



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

**FINAL DECISION**

**May 23, 2017 Government Records Council Meeting**

Regino De La Cruz, Esq.  
Complainant

Complaint No. 2015-14

v.

City of Union City (Hudson)  
Custodian of Record

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to comply with the Council’s April 25, 2017 Interim Order because she failed to respond timely to the Interim Order and did not seek an extension.
2. Although the Custodian unlawfully denied access to the records identified in the *in camera* review and failed to timely respond to the Council’s April 25, 2017 Interim Order, the Custodian ultimately provided the Complainant with the identified records in accordance with the 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 23<sup>rd</sup> Day of May, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 30, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 23, 2017 Council Meeting**

**Regino De La Cruz, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-14**

v.

**City of Union City (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “Police accident and incident reports” for the past three years concerning a certain property in Union City.<sup>3</sup>

**Custodian of Record:** Erin Knoedler<sup>4</sup>  
**Request Received by Custodian:** December 17, 2014  
**Response Made by Custodian:** December 29, 2014  
**GRC Complaint Received:** January 22, 2015

**Records Submitted for *In Camera* Examination:** Responsive records withheld from disclosure on the grounds that they are criminal investigatory records under N.J.S.A. 47:1A-1.1.

**Background**

April 25, 2017 Council Meeting:

At its April 25, 2017 public meeting, the Council considered the March 21, 2017 *In Camera* 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 complied with the Council’s December 13, 2016 Interim Order because she timely provided nine (9) copies of the requested records, along with a signed certification.
2. In addition to the records identified in the above table, the Custodian improperly denied access to incident reports pertaining to matters related to the Division of Alcoholic Beverage Control, citing the criminal investigatory exemption. N.J.S.A. 47:1A-6. Nonetheless, such records are exempt from access pursuant to N.J.S.A.

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

<sup>2</sup> Represented by Sheri K. Siegelbaum, Esq., Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> At the time of the OPRA request, the Custodian of Record was Dominick Cantatore.

47:1A-9(a) and N.J.A.C. 13:2-29.2(a), which exempt investigative records or reports created by municipal law enforcement agencies on behalf of the Division of Alcoholic Beverage Control, as well as initial reports alleging violations. Additionally, those incident reports identified as “SICK” or “SICK CALL” were lawfully withheld from disclosure pursuant to Executive Order No. 26 (Gov. McGreevey, 2002) and Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated January 29, 2013), as they only pertained to medical incidents and not criminal activity. The remaining incident reports were lawfully withheld from disclosure in accordance with North Jersey Media Group, Inc. (“NJMG”) v. Twp. of Lyndhurst, 441 N.J. Super. 70, 103-05 (App. Div. 2015) appeal docketed, A-35-15 North Jersey Media Group, Inc. v. Twp. of Lyndhurst (076184), as they pertained to criminal investigations. N.J.S.A. 47:1A-1.1.

3. **The Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.<sup>5</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian’s compliance with the Council’s Interim Order.

#### Procedural History:

On April 27, 2017, the Council distributed its Interim Order to all parties.

On May 5, 2017, the Custodian responded to the Council’s Interim Order. The Custodian certified that she provided the Complainant with the responsive records in accordance with the Interim Order.

#### Analysis

#### Compliance

At its April 25, 2017 meeting, the Council ordered the Custodian to produce the responsive records identified in the Interim Order and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. That same day, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on May 4, 2017.

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<sup>5</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 May 5, 2017, the sixth (6<sup>th</sup>) business day after receipt of the Council's Order, the Custodian responded to the Council's Interim Order, providing evidence that records were delivered to the Complainant as well as a certified confirmation of compliance.

Therefore, the Custodian failed to comply with the Council's April 25, 2017 Interim Order because she failed to respond timely to the Interim Order and did not seek an extension.

### **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 records identified in the *in camera* review and failed to respond timely to the Council's April 25, 2017 Interim Order, the Custodian ultimately provided the Complainant with the identified records in accordance with the 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 failed to comply with the Council's April 25, 2017 Interim Order because she failed to respond timely to the Interim Order and did not seek an extension.
2. Although the Custodian unlawfully denied access to the records identified in the *in camera* review and failed to timely respond to the Council's April 25, 2017 Interim Order, the Custodian ultimately provided the Complainant with the identified records in accordance with the 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: Samuel A. Rosado  
Staff Attorney

May 16, 2017



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**

**April 25, 2017 Government Records Council Meeting**

Regino De La Cruz, Esq.  
Complainant

Complaint No. 2015-14

v.

