeting

Aakash Dalal
Complainant

Complaint No. 2015-280

v.

NJ Department of Law and Public Safety,
Division of Criminal Justice
Custodian of Record

At the September 26, 2017 public meeting, the Government Records Council (“Council”) considered the September 19, 2017 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 April 25, 2017 Interim Order because he responded in the extended time frame by providing nine (9) copies of the records required for an *in camera* review and a legal certification regarding the criminal investigatory nature. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Because the evidence of record supports that the Custodian did not violate OPRA, the GRC declines a knowing and willful analysis. No further action is required.

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 26th Day of September, 2017

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 29, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
September 26, 2017 Council Meeting**

**Aakash Dalal¹
Complainant**

GRC Complaint No. 2015-280

v.

**New Jersey Department of Law & Public Safety,
Division of Criminal Justice²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. Mail of:

1. Letters written by Assistant Attorney General (“AAG”) Michael Williams to complainants regarding a Bergen County Prosecutor’s Office (“BCPO”) sports memorabilia auction.
2. All letters received by the New Jersey Department of Law & Public Safety (“LPS”), Division of Criminal Justice (“DCJ”) in response to AAG Williams’ letters.
3. All complaints received and reviewed by DCJ regarding the BCPO sports memorabilia auction.
4. The e-mail to Prosecutor John L. Molinelli, cited by Custodian’s Counsel in the Statement of Information (“SOI”) that was submitted in Dalal v. NJ Dep’t of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2015-121 (June 2015).
5. All e-mails from BCPO to Prosecutor Molinelli in response to the above e-mail.
6. All investigative or police reports written by DCJ employees regarding the BCPO sports memorabilia auction.
7. All e-mails or letters from the Custodian’s Counsel and/or AAG Williams to Prosecutor Molinelli regarding Dalal, GRC 2015-121, and the OPRA request that was the subject of that complaint from April 7, 2015, through July 7, 2015.

Custodian of Record: Robert McGrath

Request Received by Custodian: August 14, 2015

Response Made by Custodian: August 24, 2015

GRC Complaint Received: September 1, 2015

Records Submitted for *In Camera* Examination:

1. Complaint filed by Mr. and Ms. Slokovitz, dated December 2, 2014.
2. Complaint filed by William Brennan, forwarded to DCJ.
3. Complaint filed by anonymous, sent to the Attorney General Division of DCJ.

¹ No legal representation listed on record.

² Represented by Deputy Attorney Jennifer Stonerod.

4. E-mail chain between Mr. Brennan and Lt. Stan Beet from DCJ from December 29, 2014, through January 13, 2015.
5. E-mail chain between Mr. Brennan and Lt. Beet from December 29, 2014, through January 31, 2015.
6. E-mail from AAG Williams to Prosecutor Molinelli dated March 4, 2015 (with two (2) attachments).
7. E-mail from Prosecutor Molinelli to AAG Williams, dated March 4, 2015.
8. E-mail from Mr. Brennan to Lt. Beet and AAG Williams, dated March 5, 2015.

Background

April 25, 2017 Council Meeting:

At its April 25, 2017 public meeting, the Council considered the April 18, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the records responsive to the Complainant's OPRA request item Nos. 1 through 5 to validate the Custodian's assertion that the records were exempt from disclosure under the criminal investigatory exemption. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); North Jersey Media Grp. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015) (*cert. granted* 223 N.J. 553); N.J.S.A. 47:1A-1.1. Additionally, the Custodian shall submit a legal certification specifically detailing how the records responsive to item Nos. 1 through 5 meet the two-prong test necessary to be considered criminal investigatory records.
2. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see Conclusion No. 1 above), a document or redaction index⁴, his certified statements detailing why the records are criminal investigatory, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item Nos. 6 and 7 because he certified in the SOI, and

³ 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.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "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."

the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

4. 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 April 27, 2017, The Council distributed its Interim Order to all parties on. On May 4, 2017, Custodian's Counsel sought an extension of time until May 11, 2017, to comply with the Council's Order, which the Government Records Council ("GRC") granted.

On May 11, 2017, the Custodian responded to the Council's Interim Order. The Custodian certified that he was providing to the GRC nine (9) copies of the records required to be provided for an *in camera* review. The Custodian averred that the GRC's review would show that the records fall under the criminal investigatory exemption.

The Custodian certified that the records at issue pertained to complaints filed with DCJ regarding BCPO's sports memorabilia auction. The Custodian affirmed that the DCJ only maintains the records because it received complaints that initiated a criminal investigation. The Custodian affirmed that the DCJ conducted said criminal investigation and determined that no criminal charges were warranted. The Custodian noted that AAG Williams wrote letters to two (2) of the complainants on March 4, 2015, and e-mailed them to Prosecutor Molinelli. The Custodian affirmed that no investigative reports responsive to the Complainant's OPRA request item No. 6 existed because DCJ reviewed and closed the cases.

