



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 23, 2013 Government Records Council Meeting

Eugene Seabrooks
Complainant

Complaint No. 2012-230

v.

County of Essex
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the terms of the Council’s June 25, 2013 Interim Order by providing the GRC’s Executive Director with certified confirmation in a timely manner that the Custodian had a search of the files conducted and determined that the records responsive to request item number 1, arrest warrants for Eugene Seabrooks and Alkabir Sorey issued on August 22, 1994, do not exist.
2. The Custodian failed to bear his burden of proving a lawful basis for a denial of access to the records responsive to request item number 1 because the Custodian originally asserted the records were exempt from disclosure when, in fact, they were not exempt for any valid legal reason. Moreover, based upon the Custodian’s certification of compliance, the Custodian did not even know if the requested records were in existence when he denied the Complainant access to those records. However, the Custodian did comply with the terms of the Council’s June 25, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 23rd Day of July 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: July 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Eugene Seabrooks¹
Complainant**

GRC Complaint No. 2012-230

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint:

1. Copies of arrest warrants for Eugene Seabrooks and Alkibir Sorey issued on August 22, 1994.
2. Copies of all supporting affidavits and court dates for Ind. 95-1-6.³

Custodian of Records: Al Fusco

Request Received by Custodian: May 2, 2012

Response Made by Custodian: May 7, 2012

GRC Complaint Received: July 30, 2012

Background⁴

June 25, 2013 Council Meeting:

At its June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 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, found that:

1. The Custodian failed to bear his burden of proving a lawful basis for a denial of access to the records responsive to request item number 1. N.J.S.A. 47:1A-6. As such, the Custodian must disclose the requested records to the Complainant.
2. The records responsive to request item number 2 meet the criteria for criminal investigatory records as set forth in N.J.S.A. 47:1A-1.1; therefore, they are not

¹ No legal representation listed on record.

² Represented by James Paganelli, Esq., of Office of the Essex County Counsel (Newark, NJ); however, there are no submissions on file from the Custodian’s Counsel to the GRC.

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.

government records as defined under OPRA and are not subject to public access. Thus, the Custodian did not unlawfully deny access to said records. *See Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).*

3. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
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 June 26, 2013, the Council distributed its Interim Order to all parties.

Compliance:

On July 2, 2013, the fourth (4th) business day following receipt of the Council's Interim Order, Executive Assistant Prosecutor Debra Simms of the Essex County Prosecutor's Office responded to the Council's Interim Order, certifying that the records ordered for disclosure do not exist. On July 3, 2013, the GRC e-mailed the Custodian, Al Fusco, and informed him that as the Custodian of Records in this complaint, he must personally comply with the Council's June 25, 2013 Interim Order.

On July 8, 2013, the Custodian certifies that the Council's Interim Order required the Custodian to disclose to the Complainant the records responsive to request item number 1, arrest warrants for Eugene Seabrooks and Alkibir Sorey issued on August 22, 1994. The Custodian certifies that he and Debra Simms, the custodian of records for the Essex County Prosecutor's Office, had a search conducted of the files and determined that no records responsive to request item number 1 exist. The Custodian certifies that, because the requested records do not exist, he is unable to comply with the provision of the Interim Order requiring disclosure of said records.

Analysis

Compliance

On June 25, 2013, the Council ordered the Custodian to disclose to the Complainant the records responsive to request item number 1, copies of arrest warrants for Eugene Seabrooks and Alkibir Sorey issued on August 22, 1994. Said Order required the Custodian to comply with its terms within five (5) business days from receipt of same, and provide certified confirmation of compliance to the GRC's Executive Director.

On June 26, 2013, the Council distributed its Interim Order to all parties, resulting in a July 3, 2013 compliance deadline for the Custodian. On July 2, 2013, Executive Assistant Prosecutor Simms asserted she was the Custodian in this complaint and certified that the records the Council ordered disclosed do not exist. On July 3, 2013, the GRC e-mailed the Custodian, Al Fusco, and informed him that as the Custodian of Records in this complaint, he must personally comply with the Council's Interim Order.

