



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

February 26, 2020 Government Records Council Meeting

Gregory Gibbs
Complainant

Complaint No. 2018-14

v.

Atlantic County Prosecutor's Office
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council ("Council") considered the January 21, 2020 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 complied with the Council's January 7, 2020 Interim Order because she responded in the prescribed time frame providing the withheld record and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the requested arrest report, he lawfully denied access to the remainder of the Complainant's OPRA request. Additionally, the current Custodian cured the Custodian's unlawful denial of access by disclosing the arrest report in accordance with the Council's January 7, 2020 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 26th Day of February 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: March 3, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Gregory Gibbs¹
Complainant**

GRC Complaint No. 2018-14

v.

**Atlantic County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint:³ Regarding State v. Gibbs, Indictment No. 12-07-1963:

1. All arrest reports, pre-trial memorandums and investigative reports.
2. All photo arrays, handwritten notes, and police reports.
3. All dispatch reports and walkie talkie reports.
4. All e-mails, electronic communications records, fax wire transfers.

Custodian of Record: Dylan P. Thompson⁴

Request Received by Custodian: September 18, 2017

Response Made by Custodian: September 26, 2017

GRC Complaint Received: January 30, 2018

Background

January 7, 2020 Council Meeting:

At its January 7, 2020 public meeting, the Council considered the October 30, 2019⁵ 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 Complainant's OPRA request item No. 4 seeking "e-mails, electronic communications, and fax wire transfers" regarding Indictment No. 13-07-1963 is invalid. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). See also Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016).

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant requested other records that are not at issue in the instant matter.

⁴ The current Custodian of Record is Nicole L. Campellone.

⁵ This complaint was prepared for adjudication at the Council's November 12, 2019 meeting but could not be adjudicated due to lack of quorum.

Thus, there was no unlawful denial of access to this portion of the request. N.J.S.A. 47:1A-6.

2. The Custodian may have unlawfully denied access to the portion of the Complainant's OPRA request item No. 1 seeking arrest reports pertaining to Indictment No. 13-07-1963. N.J.S.A. 47:1A-6; Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008). The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.
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 deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸**
4. The portions of the Complainant's OPRA request item Nos. 1-3 seeking pre-trial memoranda, investigative reports, handwritten notes, police reports, dispatch reports, and walkie talkie 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, 546 (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). The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6.
5. The portion of the Complainant's OPRA request item No. 2 seeking "photo arrays" is 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). Therefore, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.
6. 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 January 8, 2020, the Council distributed its Interim Order to all parties. On January 14,

⁶ 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.

⁷ "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."

⁸ 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.

2020, the current Custodian responded to the Council's Interim Order. Therein, the current Custodian attached a copy of the requested arrest report as well as a certified confirmation of compliance to the Executive Director. The current Custodian certified that she provided the Complainant with a copy of the arrest report that same day, with redactions to a driver's license number and social security number pursuant to N.J. Court Rules, R. 1:38-7.

Analysis

Compliance

At its January 7, 2020 meeting, the Council ordered the Custodian to provide the Complainant with a copy of the withheld arrest report and to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On January 8, 2020, 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 January 15, 2020.

On January 14, 2020, the fourth (4th) business day after receipt of the Council's Order, the current Custodian responded in writing, attaching a copy of the requested arrest report as well as a certified confirmation of compliance. The current Custodian certified that the Complainant was simultaneously provided a copy of the arrest report.

Therefore, the current Custodian complied with the Council's January 7, 2020 Interim Order because she responded in the prescribed time frame providing the withheld record and simultaneously provided 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)).

Although the Custodian unlawfully denied access to the requested arrest report, he lawfully denied access to the remainder of the Complainant's OPRA request. Additionally, the current Custodian cured the Custodian's unlawful denial of access by disclosing the arrest report in accordance with the Council's January 7, 2020 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 complied with the Council's January 7, 2020 Interim Order because she responded in the prescribed time frame providing the withheld record and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the requested arrest report, he lawfully denied access to the remainder of the Complainant's OPRA request. Additionally, the current Custodian cured the Custodian's unlawful denial of access by disclosing the arrest report in accordance with the Council's January 7, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado
Staff Attorney

January 21, 2020⁹

⁹ This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to a lack of quorum.