The Custodian noted that DCJ's Internal Affairs ("IA") Unit also conducted a separate review. The Custodian affirmed that IA memoranda do exist but that they are not akin to investigative or police reports because the IA review was not criminal in nature. Also, the Custodian noted that DCJ would not have received any of the IA Unit's records or internal memoranda due to the confidentiality placed on IA records per the Attorney General's IA Policies and Procedures (revised July 2014).

The Custodian averred that all records are criminal investigatory in nature, regardless of the outcome of the review. The Custodian noted that these records do not lose their classification as criminal investigatory records simply because the case was closed or unfounded. The Custodian averred that, to the contrary, the fact that the complaints were unsubstantiated provides an additional basis for nondisclosure. The Custodian thus requested that, upon *in camera* review, the GRC uphold the Custodian's denial of access to those records responsive to the Complainant's OPRA request item Nos. 1 through 5.

Analysis

Compliance

At its April 25, 2017 meeting, the Council ordered the Custodian to submit nine (9) copies of the records responsive to the Complainant's OPRA request item Nos. 1 through 5 for an *in camera* review, along with a legal certification specifically detailing how those records were criminal investigatory in nature. The Council also ordered that the Custodian simultaneously provide certified confirmation of compliance to the Executive Director. On April 27, 2017, 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 4, 2017.

On May 4, 2017, the fifth (5th) business day after receipt of the Council's Order, Custodian's Counsel sought an extension until May 11, 2017, to comply with the Order, which the GRC granted. On May 11, 2017, the final day of the extended time frame, the Custodian provided to the GRC nine (9) copies of the records the Council ordered for *in camera* review. The Custodian also provided his certified statements detailing the criminal investigatory nature of the records at issue. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's April 25, 2017 Interim Order because he responded in the extended time frame by providing nine (9) copies of the records required for an *in camera* review and a legal certification regarding the criminal investigatory nature. Further, the Custodian also simultaneously provided certified confirmation of compliance to 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.

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, 2017 N.J. LEXIS 745 (N.J. July 11, 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 31.

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 32-33. Although the court agreed with the Appellate Division’s analysis in O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 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 37 (*citing N. Jersey Media Grp.*, 441 N.J. Super. at 105).⁶ 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 which 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. at 38 (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) (“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.”)⁷ 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.”

The GRC conducted an *in camera* examination on the submitted records. Each of the three (3) complaints clearly show that DCJ conducted a criminal investigation of the sports memorabilia allegations. Further, all of the correspondence relates exclusively to those criminal investigations. Further, there is no indication in the record that any law required DCJ to create or maintain the records reviewed *in camera*. For those reasons, the records certainly meet both prongs of the criminal investigatory exemption.

Accordingly, the Custodian lawfully denied access to the records responsive to the Complainant’s OPRA request item Nos. 1 through 5 because they are exempt under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.

⁶This 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. Further, only those records created in their capacity as criminal investigators are subject to OPRA’s criminal investigatory records exemption.

⁷ Affirmed in an unpublished opinion of the Appellate Division in May 2004.

Knowing & Willful

Because the evidence of record supports that the Custodian did not violate OPRA, the GRC declines a knowing and willful analysis. No further action is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's April 25, 2017 Interim Order because he responded in the extended time frame by providing nine (9) copies of the records required for an *in camera* review and a legal certification regarding the criminal investigatory nature. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Because the evidence of record supports that the Custodian did not violate OPRA, the GRC declines a knowing and willful analysis. No further action is required.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

September 19, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

April 25, 2017 Government Records Council Meeting

Aakash Dalal
Complainant

Complaint No. 2015-280

v.

NJ Department of Law & Public Safety,
Division of Criminal Justice
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council ("Council") considered the April 18, 2017 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 GRC must conduct an *in camera* review of the records responsive to the Complainant's OPRA request item Nos. 1 through 5 to validate the Custodian's assertion that the records were exempt from disclosure under the criminal investigatory exemption. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); North Jersey Media Grp. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015)(*cert. granted* 223 N.J. 553); N.J.S.A. 47:1A-1.1. Additionally, the Custodian shall submit a legal certification specifically detailing how the records responsive to item Nos. 1 through 5 meet the two-prong test necessary to be considered criminal investigatory records.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see Conclusion No. 1 above), a document or redaction index², his certified statements detailing why the records are criminal investigatory, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹ 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.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "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. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item Nos. 6 and 7 because he certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
4. 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 April, 2017

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: April 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2017 Council Meeting**

**Aakash Dalal¹
Complainant**

GRC Complaint No. 2015-280

v.