On July 8, 2013, the Custodian provided certified confirmation to the GRC's Executive Director that he and Executive Assistant Prosecutor Simms had a search conducted of the files and determined that no records responsive to request item number 1 exist. The Custodian also certified that, because the requested records do not exist, he is unable to comply with the provision of the Interim Order requiring disclosure of said records.

Therefore, the Custodian has complied with the terms of the Council's June 25, 2013 Interim Order by providing the GRC's Executive Director with certified confirmation in a timely manner that he had a search of the files conducted and determined that the records responsive to request item number 1, arrest warrants for Eugene Seabrooks and Alkabir Sorey issued on August 22, 1994, do not exist.⁵

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “... [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (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)).

⁵ Because the custodian in the Essex County Prosecutor's Office complied with the terms of the Council's Interim Order on the fourth (4th) business day following the Custodian's receipt of same, the GRC considers the extended period necessary for compliance by Custodian, Al Fusco, to be timely.

Here, the Custodian failed to bear his burden of proving a lawful basis for a denial of access to the records responsive to request item number 1 because the Custodian originally asserted the records were exempt from disclosure when, in fact, they were not exempt for any valid legal reason. Moreover, based upon the Custodian's certification of compliance, the Custodian did not even know if the requested records were in existence when he denied the Complainant access to those records. However, the Custodian did comply with the terms of the Council's June 25, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the terms of the Council's June 25, 2013 Interim Order by providing the GRC's Executive Director with certified confirmation in a timely manner that the Custodian had a search of the files conducted and determined that the records responsive to request item number 1, arrest warrants for Eugene Seabrooks and Alkabir Sorey issued on August 22, 1994, do not exist.
2. The Custodian failed to bear his burden of proving a lawful basis for a denial of access to the records responsive to request item number 1 because the Custodian originally asserted the records were exempt from disclosure when, in fact, they were not exempt for any valid legal reason. Moreover, based upon the Custodian's certification of compliance, the Custodian did not even know if the requested records were in existence when he denied the Complainant access to those records. However, the Custodian did comply with the terms of the Council's June 25, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 25, 2013 Government Records Council Meeting

Eugene Seabrooks
Complainant

Complaint No. 2012-230

v.

County of Essex
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council ("Council") considered the June 18, 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 failed to bear his burden of proving a lawful basis for a denial of access to the records responsive to request item number 1. N.J.S.A. 47:1A-6. As such, the Custodian must disclose the requested records to the Complainant.
2. The records responsive to request item number 2 meet the criteria for criminal investigatory records as set forth in N.J.S.A. 47:1A-1.1; therefore, they are not government records as defined under OPRA and are not subject to public access. Thus, the Custodian did not unlawfully deny access to said records. *See Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).*
3. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
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.

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the
Government Records Council
On The 25th Day of June, 2013

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting**

**Eugene Seabrooks¹
Complainant**

GRC Complaint No. 2012-230

v.

**County of Essex²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of arrest warrants for Eugene Seabrooks and Alkahir Sorey issued on August 22, 1994.
2. Copies of all supporting affidavits and court dates for Ind. 95-1-6.³

Request Made: May 2, 2012

Response Made: May 7, 2012

GRC Complaint Filed: July 30, 2012⁴

Background⁵

Request and Response:

On May 2, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On May 7, 2012, the second (2nd) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the requested records are part of the Prosecutor’s investigatory file and are denied on the basis that they constitute criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and Janeczko v. Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80. The Custodian also informed the Complainant that the records contain information deemed to be confidential and that, pursuant to OPRA, “...a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizens’ reasonable expectation of privacy.” N.J.S.A. 47:1A-1. The Custodian further informed the Complainant that the requested

¹ No legal representation listed on record.

² Al Fusco, Custodian of Records. Represented by James Paganelli, Esq., of Office of the Essex County Counsel (Newark, NJ); however, there are no submissions on file from the Custodian’s Counsel to the GRC.

