



**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**

**November 12, 2019 Government Records Council Meeting**

Richard B. Costigan  
Complainant

Complaint No. 2017-184

v.

Cape May County Prosecutor's Office  
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council ("Council") considered the October 30, 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 current Custodian did not comply fully with the Council's September 24, 2019 Interim Order. Specifically, although the current Custodian disclosed the responsive autopsy report to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director, she failed to do so within the prescribed time frame.
2. Although the Custodian unlawfully denied access to the responsive autopsy report, he lawfully denied access to additional records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Further, although untimely, the current Custodian cured the Custodian's denial of access by disclosing same to the Complainant in response to the Council's September 24, 2019 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 12<sup>th</sup> 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 15, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Richard B. Costigan<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-184**

v.

**Cape May County Prosecutor's Office<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copy of the incident report and all records relating to an alleged suicide on December 12, 2015 in Ocean City, NJ.<sup>3</sup>

**Custodian of Record:** Robert W. Johnson, Esq.<sup>4</sup>

**Request Received by Custodian:** Various

**Response Made by Custodian:** Various

**GRC Complaint Received:** September 12, 2017

**Background**

**September 24, 2019 Council Meeting:**

At its September 24, 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 unlawfully denied access to the responsive autopsy report. N.J.S.A. 47:1A-6. Specifically, the responsive report did not meet the two-prong test necessary to be considered a criminal investigatory record. N.J.S.A. 47:1A-1.1; N.J.S.A. 52:17B-88; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated June 30, 2015). Thus, the current Custodian must disclose the responsive autopsy report to the Complainant.

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

<sup>2</sup> Represented by Jeffrey R. Lindsay, Esq. (Cape May Court House, NJ). Previously represented by James B. Arsenault, Jr., Esq. (Cape May Court House, NJ).

<sup>3</sup> The Complainant's many requests were more detailed; however, this description omits those details due to the sensitive nature of the incident.

<sup>4</sup> The current Custodian of Record is Michelle L. DeWeese, Esq.

2. **The current Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the current Custodian shall simultaneously deliver<sup>5</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**
3. The remaining reports are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); 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); Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005); Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015). Thus, the Custodian lawfully denied access to all remaining reports. N.J.S.A. 47:1A-6.
4. The photographs responsive to the Complainant's various OPRA requests are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), and Executive Order No. 69 (Gov. Whitman, 1997). See Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009); Lynn v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2015-186 (January 2017). Accordingly, the Custodian lawfully denied access to the responsive photographs. N.J.S.A. 47:1A-6.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On September 26, 2019, the Council distributed its Interim Order to all parties. On October 4, 2019, the current Custodian responded to the Council's Interim Order. Therein, the current Custodian certified that she disclosed a copy of the autopsy report to the Complainant on the same day without redactions.<sup>8</sup>

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<sup>5</sup> 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.

<sup>6</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>7</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.

<sup>8</sup> The GRC subsequently e-mailed the current Custodian asking her to confirm the date she received the Interim Order, but received no response.

## Analysis

### Compliance

At its September 24, 2019 meeting, the Council ordered the current Custodian to disclose the responsive autopsy report and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On September 26, 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 October 3, 2019.

On October 4, 2019, the sixth (6<sup>th</sup>) business day after receipt of the Council's Order, the current Custodian disclosed the autopsy report to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director. While the current Custodian performed the actions required in the Order, she failed to do so within the prescribed time frame. For this reason, the current Custodian only partially complied with the Council's Order.

Therefore, the current Custodian did not comply fully with the Council's September 24, 2019 Interim Order. Specifically, although the current Custodian disclosed the responsive autopsy report to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director, she failed to do so within the prescribed time frame.

### 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 the Custodian unlawfully denied access to the responsive autopsy report, he lawfully denied access to additional records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Further, although untimely, the current Custodian cured the Custodian's denial of access by disclosing same to the Complainant in response to the Council's September 24, 2019 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 current Custodian did not comply fully with the Council's September 24, 2019 Interim Order. Specifically, although the current Custodian disclosed the responsive autopsy report to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director, she failed to do so within the prescribed time frame.
  