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101 SOUTH BROAD STREET
PO BOX 819
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 7, 2020 Government Records Council Meeting

Gregory Gibbs
Complainant

Complaint No. 2018-14

v.

Atlantic County Prosecutor's Office
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council ("Council") considered the October 30, 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 Complainant's OPRA request item No. 4 seeking "e-mails, electronic communications, and fax wire transfers" regarding Indictment No. 13-07-1963 is invalid. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). See also Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016). Thus, there was no unlawful denial of access to this portion of the request. N.J.S.A. 47:1A-6.
2. The Custodian may have unlawfully denied access to the portion of the Complainant's OPRA request item No. 1 seeking arrest reports pertaining to Indictment No. 13-07-1963. N.J.S.A. 47:1A-6; Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008). The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.
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 portions of the Complainant's OPRA request item Nos. 1-3 seeking pre-trial memoranda, investigative reports, handwritten notes, police reports, dispatch reports, and walkie talkie 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, 546 (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). The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6.
5. The portion of the Complainant's OPRA request item No. 2 seeking "photo arrays" is 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). Therefore, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.
6. 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 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 8, 2020

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
January 7, 2020 Council Meeting**

**Gregory Gibbs¹
Complainant**

GRC Complaint No. 2018-14

v.

**Atlantic County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint:³ Regarding State v. Gibbs, Indictment No. 12-07-1963:

1. All arrest reports, pre-trial memorandums and investigative reports.
2. All photo arrays, handwritten notes, and police reports.
3. All dispatch reports and walkie talkie reports.
4. All e-mails, electronic communications records, fax wire transfers.

Custodian of Record: Dylan P. Thompson

Request Received by Custodian: September 18, 2017

Response Made by Custodian: September 26, 2017

GRC Complaint Received: January 30, 2018

Background⁴

Request and Response:

On September 18, 2017, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On September 26, 2017, the Custodian responded in writing denying access to all requested records, stating they were criminal investigatory records not subject to disclosure under N.J.S.A. 47:1A-1.1. The Custodian also cited 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) to note that a criminal investigatory record remains exempt, regardless of whether the investigation was open or closed.

Denial of Access Complaint:

On January 30, 2018, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant requested other records that are not at issue in the instant matter.

⁴ 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.

Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to provide all requested records and only provided one CD. The Complainant asserted that he should be entitled to all e-mails, electronic communications and fax wire transfers.

Statement of Information:

On February 27, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on September 18, 2017. The Custodian certified that he looked through the physical and digital versions of the relevant file for responsive records. The Custodian certified that responded in writing on September 26, 2017 denying access to the requested records.

The Custodian asserted that the requested records were not open disclosure, arguing they were criminal investigatory records and were not subject to disclosure under N.J.S.A. 47:1A-1.1. The Custodian added that the records were exempt from disclosure regardless of whether the investigation was open or closed, citing Janeczko, GRC 2002-79, et seq.

Analysis

Validity of Request

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.), certif. denied, 193 N.J. 292 (2007).⁵ In Paff, the complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian’s denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian’s cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to “render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.”

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given

⁵ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957).

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

[MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Regarding requests for e-mails and correspondence, the GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See Elcavage, GRC 2009-07; Sandoval v. N.J. State Parole Bd., GRC

⁶ Affirmed on appeal from Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004).

Complaint No. 2006-167 (Interim Order dated March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011). Further, the Council has previously determined that a request failing to contain all appropriate criteria set forth in Elcavage, GRC 2009-07, was invalid. See *e.g.* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010) (invalid request omitting the “subject and/or content”); Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016) (invalid request omitting “date or range of dates”).

Here, Complainant’s OPRA request item No. 4 sought “e-mail, electronic communications, and fax wire transfers” pertaining to his Indictment No. 13-07-1963. The request failed to identify a sender and/or recipient and failed to include a date or range of dates. Therefore, the request failed to satisfy the elements required to be a valid request for communications under Elcavage and Armenti.

Accordingly, the Complainant’s OPRA request item No. 4 seeking “e-mails, electronic communications, and fax wire transfers” regarding Indictment No. 13-07-1963 is invalid. Elcavage, GRC 2009-07; Armenti, GRC 2009-154. See also Inzelbuch, GRC 2015-68. Thus, there was no unlawful denial of access to this portion of the request. N.J.S.A. 47:1A-6.

