



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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Commissioner

FINAL DECISION

July 25, 2017 Government Records Council Meeting

Anthony Walker
Complainant

Complaint No. 2016-06

v.

City of Newark Division of Police (Essex)
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Detective Olga Perez’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s request, either granting access, denying access, seeking clarification, or requesting another extension of time within the extended time frame, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian lawfully denied access to the statement taken from Dominique Young on February 13, 2010, in connection with incident report #C1001003 and sought by the Complainant in his request dated February 24, 2015, because said witness statement constitutes a criminal investigatory record that is exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. *See* N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 2017 N.J. LEXIS 745 (N.J. July 11, 2017). *See also* 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), Parker v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2009-225 (October 2010) and Marciante v. N.J. Dep’t of Env’tl. Prot., GRC Complaint No. 2013-171 (April 2014).



4. Because the Complainant did not submit his March 16, 2015 OPRA request to the Custodian, the Custodian certified that he never received said request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification, this section of the complaint is without any reasonable factual basis to pursue. N.J.S.A. 47:1A- 5(g).
5. Detective Olga Perez lawfully denied access to requested item number 1 of the Complainant's March 31, 2015 OPRA request because said witness statement constitutes a criminal investigatory record that is exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 2017 N.J. LEXIS 745 (N.J. July 11, 2017). See also 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), Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010) and Marciante v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2013-171 (April 2014).
6. Detective Olga Perez did not unlawfully deny access to the 9-1-1 audio recordings responsive to requested item number 2 of the Complainant's March 31, 2015 request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian, however, certified that a copy of the CAD report responsive to this request item was disclosed to the Complainant via police correspondence dated May 29, 2015. N.J.S.A. 47:1A-6.
7. The Custodian lawfully denied access to requested item number 1 of the Complainant's October 27, 2015 OPRA request because said witness statement constitutes a criminal investigatory record that is exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 2017 N.J. LEXIS 745 (N.J. July 11, 2017). See also 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), Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010) and Marciante v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2013-171 (April 2014).
8. The Custodian did not unlawfully deny access to the record responsive to requested item number 2 of the Complainant's October 27, 2015 request because the Custodian certified that such record does not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Notwithstanding the Custodian's "deemed denial," the Custodian did not unlawfully deny the Complainant access to requested item number 3 of his October 27, 2015.

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 25th Day of July, 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: July 28, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Anthony Walker¹
Complainant**

GRC Complaint No. 2016-6

v.

**City of Newark Division of Police (Essex)²
Custodial Agency**

Records Relevant to Complaint:

Request dated February 24, 2015

Copies of the following record “connected with and pertaining to Incident report #C10011003 filed by Newark police officer Ramon Rosado (#10163) and his partner officer Alberto Mendez (#7210) on February 13, 2010:

- The signed statement taken from Dominique Young on February 13, 2010 in connection to incident report #C1001003” (*sic*).³

Request dated March 16, 2015

This was merely a duplicate copy of the February 24, 2015 request with the date crossed out and replaced with the date “March 16, 2015” and the notation “2nd request.”

Request dated March 31, 2015

Copies of:

1. “The sworn statement of Dominique Young on 2-13-10 taken by Newark Police in connection with the incident report.”
2. “Newark Police dispatch records when Newark Police were called/dispatched to 579 13th, Newark, NJ 2nd floor on the dates of February 11, 2010 between 4:00 p.m. to 10:00 p.m. and on February 13, 2010 between the hours of 2:00 p.m. - 7:00 p.m.” (*sic*).

¹ No legal representation listed on record.

² Represented by Willie L. Parker, Esq., (Newark, NJ).

