



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**

**August 24, 2021 Government Records Council Meeting**

Mary B. Colvell  
Complainant

Complaint No. 2019-134

v.

Hightstown Police Department (Mercer)  
Custodian of Record

At the August 24, 2021 public meeting, the Government Records Council (“Council”) considered the August 17, 2021 Supplemental 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 did not fully comply with the Council’s March 30, 2021 Interim Order. Specifically, although the Custodian timely provided the Complainant with the responsive records, she did not provide a certified confirmation of compliance to the Executive Director within the prescribed time frame.
2. The Complainant has failed to establish in her request for reconsideration of the Council’s March 30, 2021 Interim Order that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on mistake, extraordinary circumstances, and fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant did not demonstrate that the Council incorrectly found that no responsive records exist regarding conclusion No. 7 of the Interim Order. Additionally, the Complainant’s remaining arguments disputed the Custodian’s response to the Interim Order rather than the Order itself. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. The Custodian unlawfully denied access to portions of the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council’s March 31, 2021 Interim Order. However, the Custodian demonstrated that she provided responsive records to the Complainant in accordance with the 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 24<sup>th</sup> Day of August 2021

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: August 25, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*  
**Supplemental Findings and Recommendations of the Executive Director  
August 24, 2021 Council Meeting**

**Mary B. Colvell<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-134**

v.

**Hightstown Police Department (Mercer)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies via pick up of:

May 10, 2019 OPRA Request:

1. Kevin Colvell – 05/02/2019 – All documentation (complaint-warrant, police reports, notes, etc.); all audio/video related to incident – during arrest, transports, police station.
2. Colvell family at 128 Broad St. – All information in CAD system; all police records, tickets, complaints made to [Hightstown Police Department (“HPD”)], etc. in past; any audio/video.
3. Marissa Clark – All documentation, police records, tickets, audio/video of investigation for complaint-warrant; any telephone communications, records, etc. (May 2019 and any previous/past history).
4. 05/08/2019 – Audio/video of discussion with Sgt. Benjamin Miller #1113 in lobby of [HPD].

May 22, 2019 OPRA Request:

On or around 05/02/2019, Kevin Colvell was arrested by [HPD]. This request is for copies of the following:

1. All documentation related to this matter – etc. complaint-warrant, police reports, identity of arresting and investigative officers, length of investigation.
2. Information of circumstances surrounding the arrest – all audio/video of officers related to prior, during, transports and police station, etc.

On or around 05/02/2019, Marissa Clark alleged charges, which resulted in a complaint-warrant and arrest. The following records, as discoverable, are requested:

1. Police record of Marissa Clark (complaint-summons history).
2. The audio/video of investigation for complaint-warrant.
3. Any telephone communications from Marissa Clark to HPD for investigation.
4. Any police reports regarding complaint-warrant.

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

<sup>2</sup> Represented by Frederick C. Rafetto, Esq., of Ansell, Grimm & Aaron, P.C. (Ocean, NJ).

**Custodian of Record:** Debra Sopronyi

**Request Received by Custodian:** May 10, 2019; May 28, 2019

**Response Made by Custodian:** May 20, 2019; May 30, 2019

**GRC Complaint Received:** July 9, 2019

### **Background**

#### **March 30, 2021 Council Meeting:**

At its March 30, 2021 public meeting, the Council considered the March 23, 2021 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 May 10, 2019 request item Nos. 2 and 3 seeking various police records pertaining to the "Colvell family" and Ms. Clark are invalid because they require research. Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012). See also Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>3</sup> 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 these request items. N.J.S.A. 47:1A-6.
2. The Custodian unlawfully denied access to the portion of the Complainant's May 22, 2019 OPRA request seeking the "identity of arresting and investigative officers" and "length of investigation" pertaining to the arrest of Mr. Colvell on May 2, 2019, since such information is required to be disclosed under N.J.S.A. 47:1A-3(b). N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose the information to the Complainant.
3. The Custodian unlawfully denied access to the portion of the Complainant's OPRA requests seeking the complaint-warrant pertaining to the arrest of Mr. Colvell on May 2, 2019. N.J.S.A. 47:1A-6; Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall disclose the responsive record with redactions where applicable. Alternatively, if no responsive record exists, the Custodian shall certify to same.
4. The Custodian may have unlawfully denied access to this portion of the Complainant's May 22, 2019 OPRA request seeking telephone communications between Ms. Clark and Hightstown Police Department dated May 2, 2019, pertaining to the investigation. N.J.S.A. 47:1A-6; Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 364-65 (App. Div. 2003). The Custodian shall conduct a search for responsive records and provide same to the Complainant, with redactions where applicable. Alternatively, if no responsive records exist, the Custodian shall certify to same.