2. Although the Custodian unlawfully denied access to the responsive autopsy report, he lawfully denied access to additional records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Further, although untimely, the current Custodian cured the Custodian's denial of access by disclosing same to the Complainant in response to the Council's September 24, 2019 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: Frank F. Caruso  
Executive Director

October 30, 2019



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

INTERIM ORDER

September 24, 2019 Government Records Council Meeting

Richard B. Costigan  
Complainant

Complaint No. 2017-184

v.

Cape May County Prosecutor's Office  
Custodian of Record

At the September 24, 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 unlawfully denied access to the responsive autopsy report. N.J.S.A. 47:1A-6. Specifically, the responsive report did not meet the two-prong test necessary to be considered a criminal investigatory record. N.J.S.A. 47:1A-1.1; N.J.S.A. 52:17B-88; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated June 30, 2015). Thus, the current Custodian must disclose the responsive autopsy report to the Complainant.
2. **The current Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the current Custodian shall simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**
3. The remaining reports are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. N.J. Dep't of Law and Pub. Safety, Div. of Criminal

<sup>1</sup> 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.

<sup>2</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>3</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.

Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005); Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015). Thus, the Custodian lawfully denied access to all remaining reports. N.J.S.A. 47:1A-6.

4. The photographs responsive to the Complainant's various OPRA requests are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), and Executive Order No. 69 (Gov. Whitman, 1997). See Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009); Lynn v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2015-186 (January 2017). Accordingly, the Custodian lawfully denied access to the responsive photographs. N.J.S.A. 47:1A-6.
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 24<sup>th</sup> Day of September 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: September 26, 2019**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 24, 2019 Council Meeting**

**Richard B. Costigan<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-184**

v.

**Cape May County Prosecutor's Office<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copy of the incident report and all records relating to an alleged suicide on December 12, 2015 in Ocean City, NJ.<sup>3</sup>

**Custodian of Record:** Robert W. Johnson, Esq.<sup>4</sup>

**Request Received by Custodian:** Various

**Response Made by Custodian:** Various

**GRC Complaint Received:** September 12, 2017

**Background<sup>5</sup>**

**Request and Response:**

Between January 25, 2016 and August 2, 2017,<sup>6</sup> the Complainant submitted twelve (12) Open Public Records Act ("OPRA") requests to the Custodian seeking the above-mentioned records. The Cape May County Prosecutor's Office ("CMCPO") responded in writing to the first to requests denying same because of an "open, active investigation." N.J.S.A. 47:1A-1.1. The CMCPO responded in writing to the third OPRA request denying access under the "criminal investigatory" exemption. N.J.S.A. 47:1A-1.1. The CMCPO subsequently responded in writing to each additional OPRA request denying on the basis that "[i]nvestigatory records" were exempt from disclosure. N.J.S.A. 47:1A-1.1.

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

<sup>2</sup> Represented by Jeffrey R. Lindsay, Esq. (Cape May Court House, NJ). Previously represented by James B. Arsenault, Jr., Esq. (Cape May Court House, NJ).

<sup>3</sup> The Complainant's many requests were more detailed; however, this description omits those details due to the sensitive nature of the incident.

<sup>4</sup> The current Custodian of Record is Michelle L. DeWeese, Esq.

<sup>5</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>6</sup> The Complainant noted in his twelfth (12<sup>th</sup>) OPRA request that he also sought the requested record under the common law right of access.

### Denial of Access Complaint:

On September 12, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the incident in question was an alleged suicide; however, certain evidence suggested otherwise. The Complainant stated that he submitted twelve (12) OPRA requests over an eighteen (18) month period seeking access to records sought above. The Complainant asserted that the Custodian denied access to the first two (2) OPRA requests, stating that an “open, active investigation” was being conducted. The Complainant averred that the Custodian denied access to the third request under the “criminal investigatory” exemption. The Complainant averred that the Custodian then denied access to the remaining requests under the “investigative records” exemption.

The Complainant contended that the criminal investigatory exemption did not apply to the requested report because there was no indication from law enforcement that a criminal investigation into the December 12, 2015 incident occurred. The Complainant thus argued that the requested record could not fall within the two-prong definition of a criminal investigatory record. N.J.S.A. 47:1A-1.1.

The Complainant argued that in N. Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541 (2017), the New Jersey Supreme Court distinguished the differences between requests under OPRA and the common law right of access. Id. at 578-579. The Complainant contended that even if the GRC determined that CMCPD lawfully denied access to records under OPRA, he had a common law right to access them.

