



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**February 26, 2019 Government Records Council Meeting**

Charisa A. Harmon  
Complainant

Complaint No. 2017-38

v.

Morris County Prosecutor's Office  
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council ("Council") considered the February 19, 2019 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 the Custodian has borne his burden of proving a lawful denial of access to any records potentially responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian provided a sufficient legal certification proving that acknowledging the existence of records responsive to the OPRA request would run contrary to N.J.S.A. 47:1A-9(b). See N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182 (App. Div. 2016). Thus, the Custodian's use of the "Glomar" response with respect to the subject OPRA request was valid.

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 26<sup>th</sup> Day of February, 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: March 1, 2019**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
February 26, 2019 Council Meeting**

**Charisa A. Harmon<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-38**

v.

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

**Records Relevant to Complaint:** Copies of “any and all records/documentation (paper, [compact discs], electronic format, transcripts, and notes – handwritten or typed) pertaining to” the Complainant, the Morris Psychological Group, and an identified individual, as well as any “records of any criminal investigation(s)” pertaining to the above from January 1, 2014 to present.

**Custodian of Record:** Thomas C. Schmid

**Request Received by Custodian:** January 30, 2017

**Response Made by Custodian:** February 8, 2017

**GRC Complaint Received:** February 22, 2017

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

**Request and Response:**

On January 27, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 8, 2017, the Custodian responded in writing denying the Complainant’s OPRA request. First, the Custodian stated that he could neither confirm nor deny the existence of records relating to an individual not arrested or charged. N.J.S.A. 47:1A-9(b); N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182 (App. Div. 2016). Second, the Custodian stated that if records did exist, they would be exempt under the criminal investigatory exemption per OPRA and prevailing case law. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 104-106 (App. Div. 2015) (cert. granted 223 N.J. 553 (2015)); Janeczko v. Dep’t of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79, *et seq.* (June 2004) (affirmed on appeal, App. Div. 2004).

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

### Denial of Access Complaint:

On February 22, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she submitted her request to the Morris County Prosecutor’s Office (“MCPO”) after discovering that an individual was allegedly hacking into her computer. The Complainant averred that she had been trying to initiate complaints against the individual for some time, but that the MCPO declined to investigate. The Complainant asserted that the subject request represented her attempt to see what documentation, if any, the MCPO maintained concerning the individual.

### Statement of Information:

On April 5, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 30, 2017. The Custodian certified that his search included contacting detectives and assistant prosecutors within the MCPO involved with any potential relevant investigations. The Custodian certified that he responded in writing on February 8, 2017 denying the request by neither confirming nor denying the existence of records. Further, the Custodian affirmed that he advised that if records did exist, they would be exempt under the criminal investigatory exemption.

The Custodian argued that his denial of access was lawful in accordance with N. Jersey Media Grp., Inc., 447 N.J. Super. 182, where the court stated that “[r]ecords relating to a person who has not been arrested or charged . . . are entitled to confidentiality based on long-established judicial precedent.” Id. at 189. The Custodian stated that the court held that a “neither confirm nor deny” response was permissible when the agency:

- (1) relies upon an exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents[;] and
- (2) presents a sufficient basis for the court to determine that the claimed exemption applies.

[Ibid.]

The Custodian contended that long before OPRA’s enactment, New Jersey courts consistently recognized the heightened degree of confidentiality of records pertaining to individuals not arrested or charged. Id. at 203-204; Loigman v. Kimmelman, 102 N.J. 98, 107 (1986); State v. Marshall, 148 N.J. 89, 273 (1997). The Custodian asserted that OPRA did not nullify these existing exemptions. N.J.S.A. 47:1A-9(b). The Custodian also noted that OPRA’s requirement to disclose certain investigatory information under N.J.S.A. 47:1A-3(b) when no arrest has been made did not include suspect names. The Custodian equated this omission to a “strong indication” that an investigation target should be afforded confidentiality for multiple reasons.

The Custodian asserted that it was not uncommon for law enforcement agencies to receive reports determined to be unfounded, fallacious, or lacking the proofs necessary to criminally prosecute an individual. The Custodian argued that disclosure of a suspect’s name could

unintentionally boost their perceived criminal culpability and could expose the agency to civil liability or profession discipline. See RPC 3.8(f).

The Custodian contended that here, the Complainant sought investigative files related to an individual she accused of criminal acts. The Custodian argued that the Complainant's personal knowledge that an individual may be under investigation did not negate a potential breach of confidentiality. The Custodian further argued that even if records existed and were exempt as criminal investigatory records, the mere acknowledgement of their existence would inadvertently disclose to the public the nature of the investigation and name of the suspect. The Custodian asserted that such an action would circumvent the confidentiality principles prescribed in multiple court decisions and adopted by N.J.S.A. 47:1A-9(b). The Custodian also contended that, without inference here, unscrupulous accusers could use such a circumvention to publicly disparage a suspect. The Custodian thus asserted that it was legally appropriate and prudent to neither confirm nor deny the existence of records.