City of Union City (Hudson)  
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the March 21, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s December 13, 2016 Interim Order because she timely provided nine (9) copies of the requested records, along with a signed certification.
2. Pursuant to N.J.A.C. 5:105-2.10(a), the Council, “at its own discretion, may reconsider any decision it renders.” The GRC acknowledges that it made a mistake in law in requiring disclosure of police incident reports containing exempt medical information. The GRC thus reconsiders this matter of its own volition in order to amend the Council’s March 28, 2017 Interim Order.
3. In addition to the records identified in the above table, the Custodian improperly denied access to incident reports pertaining to matters related to the Division of ABC, citing the criminal investigatory exemption. N.J.S.A. 47:1A-6. Nonetheless, such records are exempt from access pursuant to N.J.S.A. 47:1A-9(a) and N.J.A.C. 13:2-29.2(a), which exempt investigative records or reports created by municipal law enforcement agencies on behalf of the Division of Alcoholic Beverage Control, as well as initial reports alleging violations. Additionally, those incident reports identified as “SICK” or “SICK CALL” were lawfully withheld from disclosure pursuant to Executive Order No. 26 (Gov. McGreevey, 2002) and Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated January 29, 2013), as they only pertained to medical incidents and not criminal activity. The remaining incident reports were lawfully withheld from disclosure in accordance with North Jersey Media Group, Inc. (“NJMG”) v. Twp. of Lyndhurst, 441 N.J. Super. 70, 103-05 (App. Div. 2015) appeal docketed, A-35-15 North Jersey Media Group, Inc. v. Twp. of Lyndhurst (076184), as they pertained to criminal investigations. N.J.S.A. 47:1A-1.1.



4. **The Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.<sup>1</sup>**
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 25<sup>th</sup> Day of April, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 27, 2017**

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<sup>1</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**

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

**Regino De La Cruz, Esq.<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2015-14**

v.

**City of Union City (Hudson)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** “Police accident and incident reports” for the past three years concerning a certain property in Union City.<sup>3</sup>

**Custodian of Record:** Erin Knoedler<sup>4</sup>  
**Request Received by Custodian:** December 17, 2014  
**Response Made by Custodian:** December 29, 2014  
**GRC Complaint Received:** January 22, 2015

**Records Submitted for *In Camera* Examination:** Responsive records withheld from disclosure on the grounds that they are criminal investigatory records under N.J.S.A. 47:1A-1.1.

**Background**

**December 13, 2016 Council Meeting:**

At its December 13, 2016 public meeting, the Council considered the December 6, 2016 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. In light of the court’s ruling in North Jersey Media Group, Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 105-106 (App. Div. 2015) appeal docketed, A-35-15 North Jersey Media Group, Inc. v. Twp. of Lyndhurst (076184), the GRC cannot accept the Custodian’s blanket denial of access to police accident and incident reports pertaining to a specified property on the grounds of being criminal investigatory records. In accordance thereof, the GRC must conduct an *in camera* review to determine whether the withheld records

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

<sup>2</sup> Represented by Sheri K. Siegelbaum, Esq., Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> At the time of the OPRA request, the Custodian of Record was Dominick Cantatore.

fall under the criminal investigatory exemption. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested records, which shall include all records withheld by the Custodian, in unredacted form (see No. 1 above). If any records provided to the Complainant were redacted, the Custodian must provide those records together with a duplicate record in unredacted form and a document or redaction index<sup>6</sup>. The Custodian must also execute and provide the GRC a legal certification, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> that the records provided are all the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The 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 December 14, 2016, the Council distributed its Interim Order to all parties. On December 21, 2016, the Custodian requested an extension of time to respond to the Interim Order. The GRC granted an extension until January 9, 2017. The Custodian responded to the Council's Interim Order on January 9, 2017, delivering to the GRC in a sealed envelope nine (9) copies of the requested records for an *in camera* inspection, along with a signed certification.