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

Request dated October 27, 2015

Copies of the following records “connected to incident report #C10011003:

1. The signed statement of Dominique Young of February 13, 2010 that gave birth to the above incident report.
2. The signed statement of Simone Walker on February 13, 2010 in connection to that very same incident report.
3. Newark Police dispatch records when Newark Police were dispatched to 579 13th Newark, NJ 2nd floor on February 11, 2010 between the hours of 4:00 p.m. and 10:00 p.m.” (*sic*).⁴

Custodian of Record: Kenneth Louis

Requests Received by Custodian: March 11, 2015 and November 19, 2015

Responses Made by Custodian: March 18, 2016 and December 28, 2015

Request Received by Detective Olga Perez: April 16, 2015

Response Made by Detective Olga Perez: May 29, 2015

GRC Complaint Received: January 11, 2016

Background⁵

Requests and Responses:

On February 24, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Newark Police seeking the above-mentioned record.⁶ The Custodian received the request on March 11, 2015, and responded in writing on March 18, 2015, the fifth (5th) business day following receipt of said request, informing the Complainant that the record relevant to this complaint was denied as a criminal investigatory record.

On March 16, 2015, the Complainant submitted a duplicate copy of the February 24, 2015 OPRA request with the date crossed out and replaced with the date “March 16, 2015” and the notation “2nd request.” The Custodian has no record of receiving this second request.

On March 31, 2015, the Complainant submitted an OPRA request to the Newark Police seeking the above mentioned records. The request was received by Detective Olga Perez in the Office of the Police Director, Advocate/Legal Affairs Unit, on April 16, 2015. On May 29, 2015, the thirtieth (30th) business day following receipt of said request, Detective Perez responded in writing, informing the Complainant that the request for the sworn statement of

⁴ There was another record that was requested that is not relevant to this complaint.

⁵ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁶ The copy of the request that the Complainant attached to the complaint is date stamped March 11, 2015, by the Division of Police.

Dominique Young was denied because it is part of an investigation. Regarding the dispatch records, Detective Perez informed the Complainant that the audio recording is nonexistent because it was purged after a period of thirty (3) days; however, she stated that she was forwarding to the Complainant a copy of the Computer Aided Dispatch (“CAD”) report.

On October 27, 2015, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. The Custodian received the request on November 19, 2015, and responded in writing on the same date, informing the Complainant that he would commence a search of the records responsive to the request and would need until December 3, 2015, to address the request. On December 3, 2015, the Custodian requested an extension of time until December 15, 2015. Subsequently, on December 13, 2015, the Custodian requested an extension of time until December 23, 2015. Thereafter, on December 28, 2015, the Custodian responded to the request by providing the Complainant with a copy of the CAD report for Incident No. C10011003 and denying the Complainant the balance of the records relevant to this complaint as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On January 11, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant alleges that he was unlawfully denied the following records:

1. The signed statement of Dominique Young on February 13, 2010, in connection with incident report #C10011003.
2. The signed statement of Simone Walker on February 13, 2010, in connection with incident report #C10011003.
3. Newark Police dispatch records for February 11, 2010, between 4:00 p.m. and 10:00 p.m., when police were called to 579 13th Avenue.

The Complainant asserts that on February 24, 2015, he mailed an OPRA request for several police records to Lt. John Evangelista in the Newark Police Department’s Records Unit. The Complainant states that the records he requested are disclosable under discovery Rule 3:13. The Complainant states that on March 16, 2015, he sent out a second request for the records.

The Complainant states that he received a response from the Custodian on March 18, 2015; however, the Custodian failed to send him the “very important items.” The Complainant states that on March 31, 2015, he sent another request to Lt. Evangelista asking for the denied items. The Complainant states that on May 29, 2015, he received a response from Detective Olga Perez, who denied him the sworn statement he had requested. The Complainant states that on October 27, 2015, he again sent a request for the denied records to the Custodian. The Complainant states that on November 19, 2015, he received a response from the Custodian, informing him that the requested records were in the process of being retrieved and that they would be sent to the Complainant by December 3, 2015. The Complainant states that on December 9, 2015, he received another response from the Custodian, informing him that the

records would be sent to him by December 15, 2015. The Complainant states that on January 2, 2016, he received a denial letter from the Custodian that was dated December 28, 2015.

