



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**September 29, 2020 Government Records Council Meeting**

Kelly Sherwood, Esq. (o/b/o NJ Property  
Liability Insurance Guaranty Association)  
Complainant

Complaint No. 2018-318

v.

NJ Department of Law & Public Safety,  
Division of Criminal Justice  
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 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 Complainant’s December 10, 2018 request seeking “all discovery” was invalid because it was a “blanket request” that failed to identify a specific record. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Vandy v. Newfield Police Dep’t (Gloucester), GRC Complaint No. 2016-74 and 2016-75 (May 2016). See also Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian lawfully denied access to the Complainant’s original request. N.J.S.A. 47:1A-6.
2. The records sought in the Complainant’s clarified OPRA request item No. 1 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); Janeczko v. N.J. Dep’t of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq.* (June 2004); Parker v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2009-225 (October 2010); Gethange v. Middlesex Cnty. Prosecutor’s Office, GRC Complaint No. 2015-294 (March 2017); Herbert v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2016-51 (March 2018). Thus, the Custodian lawfully denied access to the requested audio/video of witness interviews. N.J.S.A. 47:1A-6. Further, the GRC declines to address whether any of the other asserted exemptions apply to the instant clarified request item because same was properly denied under the criminal investigatory exemption.
3. The Custodian lawfully denied access to the grand jury materials responsive to the Complainant’s clarified OPRA request item No. 2. N.J.S.A. 47:1A-6. Specifically, the requested grand jury records, comprising exhibits used during the grand jury trial, are

expressly exempt from disclosure under New Jersey's Court Rules. N.J.S.A. 47:1A-9(a); R. 1:38-3(c)(4); R. 3:6-7; Reagan v. Camden Cnty. Prosecutor's Office, GRC Complaint No. 2016-28 (July 2017).

4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Complainant failed to achieve the relief sought in her Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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 29<sup>th</sup> Day of September 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: October 1, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 29, 2020 Council Meeting**

**Kelly Sherwood, Esq. (On Behalf of N.J. Property-  
Liability Insurance Guaranty Association)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-318**

v.

**N.J. Department of Law & Public Safety,  
Division of Criminal Justice<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of “[a]ll discovery” provided by the State to legal counsel for Dr. Todd Koppel and Garden State Pain Management (“GSPM”) pertaining to the criminal matter captioned State of New Jersey v. Todd Koppel and Garden State Pain Management, P.A., Indictment No. 18-02-00032-S.

**Custodian of Record:** Lt. Edward Augustyn  
**Request Received by Custodian:** December 10, 2018  
**Response Made by Custodian:** December 11, 2018  
**GRC Complaint Received:** December 28, 2018

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

**Request and Response:**

On December 10, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 11, 2018, the Custodian responded in writing seeking clarification of the subject OPRA request because it failed to identify specific “government records.” MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). On December 12, 2018, the Complainant clarified the subject OPRA request verbally via telephone to seek:

1. “[W]itness statements, notes, and other evidence related to” Indictment No. 18-02-00032-S.
2. Grand Jury materials relevant to Indictment No. 18-02-00032-S.

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

<sup>2</sup> Represented by Deputy Attorney General Michael Vomacka.

<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.

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3. Public records associated with the parties involved in the instant complaint.

On December 18, 2018, the Custodian responded in writing denying access to the Complainant's OPRA request. The Custodian stated that during their December 11, 2018 telephone call, he advised the Complainant that the records sought in clarified OPRA request item Nos. 1 and 2 were exempt from disclosure under the criminal investigatory and grand jury exemptions. N.J.S.A. 47:1A-1.1; N.J. Court Rules, R. 1:38-3; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017). The Custodian noted that he was disclosing several records (with redaction of personal information) in Indictment Nos. S-2016-001887-1602 (Koppel); S-2018-000472-1602 (Koppel), S-2018-000335-1602 (GSPM), and 18-02-00032-S (both parties) which are responsive to clarified OPRA request item No. 3. The Custodian noted that he retained the right to make assert additional denials not advanced herein.