### Analysis

#### Compliance

At its December 13, 2016 meeting, the Council ordered the Custodian to deliver to the GRC nine (9) copies of the requested records for an *in camera* inspection. The Council also ordered the Custodian to submit certified confirmation of compliance to the Executive Director. On December 14, 2016, 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 December 21, 2016.

On December 21, 2016 the Custodian's Counsel requested and was granted an extension of time to respond to the Council's Interim Order; therefore, the return date was moved to January 9, 2017.

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<sup>5</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>6</sup> The document or redaction index must identify the record and/or each redaction asserted and the lawful basis for each denial.

<sup>7</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."

On January 9, 2017, the Custodian delivered nine (9) copies of the requested records, an index indicating the basis for withholding each record, and a legal certification with respect to paragraph (5) of the Interim Order.

Therefore, the Custodian complied with the Council's December 13, 2016 Interim Order because she timely provided nine (9) copies of the requested records, along with a signed certification.

### **Reconsideration**

Pursuant to N.J.A.C. 5:105-2.10(a), the Council, "at its own discretion, may reconsider any decision it renders." The GRC acknowledges that it made a mistake in law in requiring disclosure of police incident reports containing exempt medical information. The GRC thus reconsiders this matter of its own volition in order to amend the Council's March 28, 2017 Interim Order.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

#### **Criminal Investigatory Records**

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 Appellate Division recently discussed the definition of a criminal investigatory record under OPRA, specifically interpreting what is "required by law" to be made, maintained, or kept on file. North Jersey Media Group, Inc. ("NJMG") v. Twp. of Lyndhurst, 441 N.J. Super. 70, 103 (App. Div. 2015) appeal docketed, A-35-15 North Jersey Media Group, Inc. v. Twp. of Lyndhurst (076184). The court also evaluated how and when a document "pertains" to a criminal investigation. Id. The court held that certain documents, such as computer-aided dispatch reports or daily activity logs, may contain specific entries that pertain to a criminal investigation, regardless of whether an investigation has commenced. Id. at 105. In contrast, the court highlighted examples of police activity that would not pertain to a criminal investigation, such as assisting an injured citizen in an accident. Id. Thus, police incident reports are not *prima facie* criminal investigatory records if the records do not pertain to a criminal investigation.

#### **Incident Reports Pertaining to the Division of Alcoholic Beverage Control**

OPRA states that:

[t]he provisions of this act . . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

N.J.S.A. 47:1A-9(a).

Additionally, the Division of Alcoholic Beverage Control (“Division of ABC”) has promulgated regulations concerning the confidentiality of records pertaining to enforcement of its rules, stating:

(a) [f]or purposes of investigative confidentiality and integrity, the following records constitute "confidential records" of this Division and shall not be available for inspection or photocopy: 1. All initial reports received concerning alleged violations; 2. All investigative records or reports prepared by Division personnel, or prepared on behalf of this Division by other duly authorized law enforcement agencies of municipal, State or Federal governments, or their agencies or subdivisions . . . .

N.J.A.C. 13:2-29.2.

*Incident Reports Pertaining to Medical Emergencies*

Executive Order 26 provides that:

The following records shall not be considered to be government records subject to access pursuant to [OPRA]: *Information . . . relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation . . .*

[Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”).]

In Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated January 29, 2013), the complainant sought access to an operational report describing a police response to a medical emergency. The complainant argued that the record should be released inasmuch as it relates to criminal activity, but with redactions made to medical information pursuant to EO 26. After conducting an *in camera* review, the Council found that the requested report only contained information pertaining to a medical incident, and nothing related to criminal activity. Therefore, the Council held that the record was exempt from disclosure in its entirety under EO 26. *See also* Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008) (Council held that Emergency Medical Services incident reports are exempt from disclosure pursuant to EO 26).