The Complainant asserts that the intent of OPRA is to maximize public knowledge about public affairs. The Complainant cites Mason v. City of Hoboken (no further citation). The Complainant contends that the records denied do not fall into any of the 21 categories of records exempt from disclosure, are not exempt from disclosure under federal or state law, are not deliberative, and do not contain opinions, recommendations, or advice relating to or in regard to the prosecutor's office. The Complainant also contends that there is no ongoing investigation, no court order declaring the records confidential, and no victim or witness exposed to any risk. The Complainant asserts that because there is no reason for the records to be withheld, they should be disclosed to him. The Complainant states that his narrative is a "certification in lieu of oath R: 1.4."

Statement of Information:

On February 19, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he is the custodian of records for the City of Newark pursuant to OPRA. The Custodian certifies that he received the Complainant's February 24, 2015 OPRA request on March 11, 2015, and responded in writing on March 18, 2015. The Custodian certifies that he informed the Complainant that the requested statement was denied as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. The Custodian further certifies that the Complainant attached to the complaint a duplicate copy of his February 24, 2015 request with the date crossed out and replaced with the date "March 16, 2015, 2nd request." The Custodian certifies that he has no record of receiving the second request in his office.

The Custodian certifies that on November 19, 2015 he received the Complainant's OPRA request dated October 27, 2015. The Custodian certifies that the Complainant requested: (a) the signed statement of Dominique Young of February 13, 2010 "that gave birth" to the above incident report (#C10011003); (b) the signed statement of Simone Walker on February 13, 2010, in connection to the very same incident report; (c) Newark Police dispatch records when Newark Police were dispatched to "579 13th Newark, NJ 2nd floor" on February 11, 2010, between 9:00 p.m. and 10:00 p.m.; and (d) a copy of his criminal history.

The Custodian certifies that he responded to the Complainant on November 19, 2015, informing him that the Custodian would commence a search of all relevant records responsive to the request and would need until December 3, 2015, to address the request. The Custodian certifies that he sent a letter to the Complainant on December 3, 2015, requesting an extension of time until December 15, 2015, to address the request. The Custodian further certifies that on December 13, 2015, he sent another letter to the Complainant, requesting an extension of time until December 23, 2015, to address the request. The Custodian certifies that on December 28, 2015⁷, he responded to the request by providing the Complainant with a two (2) page copy of the CAD report for Incident No. C10011003 and denying the Complainant the balance of the records

⁷ The response letter is dated December 28, 2014. The Custodian certified that this date reflects a typographical error and that the letter should be dated December 28, 2015.

relevant to this complaint as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.⁸ However, the Custodian certifies that he subsequently learned from a certification of Sergeant Beatrice Golden, dated February 19, 2016, that there is no signed statement of Simone Walker.

Among several attachments to the SOI, the Custodian included a copy of the CAD report for Incident No. C10011003 and a copy of the Request and Authorization for Records Disposal for 9-1-1 tapes from January 1, 2008, through June 31, 2011 (sic).⁹ The Custodian also attached to the SOI the incident report for Incident Number C10011003.¹⁰

The Custodian also attached to the SOI a certification of Sergeant Beatrice Golden, dated February 19, 2016. Sergeant Golden certifies that at the time of the Complainant's requests she was assigned to the Office of the Police Director, Advocate/Legal Affairs Unit, and supervised the OPRA function within the Advocate/Legal Affairs Unit. Sergeant Golden also certifies, *inter alia*, that the Complainant's March 16, 2015 "2nd request," the March 31, 2015 request, and the May 29, 2015 response from the Advocate/Legal Affairs Unit are not on file in her office. Sergeant Golden avers that the signed statement of Dominique Young, dated February 13, 2010, was located, but the Division of Police withheld the records from disclosure as a criminal investigatory record.¹¹ Sergeant Golden certifies that a statement of a victim or witness is "not required to be made, maintained, or kept on file by the City of Newark Police Department for a criminal investigation." Sergeant Golden also avers that neither a statement signed by Simone Walker nor a dispatch record for February 11, 2010, between the hours of 4:00 p.m. and 10:00 p.m., were located.¹²

