



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 29, 2013 Government Records Council Meeting

West Solloway
Complainant

Complaint No. 2011-39

v.

Bergen County Prosecutor's Office
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council ("Council") considered the January 22, 2013 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 did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian's failure to respond in writing to the Complainant's OPRA request for records, either granting access, denying access, seeking clarification or requesting an extension of time results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the requested reports associated with the fire at Good Shepherd Episcopal Church on Godwin Avenue in Midland Park, New Jersey, on November 23, 2009 and November 24, 2009 are exempt from disclosure under OPRA as criminal investigatory records, the Custodian has borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); and Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007).
3. Although the Custodian failed to provide the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days, violating N.J.S.A. 47:1A-5.i. However, the Custodian did provide a response on the eighth (8th) business day following the receipt of said request. However, the Custodian did not unlawfully deny the Complainant access to the requested reports associated with the fire at Good Shepherd Episcopal Church on Godwin Avenue in Midland Park, New Jersey,



on November 23, 2009 and November 24, 2009 because such reports are exempt from disclosure under OPRA as criminal investigatory records. Accordingly, 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, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the
Government Records Council
On The 29th Day of January, 2013

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: February 5, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting**

**West Solloway¹
Complainant**

GRC Complaint No, 2011-39

v.

**Bergen County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint:

Any reports associated with the fire at Good Shepherd Episcopal Church on Godwin Avenue in Midland Park, New Jersey, on November 23, 2009 and November 24, 2009.

Request Made: January 26, 2011

Response Made: February 7, 2011

Custodian: John Molinelli

GRC Complaint Filed: February 9, 2010³

Background

January 26, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant states that he is most interested in the cause of the fire.

February 7, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the eighth (8th) business day following receipt of such request. The Custodian states that access to the requested record is denied because the matter is still under investigation; all reports related to the cause and origin of the fire are criminal investigatory records that are exempt from disclosure pursuant to OPRA. The Custodian further asserts that the Complainant may submit another OPRA request after the investigation has been completed, but that criminal investigatory records remain exempt from disclosure even after the criminal investigation has been closed pursuant to Janeczko v. N.J. Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 (June 2004) and 2002-80 (June 2004) and Johnson v. N.J. Division of State Police, GRC Complainant No. 2004-46 (June 2004).

¹ No legal representation listed on record.

² Represented by Joe Carbone, Esq., of Carbone & Faasse (Ridgewood, NJ).

³ The GRC received the Denial of Access Complaint on said date.

February 9, 2010

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated January 26, 2011
- Custodian’s response to the OPRA request dated February 7, 2011

The Complainant states that the records that he has been able to amass from local agencies in Midland Park have led him to believe that the records he is seeking are not part of an ongoing investigation. The Complainant states that the Midland Park Fire Department’s (“Department”) report states that the Bergen County Arson Squad determined the source of ignition and cause of the fire in question to be accidental. The Complainant asserts that this report directly contradicts the letter he received from the Bergen County Prosecutor’s Office dated February 7, 2011.

The Complainant does not agree to mediate this complaint.

March 17, 2011

Request for the Statement of Information (“SOI”) sent to the Custodian.

March 22, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated January 26, 2011
- Custodian’s response to the OPRA request dated February 7, 2011

The Custodian certifies that her search for the requested records yielded a narrative case report, an arson squad investigation form, police reports, a receipt for sheriff department photographs, a photographic report, and 86 photographs. The Custodian further certifies that all of these records have a five (5) year retention schedule. The Custodian certifies that none of these records were destroyed or redacted. The Custodian argues that the requested records are exempt from disclosure as criminal investigatory records pursuant to Janeczko v. N.J. Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 (June 2004) and 2002-80 (June 2004) and Johnson v. N.J. Division of State Police, GRC Complainant No. 2004-46 (June 2004).

March 22, 2012

GRC’s letter to the Custodian. The GRC requests additional information from the Custodian to clarify whether the requested records are statutorily required to be maintained or kept on file by the Bergen County Prosecutor’s Office.

March 28, 2012

Letter from the Custodian to the GRC. The Custodian certifies that there is no statute or regulation that requires the records responsive to the Complainant’s request (and furthermore listed in the SOI) be maintained or kept on file other than the five (5) year retention schedule specified by the New Jersey Division of Archives and Records Management (DARM).