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<sup>3</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004).

5. **The Custodian shall comply with conclusion Nos. 2, 3, & 4 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 deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
6. The Custodian lawfully denied access to the portion of the Complainant's May 22, 2019 OPRA request seeking "police reports" and "notes" pertaining to the incident in which Mr. Colvell was arrested on May 2, 2019. N.J.S.A. 47:1A-6. The evidence of record demonstrates that such records fell under OPRA's criminal investigatory records exemption. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 573 (2017); Cheatham v. Borough of Fanwood Police Dep't, GRC Complaint No. 2013-262 (March 2014); and Boretsky v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2016-220 (February 2018).
7. The Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA requests seeking "audio/visual of officers" pertaining to his criminal case, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
8. 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 March 31, 2021, the Council distributed its Final Decision Interim Order to all parties. On April 2, 2021, the Complainant e-mailed the Government Records Council ("GRC"), asking how to address issues pertaining to the Council's findings and conclusions. On April 7, 2021, the GRC responded to the Complainant stating that she could submit a request for reconsideration of the Council's Order.

On April 7, 2021, the Custodian's Counsel responded to the Council's Interim Order, providing copies of records and a certification from Ms. Alexander. Regarding conclusion No. 2 of the Order, Counsel certified that copies of a CAD report and investigation report were provided to the Complainant containing the requested information as well as two (2) supplemental

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<sup>4</sup> 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.

<sup>5</sup> "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."

<sup>6</sup> 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.

investigation reports dated after the Complainant's OPRA request. Counsel certified that the reports contained redactions to protect victims' information and OPRA's criminal investigatory records exemption. Counsel also certified that no records exist containing the requested "length of investigation." Regarding conclusion No. 3, Counsel certified that a copy of the requested complaint-warrant was provided to the Complainant with redactions. Regarding conclusion No. 4, Counsel certified that a copy of an audio recording was provided to the Complainant via e-mail with redactions for victim's information.

Ms. Alexander certified that the aforementioned records were provided to the Complainant on April 7, 2021. Ms. Alexander also certified that no responsive records exist containing the requested "length of investigation."

On April 9, 2021, the GRC responded to Counsel, acknowledging receipt of the response to the Council's Interim Order. The GRC then stated that while it was understood that Ms. Alexander handled the OPRA request at issue on the Custodian's behalf, the Interim Order required a certification from the Custodian. Counsel responded that same day stating that a certification from the Custodian would be forthcoming.

On April 10, 2021, the Complainant filed a request for reconsideration of the Council's March 30, 2021 Interim Order based on a mistake, extraordinary circumstances, and fraud. The Complainant argued that the GRC made a mistake in concluding that no records exist regarding the Complainant's May 21, 2021 OPRA request item No. 2 pertaining to Mr. Colvell, which was addressed in conclusion No. 7 of the Order. The Complainant asserted that Ms. Alexander's March 15, 2021 certification indicates that she did locate audio/video from officers involved but failed to identify what audio/video was located when she searched for responsive records. The Complainant argued that Ms. Alexander should be required to identify the record and determine whether it remains denied. The Complainant also asserted that her May 10, 2019 OPRA request item No. 4 should have the date as May 3, 2019, rather than May 8, 2019.

Regarding the claim of extraordinary circumstances, the Complainant asserted that she was not told that she could provide a rebuttal to the additional information provided by the Custodian. The Complainant also noted that the Custodian did not timely submit her response to the GRC.

Regarding the claim of fraud, the Complainant argued that HPD's response to conclusion No. 2 was incomplete. The Complainant asserted that HPD failed to supply any information regarding the arresting officers. The Complainant asserted that HPD instead supplied information regarding the investigating officers dated outside the requested period. The Complainant also argued that the Custodian's SOI identified three (3) pages of e-mail correspondence with the Mercer County Prosecutor's Office but did not identify the basis for the redactions or the officer who sent or received the e-mails.

The Complainant next argued that the complaint-warrant received in response to conclusion No. 3 of the Interim Order was incomplete. The Complainant asserted that a complaint-warrant was a ten (10) page document, but only received two (2) pages. The Complainant therefore argued that HPD has not been compliant regarding this portion of the Council's Interim Order. Regarding conclusion No. 4, the Complainant argued the Ms. Alexander did not properly address

the matter by definitively stating whether HPD possessed additional telephone recordings from Ms. Clark.

