



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**July 28, 2015 Government Records Council Meeting**

George W. Schulz

Complainant

v.

NJ State Police

Custodian of Record

Complaint No. 2014-390

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s June 30, 2015 Interim Order because he responded in the prescribed time frame by providing the responsive autopsy reports certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the responsive autopsy reports, he lawfully denied access to the remainder of the responsive records. N.J.S.A. 47:1A-6. Further, the portion of the Complainant’s request seeking “all documents” and “external reports” was invalid. 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 28<sup>th</sup> Day of July, 2015

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 30, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
July 28, 2015 Council Meeting**

**George W. Schulz<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-390**

v.

**New Jersey State Police<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all documents from the case of “Baby Bones,” a deceased child discovered by authorities in Upper Freehold Township in 2005, including, but not limited to, reports of findings, autopsy reports, field reports, toxicology reports, and external reports.

**Custodian of Record:** Marco Rodriguez  
**Request Received by Custodian:** November 4, 2014  
**Response Made by Custodian:** November 17, 2014  
**GRC Complaint Received:** November 21, 2014

**Background**

**June 30, 2015 Council Meeting:**

At its June 30, 2015, public meeting, the Council considered the June 23, 2015, 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. Because the portion of the Complainant’s OPRA request seeking “all documents” related to the “Baby Bones” investigation and “external reports” is a blanket request for a class of various documents rather than a request for specifically named or identifiable government records, that portion of the request is invalid under OPRA. The Custodian had no legal duty to research his records to locate records potentially responsive to these portions of the Complainant’s request. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Adam Robert Gibbons.

Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008).

2. In light of the statutory requirement mandating the creation of autopsy reports, which was not previously contemplated in the Council's prior decisions, the Custodian unlawfully denied access to same because autopsy reports do not meet the two-prong test necessary to be considered a criminal investigatory record. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; N.J.S.A. 52:17B-88; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 380-381 (App. Div. 2009). However, the Custodian lawfully denied access to the corresponding photographs and specimens. N.J.S.A. 47:1A-1.1; Executive Order No. 9 (Gov. Hughes, 1963). The Custodian must disclose the responsive autopsy report to the Complainant. If he has already disclosed the report to the Complainant, he must certify to the date of disclosure and provide supporting documentation.
3. **The Custodian shall comply with item No. 2 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,<sup>3</sup> to the Executive Director.<sup>4</sup>**
4. The requested findings, field, and toxicology reports are criminal investigatory records, and 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 Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Crook v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2010-92 (March 2011); Grossman v. Ocean Cnty. Prosecutor Office, 2013 N.J. Super. Unpub. Lexis 1999 (July 26, 2013).
5. 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 July 1, 2015, the Council distributed its Interim Order to all parties. On July 9, 2015, the Custodian's Counsel sent the Complainant via e-mail copies of two (2) autopsy reports regarding "Baby Bones."

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<sup>3</sup> "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."

<sup>4</sup> 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.

On July 9, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that he disclosed the responsive records to the Complainant on this date via e-mail through Custodian's Counsel.

## Analysis

### Compliance

At its June 30, 2015, meeting, the Council ordered the Custodian to disclose the responsive autopsy report or, if previously provided, certify to such and include supporting documentation. Additionally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 1, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 9, 2015.

On July 9, 2015, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian's Counsel e-mailed two (2) autopsy reports to the Complainant. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's June 30, 2015, Interim Order because he responded in the prescribed time frame providing the responsive autopsy reports and simultaneously provided certified confirmation of compliance to the Executive Director.

### Knowing & Willful

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

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

Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to the responsive autopsy reports, he lawfully denied access to the remainder of the responsive records. N.J.S.A. 47:1A-6. Further, the portion of the Complainant's request seeking "all documents" and "external reports" was invalid. 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 complied with the Council's June 30, 2015 Interim Order because he responded in the prescribed time frame by providing the responsive autopsy reports certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the responsive autopsy reports, he lawfully denied access to the remainder of the responsive records. N.J.S.A. 47:1A-6. Further, the portion of the Complainant's request seeking "all documents" and "external reports" was invalid. 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: Frank F. Caruso  
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover  
Executive Director

July 21, 2015



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**INTERIM ORDER**

**June 30, 2015 Government Records Council Meeting**

George W. Schulz  
Complainant

Complaint No. 2014-390

v.

