



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

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

Robert Byrd  
Complainant

Complaint No. 2018-23

v.

Atlantic City Police Department (Atlantic)  
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 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, finds that:

1. The Custodian’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. Notwithstanding the potential nonexistent of responsive records, the requested police and lab reports regarding a handgun used in the commission of a 1984 incident 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, 569 (2017); Leak v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009). Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6.

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**

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

**Robert Byrd<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-23**

v.

**Atlantic City Police Department (Atlantic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of “police records and lab reports on the .22 caliber handgun used in” Case Number “McInv 49-84.”

**Custodian of Record:** Paula Geletei

**Request Received by Custodian:** January 18, 2018

**Response Made by Custodian:** January 30, 2018

**GRC Complaint Received:** February 15, 2018

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

**Request and Response:**

On January 18, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 30, 2018, Records Unit Supervisory Tamika Harrington responded in writing on behalf of the Custodian stating that the Atlantic City Police Department (“ACPD”) “no longer [had] records dated [that] far back.” Ms. Harrington suggested that the Complainant contact the Atlantic County Prosecutor’s Office (“ACPO”), Homicide Unit for further assistance.<sup>4</sup>

**Denial of Access Complaint:**

On February 15, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that ACPD denied his OPRA request on the basis that they no longer maintained records as far back as 1984. The Complainant

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

<sup>2</sup> Represented by Karl Timbers, Esq. (Atlantic City, NJ).

<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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

<sup>4</sup> The GRC notes that the Complainant submitted an OPRA request to the ACPO on January 18, 2018. The Custodian responded denying access to said request under the criminal investigatory exemption. That denial is currently the subject of Byrd v. Atlantic Cnty. Prosecutor’s Office, GRC Complaint No. 2018-24.

argued he filed the instant complaint in order to ascertain “official policies on the storage and/or whereabouts of such records for the year involved.”

Statement of Information:<sup>5</sup>

On April 17, 2018, the GRC requested a completed Statement of Information (“SOI”) from the Custodian. On May 11, 2018, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt.

Analysis

Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. The Council thus noted the custodian’s failure to adhere to N.J.A.C. 5:105-2.4(a). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the Custodian did not comply with the GRC’s initial request for an SOI. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a “No Defense” letter and requesting a completed SOI within three (3) business days of receipt. The GRC received no response to its SOI request from the Custodian thereafter.

Accordingly, the Custodian’s failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate

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<sup>5</sup> On March 9, 2018, this complaint was referred to mediation. On April 2, 2018, this complaint was referred back to the GRC for adjudication.

a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

### **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.

Here, the Complainant sought access to “police records and lab reports” regarding a firearm used in a 1984 incident. On behalf of the Custodian, Ms. Harrington denied access on the basis that ACPD “no longer [had] records dated [that] far back.” Ms. Harrington also directed the Complainant to contact the ACPO regarding the incident. The Complainant filed the instant complaint arguing that he intended to ascertain “official policies on the storage and/or whereabouts of such records for the year involved.” Thereafter, and as noted above, the Custodian failed to file an SOI.

Notwithstanding the forgoing, 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)).<sup>6</sup> 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 below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975)

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<sup>6</sup> On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

(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)).

Further, N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

Thus, the GRC must take judicial notice that the Complainant here filed similar OPRA requests as issue in Byrd v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2018-24 and Byrd v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2018-57 being concurrently adjudicated with this complaint. Specifically, the subject OPRA requests seeking "police . . . and lab reports" regarding incidents in 1984. In fact, the subject OPRA request in Byrd, GRC 2018-24 is exact to the request at issue here. In those complaints, both custodians denied access to the OPRA requests under the criminal investigatory exemption.

Although the ACPD initially responded in the OPRA request at issue here asserting that they no longer maintained responsive records, the Custodian failed to submit an SOI certifying to this fact. Nevertheless, the Administrative Procedures Act and the courts have permitted the GRC to take judicial notice and raise additional defenses *sua sponte*. Thus, notably relying on judicial notice of the facts present in Byrd, GRC 2018-24, the GRC will exercise its *sua sponte* right to determine whether the requested records were exempt under the criminal investigatory exemption.

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.”

Further, in Leak v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009), the complainant sought, among other records, “ballistics results from a 1994 trial.” The custodian responded denying access to responsive records pursuant to N.J.S.A. 47:1A-1.1. and Executive Order No. 69 (Governor Whitman, 1997). In determining whether the custodian lawfully denied access to the responsive records, the Council contemplated

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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.

the term “ballistics” as defined in the Merriam Webster dictionary.<sup>9</sup> Id. at 5. Further, the Council considered how law enforcement agencies applied ballistics to criminal investigations involving the use of a firearm. Based on the forgoing, the Council determined that the custodian lawfully denied access to the responsive records. Id. at 6.

Upon review of this complaint, the Council is persuaded that the requested “police . . . and lab reports” are exempt from disclosure under the criminal investigatory exemption. This is notwithstanding ACPD’s assertion that no responsive records exist. As to the first prong of the test, there is no evidence in the record that the requested reports were required by law to be made. As to the second prong of the test, the records clearly pertain to a criminal investigation of the 1984 incident involving the identified “handgun.” Further, the requested reports could easily fall within the “ballistics” category to the extent that investigators tested the gun to connect it to each incident. Thus, a conclusion on par with Leak, GRC 2007-148 is appropriate here.

Accordingly, notwithstanding the potential nonexistent of responsive records, the requested police and lab reports regarding a handgun used in the commission of a 1984 incident are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., 229 N.J. 541; Leak, GRC 2007-148. Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. Notwithstanding the potential nonexistent of responsive records, the requested police and lab reports regarding a handgun used in the commission of a 1984 incident 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, 569 (2017); Leak v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009). Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso  
Executive Director

October 30, 2019

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<sup>9</sup> Merriam Webster defines “ballistics” as “the firing characteristics of a firearm or cartridge.” <http://www.merriam-webster.com/dictionary/ballistics>.