Denial of Access Complaint:

On December 28, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that her firm represents New Jersey Property-Liability Insurance Guaranty Association ("NJPLIGA"), a State-created entity that provides personal injury protection benefits for individuals involved in motor vehicle accidents without insurance. The Complainant stated that NJPLIGA recently filed a civil action against the parties in Indictment No. 18-02-00032-S over insurance fraud.

The Complainant stated that in furtherance of the civil action, she sought all discovery associated with those parties for NJPLIGA to effectively fight the fraud claim. The Complainant contended that her original OPRA request did not seek "any and all documents;" rather, it specifically sought discovery provided "by the State . . . to Dr. Koppel's attorney." The Complainant contended that NJPLIGA was entitled to the records to assist their legal challenge. The Complainant argued that although the Custodian provided several records regarding Dr. Koppel and GSPM as a result of the clarified OPRA request, he did not provide witness statements, notes, other evidence, and grand jury materials.

Statement of Information:<sup>4</sup>

On July 8, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on December 10, 2018. The Custodian affirmed that his search included conducting a global case search in Infoshare by defendants and identified case file numbers. The Custodian certified that based on this search, he located three (3) complaints and an indictment. The Custodian certified that he responded in writing on December 18, 2018 disclosing those records located, with redactions for personal information, and denied access to the remainder of the OPRA request.

The Custodian contended that he properly denied access to the Complainant's initial OPRA request because it was invalid. Spectaserv, Inc. v. Middlesex Cnty. Util. Auth., 416 N.J. Super. 565, 576 (App. Div. 2010); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J.

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<sup>4</sup> On January 24, 2019, this complaint was referred to mediation. On June 20, 2019, this complaint was referred back to the GRC for adjudication.  
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Super. 166, 178 (App. Div. 2007). See also Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015). The Custodian argued that the subject request seeking “all discovery” provided to a criminal defendant indicted on twenty (20) counts of insurance fraud failed to identify specific records. The Custodian argued that because the request was invalid, he properly sought clarification of it.

The Custodian further contended that he lawfully denied access to the records sought in the Complainant’s clarified OPRA request. The Custodian initially stated that the responsive records were exempt from disclosure under the New Jersey Insurance Fraud Protection Act (“Act”). The Custodian stated that the Act prohibits disclosure of all “[p]apers, documents, reports, or evidence relative to the subject of an investigation . . .” N.J.S.A. 17:33A-11. The Custodian contended that the Complainant sought “documents and evidence” related to an insurance fraud prosecution. The Custodian thus argued that same were exempt from disclosure under the Act and a lawful denial occurred.

The Custodian next contended that witness statements, notes, grand jury materials, and “unfiled evidence” 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, 569 (2017). The Custodian contended that any responsive records clearly related to a criminal investigation and fall within the exemption contained within OPRA. Id. The Custodian argued that grand jury records are also exempt from disclosure under N.J.S.A. 47:1A-9(a) and N.J. Court Rules, R. 1:38-3; R. 3:6-7. The Custodian also argued that unfiled discovery records are exempt from disclosure under N.J.S.A. 47:1A-9(b). See Drinker, Biddle & Reath, LLP. v. N.J. Dep’t of Law & Pub. Safety, Div. of Law, 421 N.J. Super. 489 (App. Div. 2011).

#### Additional Submissions:

On July 23, 2019, the Complainant submitted a letter brief replying to the Custodian’s SOI. The Complainant averred that NJPLIGA was the victim of insurance fraud and sought the discovery items in Indictment 18-02-00032-S to “support Governor Murphy’s policy of fighting insurance fraud.” The Complainant reiterated from her Denial of Access Complaint that NJPLIGA recently filed suit against Dr. Koppel based on his violations of the Act.

The Complainant first contended that her original OPRA request did not seek “everything in the State’s file.” The Complainant argued that her request only sought “documents that were given to defense counsel . . .” The Complainant contended that the Custodian failed to identify those records individually, instead opting to deny the original OPRA request as invalid.

The Complainant further contended that she did not seek records falling within the purview of the Act. The Complainant further argued that they never requested any “documents or evidence related to an insurance fraud prosecution . . .” The Complainant reiterated that she only sought those documents turned over to defendant’s counsel. The Complainant alleged that the Act could not apply to records already disclosed to defense counsel.