NJ State Police  
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 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. Because the portion of the Complainant’s OPRA request seeking “all documents” related to the “Baby Bones” investigation and “external reports” is a blanket request for a class of various documents rather than a request for specifically named or identifiable government records, that portion of the request is invalid under OPRA. The Custodian had no legal duty to research his records to locate records potentially responsive to these portions of the Complainant’s request. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008).
2. In light of the statutory requirement mandating the creation of autopsy reports, which was not previously contemplated in the Council’s prior decisions, the Custodian unlawfully denied access to same because autopsy reports do not meet the two-prong test necessary to be considered a criminal investigatory record. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; N.J.S.A. 52:17B-88; O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 380-381 (App. Div. 2009). However, the Custodian lawfully denied access to the corresponding photographs and specimens. N.J.S.A. 47:1A-1.1; Executive Order No. 9 (Gov. Hughes, 1963). The Custodian must disclose the responsive autopsy report to the Complainant. If he has already disclosed the report to the Complainant, he must certify to the date of disclosure and provide supporting documentation.



3. **The Custodian shall comply with item No. 2 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,<sup>1</sup> to the Executive Director.<sup>2</sup>**
4. The requested findings, field, and toxicology reports are criminal investigatory records, and 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 Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Crook v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2010-92 (March 2011); Grossman v. Ocean Cnty. Prosecutor Office, 2013 N.J. Super. Unpub. Lexis 1999 (July 26, 2013).
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of June, 2015

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 1, 2015**

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<sup>1</sup> "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."

<sup>2</sup> 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.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 30, 2015 Council Meeting**

**George W. Schulz<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-390**

v.

**New Jersey State Police<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all documents from the case of “Baby Bones,” a deceased child discovered by authorities in Upper Freehold Township in 2005, including, but not limited to, reports of findings, autopsy reports, field reports, toxicology reports and external reports.

**Custodian of Record:** Marco Rodriguez  
**Request Received by Custodian:** November 4, 2014  
**Response Made by Custodian:** November 17, 2014  
**GRC Complaint Received:** November 21, 2014

**Background<sup>3</sup>**

**Request and Response:**

On November 4, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 14, 2014, the sixth (6<sup>th</sup>) business day after receipt of the OPRA request,<sup>4</sup> the Custodian responded in writing, denying access to the responsive reports as criminal investigatory records. N.J.S.A. 47:1A-1.1.

**Denial of Access Complaint:**

On November 21, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian unlawfully denied access to the responsive records “as part of an ongoing investigation.” The Complainant noted that the remains were identified, three (3) individuals pled guilty to crimes in 2013, and the

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Adam Robert Gibbons.

<sup>3</sup> 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.

<sup>4</sup> November 4, and November 11, 2014, were State holidays.

case was closed and complete. The Complainant asserted that, even if the records were exempt under the criminal investigatory exemption, the Custodian failed to redact those exempt portions of the records and provide the rest, as required under N.J.S.A. 47:1A-5(a).

Statement of Information:

On January 20, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 4, 2014. The Custodian certified that he contacted the Homicide Unit and was advised that responsive records existed; however, same were exempt from disclosure. The Custodian certified that he responded in writing on November 17, 2014, denying access to the responsive records pursuant to N.J.S.A. 47:1A-1.1.

The Custodian argued that he appropriately denied access because the records meet the two-prong test of a criminal investigatory exemption: the records, held by the New Jersey State Police (“NJSP”), pertained to a criminal investigation and no Attorney General Guidelines required the records to be made, maintained, or kept on file. *Citing O’Shea v. Twp. of West Milford*, 410 N.J. Super. 371, 465-55 (App. Div. 2009)(holding that “use of force” reports are subject to OPRA because the Attorney General’s Guidelines require their creation).