### Statement of Information:

On October 12, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the CMCPD received the Complainant’s OPRA requests on various dates beginning on January 25, 2016 up through August 4, 2017. The Custodian certified that the investigation file contained forty-one (41) pages of reports from the Ocean City Police Department (“OCPD”), Ocean City Fire & Emergency Medical Services, CMCPD investigators, and the State Medical Examiner’s Office (“ME”). The Custodian further affirmed that the file contained a compact disc that contained seven-nine (79) photographs taken by law enforcement related to the investigation. The Custodian certified that he reviewed the CMCPD’s investigatory file and determined that the requested records were exempt from disclosure as investigatory and/or medical examiner records. The Custodian certified that he responded in writing denying each request from January 28, 2016 and beyond as required under OPRA.

The Custodian contended that he lawfully denied access to the Complainant’s OPRA requests. The Custodian confirmed that the “unattended death” was investigated by the OCPD, ME Southern Regional Office, and CMCPD. The Custodian affirmed that foul play was not suspected, and the death was ruled a suicide by the ME. Additionally, the Custodian certified that the decedent’s estate executrix sent an e-mail to the CMCPD on September 25, 2017 asking that no records be released to the Complainant. The Custodian thus asserted that based on exemptions contained in OPRA and the wishes of the family, he denied access to each of the Complainant’s OPRA requests.

### Additional Submissions:

On August 23, 2019, the GRC sought additional information from Custodian. Specifically, the GRC stated that the CMCPD identified “41 pages” of records and “a CD containing 79 photographs” as responsive to the subject OPRA request. The GRC further stated that the CMCPD asserted that the responsive records were exempt as “investigatory records.” The GRC thus requested that the Custodian provide responses to the following:

1. Is there a New Jersey statute, regulation, Attorney General (“AG”) Guideline, or AG Directive that requires a prosecutor’s office to conduct a criminal investigation in every instance of a potential suicide or unattended death? If so, please identify it.
2. Did the CMCPD conduct a criminal investigation from the outset of the incident referenced in this complaint?
3. Can the CMCPD provide a more detailed accounting of the records responsive to this request? If so, the GRC requests that the Custodian prepare and provide a document index identifying each individual record comprising the “41 pages of reports.” Further, the GRC requests that the document index include a detailed explanation of the content of the photographs (*i.e.* do they contain images of the decedent and if so, how many).

The GRC requested that the Custodian provide a response to the forgoing by close of business on August 28, 2019.

On August 28, 2019, the current Custodian responded to the GRC’s request for additional information. Therein, the current Custodian certified that the CMCPD investigation of the December 12, 2015 incident was authorized and required by the Cape May County Association of Chiefs of Police, Standard Operating Procedure (“SOP”) No. 12. The current Custodian certified that CMCPD Investigator John Caccia was assigned to investigate the incident in accordance with SOP No. 12. The current Custodian provided a document index identifying twelve (12) individual records, including investigative reports, an autopsy report, and logs. The current Custodian also provided a written description of the seventy-nine (79) photographs contained on a DVD titled “15-457, Scene and Hospital Photos.”

### 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.

To begin, the Complainant’s various OPRA requests sought an incident report related to the December 12, 2015 incident. However, in one of the OPRA requests, the Complainant also sought all “pertaining records.” In the SOI, the Custodian identified multiple records responsive to the Complainant’s various OPRA requests. In response to the GRC’s request for additional

information, the current Custodian identified twelve (12) records and seventy-nine (79) photographs that are responsive to the subject OPRA requests. Included in the twelve (12) records appeared to be the e-mail from the decedent's sister that the Custodian included in his SOI and which post-dated the OPRA requests. Thus, the GRC will not address this record because it was not in existence prior to the Complainant's final OPRA request submission. However, the GRC will make a determination on the remaining eleven (11) records, as well as the photographs.

OPRA provides that:

[A] government record shall not include . . . any copy, reproduction or facsimile of any photograph, negative or print, including instant photographs and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner.

[N.J.S.A. 47:1A-1.1.]

Moreover, 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.” Id. 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, 229 N.J. 541 (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 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).<sup>7</sup> 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.”<sup>8</sup> 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.”

