



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Shamsiddin Abdur-Raheem
Complainant
v.
NJ State Police
Custodian of Record

Complaint No. 2016-291

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s November 12, 2019 Interim Order because she responded in the prescribed time frame disclosing the chain-of-custody reports to the Complainant and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to timely respond resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the responsive chain-of-custody forms. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s November 12, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were 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 7th Day of January 2020

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: January 9, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Shamsiddin Abdur Raheem¹
Complainant**

GRC Complaint No. 2016-291

v.

**New Jersey State Police²
Custodial Agency**

Records Relevant to Complaint: Hardcopies of all chain-of-custody reports of reports received, released, and forwarded regarding the “Certified Laboratory Report Drug Analysis” (“Analysis”) submitted by New Jersey State Prison in “Laboratory No. C14-04762, Agency No. 2014-09-02-001 NJSP” analyzed on October 15, 2014.

Custodian of Record: Trooper Kristina Pados
Request Received by Custodian: November 2, 2016
Response Made by Custodian: January 17, 2017
GRC Complaint Received: November 10, 2016

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the September 17, 2019 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 did not bear her burden of proof that she 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 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 failed to bear her burden of proving a lawful denial of access to the responsive chain-of-custody reports. N.J.S.A. 47:1A-6. Specifically, the reports do not meet the two-prong test set forth under OPRA to be considered criminal investigatory

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Suzanne Davies.

in nature. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009); Dericks (O.B.O. TAPintoSparta.net) v. Sparta Twp. (Sussex), GRC Complaint No. 2016-227 (September 2017). Thus, the Custodian must disclose the responsive reports to the Complainant.

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
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 November 14, 2019, the Council distributed its Interim Order to all parties. On November 21, 2019, the Custodian responded to the Council’s Interim Order. Therein, the Custodian certified that she received the Council’s Order on November 14, 2019. The Custodian further affirmed that in accordance with the Order, she sent the responsive chain-of-custody reports to the Complainant via regular mail.

Analysis

Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian to disclose the responsive chain-of-custody reports to the Complainant and to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On November 14, 2019, 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 November 21, 2019.

On November 21, 2019, the fifth (5th) business day after receipt of the Council’s Order, the Custodian responded to it. Therein, the Custodian certified that she provided the responsive records

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "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."

⁵ 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.

to the Complainant via regular mail.

Therefore, the Custodian complied with the Council's November 12, 2019 Interim Order because she responded in the prescribed time frame disclosing the chain-of-custody reports to the Complainant and simultaneously providing certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian's failure to timely respond resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the responsive chain-of-custody forms. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's November 12, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's November 12, 2019 Interim Order because she responded in the prescribed time frame disclosing the chain-of-custody reports to

the Complainant and simultaneously providing certified confirmation of compliance to the Executive Director.

2. The Custodian's failure to timely respond resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the responsive chain-of-custody forms. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's November 12, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

December 10, 2019



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Shamsiddin Abdur Raheem
Complainant
v.
NJ State Police
Custodian of Record

Complaint No. 2016-291

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her 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 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 failed to bear her burden of proving a lawful denial of access to the responsive chain-of-custody reports. N.J.S.A. 47:1A-6. Specifically, the reports do not meet the two-prong test set forth under OPRA to be considered criminal investigatory in nature. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009); Dericks (O.B.O. TAPintoSparta.net) v. Sparta Twp. (Sussex), GRC Complaint No. 2016-227 (September 2017). Thus, the Custodian must disclose the responsive reports to the Complainant.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

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.

Interim Order Rendered by the
Government Records Council
On The 12th Day of November 2019

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: November 14, 2019

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Shamsiddin Abdur Raheem¹
Complainant**

GRC Complaint No. 2016-291

v.

**New Jersey State Police²
Custodial Agency**

Records Relevant to Complaint: Hardcopies of all chain-of-custody reports of reports received, released, and forwarded regarding the “Certified Laboratory Report Drug Analysis” (“Analysis”) submitted by New Jersey State Prison in “Laboratory No. C14-04762, Agency No. 2014-09-02-001 NJSP” analyzed on October 15, 2014.

Custodian of Record: Trooper Kristina Pados
Request Received by Custodian: November 2, 2016
Response Made by Custodian: January 17, 2017
GRC Complaint Received: November 10, 2016

Background³

Request and Response:

On September 22, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On November 10, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the request at issue here was a resubmission of the request at issue in Abdur-Raheem v. N.J. State Police, GRC Complaint No. 2016-207 (July 2018) (administratively disposed of due to no correspondence received by the custodian). The Complainant stated that after receiving the Statement of Information (“SOI”) certifying that the request was addressed incorrectly, he resubmitted the subject OPRA request to the correct address. The Complainant asserted that, to date, he had not received a response from the Custodian.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Suzanne Davies.