Regarding autopsy reports, the Custodian concedes that the actual reports (not to include the photographs and physical specimens) do not meet the criminal investigatory exemption because those records are required to be made according to N.J.S.A. 52:17B-88. *See Shuttleworth v. City of Camden*, 258 N.J. Super. 573 (App. Div. 1992). The Custodian certified that he would need additional time to obtain the autopsy report because it is not in his possession. The Custodian stated that he would forward same to the Complainant, along with an updated OPRA receipt, once he is in possession of same. Additionally, the Custodian stated that he would provide certifications to memorialize this disclosure to the GRC.

Regarding external reports, the Custodian certified that he interpreted this portion of the request to seek criminal investigation reports that are generated by outside agencies. However, the Custodian argued that “external reports” are not specific, identifiable government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). *See also Spectraserve, Inc. v. Middlesex Cnty. Util. Auth.*, 416 N.J. Super. 565, 576 (App Div. 2010).

Additional Submissions:

On February 4, 2015, the Complainant noted, via letter to the GRC, that he was satisfied with the Custodian’s change in stance on the autopsy report. However, the Custodian disputed the remainder of the Custodian’s denial of access. The Complainant reiterated from the Denial of Access Complaint that OPRA does not allow a custodian to withhold records from an investigation once it has concluded. N.J.S.A. 47:1A-3(a). The Complainant asserted that the “Baby Bones” case has been closed.

The Complainant asserted that the Custodian appeared to be relying on the Superior Court's decision in Grossman v. Ocean Cnty. Prosecutor Office, 2013 N.J. Super. Unpub. Lexis 1999 (July 26, 2013), to support his denial of access. The Complainant noted that there, some of the records provided to the plaintiff are similar to those at issue here. Specifically, defendants disclosed documents entered into evidence during the subject criminal trial. The Complainant asserted that he received no such records.

Finally, the Complainant contended that there is a strong public interest in disclosure of the records. The Complainant noted that he is a journalist at the Center for Investigative Reporting and is preparing a story for a national audience on the difficulty of law enforcement to investigate crimes similar to the "Baby Bones" case. The Complainant also noted that the "Baby Bones" story garnered national attention on a 2009 episode of "America's Most Wanted."

### Analysis

#### Validity of Request

The New Jersey Appellate Division has held that:

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

MAG, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

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

Id. at 549 (emphasis added).

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. at 549 (emphasis added). Bent, 381

N.J. Super. at 37;<sup>5</sup> NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008), the complainant filed an OPRA request for two entire prosecutor's office files. The Council relied upon MAG, 375 N.J. Super. at 546, Bent, 381 N.J. Super. at 37, and Asarnow v. Dep't of Labor, GRC Complaint No. 2006-24 (May 2006), in determining that the request was overbroad and a blanket request for a class of various documents rather than a request for a specific government record. As such, the Council found that the custodian met her burden of proof in denying access to the responsive records.

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking "[a]ny and all documents and evidence" relating to an investigation being conducted by the Somerset County Prosecutor's Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in [MAG], [Bent] and the Council's decisions in [Asarnow, GRC 2006-24] and [Morgano, GRC 2007-190].

Here, a portion of the Complainant's OPRA request sought "all documents" from the "Baby Bones" case and listed several types of records to include "external reports." As in Feiler-Jampel, GRC 2007-190, the Council has repeatedly determined that requests for all documents from a particular file or investigation are invalid. *See also* Randazzo-Thompson v. City of Vineland (Cumberland), GRC Complaint No. 2010-76 (May 2011); Bragg v. NJ Dep't of Corrections, GRC Complaint No. 2010-145 (March 2011); Bradley-Williams v. Atlantic Cnty. Jail (Atlantic), GRC Complaint No. 2011-232 (December 2012). Additionally, the GRC is satisfied that the term "external reports" does not sufficiently identify responsive records with specificity.