On April 23, 2021, Counsel submitted objections to the request for reconsideration, as well as a certification of compliance with the Council's Interim Order. The Custodian certified that the located audio/video referenced in Ms. Alexander's March 15, 2021 certification pertained to an in-car transport video from October 2, 2019. The Custodian certified that the identified record was not in existence at the time the Complainant made her OPRA requests. The Custodian certified that Ms. Alexander mentioned the video since it involved the same parties but was ultimately was not responsive to the Complainant's request. The Custodian also certified that even if the video was responsive, it was destroyed in accordance with the State's retention schedule.

The Custodian also certified that the CAD report and investigative report were provided to address the Complainant's request for the identities of the arresting officers, as the records contained the identities of all HPD personnel involved in the incident. The Custodian certified that the redacted information in the records constituted criminal investigatory records under OPRA and were therefore appropriate. The Custodian also certified that the supplemental investigation reports did not exist at the time she submitted her SOI, and therefore could not have been provided at the time or at the time of the requests.

The Custodian certified that regarding the e-mail correspondence, those records were withheld at the time as criminal investigatory records, and that the Complainant was not the victim of the alleged crimes. Notwithstanding, the Custodian certified that redacted copies of the e-mails were being provided as part of this response to ensure full compliance with the current matter.

Regarding the complaint-warrant, the Custodian certified that although the record was issued through the Hightstown Municipal Court, it originated directly from the victim and not by an HPD officer. The Custodian certified that HPD therefore only possessed the first two (2) pages of the complaint-warrant and did not possess the remaining eight (8) pages.

Regarding the telephone communications between Ms. Clark and HPD, the Custodian certified that Hightstown Borough ("Borough") had a shared services agreement with East Windsor Township ("Township") in which the Township provided dispatch services to the Borough, including 911 emergency calls. The Custodian certified that the HPD processed non-emergency and administrative calls through sixteen (16) telephone lines. The Custodian certified that a search of all sixteen (16) telephone lines failed to locate any other responsive telephone communications beyond the recording provided to the Complainant on April 7, 2021.

On April 25, 2021, the Complainant submitted a reply to the Custodian's opposition to the request for reconsideration. The Complainant contended that the provided audio recording could not be authenticated when delivered electronically. The Complainant also asserted that the Custodian did not provide additional CAD reports that were responsive to her requests and included a copy of one in her response.

The Complainant argued that any relevant audio/video from HPD personnel should not have been deleted as the case was still open. The Complainant also contended that while the video dated October 2, 2019 was not requested, same should not have been deleted as well.

### **Analysis**

#### **Compliance**

At its March 30, 2021 meeting, the Council ordered the Custodian to provide responsive records withheld from disclosure and to search for and locate additional records. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On March 31, 2021, 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 April 8, 2021.

On April 7, 2021, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, Counsel responded in writing, providing responsive records and information in accordance with the Order. However, while Ms. Alexander provided a certification, the Custodian did not provide certified confirmation of compliance to the Executive Director until April 23, 2021, the sixteenth (16<sup>th</sup>) business day after receipt. Thus, the Custodian's response was untimely.

Therefore, the Custodian did not fully comply with the Council's March 30, 2021 Interim Order. Specifically, although the Custodian timely provided the Complainant with the responsive records, she did not provide a certified confirmation of compliance to the Executive Director within the prescribed time frame.

#### **Reconsideration**

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order dated March 30, 2021 on April 9, 2021, six (6) business days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent



evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Upon review of the parties' filings, the Complainant's request for reconsideration should be denied. Regarding the issue of mistake, although the Custodian did state that an audio/video recording pertaining to the incident was located, the Custodian later certified that the record was created after the Complainant submitted her OPRA requests. The Complainant thereafter conceded that the record would not have been responsive to her requests. Thus, there was no mistake pertaining to conclusion No. 7 of the Council's Interim Order.

Additionally, the Complainant's remaining arguments regarding fraud and extraordinary circumstances did not pertain to the Council's Interim Order, but rather expressed dissatisfaction of the Custodian's response to same. Also, the GRC has consistently held that it does not have the authority to gauge the integrity or content of the provided records. See Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003), and Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005).