In the instant matter the GRC conducted an *in camera* examination on the submitted records, which largely consisted of police incident reports pertaining to or located near a specified address.<sup>8</sup> The results of the examination are set forth in the following table:

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>9</sup></b>
COUC000114	Incident Report #14056739/1	Water Leak	<u>N.J.S.A.</u> 47:1A-1.1  Criminal investigatory record.	The Custodian unlawfully denied access to the record and must disclose same. <u>NJMG</u> , 441 <u>N.J. Super.</u> at 105-106.
COUC000153	Incident Report #14009381/1	Lost Property	<u>N.J.S.A.</u> 47:1A-1.1  Criminal investigatory record.	The Custodian unlawfully denied access to the record and must disclose same. <u>NJMG</u> , 441 <u>N.J. Super.</u> at 105-106.
COUC000198	Incident Report #13033967/1	Dangerous Condition	<u>N.J.S.A.</u> 47:1A-1.1  Criminal investigatory record.	The Custodian unlawfully denied access to the record and must disclose same. <u>NJMG</u> , 441 <u>N.J. Super.</u> at 105-106.

<sup>8</sup> A review of the incident reports provided indicates that a substantial portion pertain to incidents occurring after the date of the request, December 17, 2014, or prior to the earliest requested date, December 17, 2011. The GRC disregarded those records as not responsive to the Complainant's OPRA request.

<sup>9</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

COUC000203	Incident Report #13002656/1	Lost Bar Card	<u>N.J.S.A.</u> 47:1A-1.1  Criminal investigatory record.	The Custodian unlawfully denied access to the record and must disclose same. <u>NJMG</u> , 441 <u>N.J. Super.</u> at 105-106.
COUC000232 COUC000233	Incident Report #11084734/0	Lost Property	<u>N.J.S.A.</u> 47:1A-1.1  Criminal investigatory record.	The Custodian unlawfully denied access to the record and must disclose same. <u>NJMG</u> , 441 <u>N.J. Super.</u> at 105-106.

In addition to the records identified in the above table, the Custodian improperly denied access to incident reports pertaining to matters related to the Division of ABC, citing the criminal investigatory exemption. N.J.S.A. 47:1A-6. Nonetheless, such records are exempt from access pursuant to N.J.S.A. 47:1A-9(a) and N.J.A.C. 13:2-29.2(a), which exempt investigative records or reports created by municipal law enforcement agencies on behalf of the Division of ABC, as well as initial reports alleging regulatory violations. Additionally, those incident reports identified as “SICK” or “SICK CALL” were lawfully withheld from disclosure pursuant to EO 26 and Rivera, GRC 2010-208, as they only pertained to medical incidents and not criminal activity. The remaining incident reports were lawfully withheld from disclosure in accordance with NJMG, 441 N.J. Super. at 103-05, as they pertained to criminal investigations. N.J.S.A. 47:1A-1.1.

**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 complied with the Council’s December 13, 2016 Interim Order because she timely provided nine (9) copies of the requested records, along with a signed certification.
2. Pursuant to N.J.A.C. 5:105-2.10(a), the Council, “at its own discretion, may reconsider any decision it renders.” The GRC acknowledges that it made a mistake in law in requiring disclosure of police incident reports containing exempt medical information. The GRC thus reconsiders this matter of its own volition in order to amend the Council’s March 28, 2017 Interim Order.

3. In addition to the records identified in the above table, the Custodian improperly denied access to incident reports pertaining to matters related to the Division of ABC, citing the criminal investigatory exemption. N.J.S.A. 47:1A-6. Nonetheless, such records are exempt from access pursuant to N.J.S.A. 47:1A-9(a) and N.J.A.C. 13:2-29.2(a), which exempt investigative records or reports created by municipal law enforcement agencies on behalf of the Division of Alcoholic Beverage Control, as well as initial reports alleging violations. Additionally, those incident reports identified as “SICK” or “SICK CALL” were lawfully withheld from disclosure pursuant to Executive Order No. 26 (Gov. McGreevey, 2002) and Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated January 29, 2013), as they only pertained to medical incidents and not criminal activity. The remaining incident reports were lawfully withheld from disclosure in accordance with North Jersey Media Group, Inc. (“NJMG”) v. Twp. of Lyndhurst, 441 N.J. Super. 70, 103-05 (App. Div. 2015) appeal docketed, A-35-15 North Jersey Media Group, Inc. v. Twp. of Lyndhurst (076184), as they pertained to criminal investigations. N.J.S.A. 47:1A-1.1.
4. **The Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.**<sup>10</sup>
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: Samuel A. Rosado  
Staff Attorney

April 18, 2017

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<sup>10</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  
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

December 13, 2016 Government Records Council Meeting

Regino De La Cruz, Esq.  
Complainant

Complaint No. 2015-14

v.