### Autopsy Report

In earlier decisions regarding the disclosability of autopsy reports, the Council has determined that same were exempt as criminal investigatory records. Leak v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009); Crook v. Atlantic Cnty. Prosecutor’s Office, GRC Complaint No. 2010-92 (March 2011); Lado v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2010-102 (May 2011). However, in Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated June 30, 2015), the GRC reversed course based on the custodian’s acknowledgement that N.J.S.A. 52:17B-88 required the creation of same. Based on this, the Council required disclosure of the requested autopsy report, reasoning that

[A]utopsy reports generally are not exempt as criminal investigatory records by virtue of the fact that they do not meet the two-prong test contemplated by both OPRA and precedential case law. O’Shea, 410 N.J. Super. at 380-381. However, the GRC is not prepared to determine that autopsy reports must be disclosed in their entirety going forward, as certain information contained therein may fall within other exemptions not contemplated herein.

[Id. at 5.]

In the instant matter, the Custodian initially denied access to the responsive autopsy report, one (1) of the eleven (11) reports identified as responsive, under the criminal investigatory exemption. However, in keeping with N. Jersey Media Grp., Inc., 229 N.J. 541 and Schulz, GRC 2014-390, and the creation requirement under N.J.S.A. 52:17B-88 provides that the responsive autopsy report cannot meet the two-prong definition of a criminal investigatory record.

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<sup>7</sup>This 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.

<sup>8</sup>The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

Additionally, the CMCPO has not provided any additional legal arguments that may compel the GRC to address whether other exemptions applied to the report.

Accordingly, the Custodian unlawfully denied access to the responsive autopsy report. N.J.S.A. 47:1A-6. Specifically, the responsive report did not meet the two-prong test necessary to be considered a criminal investigatory record. N.J.S.A. 47:1A-1.1; N.J.S.A. 52:17B-88; N. Jersey Media Grp., Inc., 229 N.J. 541; Schulz, GRC 2014-390. Thus, the current Custodian must disclose the responsive autopsy report to the Complainant.

### Remaining Reports

The GRC has previously held that many of these records were exempt from disclosure where they met the two (2) prong test required to be a criminal investigatory record under OPRA. See Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005) (holding that incident reports are exempt from disclosure under OPRA as criminal investigatory records); Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015) (holding that evidence receipt records were exempt from disclosure). However, the Council has found these records can be disclosable where they did not meet the criminal investigatory test. See De La Cruz, Esq. v. City of Union City (Hudson), GRC Complaint No. 2015-14 (May 2017) (holding that certain incident reports were disclosable where they were not criminal investigatory, medical, or otherwise exempt under State regulations). In the instant complaint, the GRC must determine whether the responsive records meet the N. Jersey Media Grp. test and act accordingly based on the result.

Here, the remaining reports comprise of investigative and supplemental reports, evidence receipts, contact sheets, logs and a suicide note. In order to determine whether these records fall within the criminal investigatory test, the GRC sought additional information regarding the nature of CMCPO's investigations in suspected suicides or unattended deaths. In response, the current Custodian provided a copy of SOP No. 12 regarding death investigations. The current Custodian also provided a description of each responsive record, which gave the GRC additional information necessary to render a decision. Some of them plainly elicited the presence of a criminal investigation from the outset of the December 12, 2015 incident.

In applying the two-prongs of the criminal investigatory exemption found in N. Jersey Media Grp., Inc., 229 N.J. 541, the GRC is satisfied that the Custodian lawfully denied access to the remaining reports. Notably, the SOP required municipal law enforcement agencies to contact the CMCPO Major Crime Unit to investigate these types of incidents. Additionally, the title of some of the responsive records plainly elicited that from the outset, a criminal investigation took place. Further, there is no evidence in the record indicating that any of the remaining reports were required by law to be made. Thus, as discussed above, precedential case law supports the inclusion of these records under the criminal investigatory exemption when they meet the two-prong test, regardless of the investigation status. Janeczko, GRC 2002-79, *et seq.*; Nance, GRC 2003-125; Mawhinney, GRC 2015-85.

Accordingly, the remaining reports are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541; Janeczko,

GRC 2002-79, *et seq.*; Nance, GRC 2003-125; Mawhinney, GRC 2015-85. Thus, the Custodian lawfully denied access to all remaining reports. N.J.S.A. 47:1A-6.

### Photographs

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; 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) (emphasis added).]