³ 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.

Response:

On November 15, 2016, the Custodian allegedly responded via certified mail extending the response time frame. On December 7, 2016, the Custodian allegedly responded via certified mail extending the response time frame a second time. On January 2, 2017, the Custodian allegedly responded via certified mail extending the response time frame a third time. On January 17, 2017, the Custodian responded in writing denying access under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. See N. Jersey Media Grp. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015).

Statement of Information:

On January 26, 2017, the Custodian filed a Statement of Information (“SOI”) attaching a certification from Dr. Howard Baum. The Custodian certified that she received the Complainant’s OPRA request on November 2, 2016. The Custodian certified that her search included contacting the Office of Forensic Science (“OFS”). The Custodian certified that Dr. Baum provided the reports and advised they were part of an on-going criminal investigation. See Baum Cert. at ¶ 7. The Custodian certified that she sought three (3) extensions of time before responding in writing on January 17, 2017 denying access to the responsive records under the criminal investigatory exemption.

The Custodian contended that she lawfully denied access to the responsive records under the criminal investigatory exemption. O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009); N. Jersey Media Grp., 441 N.J. Super. 70. The Custodian averred that chain-of-custody reports were created by OFS during investigations based on standards existent in the field of forensic science. See Baum Cert. at ¶ 3-5. The Custodian further averred that the reports were created solely for tracking the correct handling of evidence should issues arise in subsequent court proceedings. Id. The Custodian certified that the records at issue were created as part of a criminal investigation by the New Jersey State Police (“NJSP”) into narcotics charges against the Complainant. The Custodian noted that the Complainant failed to identify any statutes, regulations, or case law requiring the creation of chain-of-custody reports. See also Baum Cert. at ¶ 6.

The Custodian further asserted that the delay in responding to this request did not represent a knowing and willful violation. The Custodian noted that prior to receiving the request on November 2, 2016, one of the two NJSP custodians was out on extended leave. The Custodian asserted that this absence resulted in delays in responding to OPRA requests. The Custodian noted that she sought multiple extensions because of the circumstances before denying the request on January 17, 2017. The Custodian argued that this technical violation of OPRA did not represent a positive element of conscious wrongdoing required to hold that her actions were knowing and willful in nature.

Additional Submissions:

On February 1, 2017, the Complainant submitted a letter response to the SOI. Therein, the Complainant disputed that the chain-of-custody records were exempt from disclosure as criminal investigatory records. The Complainant contended that the Custodian relied on the “unsupported

statement” of Dr. Baum, thereby supplanting her responsibility as a “custodian of record” under OPRA. The Complainant also argued that the records in question were not part of a criminal investigation: NJSP did not provide any documentary evidence of a criminal investigation. The Complainant asserted that to the contrary, the records related to an internal prison disciplinary proceeding investigation initiated on August 30, 2014 against him for an infraction of N.J.A.C. 10A:4-4.1(a)(2)(xv). The Complainant noted that the alleged substance at the center of the infraction charge was sent to OFS pursuant to N.J.A.C. 10A:3-6.5 and that he attached documentation to support his position.

Additionally, the Complainant argued that even if the reports pertained to a criminal investigation, they would not be exempt under N.J.S.A. 47:1A-1.1 because they are required to be maintained. The Complainant asserted that Dr. Baum confirmed as much in his certification by affirming that “[c]hain-of-custody reports are *required* in the field of forensic science.” See Baum Cert. at ¶ 5. The Complainant thus concluded that the responsive reports could not meet the two-prong test as described in N. Jersey Media Grp., 441 N.J. Super. 70.

The Complainant also argued that the Attorney General’s (“AG”) Guidelines require the creation of chain-of-custody reports. The Complainant asserted that this fact garners a determination similar to O’Shea, 410 N.J. Super. 371, where the court held that use of force reports were not criminal investigatory records because the AG’s Guidelines required their creation.⁴

On March 13, 2017, the Complainant submitted a supplemental response to the SOI. The Complainant supplemented his response by stating that the AG Guideline to which he referenced in his prior submission was “[AG] Guidelines, The Property and Evidence Function.” Id. at 3-4. The Complainant argued that the Guidelines have the force of law, as provided for in O’Shea, 410 N.J. Super. 371.