The Complainant noted that the same could be said for the attached grand jury transcript, which was loaded to the eCourts system by defense counsel on January 9, 2019. The Complainant

contended that once the grand jury transcript was made public, any exemption to it is waived. See In Re: Grand Jury Subpoenas Issued, 389 N.J. Super. 281, 298 (App. Div. 2006). The Complainant thus argued that any exemption to the requested grand jury materials has been waived and the GRC should order disclosure of those transcript attachments.

The Complainant further argued that NJPLIGA is not the media, rather, it is the victim of insurance fraud. The Complainant contended that the instance complaint differs from N. Jersey Media Grp., Inc., 229 N.J. Super. 541. The Complainant argued that instead, the Custodian should have weighed whether disclosure was inimical to the public interest. N.J.S.A. 47:1A-3(a). The Complainant contended that OPRA was enacted to promote transparency and that all right to access shall be construed in favor of disclosure. N.J.S.A. 47:1A-1. The Complainant contended that it was in the public's interest to require disclosure of the request records in order to allow NJPLIGA to pursue its fraud litigation.

Finally, the Complainant asserted that she did not seek unfiled discovery. The Complainant contended that instead, NJPLIGA was entitled to those specific records "listed in the OPRA request."<sup>5</sup>

## Analysis

### Validity of Request

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, 375 N.J. Super. at 546 (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.

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<sup>5</sup> On August 23, 2019, the Complainant advised the GRC that Indictment No. 18-02-00032-S was dismissed by the Passaic County Law Division on July 24, 2019. Kelly Sherwood, Esq. (On Behalf of N.J. Property-Liability Insurance Guaranty Association) v. N.J. Department of Law & Public Safety, Division of Criminal Justice, 2018-318 – Findings and Recommendations of the Executive Director

[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, 381 N.J. Super. at 37;<sup>6</sup> N.J. Builders, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

The GRC has typically held that a request seeking access to a “file” is invalid because it represents a blanket request for a class of various, unidentifiable records. See Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008); Nunley v. N.J. State Parole Bd., GRC Complaint No. 2013-335 (July 2014). In Bragg, GRC 2010-145, the complainant disputed the custodian’s denial of his request seeking his “[c]omplete institutional” and “Special Investigation Division” files. In the SOI, the custodian argued that a portion of the request was invalid because it failed to identify specific records. The Council agreed, finding that both request items were invalid because the complainant’s “request seeks entire files rather than specific identifiable government records.” (Citations Omitted). See also Bradley-Williams v. Atlantic Cnty. Jail, GRC Complaint No. 2011-232 (December 2012); Torian v. N.J. State Parole Bd., GRC Complaint No. 2013-245 (June 2014).

Further, the Council has previously held that a request seeking “discovery” submitted for a particular case was invalid. Specifically, in Vandy v. Newfield Police Dep’t (Gloucester), GRC Complaint No. 2016-74 and 2016-75 (May 2016), the complainant submitted two (2) OPRA requests seeking the “[d]iscovery [p]ackage” for two complaints. The custodian responded stating that the complainant was not entitled to the entirety of both packages, but that he should submit a new OPRA request identifying specific records within the package. That complaint ensued, wherein the complainant argued that the custodian failed to disclose responsive records. The custodian maintained that he sought clarification and the complainant failed to oblige him. Upon review of the subject requests, the Council held that “a discovery request is more akin to a ‘blanket request’ for various facts and documents relevant to a particular action . . .” Id. at 5. Thus, the Council, relying on its prior decision in Redden v. Cape May Cnty. Prosecutor’s Office, GRC Complaint No. 2007-206 (September 2009), held that both requests were invalid because they failed to identify specific government records. Id. at 6.