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

⁴ The Complainant signed the Denial of Access Complaint on said date.

⁵ 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.

records are denied because the records were not specifically identified and OPRA only allows for disclosure of records, not general data, information or statistics. Finally, the Custodian informed the Complainant that the requested records are denied because they constitute inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian cited Bent v. Stafford Police Department, 381 N.J. Super. 30, 39 (App. Div. 2005), citing MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-549 (App. Div. 2005), in support of the latter two reasons for denying access.

Denial of Access Complaint:

On July 30, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he provided his request to the Custodian on May 2, 2012, and that the Custodian denied his request on May 7, 2012. The Complainant asserts that the warrants are public records maintained at the Criminal Case Management Office.

Statement of Information:

On August 30, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on May 3, 2012, and that he responded to the request on May 7, 2012.

The Custodian certifies that the records responsive to request item number 1 and request item number 2 are warrants for Eugene Seabrooks and Alkibir Sorey issued on August 22, 1994, and all supporting affidavits and court dates for Ind. 95-1-6, respectively. The Custodian certifies that, if the records do exist, they are criminal investigatory records denied pursuant to N.J.S.A. 47:1A-1.1 and Janeczko, supra. The Custodian also certifies that the records are confidential pursuant to N.J.S.A. 47:1A-1.1, and further, that the request does not identify any records with specificity. The Custodian cites Bent, supra, and MAG, supra.

Analysis⁶

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 item number 1 - copies of arrest warrants for Eugene Seabrooks and Alkibir Sorey issued on August 22, 1994.

⁶ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

In his SOI, the Custodian certified that the records responsive to request item number 1 are copies of warrants for Eugene Seabrooks and Alkabir Sorey issued on August 22, 1994, and that he denied access to the records for three reasons: (1) they constitute criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1; (2) the records are confidential because disclosure of the records would violate the citizens' reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1; and (3) the requested records were not specifically identified and OPRA only allows for disclosure of records, not general data, information or statistics.⁷

Denial (1) - criminal investigatory records exemption.

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.

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).⁸ In Janeczko, 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."

The records responsive to request item number 1 are arrest warrants. An arrest warrant is required by law to be made pursuant to R. 3:2-3(a), which provides that "[a]n arrest warrant shall be made on a Complaint-Warrant (CDR2) form." Further, the requested records are not records containing "information that is part and parcel of an investigation." They are charging documents which contain "...a written statement of the essential facts constituting the offense charged..." R. 3:2-1(a). Moreover, the GRC has never found that requested warrants were exempt from disclosure as criminal investigatory records. *See* Paff v. Cumberland County Sheriff's Office, GRC Complaint No. 2005-159 (January 2006); Rosenberg v. Bergen County Sheriff's Office, GRC Complaint No. 2008-96 (April 2009); Harris v. NJ Dept. of Corrections, GRC Complaint No. 2010-233 (February 2012). *See also* Lopez-Rodriguez v. Passaic County Prosecutor's Office, GRC Complaint No. 2011-325 (March 2013).

Thus, there is no evidence supporting the Custodian's claim that the records responsive to request item number 1 are exempt from disclosure as criminal investigatory records.

Denial (2) - disclosure of the records would violate the citizens' reasonable expectation of privacy.

OPRA provides that "...a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted

⁷ In his response to the OPRA request the Custodian asserted the records were also denied because they constitute ACD material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1; however, the Custodian did not include this in his SOI as a reason for denying access.

⁸ Affirmed in an unpublished opinion of the Appellate Division in May 2004.

when disclosure thereof would violate the citizen's reasonable expectation of privacy..." N.J.S.A. 47:1A-1. OPRA also provides that "...[a] government record shall not include...that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person..." N.J.S.A. 47:1A-1.1. However, OPRA also provides that:

"[i]f an arrest has been made [the following information shall be made available to the public] the defendant's name, age, residence, occupation, marital status and similar background information and the identity of the complaining party...***the text of any charges***...the identity of the investigating and arresting personnel and agency...the time and place of arrest...and information as to circumstances surrounding bail, whether it was posted and the amount thereof." N.J.S.A. 47:1A-3(b) (Emphasis added.)