Finally, the Complainant contended that the Custodian knowingly and willfully violated OPRA. The Complainant argued that the Custodian knew, or should have known, that the responsive records were not exempt from disclosure under the criminal investigatory exemption. The Complainant thus requested that the GRC levy the civil penalty against the Custodian for her denial of access.

On September 26, 2018, the GRC sought additional information from the Custodian. Therein, the GRC stated that the Complainant asserted that he submitted his OPRA request on September 22, 2016. The GRC further stated that the Custodian certified in the SOI that she did not receive the OPRA request until November 2, 2016. The GRC, noting that the passage of time between mailing and receipt seemed “atypically lengthy,” requested that the Custodian provide certified responses to the following:

1. When did the NJSP receive the subject OPRA request? This may include receipt by an employee who was not the official custodian. Please include supporting documentation, such as a date-stamped copy of the original request.

⁴ The Complainant also argued that the records should be disclosed as part of the discovery process. The GRC notes that OPRA and discovery are separate processes and that it has no authority over discovery requests. N.J.S.A. 47:1A-7(b). See also Mid-Atlantic Recycling Tech. v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004).

2. If the request was received by an individual other than the Custodian, please identify the person and provide details as to why there was a delay in forwarding the request to the custodian, if available?

The GRC requested that the Custodian provide her legal certification by no later than October 1, 2018.

On October 1, 2018, the Custodian responded to the GRC's request for additional information. Therein, the Custodian certified that the Office of Professional Standards ("OPS") received the subject OPRA request on September 29, 2016. The Custodian certified that OPS forwarded the OPRA request to her office for processing. The Custodian noted that because the request was submitted via regular mail, it had to be manually entered into NJSP's electronic OPRA tracking system. The Custodian affirmed that this was done on November 2, 2016. The Custodian finally certified that she sought multiple extensions after the request was processed.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days 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).⁵ 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).

The Complainant filed the instant complaint contending that the Custodian failed to timely respond to his OPRA request. In the SOI, the Custodian certified that she did not receive the subject OPRA request until November 2, 2016. Given the length of time that passed between the submission date and receipt date, the GRC sought additional information from the Custodian. In response to said request, the Custodian certified that OPS received the OPRA request on September 29, 2016 and forwarded to her office for processing. The Custodian further affirmed that she had to manually add the OPRA request into NJSP's electronic tracking system because it was sent via U.S. mail, which she did on November 2, 2016.

In reviewing the evidence here, the GRC is satisfied that the Custodian failed to timely respond to the Complainant's OPRA request. Specifically, the Custodian certified that OPS received the OPRA request on September 29, 2016 and forwarded same to her office for processing. Thereafter, the Custodian did not begin to address the subject OPRA request until entering it into NJSP's electronic tracking system approximately twenty-three (23) business days

⁵ 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.

later. Thus, at the time that the Custodian entered the OPRA request into the system, the statutorily mandated time frame to respond had already expired.

Therefore, the Custodian did not bear her 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 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.

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.

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, 410 N.J. Super. 371.

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017), on appeal from N. Jersey Media Grp., 441 N.J. Super. 70. 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 564.

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 365. Although the Court agreed with the Appellate Division's analysis in O'Shea, 410 N.J. Super. at 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 569 (citing N. Jersey Media Grp., Inc., 441 N.J. Super. at

105).⁶ 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 that 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. (emphasis added).

The Council has also 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.”⁷ 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.”

Initially, in Cundiff v. N.J. Dep’t of Law & Pub. Safety, GRC Complaint No. 2003-34 (March 2005), the Council held that the custodian unlawfully denied access to multiple records, including chain-of-custody forms, under the attorney work-product privilege. However, the Council did not address whether said records were exempt under the criminal investigatory exemption because no the custodian did not assert said argument.

Subsequent to the Council’s holding in Cundiff, the Appellate Division addressed the criminal investigatory exemption at length in O’Shea, 410 N.J. Super. 371 (App. Div. 2009). There, the court upheld the trial judge’s decision allowing access to use of force reports, noting with respect to the first prong of N.J.S.A. 47:1A-1.1 that:

[T]here are no specific “statutes” or “administrative rules” that require [use of force reports] to be completed or maintained by a Township's police department. We hold, however, that [the AG Guidelines], that requires the completion of [use of force reports] and their maintenance in the files of police departments, has the force of law for police entities.

[Id. at 382.]