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<sup>6</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004). Kelly Sherwood, Esq. (On Behalf of N.J. Property-Liability Insurance Guaranty Association) v. N.J. Department of Law & Public Safety, Division of Criminal Justice, 2018-318 – Findings and Recommendations of the Executive Director

Here, the Complainant's December 10, 2018 OPRA request sought "all discovery" sent by the State to counsel for defendants in Indictment No. 18-02-00032-S. The Custodian responded on December 11, 2018 denying the OPRA request as invalid and asking the Complainant to clarify same, which she did on December 12, 2018. Thereafter, in her Denial of Access Complaint, the Complainant contended that her initial OPRA request was valid because it sought "discovery" submitted for a specific matter and not "any and all documents." In the SOI, the Custodian maintained that the Complainant's original request was invalid because it failed to identify specific records within the "discovery file." Citing Spectaserv, Inc., 416 N.J. Super. at 576; N.J. Builders Ass'n, 390 N.J. Super. at 178; Lagerkvist, 443 N.J. Super. at 236-237.

Precedential case law supports that Custodian's position that the original OPRA request was invalid. Specifically, the request seeking "all discovery" was a blanket request for any documents sent to defendant's counsel, rather than an identifiable request for specific records. Further, the Council's decision in Vandy, GRC 2016-74, *et seq.* is on point with the facts of this complaint. Thus, the GRC logically concludes that the original OPRA request was invalid.

Accordingly, the Complainant's December 10, 2018 request seeking "all discovery" was invalid because it was a "blanket request" that failed to identify a specific record. MAG, 375 N.J. Super. at 546; Vandy, GRC 2016-74, *et seq.* See also Bent, 381 N.J. Super. at 37, N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler, GRC 2007-151. Thus, the Custodian lawfully denied access to the Complainant's original 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.

Having determined that the Complainant's original request was invalid, the GRC now turns to the Complainant's clarified OPRA request and whether the Custodian lawfully denied access to item Nos. 1 and 2.<sup>7</sup>

#### **Clarified OPRA request item No. 1**

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, 380-381 (App. Div. 2006).

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<sup>7</sup> The GRC notes that the Custodian disclosed multiple records in response to clarified OPRA request item No. 3. The Complainant did not include this item as at issue in the Denial of Access Complaint. Additionally, the Complainant's clarified request did not seek access to "unfiled evidence" or "unfiled discovery." Thus, the GRC will not address this clarified request item or the "unfiled evidence" issue.

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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., 441 N.J. Super. 70. 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>8</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 & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq.* (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>9</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."

In noting that the N. Jersey Media Grp., Inc. Court held that the witness statements at issue there were exempt under OPRA, the Council has previously found the same. In Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010), the complainant requested seven witness statements. Determining that the statements were made by witnesses obtained during the course of a criminal investigation, the Council held that they were exempt from disclosure under OPRA as criminal investigatory records and that the custodian did not violate OPRA by denying the request. See also Walker v. City of Newark, Div. of Police (Essex), GRC Complaint No. 2016-6 (July 2017).

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<sup>8</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>9</sup>The GRC's ruling was affirmed in an unpublished opinion of the Appellate Division.

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The Council has also previously held that notes and evidence records pertaining to a criminal investigation fell within the criminal investigatory exemption. See *e.g.* Gethange v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2015-294 (March 2017); Herbert v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2016-51 (March 2018).

In the matter before the Council, the Complainant's clarified OPRA request item No. 1 sought "witness statements, notes, and other evidence" related to Indictment No. 18-02-00036-S. The Custodian responded in writing denying access to said records under, among other bases, the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. Following the filing of this complaint, the Custodian maintained his position in the SOI that he lawfully denied access to this clarified item under OPRA. In response to the SOI, the Complainant contended that N. Jersey Media Grp., Inc. did not apply here because NJPLIGA was not a media group and had an express interest in the records. The Complainant further argued that the Custodian failed to weigh the clarified request item on whether disclosure would be inimical to the public interest. N.J.S.A. 47:1A-3(a).