Therefore, because the portion of the Complainant's OPRA request seeking "all documents" related to the "Baby Bones" investigation and "external reports" is a blanket request for a class of various documents rather than a request for specifically named or identifiable government records, that portion of the request is invalid under OPRA. The Custodian had no legal duty to research his records to locate records potentially responsive to these portions of the Complainant's request. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Feiler-Jampel, GRC 2007-190.

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<sup>5</sup> Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

## 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.

Criminal investigatory records are exempt from disclosure. N.J.S.A. 47:1A-1.1. A criminal investigatory record is defined as “. . . a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding . . .” Id. For a record to be exempt from disclosure under OPRA as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1, that record must meet both prongs of a two-prong test: that is, “‘not be required by law to be made,’ and the record must ‘pertain[] to any criminal investigation or related civil enforcement proceeding.’” O’Shea, 410 N.J. Super. 371.

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 Dep’t of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). 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.” *See also* Solloway v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-39 (January 2013); Reitzler v. Egg Harbor Police Dep’t (Atlantic), GRC Complaint No. 2011-85 (January 2013); Hwang v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-348 (January 2013).

### Autopsy Reports

In limited prior decisions regarding the disclosability of autopsy reports, the Council has determined that same were exempt as criminal investigatory records. Leak v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009); Crook v. Atlantic Cnty. Prosecutor’s Office, GRC Complaint No. 2010-92 (March 2011); Lado v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2010-102 (May 2011). However, the Council made those decisions without knowledge of the requirement that the reports must be created pursuant to N.J.S.A. 52:17B-88. Specifically, this statute requires that “[a] detailed description of the findings written during the progress of such autopsy and the conclusions drawn therefrom shall thereupon be filed in the offices of the State Medical Examiner, the county medical examiner and the county prosecutor.” Id.

Thus, it stands to reason that a reversal of the Council’s past holdings on autopsy reports is warranted based on their requirement to be made under N.J.S.A. 52:17B-88. Specifically, autopsy reports generally are not exempt as criminal investigatory records by virtue of the fact that they do not meet the two-prong test contemplated by both OPRA and precedential case law. O’Shea, 410 N.J. Super. at 380-381. However, the GRC is not prepared to determine that

autopsy reports must be disclosed in their entirety going forward, as certain information contained therein may fall within other exemptions not contemplated herein.

In the instant matter, the Custodian initially denied access to the responsive autopsy report under the criminal investigatory exemption. The Custodian subsequently conceded that N.J.S.A. 52:17B-88 requires the creation of autopsy reports and that the responsive report did not meet the criminal investigatory exemption. The Custodian stated that he needed additional time to retrieve the report because it was not in his possession. However, there is no evidence in the record that the Custodian ever retrieved and forwarded the report to the Complainant.

Additionally, to the extent that the medical examiner's photographs and physical specimens exist, they clearly fall within existing exemptions at N.J.S.A. 47:1A-1.1 and Executive Order No. 9 (Gov. Hughes, 1963) ("EO 9") (exempting access to medical examiner photographs/videotapes taken at the scene of a death or during an autopsy and records concerning morbidity or mortality of named persons respectively). The GRC is satisfied that the Custodian's denial of those records was lawful.

Therefore, in light of the statutory requirement mandating the creation of autopsy reports, which was not previously contemplated in the Council's prior decisions, the Custodian unlawfully denied access to same because autopsy reports do not meet the two-prong test necessary to be considered a criminal investigatory record. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; N.J.S.A. 52:17B-88; O'Shea, 410 N.J. Super. at 380-381. However, the Custodian lawfully denied access to the corresponding photographs and specimens. N.J.S.A. 47:1A-1.1; EO 9. The Custodian must disclose the responsive autopsy report to the Complainant. If he has already disclosed the report to the Complainant, he must certify to the date of disclosure and provide supporting documentation.