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 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).⁷ 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 long held that once a record is determined to be a criminal investigatory record, it is exempt from access. See Janeczko, GRC Complaint No. 2002-79, *et seq.*, 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.”⁸ 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.”

Arrest Reports

The Council has held that arrest reports are disclosable, with redactions for information otherwise exempt under OPRA. See Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008).

Here, the Complainant’s OPRA request item No. 1 sought in part any arrest reports pertaining to his indictment. The Custodian argued in his response and in the SOI that responsive records were exempt under the criminal investigatory exemption. However, it is unclear in the record whether such records exist in the file.

Accordingly, the Custodian may have unlawfully denied access to the portion of the Complainant’s OPRA request item No. 1 seeking arrest reports pertaining to Indictment No. 13-07-1963. N.J.S.A. 47:1A-6; Morgano, 2007-156. The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.

⁷This 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.

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

Pre-Trial Memoranda, Investigative Reports, Handwritten Notes, Police Reports, Dispatch Reports, Walkie Talkie 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). 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.

Regarding the first prong, there is no evidence in the record to indicate that the records are required by law to be made in the Atlantic County Prosecutor's Office's course of official business. As to the second prong, the Complainant included in his Denial of Access Complaint copies of a complaint/warrant provided in response to the OPRA request at issue. Upon review, the record demonstrates that the Complainant sought records pertaining to a criminal indictment. Furthermore, the Complainant is currently incarcerated as a result of the indictment and subsequent conviction.⁹ Based on the foregoing, the GRC is satisfied that the aforementioned records fell under the criminal investigatory records exemption and are not subject to disclosure.

Accordingly, the portions of the Complainant's OPRA request item Nos. 1-3 seeking pre-trial memoranda, investigative reports, handwritten notes, police reports, dispatch reports, and walkie talkie reports are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., 229 N.J. at 546; Janeczko, GRC 2002-79, *et seq.* The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6.

Photo Arrays

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:

⁹ "Offender Details." New Jersey Department of Corrections, https://www20.state.nj.us/DOC_Inmate/details?x=1064699&n=1 (last accessed September 27, 2019).

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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 v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order February 25, 2009), 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.]

Additionally, 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).¹⁰

In the matter before the Council, the Complainant's OPRA request item No. 2 sought in part any “photo arrays” pertaining to his indictment. The GRC has already concluded that the request pertained to a criminal investigation. Further, a plain reading of EO 69 and all relevant case law, supports the conclusion that the photographs responsive to the subject OPRA request are exempt from disclosure. Based on the forgoing, the GRC is satisfied that the Custodian lawfully denied access to the responsive photographs.

¹⁰ Affirmed on appeal in Lynn v. Middlesex Cnty. Prosecutor's Office, 2018 N.J. Super. Unpub. LEXIS 370 (App. Div. 2018).

Accordingly, the portion of the Complainant's OPRA request item No. 2 seeking "photo arrays" is 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. Therefore, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

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 Complainant's OPRA request item No. 4 seeking "e-mails, electronic communications, and fax wire transfers" regarding Indictment No. 13-07-1963 is invalid. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). See also Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016). Thus, there was no unlawful denial of access to this portion of the request. N.J.S.A. 47:1A-6.
2. The Custodian may have unlawfully denied access to the portion of the Complainant's OPRA request item No. 1 seeking arrest reports pertaining to Indictment No. 13-07-1963. N.J.S.A. 47:1A-6; Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008). The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.
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 deliver¹¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹² to the Executive Director.¹³**

¹¹ 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.

¹² "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."

¹³ 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 portions of the Complainant's OPRA request item Nos. 1-3 seeking pre-trial memoranda, investigative reports, handwritten notes, police reports, dispatch reports, and walkie talkie 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, 546 (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). The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6.
5. The portion of the Complainant's OPRA request item No. 2 seeking "photo arrays" is 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). Therefore, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

October 30, 2019¹⁴

¹⁴ This complaint was prepared for adjudication at the Council's November 12, 2019 meeting but could not be adjudicated due to lack of quorum.