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on mistake, extraordinary circumstances, and fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Complainant did not demonstrate that the Council incorrectly found that no responsive records exist regarding conclusion No. 7 of the Interim Order. Additionally, the Complainant's remaining arguments disputed the Custodian's response to the Interim Order rather than the Order itself. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

### **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)).

In the matter before the Council, the Custodian unlawfully denied access to portions of the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council’s March 31, 2021 Interim Order. However, the Custodian demonstrated that she provided responsive records to the Complainant in accordance with the 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 Custodian did not fully comply with the Council’s March 30, 2021 Interim Order. Specifically, although the Custodian timely provided the Complainant with the responsive records, she did not provide a certified confirmation of compliance to the Executive Director within the prescribed time frame.
2. The Complainant has failed to establish in her request for reconsideration of the Council’s March 30, 2021 Interim Order that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on mistake, extraordinary circumstances, and fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant did not demonstrate that the Council incorrectly found that no responsive records exist regarding conclusion No. 7 of the Interim Order. Additionally, the Complainant’s remaining arguments disputed the Custodian’s response to the Interim Order rather than the Order itself. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J.

Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

3. The Custodian unlawfully denied access to portions of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's March 31, 2021 Interim Order. However, the Custodian demonstrated that she provided responsive records to the Complainant in accordance with the 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

August 17, 2021



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DEPARTMENT OF COMMUNITY AFFAIRS  
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PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
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**INTERIM ORDER**

**March 30, 2021 Government Records Council Meeting**

Mary B. Colvell  
Complainant

Complaint No. 2019-134

v.

Hightstown Police Department (Mercer)  
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 2021 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 May 10, 2019 request item Nos. 2 and 3 seeking various police records pertaining to the “Colvell family” and Ms. Clark are invalid because they require research. Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012). See also Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); <sup>1</sup> 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 these request items. N.J.S.A. 47:1A-6.
2. The Custodian unlawfully denied access to the portion of the Complainant’s May 22, 2019 OPRA request seeking the “identity of arresting and investigative officers” and “length of investigation” pertaining to the arrest of Mr. Colvell on May 2, 2019, since such information is required to be disclosed under N.J.S.A. 47:1A-3(b). N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose the information to the Complainant.
3. The Custodian unlawfully denied access to the portion of the Complainant’s OPRA requests seeking the complaint-warrant pertaining to the arrest of Mr. Colvell on May 2, 2019. N.J.S.A. 47:1A-6; Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall disclose the responsive record with redactions where applicable. Alternatively, if no responsive record exists, the Custodian shall certify to same.
4. The Custodian may have unlawfully denied access to this portion of the Complainant’s May 22, 2019 OPRA request seeking telephone communications between Ms. Clark

and Hightstown Police Department dated May 2, 2019, pertaining to the investigation. N.J.S.A. 47:1A-6; Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 364-65 (App. Div. 2003). The Custodian shall conduct a search for responsive records and provide same to the Complainant, with redactions where applicable. Alternatively, if no responsive records exist, the Custodian shall certify to same.

5. **The Custodian shall comply with conclusion Nos. 2, 3, & 4 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 deliver<sup>2</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>3</sup> to the Executive Director.<sup>4</sup>**
6. The Custodian lawfully denied access to the portion of the Complainant's May 22, 2019 OPRA request seeking "police reports" and "notes" pertaining to the incident in which Mr. Colvell was arrested on May 2, 2019. N.J.S.A. 47:1A-6. The evidence of record demonstrates that such records fell under OPRA's criminal investigatory records exemption. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 573 (2017); Cheatham v. Borough of Fanwood Police Dep't, GRC Complaint No. 2013-262 (March 2014); and Boretsky v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2016-220 (February 2018).
7. The Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA requests seeking "audio/visual of officers" pertaining to his criminal case, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
8. 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.

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<sup>2</sup> 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.

<sup>3</sup> "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."

<sup>4</sup> 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.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of March 2021

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 31, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 30, 2021 Council Meeting**

**Mary B. Colvell<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-134**

v.

**Hightstown Police Department (Mercer)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies via pick up of:

May 10, 2019 OPRA Request:

1. Kevin Colvell – 05/02/2019 – All documentation (complaint-warrant, police reports, notes, etc.); all audio/video related to incident – during arrest, transports, police station.
2. Colvell family at 128 Broad St. – All information in CAD system; all police records, tickets, complaints made to [Hightstown Police Department (“HPD”)], etc. in past; any audio/video.
3. Marissa Clark – All documentation, police records, tickets, audio/video of investigation for complaint-warrant; any telephone communications, records, etc. (May 2019 and any previous/past history).
4. 05/08/2019 – Audio/video of discussion with Sgt. Benjamin Miller #1113 in lobby of [HPD].