The Custodian's Counsel argues that the three requested records relevant to the complaint fall under the criminal investigatory records exception pursuant to N.J.S.A. 47:1A-1.1 since they all relate to the criminal investigation of Incident Number C10011003 and are not required by law to be made, maintained, or kept on file by the City of Newark Police Department. The Custodian's Counsel states that the Complainant failed to produce any evidence to the contrary. Counsel states that although the Complainant asserted that the requested records are not part of an ongoing investigation and therefore no longer confidential, he misunderstands OPRA. Counsel asserts that the criminal investigatory records exception continues even after the

⁸ The Custodian certified (in Item 9 of the SOI) that this same CAD report was disclosed to the Complainant on May 29, 2015 "via Police correspondence." This would have been Detective Perez's response to the Complainant's March 31, 2015 request.

⁹ The CAD report for the referenced incident number is dated February 13, 2010, from 3:53 p.m. until 6:13 p.m. The Request and Authorization for Records Disposal form encompasses the period of time the dispatch transmissions were recorded for the record that was requested by the Complainant in his requests dated March 31, 2015 and October 27, 2015. The form shows that the 9-1-1 tapes were authorized for disposal on October 3, 2011, and were verified to have been erased from the memory of a digital recording device as of January 31, 2012. The Custodian also certified (in Item 9 of the SOI) that, due to the "destruction authorization," no responsive audio tapes exist.

¹⁰ The incident report for Incident Number C10011003 reveals that the incident was a reported criminal sexual assault (N.J.S.A. 2C:14-2).

¹¹ This record is the one requested in the Complainant's February 24, 2015 request. It was also listed as requested item number 1 in the Complainant's March 31, 2015 and October 27, 2015 OPRA requests.

¹² The Simone Walker statement was listed as request item number 2 in the Complainant's October 27, 2015 request. The dispatch record for February 11, 2010 was one of two dispatch records listed in request item number 2 of the Complainant's March 31, 2015 request, and it was also request item number 3 of the Complainant's October 27, 2015 request.

investigation has been completed. Counsel cites 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 support of his assertion.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond accordingly results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).¹³ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Request dated March 31, 2015

The Complainant submitted an OPRA request dated March 31, 2015, to the Newark Police, which was confirmed received by Detective Olga Perez in the Office of the Police Director on April 16, 2015. On May 29, 2015, the thirtieth (30th) business day following receipt of said request, Detective Perez responded in writing, in part denying and in part fulfilling the request.

Therefore, Detective Olga Perez's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Request dated October 27, 2015

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007, to fulfill the complainant's OPRA request. On April 20, 2007, the custodian responded, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were provided until May 31, 2007. The Council held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the

¹³ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) ... however ... [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records. Id.

Here, similar to the facts in Kohn, the Custodian timely responded in writing to the Complainant’s October 27, 2015 OPRA request by properly requesting extensions of time until December 23, 2015. However, the Custodian thereafter failed to respond in writing to the Complainant until December 28, 2015, in part denying and in part fulfilling the request.

Accordingly, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s request, either granting access, denying access, seeking clarification, or requesting another extension of time within the extended time frame, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. *See also* Kohn, GRC 2007-124.

Unlawful Denial of Access

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

Request dated February 24, 2015

There is only one record relevant to the complaint in this request, which is a statement taken from Dominique Young as part of the investigation of Newark Police Incident Number C100110033. The Custodian denied the Complainant access to the record because he certified that it is a criminal investigatory record exempt from access pursuant to N.J.S.A. 47:1A-1.1.

OPRA defines a criminal investigatory record as “a record which is not required by law to be made, maintained, or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” N.J.S.A. 47:1A-1.1. Therefore, for a record to be considered 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. *See* O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009).