The Custodian finally noted that, without confirming or denying the existence of records, he contacted detectives and assistant prosecutors regarding the request. The Custodian asserted that he was able to confirm that there were no responsive records that would be outside of OPRA's criminal investigatory exemption. N.J.S.A. 47:1A-1.1; Janeczko, GRC 2002-79.

### **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.

In N. Jersey Media Grp., 447 N.J. Super. 182, ruled on whether a public agency was permitted to "neither confirm, nor deny" the existence of records responsive to an OPRA request. There, the plaintiff sought records under OPRA concerning an individual who was not charged with a crime. The court established a two-part test to determine when an agency may employ a "Glomar"<sup>4</sup> response to an OPRA request:

[T]he agency [must] (1) rel[y] upon the exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) present[] a sufficient basis for the court to determine that the claimed exemption applies.

[N. Jersey Media Grp., 447 N.J. Super. at 188.]

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<sup>4</sup> The moniker stems from Phillippi v. CIA, 546 F.2d 1009, 1011 (D.C. Cir. 1979), where the CIA responded to a Freedom of Information Act request regarding the *Hughes Glomar Explorer*, an oceanic ship allegedly owned by the federal government but officially listed as a private vessel.

The defendant's initial response to the OPRA request argued that confirming whether or not the subject of the request was arrested, charged, or involved in an investigation could cause "irreparable harm" to the subject and open the defendant and its employees to civil liability. Id. at 205. It was not until after the plaintiff challenged the defendant in court that they listed specific OPRA exemptions: the criminal investigatory records exemption and the ongoing investigation exemption. Id. The court rejected those exemptions because they only applied where government records actually existed. Id. at 207.

However, the court noted that N.J.S.A. 47:1A-9(b) protected a preexisting grant of confidentiality for records if established by, among other authorities, judicial case law. Id. at 202. The court then highlighted pre-OPRA precedent, demonstrating the need for confidentiality pertaining to whether an individual has been arrested or charged. Id. at 203. According to the court, the grant of confidentiality benefited law enforcement in conducting investigations as well as protects the privacy interests of individuals. Id. at 203-204. Therefore, the court held that the defendant satisfied its two-part test and found that its "Glomar" response was valid. Id. at 206.

Here, the Custodian denied the Complainant's OPRA request in accordance with N. Jersey Media Grp. The Custodian also stated that if records existed, they would be exempt under the criminal investigatory exemption. In the SOI, the Custodian reasserted the above and included additional reasons for denying access. Chief among those reasons was the courts' heightened degree of confidentiality pertaining to individuals not arrested or charged, which the Custodian argued was recognized under N.J.S.A. 47:1A-9(b). The Custodian certified that the Complainant's request sought records related to an individual she accused of criminal acts, but who was not arrested or charged. The Custodian affirmed that the Complainant's personal knowledge of a potential investigation did not abrogate the judicially recognized confidentiality exemptions afforded for in N.J.S.A. 47:1A-9(b).

After reviewing the evidence of record here, the GRC finds the facts of this complaint to be on point with N. Jersey Media Grp. Specifically, the Complainant here sought records regarding an individual that had not been arrested, as the Complainant admits in the Denial of Access Complaint. Further, the Custodian certified that no arrests took place; thus, acknowledgment of an investigation would subject them to irreparable harm. As noted in N. Jersey Media Grp., "[w]hen evaluating a 'Glomar' response, federal courts must 'accord 'substantial weight' to the agency's affidavits.'" Id. at 209 (citing Wilner v. NSA, 592 F.3d 60, 68 (2d Cir. 2009) (quoting Minier v. CIA, 88 F.3d 79, 803-04 (9th Cir. 1996)). Thus, the Custodian's arguments met the two-prong test to utilize the "Glomar" response substantially for the same reasons discussed in N. Jersey Media Grp. Based on this, a conclusion in line with N. Jersey Media Grp. is appropriate here.

Accordingly, the Custodian has borne his burden of proving a lawful denial of access to any records potentially responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian provided a sufficient legal certification proving that acknowledging the existence of records responsive to the OPRA request would run contrary to N.J.S.A. 47:1A-9(b). See N. Jersey Media Grp., 447 N.J. Super. 182. Thus, the Custodian's use of the "Glomar" response with respect to the subject OPRA request was valid.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that the Custodian has borne his burden of proving a lawful denial of access to any records potentially responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian provided a sufficient legal certification proving that acknowledging the existence of records responsive to the OPRA request would run contrary to N.J.S.A. 47:1A-9(b). See N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182 (App. Div. 2016). Thus, the Custodian's use of the "Glomar" response with respect to the subject OPRA request was valid.

Prepared By: Frank F. Caruso  
Acting Executive Director

February 19, 2019