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁴ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant matter, the Custodian provided a written response to the Complainant's OPRA request on the eighth (8th) business day following the Custodian's receipt of said request. Accordingly, the Custodian's response is one (1) day outside of

⁴ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

the statutorily mandated seven (7) business day timeframe allotted by N.J.S.A. 47:1A-5.i. for a grant or denial of access from a Custodian.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian's failure to respond in writing to the Complainant's OPRA request for records, either granting access, denying access, seeking clarification or requesting an extension of time results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...[a] government record shall not include the following information which is deemed to be confidential ... criminal investigatory records[.]" (Emphasis added). N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

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 provides in pertinent part that:

"A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA] ... criminal investigatory records ..." N.J.S.A. 47:1A-1.1.

Further, a criminal investigatory record is defined in OPRA 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.

Thus, 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 is encompassed within the definition of a criminal investigatory record set forth at N.J.S.A. 47:1A-1.1 and is therefore exempt from disclosure under OPRA.

In the instant matter the Complainant is seeking “any reports associated with the fire at Good Shepherd Episcopal Church on Godwin Avenue in Midland Park, New Jersey, on November 23, 2009 and November 24, 2009.” The Custodian contends that the requested records are exempt from disclosure as criminal investigatory records pursuant to Janeczko v. N.J. Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 (June 2004) and 2002-80 (June 2004) and Johnson v. N.J. Division of State Police, GRC Complainant No. 2004-46 (June 2004).

In Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (October 2008), the Council held in pertinent part that “[t]he record requested ... a police arrest report, is required to be maintained or kept on file by the [RMS], therefore it is a government record subject to disclosure pursuant to N.J.S.A. 47:1A-1.1.” See also Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008).

However, in response to recent legal developments, the Council now reverses its decision in Morgano, *supra*, and Bart, *supra*, and determines that the RMS record retention schedules do not operate as “law” under OPRA pursuant to N.J.S.A. 47:1A-1.1 to render criminal investigatory records disclosable under OPRA. The GRC’s order for disclosure of arrest reports in Morgano, *supra*, still rests on the observation that most information subject to disclosure under N.J.S.A. 47:1A-3(b) and thus arrest reports should be disclosed with appropriate redactions for ease of disclosure.

Prior to the 2002 passage of the OPRA, individuals seeking access to government documents could file pursuant to the Right-to-Know Law (previously codified at N.J.S.A. 47:1A-1 et seq.) or the common law. Under the Right-to-Know Law, individuals had the right to inspect and copy records “required by law to be made, maintained or kept on file by public officials.” State v. Marshall, 148 N.J. 89, 272 (1997). In the context of criminal investigatory records, the New Jersey Supreme Court held that “[t]he Right-to-Know Law does not provide ... the right to inspect the law-enforcement files ... because no law or regulation requires that such files ‘be made, maintained or kept.’” *Id.*; see also Daily Journal v. Police Dep’t of the City of Vineland, 351 N.J. Super. 110, 121 (App. Div. 2002); River Edge Savings & Loan Ass’n v. Hyland, 165 N.J. 540, 545 (App. Div. 1979).

Thus, the Court considered criminal investigatory records outside of the set of documents required to be produced under the Right-to-Know Law.

The pre-OPRA case law permitted production of some of these criminal investigatory records only after balancing the State's interest against the individual's and the public's interest in disclosure. Marshall, 148 N.J. at 273-74; Daily Journal, 351 N.J. Super. at 122-23. This common law "balancing test" required that the person seeking access demonstrate standing by showing an interest in the subject matter of the material, and then an "exquisite weighing process" involving six non-dispositive factors. Daily Journal, 351 N.J. Super. at 123 (quoting Beck v. Bluestein, 194 N.J. Super. 247, 263 (App. Div. 1984)); *see also* Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).

