



**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**

Robert Byrd  
Complainant

Complaint No. 2018-24

v.

Atlantic County Prosecutor's Office  
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 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. 2018-24**

v.

**Atlantic County Prosecutor's Office<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:** Melinda A. Harrigan

**Request Received by Custodian:** January 24, 2018

**Response Made by Custodian:** January 29, 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 29, 2018, the Custodian responded in writing denying access to the requested records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; 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).

**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 the Atlantic County Prosecutor's Office ("ACPO") denied him access to requested records under the criminal investigatory exemption. The Complainant argued the records in question were disclosed to the public in Mr. Hart's trial.

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

### Statement of Information:

On February 28, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 24, 2018. The Custodian certified that she searched the ACPO InfoShare system based on the information included in the subject OPRA request. The Custodian certified that she was unable to locate the identified case. The Custodian further certified that she did not conduct an additional search because the requested records were “clearly investigatory in nature.” The Custodian certified that she responded in writing on January 29, 2018 denying access to any potentially responsive records under the criminal investigatory exemption.

The Custodian argued that she lawfully denied access to the Complainant’s OPRA request because said records were exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 556 (2017). The Custodian affirmed that the requested police records and lab reports were not required by law to be made or maintained. The Custodian further averred that the records pertained to a criminal investigation, regardless of whether said investigation concluded. Janeczko, GRC 2002-79 *et seq.*

### 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.

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., 229 N.J. 541, 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>4</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, GRC 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.”<sup>5</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.”

Additionally, 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 the term “ballistics” as defined in the Merriam Webster dictionary.<sup>6</sup> Id. at 5. Further, the Council

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<sup>4</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>5</sup>The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

<sup>6</sup>Merriam Webster defines “ballistics” as “the firing characteristics of a firearm or cartridge.” <http://www.merriam-webster.com/dictionary/ballistics>.

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.

Here, the Complainant sought access to “police records and lab reports” regarding a firearm used in a 1984 incident. The Custodian denied access to the requested records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; Janeczko, GRC 2002-79, *et seq.* The Complainant disputed this denial arguing that the records in question were disclosed in Mr. Hart’s trial. In the SOI, the Custodian maintained her position that the requested records were exempt from disclosure under the criminal investigatory exemption.

Upon review of this complaint, the Council is persuaded that the Custodian lawfully denied access to the requested “police . . . and lab reports” under the criminal investigatory exemption. 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, 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 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