



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 26, 2017 Government Records Council Meeting

Jennifer Dericks (o/b/o TAPintoSparta.net)

Complaint No. 2016-227

Complainant

v.

Sparta Township (Sussex)

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 the evidence of record reveals that the record responsive to the request, a body worn camera recording made on April 23, 2016, is barred from disclosure pursuant to the provisions of N.J.S.A. 2A:4A-60. Because that statute is a law that contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9(a), the confidentiality provisions of N.J.S.A. 2A:4A-60 restrict public access to the requested record. Accordingly, the Custodian lawfully denied the Complainant access to said record. N.J.S.A. 47:1A-6.

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**

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

**Jennifer Dericks (o/b/o TAPintoSparta.net)¹
Complainant**

GRC Complaint No. 2016-227

v.

**Sparta Township (Sussex)²
Custodial Agency**

Records Relevant to Complaint: Electronic record via e-mail of body camera recordings from officers responding to a request for medical assistance for a juvenile at Valley View Trail on April 23, 2016.³

Custodian of Record: Neil Spidaletto

Request Received by Custodian: August 1, 2016

Response Made by Custodian: August 8, 2016

GRC Complaint Received: August 16, 2016

Background⁴

Request and Response:

On August 1, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 8, 2016, the fifth (5th) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that the requested record was denied as a “criminal investigative record.”

Denial of Access Complaint:

On August 16, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on August 1, 2016, she submitted an OPRA request to the municipal clerk and that the Custodian on August 8, 2016, denied her request for a recording from a body worn camera (“BWC”) because it was a criminal investigatory record.

¹ No legal representation listed on record.

² Represented by Richard A. Stein, Esq., of Laddey, Clark & Ryan, LLP (Sparta, NJ).

³ There were other records requested that are not relevant to 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.

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The Complainant first argues that for a record to be considered a criminal investigatory record under OPRA, it must not be required by law to be “made, maintained or produced.” The Complainant states that Attorney General’s Law Enforcement Directive 2015-1 addresses police BWCs providing in part that:

“Unless a specific provision of AG Directive 2015-1 directs that a BWC not be activated, uniformed officers equipped with BWCs are required to activate their BWCs as soon as it is safe and practicable to do so . . . when involved in any of the following circumstances . . . 2) Officer is responding to a call for service and is at or near the location of the call . . . 3) Officer is conducting a motorist aid or community caretaking check.”⁵

The Complainant states that, although a Directive from the Attorney General is not a statute, law enforcement officers understand that there are consequences for not adhering to such Directives. Therefore, the Complainant argues that recordings from BWCs should not be considered criminal investigatory records.

The Complainant next argues that if an investigation is in progress, information is not confidential unless release of same is harmful to the public interest. The Complainant asserts that the Attorney General’s Directive provides in Section 11 that, “[t]he need for public access outweighs the law enforcement interest in maintaining confidentiality.” The Complainant contends that because the police have been accused of wrongdoing, it is in the public’s interest to be able to evaluate the accusation using all records available.

Finally, the Complainant argues that until the police went to the Gitelman home, the matter was a call for medical assistance and not an investigation of a criminal offense. For that reason, the Complainant contends that the BWC recording is not a criminal investigatory record.

Statement of Information:

On August 24, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 1, 2016, and responded August 8, 2016. The Custodian certifies that the record responsive to the request that is relevant to the complaint is “[b]ody camera video recorded onto a CD,” which was denied under N.J.S.A. 47:1A-1.1 as being a criminal investigatory record.

The Custodian certifies that the requested record is related to a criminal investigation made by the Sparta Township Police Department on April 23, 2016. The Custodian further certifies that the investigation commenced when the Sparta Police received a call regarding criminal mischief in the area of Valley View Trail. The Custodian certifies that upon arrival at the scene, the police took a statement from a witness, who stated that several juveniles were damaging mailboxes, but when he confronted the juveniles, they ran away. The Custodian states that the witness said he gave chase until one of the juveniles injured himself by running into a mailbox. The Custodian states that the witness said that while he was waiting with the injured

⁵ The Complainant notes that the emphasis was in the original document from which she quoted.
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juvenile, who appeared intoxicated, he was approached by Daniel and Karen Gitelman. The Custodian states that the witness said the Gitelmans told him that they would take the injured juvenile to their home to take care of him.