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 2017 N.J. LEXIS 745 (N.J. July 11, 2017), on appeal from N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015). In the appeal, the court affirmed that OPRA’s criminal investigatory records exemption applies to police records which originate from a criminal investigation. However, the court stated that “to qualify for the exception — and be exempt from disclosure — a record (1) must not be ‘required by law to be made,’ and (2) must ‘pertain[] to a criminal investigation.’ N.J.S.A. 47:1A-1.1.” Id. at *31.

The court made it clear that if the first prong cannot be met because such a record is required by law to be made, then that record “cannot be exempt from disclosure under OPRA’s criminal investigatory records exemption. N.J.S.A. 47:1A-1.1.” Id. at *32-33. Although the court agreed with the Appellate Division’s analysis in O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382, that a clear statement of policy to police officers from the State Attorney General has “the force of law for police entities,” it refused to conclude that records retention schedules adopted by the State Records Committee meet OPRA’s “required by law” standard.

The court also noted that even if a record is not required by law to be made, it must still be found to pertain to a criminal investigation. The court reiterated the Appellate Division’s observation that “some police records relate to an officer’s community-caretaking function; others to the investigation of a crime.” Id. at *37 (*citing* N. Jersey Media Grp., 441 N.J. Super. at 105).¹⁴ Therefore, the court reasoned that determining whether such records pertain to a criminal investigation requires a “case-by-case analysis.” However, the court pointed out that police records which stem from “an investigation into *actual or potential* violations of criminal law” such as “detailed investigative reports and witness statements ...” will satisfy the second prong of OPRA’s criminal investigatory records exemption. Id. at *38 (emphasis added).

The Council has long held that once a record is determined to be a criminal investigatory record, it is exempt from access. *See* 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), holding that “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.”¹⁵ Moreover, with respect to concluded investigations, the Council pointed out in Janeczko that, “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete.”

Here, the certification of Sergeant Beatrice Golden of the Police Advocate/Legal Affairs Unit was included by the Custodian as part of his SOI. Sergeant Golden certified that the statement of a victim or witness is not required to be made, maintained, or kept on file as part of a criminal investigation. For this reason, Sergeant Golden certified that the City withholds such records from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. Moreover, the evidence of record makes it clear that the requested document is part of a criminal investigation. The police report for Incident Number C10011003 that the Custodian attached to the SOI reveals that the incident was a reported criminal sexual assault, and it was for this same incident number that the Complainant requested a copy of the witness statement.

The Council has long held that witness statements made in the course of a criminal investigation are criminal investigatory records. In Parker v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2009-225 (October 2010), the complainant requested seven witness statements. Determining that the statements were made by witnesses obtained during the course of a criminal investigation, the Council held that they were exempt from disclosure under OPRA

¹⁴This is instructive for police agencies because it underscores the fact that their role in society is multi-faceted; hence, not all of their duties are focused upon investigation of criminal activity. And only those records created in their capacity as criminal investigators are subject to OPRA’s criminal investigatory records exemption.

¹⁵ Affirmed in an unpublished opinion of the Appellate Division in May 2004.

as criminal investigatory records and that the custodian did not violate OPRA by denying the request. More recently, in Marciante v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2013-171 (April 2014), the complainant requested a witness statement concerning a telephone conversation between himself and the witness. The statement was taken during the course of an investigation by officers of the Division of Fish & Wildlife, along with local law enforcement, of an alleged threat made by the complainant. The Council held that the requested witness statement was lawfully denied as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.

Here, the evidence of record indicates that the Newark Police were conducting an investigation of criminal sexual assault at the time the record responsive to this request was created. Said record was not "required to be made, maintained, or kept on file," and pertains to a criminal investigation, regardless of whether the investigation is ongoing or has been resolved. N.J.S.A. 47:1A-1.1; Janeczko, GRC 2002-79 & 2002-80.