In applying the two prongs of the criminal investigatory exemption found in N. Jersey Media Grp., Inc., 229 N.J. 541 to the records sought in clarified OPRA request item No. 1, the GRC is satisfied that the Custodian lawfully denied access to the responsive records. Of pertinent note, the responsive records being held by the Division of Criminal Justice relate to a criminal investigation resulting in defendants being indicted of twenty (20) criminal counts associated with insurance fraud as indicated by the indictment papers disclosed to the Complainant. In fact, there is no disagreement between the parties that Indictment 18-02-00032-S related to a criminal action. Also, the Complainant has not presented any evidence that the records 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.*

Additionally, the GRC is not persuaded by the Complainant's argument that the Custodian failed to weigh whether disclosure would be inimical to the public interest. This argument relies on the exception to the "investigation in progress" exemption set forth in N.J.S.A. 47:1A-3(a). However, as noted by the Supreme Court, the criminal investigatory exemption "unlike the exemption for ongoing investigations [at N.J.S.A. 47:1A-3] does not consider whether disclosure would 'be inimical to the public interest.'" N. Jersey Media Grp., Inc., 229 N.J. at 569. It should be noted that the Custodian did not rely on N.J.S.A. 47:1A-3(a) as an exemption. Notwithstanding, a finding that the responsive records are exempt under the criminal investigatory exemption ends the inquiry.

Accordingly, the records sought in the Complainant's clarified OPRA request item No. 1 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.*; Parker, GRC 2009-225; Gethange, GRC 2015-294; Herbert, GRC 2016-51. Thus, the Custodian lawfully denied access to the requested audio/video of witness interviews. N.J.S.A. 47:1A-6. Further, the GRC declines to address whether any of the other asserted exemptions apply to the instant clarified request item because same was properly denied under the criminal investigatory exemption.

## Clarified OPRA request item No. 2

OPRA further states that:

The provisions of [OPRA] *shall 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).]

New Jersey Court Rules hold that the “requirement as to secrecy of proceedings of the grand jury shall remain as heretofore, and all people other than witnesses . . . shall be required to take an oath of secrecy before their admission thereto.” R. 3:6-7. A similar Court Rule provides that records relating to grand jury proceedings pursuant to R. 3:6-7 must be kept confidential. R. 1:38-3(c)(4). To that end, the Council has previously held that a custodian lawfully denied access to records included as part of a grand jury investigation. See Maniscalco v. Atlantic Cnty. Prosecutor’s Office, GRC Complaint No. 2012-247 (July 2013); Dunn v. Burlington Cnty. Prosecutor’s Office, GRC Complaint No. 2013-218 (January 2014); Reagan v. Camden Cnty. Prosecutor’s Office, GRC Complaint No. 2016-28 (July 2017).

Here, the Complainant’s clarified OPRA request item No. 2 sought grand jury materials, which she later noted were those exhibits listed in the grand jury transcript obtained from eCourts. The Custodian denied access to said records under the criminal investigatory exemption and the Court Rules requiring confidentiality of grand jury records. R. 1:38-3; R. 3:6-7. The Complainant countered by arguing that defendant’s counsel posted the grand jury transcript to eCourts effectively waiving any exemption to the requested exhibits. In Re: Grand Jury, 389 N.J. Super. at 298.

However, precedential GRC case law supports the Custodian’s denial to the requested grand jury records. The grand jury exhibits, as indicated by the transcript, include several different records including statements, charts, text message, bank records and medical records the State relied upon during the grand jury proceedings. These exhibits remain exempt from disclosure under R. 1:38-3(c)(4) and R. 3:6-7. Reagan, GRC 2016-28. The GRC is also not persuaded by Complainant’s argument that the transcript’s availability on the eCourts’ system constituted a waiver of this exemption. Further, In Re: Grand Jury is inapposite here because that court addressed a waiver of the attorney-client privilege and not the grand jury exemption. Ultimately, there is no evidence in the record, the Court Rules, or OPRA that explicitly provide any waiver based on disclosure. In fact, R. 1:38-3 further supports the GRC’s conclusion that no waiver of grand jury documents exists by providing that “[t]hese records remain confidential even when attached to a non-confidential document.” Id. at (a).

Accordingly, the Custodian lawfully denied access to the grand jury materials responsive to the Complainant’s clarified OPRA request item No. 2. N.J.S.A. 47:1A-6. Specifically, the

requested grand jury records, comprising exhibits used during the grand jury trial, are expressly exempt from disclosure under New Jersey's Court Rules. N.J.S.A. 47:1A-9(a); R. 1:38-3(c)(4); R. 3:6-7; Reagan, GRC 2016-28.