The Custodian certifies that after hearing the witness's statement, the police "began a criminal investigation to locate the other juveniles" The Custodian certifies that the "investigation led to the Gitelman home, at which time the investigating officer's body cam was turned on." The Custodian states that as a result of the investigation, Karen Gitelman was charged with endangering the welfare of a child and Daniel and Karen Gitelman were charged with obstruction of the administration of the law and hosting an underage drinking party.⁶

The Custodian states that N.J.S.A. 47:1A-1.1 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. The Custodian certifies that the GRC has long ruled that criminal investigatory records are exempt from disclosure under OPRA and that the exemption continues once the investigation is completed. The Custodian cites Janeczko v. NJ Dep't of Law and Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 and N. Jersey Media Group v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015) in support of his argument.

The Custodian further states that in N. Jersey Media Group, *supra*, the court observed that "when an officer turns on a Mobile Video Recorder to document a traffic stop or pursuit of a suspected criminal violation of law, that recording may pertain to a 'criminal investigation' albeit at its earliest stages." The Custodian certifies that "[t]he Sparta Township Police Department was involved in an active criminal investigation at the time that the officer's body cam was turned on, making the recording a criminal investigatory record" The Custodian certifies that because the requested record is a criminal investigatory record under N.J.S.A. 47:1A-1.1, it is exempt from access.

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.

Request for disclosure of BWC recordings is a matter of first impression for the GRC. In the denial of the request forming the basis of the instant complaint (as will be likely in many subsequent denials of BWC recordings due to the nature of such recordings), the Custodian relied upon OPRA's criminal investigatory records exemption, codified at N.J.S.A. 47:1A-1.1. In order to constitute a criminal investigatory record under N.J.S.A. 47:1A-1.1, and thus be exempt

⁶ The Custodian stated that the particulars of the criminal investigation recited here had been previously disclosed to the Complainant as part of a requested tort claims notice filed on behalf of the Gitelmans.
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from disclosure, the requested record must satisfy both prongs of a dual-prong test. First, the record must not be “required by law to be made, maintained or kept on file;” second, it must pertain to “any criminal investigation or related civil enforcement proceeding.”

The GRC will first examine the threshold issue; to wit, whether the record was or was not required by law to be made, maintained, or kept on file. The Complainant argued that the record was required by law to be “made, maintained or produced” because if a BWC is utilized, police are required to follow the Attorney General’s Directive No. 2015-1. The Complainant argues that Attorney General Directives are tantamount to law because police officers understand there is a consequence for not adhering to those Directives. The Complainant therefore concludes that the requested BWC recording should not be considered a criminal investigatory record and thus should be disclosed.

Although the Custodian acknowledged that a criminal investigatory record under OPRA is a record which is not required by law to be made, maintained, or kept on file, he failed to address whether the requested record was or was not required by law to be made maintained or kept on file. Further, the Custodian did not submit any evidence to refute the Custodian’s assertion that a BWC recording is required by law to be “made, maintained or produced” because BWC operation must comport with the Attorney General’s Directive No. 2015-1. Rather, the crux of the Custodian’s argument is his assertion that a BWC recording can be analogized to a mobile video recording, the latter having been held by the court in N. Jersey Media Group, 441 N.J. Super. 70, as a criminal investigatory record that is exempt from access.

Although the Custodian is correct that when an officer activates a BWC to document a suspected criminal violation, the recording may end up capturing aspects of a criminal investigation. However, that alone does not render it a criminal investigatory record under OPRA; it only serves to satisfy the second prong of the test. The first prong, that the record must not be “required by law to be made, maintained or kept on file” must also be satisfied.

In O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009), the court upheld the trial judge’s decision allowing access to use of force reports, noting with respect to the first prong of N.J.S.A. 47:1A-1.1 that:

there are no specific “statutes” or “administrative rules” that require [use of force reports] to be completed or maintained by a Township's police department. We hold, however, that [the AG Guidelines], that requires the completion of [use of force reports] and their maintenance in the files of police departments, has the force of law for police entities.