#### Findings, Field, and Toxicology Reports

In Grossman, 2013 N.J. Super. Unpub. LEXIS 1999 at 24,<sup>6</sup> the court stated that long-standing case law supports that the criminal investigatory exemption survives the conclusion of a criminal matter. *See also Janeczko*, GRC 2002-79 *et seq.* The court upheld defendant's denial of access to several categories of records under the criminal investigatory exemption to include the contents of the investigation file and various lab reports. Grossman, 2013 N.J. Super. Unpub. LEXIS 1999 at 25. However, the court provided access to a limited number of records based on plaintiff's common law request.<sup>7</sup>

In this matter, the Complainant sought findings, field, and toxicology reports. The Complainant argued in the Denial of Access Complaint that the Custodian unlawfully denied access to the responsive records because the "Baby Bones" case was closed; thus, the records were no longer exempt under the criminal investigatory exemption. The Complainant noted that, even if the exemption applied, the Custodian had an obligation to disclose the records with redaction. In the SOI, however, the Custodian argued that he properly denied access to the

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<sup>6</sup> The GRC notes that although the court addressed the criminal investigatory exemption in Grossman, there is no evidence to support that the Custodian relied on this case for his denial.

<sup>7</sup> Pursuant to N.J.S.A. 47:1A-7, the GRC only has the authority to adjudicate requests made pursuant to OPRA.

responsive records because they met the two-prong test necessary to designate a record as criminal investigatory in nature. In a supplemental submission, the Complainant refuted this argument, contending that the Custodian appeared to be relying on Grossman v. Ocean Cnty. Prosecutor Office, 2013 N.J. Super. Unpub. LEXIS 1999 (July 26, 2013) to support his denial of access. The Complainant noted that Grossman required disclosure of certain evidence documents but that he did not receive similar records here.

However, the evidence of record indicates that the responsive reports fall within the criminal investigatory exemption at N.J.S.A. 47:1A-1.1. The court's analysis in Grossman, although not dispositive as an unpublished opinion, is instructive here. Specifically, the court upheld defendants' denial of the investigative file containing reports either similar or comparable to the findings and field reports at issue here. Further, although the GRC has reversed itself on autopsy reports, there is no evidence suggesting that toxicology reports are similarly required by law to be made or maintained. For this reason, the Council's decision in Crook, GRC 2010-92, upholding a denial of access to toxicology reports, is applicable here. The GRC is thus satisfied that the Custodian properly denied access to these records.

Accordingly, the requested findings, field and toxicology reports are criminal investigatory records, and 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, GRC 2002-79 *et seq*; Crook, GRC 2010-92; Grossman, 2013 N.J. Super. Unpub. LEXIS 1999.

### **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. Because the portion of the Complainant's OPRA request seeking "all documents" related to the "Baby Bones" investigation and "external reports" is a blanket request for a class of various documents rather than a request for specifically named or identifiable government records, that portion of the request is invalid under OPRA. The Custodian had no legal duty to research his records to locate records potentially responsive to these portions of the Complainant's request. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008).

2. In light of the statutory requirement mandating the creation of autopsy reports, which was not previously contemplated in the Council's prior decisions, the Custodian unlawfully denied access to same because autopsy reports do not meet the two-prong test necessary to be considered a criminal investigatory record. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; N.J.S.A. 52:17B-88; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 380-381 (App. Div. 2009). However, the Custodian lawfully denied access to the corresponding photographs and specimens. N.J.S.A. 47:1A-1.1; Executive Order No. 9 (Gov. Hughes, 1963). The Custodian must disclose the responsive autopsy report to the Complainant. If he has already disclosed the report to the Complainant, he must certify to the date of disclosure and provide supporting documentation.
3. **The Custodian shall comply with item No. 2 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,<sup>8</sup> to the Executive Director.<sup>9</sup>**
4. The requested findings, field, and toxicology reports are criminal investigatory records, and 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 Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Crook v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2010-92 (March 2011); Grossman v. Ocean Cnty. Prosecutor Office, 2013 N.J. Super. Unpub. Lexis 1999 (July 26, 2013).
5. 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: Frank F. Caruso  
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Reviewed By: Joseph D. Glover  
Executive Director

June 23, 2015

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<sup>8</sup> "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."

<sup>9</sup> 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.