Executive Order No. 69 (Gov. Whitman, 1997) (“EO 69”), which superseded Executive Order No. 9 (Gov. Hughes, 1963) (“EO 9”), states that:

The following records shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the provisions of [OPRA], as amended: fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.

[Id.]

In Leak, 2007-148, the complainant sought, among other records, crime scene photographs from a 1994 trial. The custodian denied access to the photographs pursuant to N.J.S.A. 47:1A-1.1 and EO 69. The Council stated in relevant part:

Request Item No. 3 seeks crime scene photographs relating to a criminal trial in 1994 . . . EO 69, enacted on May 15, 1997, modified [EO 9] and Executive Order No. 123 (Gov. Kean, 1983). EO 69 holds that:

“[t]he following records shall not be deemed to be public records... pursuant to [OPRA], as amended: fingerprint cards, plates and photographs and similar criminal investigatory records . . . required to be made, maintained or kept by any State or local governmental agency.” (Emphasis added.)

N.J.S.A. 47:1A-9(a) recognizes exemptions from disclosure included in state and federal statutes, regulations and executive orders. In this complaint, EO 69 explicitly states that criminal investigatory photographs shall not be deemed to be public records. Therefore, the crime scene photographs responsive to request Item No. 3 of the Complainant’s May 5, 2007 OPRA request are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9(a) and EO 69.

[Leak, GRC 2007-148 at 5-6.]

Aside from its decision in Leak, the Council has previously found that photographs pertaining to a criminal investigation, especially those of a decedent or victim, are exempt from disclosure under OPRA. See *e.g.* Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2011-221 (February 2013); Lynn v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2015-186 (January 2017).<sup>9</sup>

In the matter before the Council, the photographs at issue comprised of interiors and exteriors of the scene, evidentiary photographs, and photographs of the decedent. The GRC has already concluded that the December 12, 2015 incident resulted in a criminal investigation. Further, the language of N.J.S.A. 47:1A-1.1 regarding medical examiner photographs, as well as a plain reading of EO 69 and all relevant case law, supports that the photographs responsive to the subject OPRA request were exempt from disclosure. Based on the forgoing, the GRC is satisfied that the Custodian lawfully denied access to the responsive photographs.

Accordingly, the photographs responsive to the Complainant's various OPRA requests are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), and EO 69. See Leak, GRC 2007-148; Lynn, GRC 2015-186. Accordingly, the Custodian lawfully denied access to the responsive photographs. N.J.S.A. 47:1A-6.

In closing, the GRC briefly addresses the Complainant's assertion that even if the denial under OPRA was proper, he still had a common law right to access the responsive records. N.J.S.A. 47:1A-1 provides that "[n]othing . . . shall be construed as affecting in any way the common law right of access to any record." Further, N.J.S.A. 47:1A-7(b) does not provide the GRC any authority to address common law complaints. In fact, the Council has previously held that it had no jurisdiction over the issue. See Rowan, Jr. (O.B.O. Express Times) v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013). For these reasons, the GRC cannot address whether the Complainant had a right to access under the common law.

### **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 unlawfully denied access to the responsive autopsy report. N.J.S.A. 47:1A-6. Specifically, the responsive report did not meet the two-prong test necessary to be considered a criminal investigatory record. N.J.S.A. 47:1A-1.1; N.J.S.A. 52:17B-

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<sup>9</sup> Affirmed on appeal in Lynn v. Middlesex Cnty. Prosecutor's Office, 2018 N.J. Super. Unpub. LEXIS 370 (App. Div. 2018).



88; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated June 30, 2015). Thus, the current Custodian must disclose the responsive autopsy report to the Complainant.

2. **The current Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the current Custodian shall simultaneously deliver<sup>10</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>11</sup> to the Executive Director.**<sup>12</sup>
3. The remaining reports are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); 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); Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005); Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (Interim Order dated November 17, 2015). Thus, the Custodian lawfully denied access to all remaining reports. N.J.S.A. 47:1A-6.
4. The photographs responsive to the Complainant's various OPRA requests are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), and Executive Order No. 69 (Gov. Whitman, 1997). See Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009); Lynn v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2015-186 (January 2017). Accordingly, the Custodian lawfully denied access to the responsive photographs. N.J.S.A. 47:1A-6.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Executive Director

September 17, 2019

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<sup>10</sup> 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.

<sup>11</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>12</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.