This background framed the legislature's passage of OPRA in 2002. The bills originally introduced in the Assembly and Senate did not contain a general exemption for "criminal investigatory records." Senate No. 2003, 209th Sess. (N.J. 2000); Assembly No. 1309, 209th Sess. (N.J. 2000). However, at a public hearing on March 9, 2000 before the Senate Judiciary Committee, several witnesses expressed concern over the lack of clarity in the original OPRA legislation as to whether, as a general matter, prior exemptions that had been enacted by Executive Order or through case law under the Right-to-Know law would survive the passage of OPRA. *See, e.g.*, Transcript of Public Hearing on Senate Bill Nos. 161, 351, 573, and 866, at 23 (Mar. 9, 2000), *available at* <http://www.njleg.state.nj.us/legislativepub/Pubhear/030900gg.PDF> (statement of William J. Kearns, Esq., N.J. State League of Municipalities). The Judiciary Committee members unequivocally suggested that these exemptions would survive or would be provided for in a contemporaneously passed Executive Order. *Id.* at 29-30 ("In other words, we contemplated this as all of those protections that are provided in statutes, in legislative resolutions, and executive orders would remain in place.")(statement of Sen. Martin).

The exemption from disclosure for "criminal investigatory records" was then introduced in a May 3, 2001 floor amendment to the Senate bill by OPRA's co-sponsor, Senator Martin, and remains in that form in the law. In Senator Martin's statement accompanying the floor amendment he noted that "[t]he amendments *exempt criminal investigatory records of a law enforcement agency from the statutory right of access.* However, a common law right of access could be asserted to these and other records not accessible under the statute." (Emphasis added.) Statement to Senate No. 2003, 209th Sess. (N.J. May 3, 2011). This statement was reflected in the final structure of OPRA, which provided an exemption for "criminal investigatory records," but noted that "[n]othing contained in [OPRA] ... shall be ... construed as limiting the common law right of access to a government record, *including criminal investigatory records of a law enforcement agency.*" (Emphasis added.) N.J.S.A. 47:1A-8.

In addition, the May 3, 2001 floor amendment adopted the definition of "criminal investigatory records" in terms that mimicked the language used by the prior Right-to-Know Law. Specifically, a "criminal investigatory record" was defined to entail "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." (Emphasis added.) Senate No. 2003 § 2, 209th Sess. (N.J. as amended, May 3, 2011).

Finally, in his message upon signing the final version of OPRA, Governor McGreevey mentioned only limited exemptions explicitly but included “exemptions for victims’ records, emergency and security information, *criminal investigatory records and other appropriate areas that warrant confidentiality.*” (Emphasis added.) Statement of Gov. James E. McGreevey upon passage of OPRA at 1 (Aug. 13, 2002).

The Legislature’s specific statement that the floor amendment was intended to keep criminal investigatory records as exempt from disclosure and its mimicking of the Right-to-Know Law in the definition of “criminal investigatory records” strongly suggests its intent to maintain the prior exemption as defined by the courts.

The courts’ subsequent interpretation of OPRA confirms this view. In Daily Journal v. Police Department of the City of Vineland, one of the last cases decided under the Right-to-Know Law, the Appellate Division analyzed the then-recently enacted OPRA statute as part of its application of the common law balancing test. The Court noted the exemption for and definition of “criminal investigatory records” under OPRA and found that the preservation of the common law balancing test was a “clear legislative acknowledgement that a compelling public interest is served by protecting the private interests of such citizens.” 351 N.J. Super. at 130. In other words, the Appellate Division viewed OPRA’s exemption from disclosure for criminal investigatory records as an endorsement of the common law balancing test as the means to gain access to criminal investigatory records. The courts have continued to apply the pre-OPRA exemption and common-law balancing test as developed under the Right-to-Know Law. *See, e.g., R.O. v. Plainsboro Police Dep’t*, No. A-5906-07T2, 2009 N.J. Super. Unpub. LEXIS 1560 (App. Div. June 17, 2009); Bent v. Township of Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005).

The definition of “criminal investigatory records” under OPRA excludes documents that are required to be “maintained or kept on file” by a public official from the scope of the exemption. This definition becomes problematic because the New Jersey State Records Committee has, pursuant to statutorily granted authority, created a record retention schedule through the RMS that requires police and other agencies to “maintain” various criminal investigatory records. N.J.S.A. 47:3-20; N.J.A.C. 15:3-2.1(b); *see also N.J. Land Title Ass’n v. State Records Comm.*, 315 N.J. Super. 17, 26 (App. Div. 1998) (discussing the Legislature’s delegation of authority to the Committee in order to “centraliz[e] control of the State’s public records in a single agency whose expertise would assure uniformity in the decision-making process concerning the retention and disposition of those records.”).