Id. at 382.

Because the court found that use of force reports were required to be made, the first prong of the test could not be met. Thus the court found that “[t]he [use of force reports] . . . are nominally subject to OPRA, and there is no governing policy or statement containing specific provisions for exempting them from OPRA’s general rule of disclosure . . .” Id. at 385.

Recently, in N. Jersey Media Grp. v. Twp. of Lyndhurst, 2017 N.J. LEXIS 745 (2017), the State's highest court added its weight to the concept that Attorney General Guidelines have the force of law for police by declaring:

We . . . agree with the Appellate Division's analysis in O'Shea, *supra*, that the Use of Force Policy has "the force of law for police entities (citation omitted)." And because Use of Force Reports are "required by law to be made," they cannot be exempt from disclosure under OPRA's criminal investigatory records exemption. N.J.S.A. 47:1A-1.1.

Id. at [*32]

As in the case of Use of Force Reports, there is an Attorney General pronouncement that also addresses BWCs and stored BWC recordings: the Attorney General Law Enforcement Directive No. 2015-1. This Directive states that it is establishing "Statewide Standards" and provides in relevant part that:

If a department decides to equip an officer with a BWC, this Directive provides guidance on how the device is to be used, when it will be activated, when it might be de-activated in the course of an unfolding police-civilian encounter, and when a BWC recording may be accessed, viewed, copied, disseminated, or otherwise used. In providing such guidance, this Directive establishes certain foundational requirements that all police departments must satisfy. Law enforcement agencies nonetheless are expressly authorized to impose additional requirements beyond – but not inconsistent with – those established in this Directive. *See* § 1.1.

The Directive makes clear; therefore, that it is setting minimum requirements that police agencies throughout the State must follow if they elect to use BWCs. The Directive is replete with language that imposes an affirmative duty on officers and agencies that employ BWCs to comply with the policies, standards and requirements contained within the Directive. The Directive in Section 8 and Section 9 addresses minimum retention of BWC recordings, and storage thereof, respectively.⁷

Therefore, like the Attorney General Guidelines governing the use of force, Attorney General Law Enforcement Directive No. 2015-1 is a clear, pointed statement of policy from the

⁷ Directive No. 2015-1 does not provide that BWC recordings are confidential. In Section 10.1(h), the Directive allows access to a BWC recording "to comply with any other legal obligation to turn over the recording to a person or entity." The Directive contemplates such a "legal obligation" as being a response to an OPRA request, as is evidenced in footnote 5 of the Directive. The footnote states: "When responding to a subpoena or court order, or a request pursuant to the Open Public Records Act or common law right to know, disclosure of a BWC recording under this paragraph is permitted only after providing notice to the County Prosecutor or designee, or the Director of the Division of Criminal Justice or designee, pursuant to section 11 of this Directive." Section 11 has two (2) subsections. Subsection 11.1 sets time constraints on agencies for notifying the County Prosecutor or Division of Criminal Justice; Subsection 11.2 imposes restrictions on agencies with respect to the disclosure of BWC recordings of criminal investigations, but expressly removes the provisions of Section 10.1 from its purview.

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chief law enforcement official to all agencies and officers who employ BWCs.⁸ As such, the Directive has the force of law for police entities. And although the Directive does not require BWC recordings to be made, it does require them to be “maintained or kept on file.” Indeed, the Directive imposes a minimum retention period as well as special storage requirements for BWC recordings. Therefore, because the requested record is “required by law to be . . . maintained or kept on file” it cannot be denied as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.

However, the Council is permitted to raise additional defenses regarding the disclosure of records *sua sponte* pursuant to Paff v. Twp. of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007), *certif. denied* by Paff v. Twp. of Plainsboro, 193 N.J. 292 (2007).⁹ In Paff, the complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian’s cited basis for denial was lawful. The court held that:

[t]he GRC has an independent obligation to ‘render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.

Id.