**New Jersey Department of Law & Public Safety,
Division of Criminal Justice²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. Mail of:

1. Letters written by Assistant Attorney General (“AAG”) Michael Williams to complainants regarding a Bergen County Prosecutor’s Office (“BCPO”) sports memorabilia auction.
2. All letters received by the New Jersey Department of Law & Public Safety (“LPS”), Division of Criminal Justice (“DCJ”) in response to AAG Williams’ letters.
3. All complaints received and reviewed by DCJ regarding the BCPO sports memorabilia auction.
4. The e-mail to Prosecutor John L. Molinelli, cited by Custodian’s Counsel in the Statement of Information (“SOI”) that was submitted in Dalal v. NJ Dep’t of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2015-121 (June 2015).
5. All e-mails from BCPO to Prosecutor Molinelli in response to the above e-mail.
6. All investigative or police reports written by DCJ employees regarding the BCPO sports memorabilia auction.
7. All e-mails or letters from the Custodian’s Counsel and/or AAG Williams to Prosecutor Molinelli regarding Dalal, GRC 2015-121, and the OPRA request that was the subject of that complaint from April 7, 2015, through July 7, 2015.

Custodian of Record: Robert McGrath

Request Received by Custodian: August 14, 2015

Response Made by Custodian: August 24, 2015

GRC Complaint Received: September 1, 2015

¹ No legal representation listed on record.

² Represented by Deputy Attorney Jennifer Stonerod.

Aakash Dalal v. New Jersey Department of Law & Public Safety, Division of Criminal Justice, 2015-280 – Findings and Recommendations of the Executive Director

Background³

Request and Response:

On August 10, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 24, 2015, the Custodian responded in writing, denying access to records responsive to item Nos. 1 through 5 under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. The Custodian also denied access to item Nos. 6 and 7, stating that no responsive records existed.

Denial of Access Complaint:

On September 1, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s response to his OPRA request. The Complainant stated that he based the subject OPRA request on certified statements in the Custodian’s SOI submission relevant to Dalal, GRC 2015-121.⁴ The Complainant contended that the Custodian unlawfully denied access to records at issue in item Nos. 1 through 5. The Complainant further alleged that it was nearly impossible that no records responsive to item No. 6 existed. The Complainant did not address item No. 7.

The Complainant contended that his request resulted from the BCPO’s May 2014 sports memorabilia auction of items seized from an individual accused of illegally distributing prescription medicine. The Complainant asserted that the BCPO, through Prosecutor Molinelli, allegedly spent several thousand dollars for a Nevada-based expert to authenticate the items. The Complainant alleged that, following the auction, the winning bidders filed a complaint against Prosecutor Molinelli with the Bergen County Police Department, alleging that the memorabilia was fake. The Complainant stated that the complaint was forwarded to LPS. The Complainant asserted that Prosecutor Molinelli later admitted to the media that the memorabilia was not authentic, which he did not know prior to the auction, and offered refunds to the winning bidders.

The Complainant first contended that the Custodian unlawfully denied access to item Nos. 1 through 5 because the records failed to fall within the definition of the criminal investigatory exemption. The Complainant contended that the Custodian’s Counsel previously stated in the SOI for Dalal, GRC 2015-121, that the complaints received about the auction were “determined to be unfounded.” The Complainant argued that in the absence of any criminal investigation against Prosecutor Molinelli, the responsive records could not be criminal investigatory in nature. The Complainant also argued that the Custodian’s response to item No. 6 that no records exist support this argument. The Complainant contended that if DCJ did open a

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁴ The Complainant noted that he previously filed a similar OPRA request and subsequently filed a complaint with the GRC after the Custodian failed to respond. The Complainant further noted that the GRC administratively disposed of that complaint based on the Custodian’s certification that he never received the OPRA request. *See Dalal v. NJ Dep’t of Law & Pub. Safety, Div. of Criminal Justice*, GRC Complaint No. 2015-183 (January 2016). *Aakash Dalal v. New Jersey Department of Law & Public Safety, Division of Criminal Justice*, 2015-280 – Findings and Recommendations of the Executive Director

criminal investigation, the GRC should require DCJ to provide proof from the Professional Responsibility Unit.

The Complainant next disputed the Custodian's response to his OPRA request item No. 6 that no records exist. The Complainant reiterated that the Custodian's response here is contradictory to his denial of item Nos. 1 through 5. The Complainant also added that it seemed impossible for no "investigative or police reports" to exist while the Custodian simultaneously asserted that records responsive to item Nos. 1 through 5 were criminal investigatory in nature. Additionally, the Complainant expressed incredulity that DCJ investigators did not memorialize the allegations against Prosecutor Molinelli.

Statement of Information:

On September 17, 2015, the Custodian filed a SOI. The Custodian certified that he received the Complainant's OPRA request on August 14, 2015. The Custodian certified that his search included attempting to locate responsive records, some of which existed. The Custodian certified that he responded in writing on August 24, 2015, denying the Complainant's OPRA request under the criminal investigatory exemption (item Nos. 1 through 5) and because no records existed (item Nos. 6 and 7).