Therefore, the Custodian lawfully denied access to the statement taken from Dominique Young on February 13, 2010, in connection with incident report #C1001003 and sought by the Complainant in his request dated February 24, 2015, because said witness statement constitutes a criminal investigatory record that is exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See N. Jersey Media Grp., 2017 N.J. LEXIS 745. See also Janeczko, GRC 2002-79 & 2002-80, Parker, GRC 2009-225 and Marciante, GRC 2013-171.

Request dated March 16, 2015

OPRA provides that "[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian." N.J.S.A. 47:1A- 5(g).

Here, although the Complainant stated that he forwarded an OPRA request to the Custodian on March 16, 2015, that was a duplicate of his February 24, 2015 request marked "2nd request," the Custodian certified that he did not receive the request from the Complainant. The Custodian certified that he learned of the request because a copy of it was attached to the complaint.

The evidence of record reveals that the Complainant did not submit his March 16, 2015 request to the Custodian but rather to Lt. John Evangelista in the Newark Police Records Unit. However, Sergeant Golden, supervisor of the Police Advocate/Legal Affairs Unit, certified that the Complainant's March 16, 2015 "2nd request," is not on file in her office. The Complainant has failed to provide any evidence to contradict the certification of the Custodian or Sergeant Golden.

Therefore, because the Complainant did not submit his March 16, 2015 OPRA request to the Custodian, the Custodian certified that he never received said request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification, that portion of the complaint is without any reasonable factual basis to pursue. N.J.S.A. 47:1A- 5(g).

Request dated March 31, 2015

Request item number 1 is a request for the same item requested by the Complainant in his February 24, 2015 request; therefore the GRC follows the same analysis as the analysis for the February 24, 2015 request above.

Accordingly, Detective Olga Perez lawfully denied access to requested item number 1 of the Complainant's March 31, 2015 OPRA request because said witness statement constitutes a criminal investigatory record that is exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See N. Jersey Media Grp., 2017 N.J. LEXIS 745. See also Janeczko, GRC 2002-79 & 2002-80, Parker, GRC 2009-225 and Marciante, GRC 2013-171.

With respect to request item number 2, the Custodian certified that no responsive 9-1-1 audio tapes exist because the City received authorization for disposal of all 9-1-1 tapes made between January 1, 2008, and June 31, 2011; however, a CAD report responsive to this request item was disclosed to the Complainant on May 29, 2015 "via Police correspondence." The May 29, 2015 police correspondence referenced by the Custodian would have been Detective Olga Perez's response informing the Complainant that the sworn statement of Dominique Young was denied, the audio recording is nonexistent because it was purged, and that a copy of the responsive CAD report was being disclosed.

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the 9-1-1 audio recordings responsive to request item number 2 do not exist because the City received authorization for disposal and subsequently erased all 9-1-1 recordings made within the period of time encompassing the Complainant's request.

As such, Detective Olga Perez did not unlawfully deny access to the 9-1-1 audio recordings responsive to request item number 2 of the Complainant's March 31, 2015 request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49. The Custodian, however, certified that a copy of the CAD report responsive to this request item was disclosed to the Complainant via police correspondence dated May 29, 2015. N.J.S.A. 47:1A-6.

Request dated October 27, 2015

Requested item number 1 is a request for the same item requested by the Complainant in his February 24, 2015 request; therefore the GRC follows the same analysis as the analysis for the February 24, 2015 request above.

Accordingly, the Custodian lawfully denied access to requested item number 1 of the Complainant's October 27, 2015 OPRA request because said witness statement constitutes a criminal investigatory record that is exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See N. Jersey Media Grp., 2017 N.J. LEXIS 745. See also Janeczko, GRC 2002-79 & 2002-80, Parker, GRC 2009-225 and Marciante, GRC 2013-171.

The Custodian certified that request item number 2 does not exist, and the GRC follows the same analysis as the analysis for the 9-1-1 audio recordings responsive to request item number 2 of the Complainant's March 31, 2015 OPRA request.