The information which must be disclosed pursuant to N.J.S.A. 47:1A-3(b) is typically found on a complaint summons or warrant. If information that is specifically prohibited from disclosure pursuant to N.J.S.A. 47:1A-1.1 does appear on a warrant, such information can be redacted by the Custodian. As such, disclosure of the records responsive to request item number 1, with any necessary redactions, will not violate the citizens' reasonable expectation of privacy. *See also* Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008), holding that arrest reports must be disclosed in redacted form so as to provide for disclosure of information pursuant to N.J.S.A. 47:1A-3(b).

Denial (3) - the records were not specifically identified and OPRA only allows for disclosure of records, not general data, information or statistics.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'*" N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court reasoned that:

"[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." [Emphasis added]. *Id.* at 549.

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” (Emphasis added.) *Id.* See also Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁹ New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Here, the Complainant requested “arrest warrants for Eugene Seabrooks and Alkibir Sorey issued on August 22, 1994.” Warrants are government record *forms*. See R. 3:2-3(a), which provides that “[a]n arrest warrant shall be made on a Complaint-Warrant (CDR2) form.” Such a form cannot be construed to be “general data, information or statistics.” Moreover, the Complainant in his request identified the type of record; to wit, arrest warrants. The Complainant also named the parties for which the warrants were issued and provided the Custodian with a date of issue for the warrants. Accordingly, the Custodian clearly erred in denying access to request item number 1 by asserting the Complainant requested “general data, information or statistics” and therefore did not specifically identify the records.

Accordingly, the Custodian failed to bear his burden of proving a lawful basis for a denial of access to the records responsive to request item number 1. N.J.S.A. 47:1A-6. As such, the Custodian must disclose the requested records to the Complainant.

Request item number 2 - copies of all supporting affidavits and court dates for Ind. 95-1-6.

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.*

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, *supra*. In Janeczko, 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.”

Here, although the records sought are part of an investigation dating back to the mid-1990s, the criminal investigatory records exemption continues to survive the conclusion of an 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.”

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

Here, the Custodian denied access to the requested records on the basis that they are criminal investigatory records contained in the Essex County Prosecutor's criminal file. A prosecutor's criminal file, whether open or closed, is not a public record and is exempt from disclosure under N.J.S.A. 47:1A-1.1. Further, the evidence of record is not inconsistent with the Custodian's assertion that the requested records are criminal investigatory records because the Complainant identified the records as being filed under Indictment No. 95-1-6, and an indictment is a formal written accusation of a *crime*. Additionally, there is no evidence in the record to conclude that the records are required by law to be made, maintained or kept on file.

Accordingly, the records responsive to request item number 2 meet the criteria for criminal investigatory records as set forth in N.J.S.A. 47:1A-1.1; therefore, they are not government records as defined under OPRA and are not subject to public access. Thus, the Custodian did not unlawfully deny access to said records. See Janeczko, *supra*.

Since the requested records are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, it is unnecessary for the Council to determine whether the records are also exempt from disclosure as "general data, information or statistics" or whether disclosure of the records would violate the citizens' reasonable expectation of privacy.

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 Custodian failed to bear his burden of proving a lawful basis for a denial of access to the records responsive to request item number 1. N.J.S.A. 47:1A-6. As such, the Custodian must disclose the requested records to the Complainant.
2. The records responsive to request item number 2 meet the criteria for criminal investigatory records as set forth in N.J.S.A. 47:1A-1.1; therefore, they are not government records as defined under OPRA and are not subject to public access. Thus, the Custodian did not unlawfully deny access to said records. See Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).
3. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁰ to the Executive Director.¹¹

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.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013

¹⁰ "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."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.