Although the RMS schedule is likely sufficient to make the retention of such records mandatory,⁵ there are two strong arguments that the Legislature intended criminal investigatory records to be exempted from disclosure under OPRA despite the RMS requirements. First, the directive for the creation of the RMS schedules was passed by

⁵ *See O’Shea v. Township of W. Milford*, 410 N.J. Super. 371 (App. Div. 2009), wherein the Appellate Division found that the Attorney General’s guidance document requiring the completion of Use of Force Reports had the “force of law” for police departments because the Attorney General has the authority to issue such policy and directives. *Id.* at 382.

the legislature in 1953. Thus, when the New Jersey Supreme Court decided State v. Marshall, 148 N.J. 89, 272 (1997), the RMS schedules were in place, but the Court still concluded that “no law or regulation requires that [criminal investigatory records] ‘be made, maintained or kept.’” Marshall, 148 N.J. at 272. The Legislature’s passage of OPRA with this language can be construed as its acquiescence to the Marshall decision and the Court’s holding that no law requires that criminal investigatory records be maintained. *See, e.g., Dep’t of Children & Families v. T.B.*, 207 N.J. 294, 307 (2011)(noting that “acquiescence on the part of Legislature,” or its “continued use of same language” is evidence that the legislature intended to maintain the construction given to a statute by prior case law)(citing Asbury Park Press, Inc. v. City of Asbury Park, 19 N.J. 183, 190 (1955)).

Additionally, the apparently wide scope of the RMS schedules would potentially take all documents that could be classified as “criminal investigatory records” outside of the definition set in OPRA and would therefore render the exemption meaningless. The courts have disfavored statutory constructions that render portions of a statute superfluous. *See, e.g., N.J. Ass’n of School Administrators v. Schundler*, 211 N.J. 535, (2012) at 553 (“[L]egislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless.”) (quoting Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 613 (1999)).

Therefore, it can be concluded that in passing OPRA, the Legislature intended to preserve the then-existing state of the law with respect to the disclosure of criminal investigatory records, *i.e.*, that the RMS record retention schedules do not operate to render criminal investigatory records disclosable under OPRA.

However, in North Jersey Media Group, Inc. v. Paramus, Docket No. BER-L-2818-11 (June 15, 2011), the Law Division was tasked with determining whether the responsive records were exempt as criminal investigatory records based on retention schedules set forth by RMS. The Court noted that:

“... in establishing legal support ‘[a] decision of the [GRC] shall not have value as a precedent for any case initiated in Superior Court.’ N.J.S.A. 47:1A-7. However, ‘we review final agency decisions with deference and that we will not ordinarily overturn such determinations unless they were arbitrary, capricious or unreasonable, or violated legislative policies expressed or implied in the act of governing the agency.’ Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003) (citing Campbell v. Dep’t of Civil Serv., 39 N.J. 556, 562 (1963)).” *Id.* at pg. 12.

Thus, in order to make a determination whether retention schedules effectively had the force of law, the Court looked to the Appellate Division’s decision in N.J. Land Title, supra, and the GRC’s decision in Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008)(holding that arrest reports are government records under N.J.S.A. 47:1A-1.1. because they are required to retained until the final disposition of a relevant case per Records Series No. 0007-0000).

Regarding N.J. Land Title, the Court noted that although case law is sparse on the issue of the effect of retention schedules, this case appears to have answered the question of whether retention schedules carry the force of law in the affirmative. The Court reasoned that although it the Appellate Division "... did not directly state that [RMS] requirements, as approved by the State Records Committee, are law, based on the holding and reasons for the holding, the requirements at the least *appear* to carry the force of law." (Emphasis added.) *Id.* at pg. 28.

Regarding Bart, *supra*, the Court reasoned that RMS is responsible for ensuring that "government records are maintained in accordance with the State's public records laws ..." and thus developed retention schedules requiring police departments to maintain the responsive records for a certain amount of time. The Court further noted that, in Bart, *supra*, the Council determined that records required by RMS to be maintained or kept on file are considered government records as they are required by law to be made, maintained or kept on file. The Court reasoned that the Council's holding in Bart, *supra*, "has not been contradicted by any court of competent jurisdiction." *Id.* at pg. 17.