Therefore, the Custodian did not unlawfully deny access to the record responsive to requested item number 2 of the Complainant's October 27, 2015 request because the Custodian certified that such record does not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

With respect to requested item number 3, the Custodian certified that on December 28, 2015, he disclosed to the Complainant a two (2) page copy of the CAD report for Incident No. C10011003. The evidence of record reveals that this is the only record that exists which is responsive to this request item.

As such, notwithstanding the Custodian's "deemed denial," the Custodian did not unlawfully deny the Complainant access to requested item number 3 of his October 27, 2015 OPRA request because the Custodian certified that on December 28, 2015, he disclosed to the Complainant a two (2) page copy of the CAD report for Incident No. C10011003, which is the only record that exists for this request item. N.J.S.A. 47:1A-6.

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)).

Here, although Detective Olga Perez failed to respond timely to the Complainant's OPRA request dated March 31, 2015, and although the Custodian failed to respond timely to the Complainant's October 27, 2015 OPRA request, which resulted in a "deemed" denial of said requests, Detective Perez and the Custodian did disclose to the Complaint all requested records in existence that were not otherwise exempt from access. Additionally, the evidence of record does not indicate that either Detective Perez's actions, or the Custodian's actions, had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, Detective Olga Perez and the Custodian's actions did 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. Detective Olga Perez's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's request, either granting access, denying access, seeking clarification, or requesting another extension of time within the extended time frame, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian lawfully denied access to the statement taken from Dominique Young on February 13, 2010, in connection with incident report #C1001003 and sought by the Complainant in his request dated February 24, 2015, because said witness statement constitutes a criminal investigatory record that is exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. *See* N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 2017 N.J. LEXIS 745 (N.J. July 11, 2017). *See also* 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), Parker v. Essex Cnty. Prosecutor's Office, GRC

Complaint No. 2009-225 (October 2010) and Marciante v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2013-171 (April 2014).

4. Because the Complainant did not submit his March 16, 2015 OPRA request to the Custodian, the Custodian certified that he never received said request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification, this section of the complaint is without any reasonable factual basis to pursue. N.J.S.A. 47:1A- 5(g).
5. Detective Olga Perez lawfully denied access to requested item number 1 of the Complainant's March 31, 2015 OPRA request because said witness statement constitutes a criminal investigatory record that is exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 2017 N.J. LEXIS 745 (N.J. July 11, 2017). See also 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), Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010) and Marciante v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2013-171 (April 2014).
6. Detective Olga Perez did not unlawfully deny access to the 9-1-1 audio recordings responsive to requested item number 2 of the Complainant's March 31, 2015 request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian, however, certified that a copy of the CAD report responsive to this request item was disclosed to the Complainant via police correspondence dated May 29, 2015. N.J.S.A. 47:1A-6.
7. The Custodian lawfully denied access to requested item number 1 of the Complainant's October 27, 2015 OPRA request because said witness statement constitutes a criminal investigatory record that is exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 2017 N.J. LEXIS 745 (N.J. July 11, 2017). See also 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), Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010) and Marciante v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2013-171 (April 2014).
8. The Custodian did not unlawfully deny access to the record responsive to requested item number 2 of the Complainant's October 27, 2015 request because the Custodian certified that such record does not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
9. Notwithstanding the Custodian's "deemed denial," the Custodian did not unlawfully deny the Complainant access to requested item number 3 of his October 27, 2015

OPRA request because the Custodian certified that on December 28, 2015, he disclosed to the Complainant a two (2) page copy of the CAD report for Incident No. C10011003, which is the only record that exists for this request item. N.J.S.A. 47:1A-6.

10. Although Detective Olga Perez failed to respond timely to the Complainant's OPRA request dated March 31, 2015, and although the Custodian failed to respond timely to the Complainant's October 27, 2015 OPRA request, which resulted in a "deemed" denial of said requests, Detective Perez and the Custodian did disclose to the Complaint all requested records in existence that were not otherwise exempt from access. Additionally, the evidence of record does not indicate that either Detective Perez's actions, or the Custodian's actions, had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, Detective Olga Perez and the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart

July 18, 2017