In the instant complaint, although the GRC does not agree with the Custodian that the criminal investigatory records exemption is applicable as a basis for denying access, it does find that the requested BWC recording is exempt from access on other grounds. N.J.S.A. 2A:4A-60 provides that “records of law enforcement agencies, pertaining to juveniles charged as a delinquent or found to be part of a juvenile-family crisis, shall be strictly safeguarded from public inspection. Such records shall be made available only to [enumerated individuals or entities].”¹⁰

⁸ Both Attorney General Guidelines and Directives set policy for law enforcement agencies throughout the State, and as such, can be considered to carry the same weight. See Rivera v. N.J. State Police, 2016 N.J. Super. Unpub. LEXIS 1558 [*37], (Law Div. 2016) wherein the court determined that “[t]he authority attributed to AG promulgations remains the same, whether they are issued as Guidelines or Directives.” The court based this conclusion upon the Supreme Court’s treatment of Directives and Guidelines interchangeably in State v. Brimage, 153 N.J. 1, 4 (1998).

⁹ On appeal from Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (March 2006). [unpublished]

¹⁰ N.J.S.A. 2A:4A-22(g) defines “Juvenile-family crisis” as “behavior, conduct or a condition of a juvenile, parent or guardian or other family member which presents or results in (1) a serious threat to the well-being and physical safety of a juvenile, or (2) a serious conflict between a parent or guardian and a juvenile regarding rules of conduct which has been manifested by repeated disregard for lawful parental authority by a juvenile or misuse of lawful parental authority by a parent or guardian, or (3) unauthorized absence by a juvenile for more than 24 hours from his home, or (4) a pattern of repeated unauthorized absences from school by a juvenile subject to the compulsory education provision of Title 18A of the New Jersey Statutes, or (5) an act which if committed by an adult would constitute prostitution in violation of N.J.S. 2C:34-1 or any offense which the juvenile alleges is related to the juvenile being a victim of human trafficking.”

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The Custodian certified that on April 23, 2016, after the police heard the witness's statement, they "began a criminal investigation to locate the other juveniles." Therefore the police would have begun a criminal investigation *before* they confronted the Gitelmans. Crimes committed by juveniles are generally charged as delinquent behavior. It appears, therefore, that although not established by the Custodian, the incidents of criminal mischief would have been charged as delinquency. N.J.S.A. 2A:4A-60 provides that "records of law enforcement agencies, pertaining to juveniles charged as a delinquent . . . shall be strictly safeguarded from public inspection." In the alternative, it is likely, based upon the evidence of record, that the Gitelmans were family members of one or more of the juveniles who were brought to the attention of the police. As such, given the nature of charges brought against the Gitelmans, one or more of the juveniles would likely have been found to be part of a juvenile-family crisis, and N.J.S.A. 2A:4A-60 provides that "records of law enforcement agencies, pertaining to juveniles . . . found to be part of a juvenile-family crisis, shall be strictly safeguarded from public inspection."¹¹

Accordingly, the evidence of record reveals that the record responsive to the request, a BWC recording made on April 23, 2016, is barred from disclosure pursuant to the provisions of N.J.S.A. 2A:4A-60. Because that statute is a law that contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9(a), the confidentiality provisions of N.J.S.A. 2A:4A-60 restrict public access to the requested record. Accordingly, the Custodian lawfully denied the Complainant access to said records. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the evidence of record reveals that the record responsive to the request, a body worn camera recording made on April 23, 2016, is barred from disclosure pursuant to the provisions of N.J.S.A. 2A:4A-60. Because that statute is a law that contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9(a), the confidentiality provisions of N.J.S.A. 2A:4A-60 restrict public access to the requested record. Accordingly, the Custodian lawfully denied the Complainant access to said record. N.J.S.A. 47:1A-6.

Prepared By: John E. Stewart

September 19, 2017

¹¹ The GRC would typically conduct an *in camera* examination of the requested record to confirm that the record is being lawfully withheld. In complaints concerning juvenile records under N.J.S.A. 2A:4A-60, however, the GRC cannot conduct an *in camera* examination because the GRC is not one of the enumerated individuals or entities to whom such records may be disclosed. Therefore, the GRC is restricted to the information contained in the Custodian's certification and/or evidence of record when making its recommendations to the Council.

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