City of Union City (Hudson)  
Custodian of Record

At the December 13, 2016 public meeting, the Government Records Council ("Council") considered the December 6, 2016 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. In light of the court's ruling in North Jersey Media Group, Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 105-106 (App. Div. 2015) appeal docketed, A-35-15 North Jersey Media Group, Inc. v. Twp. of Lyndhurst (076184), the GRC cannot accept the Custodian's blanket denial of access to police accident and incident reports pertaining to a specified property on the grounds of being criminal investigatory records. In accordance thereof, the GRC must conduct an *in camera* review to determine whether the withheld records fall under the criminal investigatory exemption. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested records, which shall include all records withheld by the Custodian, in unredacted form (see No. 1 above). If any records provided to the Complainant were redacted, the Custodian must provide those records together with a duplicate record in unredacted form and a document or redaction index<sup>2</sup>. The Custodian must also execute and provide the GRC a legal certification, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are all the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>2</sup> The document or redaction index must identify the record and/or each redaction asserted and the lawful basis for each denial.

<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."



3. 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 13<sup>th</sup> Day of December, 2016

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: December 14, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 13, 2016 Council Meeting**

**Regino De La Cruz, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-14**

v.

**City of Union City (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “Police accident and incident reports” for the past three years concerning a certain property in Union City.<sup>3</sup>

**Custodian of Record:** Dominick Cantatore  
**Request Received by Custodian:** December 17, 2014  
**Response Made by Custodian:** December 29, 2014  
**GRC Complaint Received:** January 22, 2015

**Background**<sup>4</sup>

**Request and Response:**

On December 17, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 29, 2014, the seventh (7<sup>th</sup>) business day following the receipt of the request, the Assistant Municipal Clerk wrote to the Complainant, advising that the records at issue were not considered public records. In reply, the Complainant advised that he was willing to limit the timeframe of his request to the preceding three years.<sup>5</sup> He also withdrew his request for arrest reports, admitting to a “typo” in his original request. On January 6, 2015, the Clerk responded in writing, denying the request on the basis that the records are protected from disclosure pursuant to the 2014 edition of the “New Jersey Law Enforcement Handbook – Attorney General Guidelines, Directives, and Procedures Annotated, Volume #3” (“Handbook”). The Clerk also released a “CAD report,” which is an 11-page index that discloses by case number hundreds of incidents, all occurring over the previous 11 years. The CAD Report lists dates, times, incident numbers, and incident types. However, the individual reports were not included.

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

<sup>2</sup> Represented by Sheri K. Siegelbaum, Esq., Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</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>5</sup> The original request sought records for a period of five years.

### Denial of Access Complaint:

On January 22, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he wanted the GRC to determine whether requested police accident/incident reports from a particular property that housed a bar were indeed public records. The Complainant contended that he reviewed a GRC handbook for Custodians and therein found no exemptions for police reports. The Complainant attached an excerpt from the Handbook that was provided to him by the Custodian, which states “incident reports” are “protected information” that cannot be released to non-police personnel without a court order, or to comply with the requirements of a statute, regulation or executive order.” Although unmentioned directly by the Complainant, it appears in the record that the Complainant stated that he sought arrest records in addition to accident and incident reports, but he rescinded that request prior to filing this complaint.

### Statement of Information:

On February 10, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the requested records were denied “in accordance with the [Handbook] Volume #3, page 645,” which provides that police incident reports are not accessible to non-police personnel, except upon Court Order or to comply with the requirements of a statute, regulation, or executive order.

### Additional Submissions:

The GRC wrote to the Complainant and Custodian on July 8, 2016, asking for a copy of the original OPRA request. On July 21, 2016, the Complaint replied by attaching a copy of his initial request. Additionally, the Complainant added that “there is no difference between police auto and non-auto incident (accident) reports. Both motor vehicle accident reports and non-motor vehicle reports that are not under criminal investigations are a public record [sic] and should be released under OPRA.”

On July 18, 2016, the GRC sought from the Custodian additional information that was missing from the SOI. The Custodian replied on January 21, 2016. However, the only additional relevant information in the amended SOI was the Custodian’s statement, which agreed with the Complainant regarding the date of the OPRA request.