Because the court found that use of force reports were required to be made, the first prong of the test could not be met. Thus, the court found that “[t]he [use of force reports] . . . are nominally subject to OPRA, and there is no governing policy or statement containing specific provisions for exempting them from OPRA’s general rule of disclosure . . .” Id. at 385.

During the pendency of this complaint, the GRC applied both O’Shea and N. Jersey Media Grp. to the body-worn camera issue in Dericks (O.B.O. TAPintoSparta.net) v. Sparta Twp. (Sussex), GRC Complaint No. 2016-227 (September 2017). There, the Council held that generally,

⁶This 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.

⁷The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

body-worn camera footage could not be considered “criminal investigatory” because AG Law Enforcement Directives required it to be maintained. Citing N. Jersey Media Grp., 229 N.J. 541 and O’Shea, 410 N.J. Super. 371. However, the Council determined that the footage at issue there was nonetheless exempt under a different exemption: N.J.S.A. 2A:4A-60.

Here, the Complainant sought access to chain-of-custody and residual reports, which the Custodian denied under the criminal investigatory exemption. In the SOI, the Custodian argued that she lawfully denied access to the responsive reports because they were not required to be made and pertained to a criminal investigation. The Custodian also submitted a legal certification from Dr. Baum supporting her position. The Custodian noted that NJSP needed the reports in the instance that any issues were challenged in court. In response to the SOI, the Complainant argued that the Custodian unlawfully denied access to the responsive reports. The Complainant first argued that the SOI indicated that the field of forensics “required” the responsive reports to be made. The Complainant next argued that the AG’s Guidelines required chain-of-custody report creation. Third, the Complainant contended that the reports at issue here pertained to institutional infractions and not a criminal investigation.

In applying the two-prongs of the criminal investigatory exemption found in N. Jersey Media Grp., Inc., 229 N.J. 541, O’Shea, 410 N.J. Super. 371, and Dericks, GRC 2016-227, the GRC is persuaded that the Custodian unlawfully denied access to the responsive reports. The evidence of record, as well as the Complainant’s countervailing arguments, provide that the subject records cannot meet the two-prong test required to be considered criminal investigatory records.

As to the first prong, there is no evidence in the record to support the Complainant’s argument regarding Dr. Baum’s assertion that the reports “were required in the field of forensics” carries the force of law. However, and similar to O’Shea, 410 N.J. Super. 371, and Dericks, GRC 2016-227, the Complainant provides sufficient evidence to prove that the AG’s Guidelines require creation of chain-of-custody reports. The “Property and Evidence Function” Guideline is explicit in its requirement that “property reports should include, at a minimum . . . [c]hain of custodian record[s].” Id. at 3. The Guideline further includes a detailed description of the information that should be contained therein and also references a standardized form developed by the Division of Criminal Justice. Id. at 3-4. Thus, having failed to meet the first prong of the test, the responsive reports are not criminal investigatory in nature.

Although the responsive reports have already failed to meet the first prong of the test, the GRC nonetheless notes that the responsive reports also fail to meet the the second prong. Specifically, the Custodian failed to prove that the chain-of-custody reports pertained to a criminal investigation. Further, the Complainant provided sufficient supporting documentation to prove that the record in question related to an institutional infraction with no connection to any criminal action against him. Finally, the fact that NJSP kept the reports for possible litigation does not correlate to performing a criminal investigation.

Accordingly, the Custodian failed to bear her burden of proving a lawful denial of access to the responsive chain-of-custody reports. N.J.S.A. 47:1A-6. Specifically, the reports do not meet the two-prong test set forth under OPRA to be considered criminal investigatory in nature. N.J.S.A.

47:1A-1.1; N. Jersey Media Grp., 229 N.J. 541; O’Shea, 410 N.J. Super. 371, 382; Dericks, GRC 2016-227. Thus, the Custodian must disclose the responsive reports to the Complainant.

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 did not bear her 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 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 failed to bear her burden of proving a lawful denial of access to the responsive chain-of-custody reports. N.J.S.A. 47:1A-6. Specifically, the reports do not meet the two-prong test set forth under OPRA to be considered criminal investigatory in nature. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009); Dericks (O.B.O. TAPintoSparta.net) v. Sparta Twp. (Sussex), GRC Complaint No. 2016-227 (September 2017). Thus, the Custodian must disclose the responsive reports to the Complainant.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰**

⁸ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁹ "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."

¹⁰ 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.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

September 17, 2019¹¹

¹¹ This complaint was prepared for adjudication at the Council's September 24, 2019 meeting; however, the Council tabled same for additional review.