The NJMG Court thus held that the records "... are government records as they are required by [RMS] to be kept on file. N.J.S.A. 47:1A-1.1.; [RMS] Municipal Police Departments M900000-004, Records Series No. 0010-0000 ...; [RMS] Municipal Police Departments M900000-004, Records Series No. 0102-0001 through No. 0102-0003 ... they are not criminal investigatory records" *Id.* at pg. 22. The Court finally held that "[a]s defendants ... have failed to satisfy their burden to show the denial of access was proper, N.J.S.A. 47:1A-6, access to the requested records is not precluded pursuant to the criminal investigatory exemption." *Id.* at Pg. 29.

In an unpublished decision in North Jersey Media Group, Inc. v. Paramus, 2012 N.J. Super. Unpub. Lexis 1685 (App. Div. 2012), the Appellate Division subsequently affirmed the Law Division's decision "... substantially for the reasons articulated ..." therein that the requested police dispatch audio recordings and police video recordings were not considered "criminal investigatory" records because said records were required to be maintained by defendants pursuant to their retention schedules set forth by RMS. The Appellate Division further noted that the Court "concluded the [RMS] requirements carry the force of law." *Id.* at 5.

However, N.J. Court Rule 1:36-3 states that:

"No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by *res judicata*, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel."

Therefore, although North Jersey, *supra*, stands for the proposition that records retention schedules carry the force of law, this unpublished opinion does not constitute precedent, nor is it binding upon the GRC.

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004. In Janeczko, the complainant requested access to copies of records related to alleged criminal actions committed by her son, who was ultimately killed by police officers. The Council found that under OPRA, “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”. Consequently, the complainant’s request was denied.

It is important to note that the criminal investigatory records exemption continues to survive the conclusion of the investigation. As the Council pointed out in Janeczko, *supra*:

“[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete. The exemption applies to records that conform to the statutory description, without reference to the status of the investigation and the Council does not have a basis to withhold from access only currently active investigations and release those where the matter is resolved or closed.”

The finding in Janeczko concurs with the Council’s decision in Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007). In Brewer, the Complainant filed an OPRA request to obtain lab records that were in the custody of the New Jersey State Police for use in an investigation. The Council found that the requested records were part of a criminal investigative file and were exempt from disclosure under OPRA. Accordingly, the Council determined that the complainant’s request was lawfully denied.

In this instant matter, Custodian certified that the requested records are criminal investigatory records. Furthermore, the Custodian certified on March 28, 2012 to the GRC that there are no applicable statutes requiring the Bergen County Prosecutor’s Office to maintain or keep or file the requested records other than the DARM record retention schedule. The Complainant has not provided any competent evidence to refute this certification.

Therefore, because the requested reports associated with the fire at Good Shepherd Episcopal Church on Godwin Avenue in Midland Park, New Jersey, on November 23, 2009 and November 24, 2009 are exempt from disclosure under OPRA as criminal investigatory records, the Custodian has borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ Department

of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); and Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007).

Because the Custodian did not unlawfully deny access to the requested records because they are criminal investigatory records which are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1, the Council declines to address the issue of whether such records are also exempt from disclosure pursuant to N.J.S.A. 47:1A-3(a).

Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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 (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

In the instant matter, the Custodian failed to provide the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days, violating N.J.S.A. 47:1A-5.i. However, the Custodian did not unlawfully deny the Complainant access to the requested reports associated with the fire at Good Shepherd

Episcopal Church on Godwin Avenue in Midland Park, New Jersey, on November 23, 2009 and November 24, 2009 because such reports are exempt from disclosure under OPRA as criminal investigatory records. Accordingly, 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, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian's failure to respond in writing to the Complainant's OPRA request for records, either granting access, denying access, seeking clarification or requesting an extension of time results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the requested reports associated with the fire at Good Shepherd Episcopal Church on Godwin Avenue in Midland Park, New Jersey, on November 23, 2009 and November 24, 2009 are exempt from disclosure under OPRA as criminal investigatory records, the Custodian has borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); and Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint Number 2006-204 (October 2007).
3. Although the Custodian failed to provide the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days, violating N.J.S.A. 47:1A-5.i. However, the Custodian did provide a response on the eighth (8th) business day following the receipt of said request. However, the Custodian did not unlawfully deny the Complainant access to the requested reports associated with the fire at Good Shepherd Episcopal Church on Godwin Avenue in Midland Park, New Jersey, on November 23, 2009 and November 24, 2009 because such reports are exempt from disclosure under OPRA as criminal investigatory records. Accordingly, 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, it is concluded that 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.

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Acting Executive Director

January 22, 2013