## Analysis

### Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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. N.J. 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.”

Recently, the Appellate Division discussed the definition of a criminal investigatory record under OPRA, specifically interpreting what is “required by law” to be made, maintained or kept on file. North Jersey Media Group, Inc. (“NJMG”) v. Twp. of Lyndhurst, 441 N.J. Super. 70, (App. Div. 2015) appeal docketed, A-35-15 North Jersey Media Group, Inc. v. Twp. of Lyndhurst (076184). The trial court held that police records that are subject to New Jersey’s statutes and accompanying regulations on the retention and maintenance of public documents satisfies the element that they are “required by law” to be made, maintained, or kept on file. Id. at 87. Additionally, the trial court concluded that Attorney General directives pertaining to police records also satisfy the “required by law” element. The Appellate Division disagreed on both counts, holding that:

documents are "required by law to be made, maintained or kept on file," if so mandated by a statute, regulation, executive order, or judicial decision. We are not persuaded that a generic record retention policy, or an internal agency directive of a public official would suffice to satisfy the "required by law" standard with respect to criminal investigatory records.

[Id. at 97 (internal quotations omitted).]

The court also determined how and when a document “pertains” to a criminal investigation. Id. at 103. The court held that certain documents, such as CAD reports or daily activity logs, may contain specific entries that pertain to a criminal investigation, even if the records themselves are created, regardless of whether an investigation has commenced. Id. at 105. Further, the court highlighted examples of police activity that would not pertain to a criminal investigation, such as assisting an injured citizen in an accident. Id. The court concluded that the plaintiff’s request for incident reports, police reports, operation reports, and investigation reports regarding a specific police shooting are all exempt as criminal investigatory records, asserting there is no law requiring their creation or retention. Id. at 106. Alternatively, the GRC is now guided by N.J.M.G.

Here, the Complainant sought the records of a client who fell on a wet floor inside a bar. The Complainant sought to review a myriad of police reports, apparently to determine if the owners were aware of an unsafe condition. The CAD index released to the Complainant shows a list of incidents, with many appearing to involve verbal disputes, disorderly persons, thefts,

noise, ABC (“Alcoholic Beverage Control”) violations, etc. One of the listed incidents, hand marked with an “X,” indicated “dang/con” (“dangerous condition”). While some of this activity may pertain to a criminal investigation as defined under N.J.M.G., other activity may not. 441 N.J. Super. at 106. Without additional information, the GRC is unable to make a determination.

In Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council,<sup>6</sup> which dismissed the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The Court stated, “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. at 354. The Court also stated that:

[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

. . .

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id. at 355.]

Therefore, in light of the court’s ruling in N.J.M.G., the GRC cannot accept the Custodian’s blanket denial of access to police accident and incident reports pertaining to the specified property on the grounds of being criminal investigatory records. 441 N.J. Super. 105-106. In accordance therewith, the GRC must conduct an *in camera* review to determine whether the withheld records fall under the criminal investigatory exemption. Paff, 379 N.J. Super. at 355.

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<sup>6</sup> Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

## **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 further adjudication of this complaint.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. In light of the court's ruling in North Jersey Media Group, Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 105-106 (App. Div. 2015) appeal docketed, A-35-15 North Jersey Media Group, Inc. v. Twp. of Lyndhurst (076184), the GRC cannot accept the Custodian's blanket denial of access to police accident and incident reports pertaining to a specified property on the grounds of being criminal investigatory records. In accordance thereof, the GRC must conduct an *in camera* review to determine whether the withheld records fall under the criminal investigatory exemption. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested records, which shall include all records withheld by the Custodian, in unredacted form (see No. 1 above). If any records provided to the Complainant were redacted, the Custodian must provide those records together with a duplicate record in unredacted form and a document or redaction index<sup>8</sup>. The Custodian must also execute and provide the GRC a legal certification, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> that the records provided are all the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The 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: Samuel A. Rosado  
Staff Attorney

Dated: December 6, 2016

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<sup>7</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>8</sup> The document or redaction index must identify the record and/or each redaction asserted and the lawful basis for each denial.

<sup>9</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."