In closing, the GRC notes that the Complainant argued on multiple occasions that she had a right to access the records based on NJPLIGA's need for the records, highlighting at one point that her client was not "the media." These arguments can only be interpreted as an attempt to argue in favor of a common law right of access because OPRA does not contemplate the identity of the requestor except in limited circumstances not present here. OPRA also does not prioritize the right of access of another "public agency" over that of a media outlet or citizen-requestors.

To the extent that the Complainant has referenced such a common law need here, the GRC notes the following. In Rosenblum v. Borough of Closter, 2006 N.J. Super. Unpub. LEXIS 1444 (App. Div. 2006),<sup>10</sup> the complainant appealed from a final decision of the GRC that denied him access under OPRA. In appealing the GRC's decision, the complainant argued that he was entitled access to the requested records under common law. In denying the complainant's argument, the court held that "the GRC is not empowered to adjudicate disputes concerning the scope of common law rights." Id. at 4. In addition, the court stated that "[t]he [GRC] is an agency 'within the Department of Community Affairs charged with adjudicating OPRA disputes' in the event the person seeking the record chooses not to file an action in Superior Court." Id. (citing Bent v. Twp. of Stafford Police Dep't., 381 N.J. Super. 30, 38 (App. Div. 2005) and N.J.S.A. 47:1A-6). See also Rowan Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013) (holding that the GRC had no jurisdiction over a common law complaint). Based on the forgoing, the GRC does not have the authority to order disclosure based on a common law need. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-7(b).

### **Prevailing Party Attorney's Fees**

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially

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<sup>10</sup> On appeal from Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005). Kelly Sherwood, Esq. (On Behalf of N.J. Property-Liability Insurance Guaranty Association) v. N.J. Department of Law & Public Safety, Division of Criminal Justice, 2018-318 – Findings and Recommendations of the Executive Director

successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney’s fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the

relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

[Id. at 76.]

In the matter before the Council, the Complainant filed the instant complaint requesting that the GRC require the Custodian to disclose the records sought in her original and clarified OPRA requests. However, the GRC has found that the original request was invalid and that those records identified in the clarified OPRA request were exempt from disclosure. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); R. 1:38-3(c)(4); R. 3:6-7. Thus, the Complainant has not achieved the desired result and it not a prevailing party in this complaint.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Complainant failed to achieve the relief sought in her Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Complainant’s December 10, 2018 request seeking “all discovery” was invalid because it was a “blanket request” that failed to identify a specific record. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Vandy v. Newfield Police Dep’t (Gloucester), GRC Complaint No. 2016-74 and 2016-75 (May 2016). See also Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian lawfully denied access to the Complainant’s original request. N.J.S.A. 47:1A-6.
2. The records sought in the Complainant’s clarified OPRA request item No. 1 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); Janeczko v. N.J. Dep’t of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq.* (June 2004); Parker v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2009-225 (October 2010); Gethange v. Middlesex Cnty. Prosecutor’s Office, GRC Complaint No. 2015-294 (March 2017); Herbert v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2016-51 (March 2018). Thus, the Custodian lawfully denied access to the requested audio/video of witness interviews. N.J.S.A. 47:1A-6. Further, the GRC declines to address whether any of the other asserted exemptions apply to the instant clarified request item because same was properly denied under the criminal investigatory exemption.

3. The Custodian lawfully denied access to the grand jury materials responsive to the Complainant's clarified OPRA request item No. 2. N.J.S.A. 47:1A-6. Specifically, the requested grand jury records, comprising exhibits used during the grand jury trial, are expressly exempt from disclosure under New Jersey's Court Rules. N.J.S.A. 47:1A-9(a); R. 1:38-3(c)(4); R. 3:6-7; Reagan v. Camden Cnty. Prosecutor's Office, GRC Complaint No. 2016-28 (July 2017).
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Complainant failed to achieve the relief sought in her Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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