The Custodian affirmed that DCJ has already confirmed that it received complaints regarding the auction; however, DCJ investigated them and determined same to be unfounded. The Custodian certified that AAG Williams sent letters to the complainants regarding DCJ's findings on March 4, 2015, which he subsequently forwarded to Prosecutor Molinelli in an e-mail.

The Custodian contended that he properly denied access to multiple records responsive to the Complainant's OPRA request. The Custodian contended that the records sought in item Nos. 1 through 5 are all criminal investigatory in nature. The Custodian further argued that precedential GRC case law supports his denial of access. Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Brewer v. NJ Dep't of Law and Pub. Safety, GRC Complaint No. 2006-204 (October 2007); Hickson v. NJ Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2006-172 (February 2007)(*aff'd* 2008 N.J. Super. Unpub LEXIS 2275 (App. Div. 2008)); Seaman v. Atlantic Highlands Police Dep't (Monmouth), GRC Complaint No. 2010-103 (May 2011).

Moreover, the Custodian certified that no records responsive to item Nos. 6 and 7 existed. The Custodian thus contended that his response that no records were "made, maintained, filed, or received by" the DCJ was accurate and proper.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise

exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA request item Nos. 1 through 5

Criminal investigatory records are exempt from disclosure. N.J.S.A. 47:1A-1.1. A criminal investigatory record is defined 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” Id. For a record to be 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: that is, “‘not be required by law to be made,’ and the record must ‘pertain[] to any criminal investigation or related civil enforcement proceeding.’” O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 465-55 (App. Div. 2009)(holding that “‘use of force’ reports are subject to OPRA because the Attorney General’s Guidelines require their creation).

In Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁵ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted 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 stated that:

[OPRA] 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 found 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

⁵ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).
Aakash Dalal v. New Jersey Department of Law & Public Safety, Division of Criminal Justice, 2015-280 – Findings and Recommendations of the Executive Director

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.

Recently, in De La Cruz v. City of Union City (Hudson), GRC Complaint No. 2015-14 (Interim Order dated December 13, 2016), the Council was tasked with determining whether a series of incident reports constituted criminal investigatory records. The Council looked to the Appellate Division's recent decision in North Jersey Media Grp. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015)(*cert. granted* 223 N.J. 553) in holding that it could not accept the custodian's blanket denial of the incident reports under the criminal investigatory exemption.

Here, the Custodian denied access to the Complainant's OPRA request item Nos. 1 through 5, arguing that the responsive records were criminal investigatory in nature. The Custodian argued in the SOI that the records were exempt from disclosure and that he properly denied access to them. N.J.S.A. 47:1A-1.1. However, the Complainant's argument regarding the non-existence of investigatory reports does bring into question whether the responsive records meet the two-prong definition of a criminal investigatory record under OPRA. Thus, and consistent with its reliance on Lyndhurst, 441 N.J. Super. 70, the GRC must perform an *in camera* review of the records responsive to item Nos. 1 through 5.

Therefore, the GRC must conduct an *in camera* review of the records responsive to the Complainant's OPRA request item Nos. 1 through 5 to validate the Custodian's assertion that the records were exempt from disclosure under the criminal investigatory exemption. *See Paff*, 379 N.J. Super. at 346; Lyndhurst, 441 N.J. Super. 70; N.J.S.A. 47:1A-1.1. Additionally, the Custodian shall submit a legal certification specifically detailing how the records responsive to item Nos. 1 through 5 meet the two-prong test necessary to be considered criminal investigatory records.

OPRA request item Nos. 6 and 7

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian initially denied access to the Complainant's OPRA request item Nos. 6 and 7, stating that no records existed. Further, the Custodian certified to this fact in the SOI. Additionally, there is no evidence in the record to refute the Custodian's certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item Nos. 6 and 7 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.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated

OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the records responsive to the Complainant's OPRA request item Nos. 1 through 5 to validate the Custodian's assertion that the records were exempt from disclosure under the criminal investigatory exemption. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); North Jersey Media Grp. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015)(*cert. granted* 223 N.J. 553); N.J.S.A. 47:1A-1.1. Additionally, the Custodian shall submit a legal certification specifically detailing how the records responsive to item Nos. 1 through 5 meet the two-prong test necessary to be considered criminal investigatory records.
2. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see Conclusion No. 1 above), a document or redaction index⁷, his certified statements detailing why the records are criminal investigatory, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item Nos. 6 and 7 because he certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. 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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⁶ 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.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁸ "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."

Aakash Dalal v. New Jersey Department of Law & Public Safety, Division of Criminal Justice, 2015-280 – Findings and Recommendations of the Executive Director