May 22, 2019 OPRA Request:

On or around 05/02/2019, Kevin Colvell was arrested by [HPD]. This request is for copies of the following:

1. All documentation related to this matter – etc. complaint-warrant, police reports, identity of arresting and investigative officers, length of investigation.
2. Information of circumstances surrounding the arrest – all audio/video of officers related to prior, during, transports and police station, etc.

On or around 05/02/2019, Marissa Clark alleged charges, which resulted in a complaint-warrant and arrest. The following records, as discoverable, are requested:

1. Police record of Marissa Clark (complaint-summons history).
2. The audio/video of investigation for complaint-warrant.
3. Any telephone communications from Marissa Clark to HPD for investigation.
4. Any police reports regarding complaint-warrant.

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

<sup>2</sup> Represented by Frederick C. Rafetto, Esq., of Ansell, Grimm & Aaron, P.C. (Ocean, NJ).

**Custodian of Record:** Debra Sopronyi  
**Request Received by Custodian:** May 10, 2019; May 28, 2019  
**Response Made by Custodian:** May 20, 2019; May 30, 2019  
**GRC Complaint Received:** July 9, 2019

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

#### **May 10, 2019 Request and Response:**

On May 10, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 20, 2019, Nancy Alexander responded in writing on the Custodian’s behalf, denying the Complainant’s OPRA request on the following grounds:

1. Safety of persons or public – see attached.
2. Your request is too broad. The request needs to be more specific.
3. Your request is too broad. The request needs to be more specific.
4. Audio/video does not exist.

The Custodian also stated that the Complainant did not certify that she had not been convicted of an indictable offense.

#### **May 22, 2019 Request and Response:**

On May 22, 2019, the Complainant submitted a revised OPRA request to the Custodian seeking the above-mentioned records. The Complainant stated that she was entitled the requested records under Executive Order No. 69 (Gov. Whitman, 1997) (“EO 69”).

On May 30, 2019, Ms. Alexander responded in writing on the Custodian’s behalf, stating that information regarding Kevin Colvell could not be provided at the time because the case was still under investigation and being reviewed by the Mercer County Prosecutor’s Office (“MCPO”). Regarding Marissa Clark, Ms. Alexander stated that records responsive for item No. 1 were attached. Ms. Alexander then stated that records responsive for item Nos. 2-4 could not be provided as the matter was still under investigation by MCPO.

#### **Denial of Access Complaint:**

On July 9, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that for the May 22, 2019 OPRA request, EO 69 should have permitted her access to the requested information. The Complainant argued that since HPD initiated the incident at issue, documentation and videos should be available and HPD failed to properly respond to her request.

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<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 July 24, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s May 22, 2019 OPRA request on May 28, 2019.<sup>4</sup> The Custodian certified that her search included conducting running names in HPD’s records management system. The Custodian certified that Ms. Alexander responded on her behalf on May 30, 2019, denying access to the request regarding Mr. Colvell, and denying access regarding Ms. Clark apart from item No. 1.

The Custodian certified that at the time of the requests, MCPO was actively investigating the incidents at issue. The Custodian also asserted that the requested records constituted criminal investigatory records and victim’s records under OPRA. N.J.S.A. 47:1A-1.1. The Custodian further argued that because the Complainant was not the victim of the alleged crimes, the requested records were not “government records” under OPRA and deemed confidential.

### Additional Submissions:

On February 2, 2021, the GRC requested additional information from the Custodian. Specifically, the GRC asked the Custodian:

1. In searching for responsive records, did you locate any “telephone communications” between Ms. Clark and HPD pertaining to the relevant incident?
2. In searching for responsive records, did you locate any “audio/video from officers” pertaining to the relevant incident?
3. Please describe the search undertaken to locate the above responsive records.

On February 19, 2021, in response to an inquiry from the Complainant, the GRC stated that the Custodian had not responded to the request for additional information. That same day, the Custodian’s Counsel e-mailed the GRC stating that a response would be coming as soon as possible. On March 9, 2021, the GRC e-mailed Counsel stating that the Custodian has not provided a response and requested a status update. That same day, Counsel responded to the GRC stating that a response would be provided by the end of that week. On March 15, 2021, the GRC informed the Custodian that if a response was not provided by the end of business on March 19, 2021, the GRC would proceed based on the information already provided by the parties.

On March 16, 2021, Counsel submitted a response to the GRC, providing a certification from Ms. Alexander. Therein, Ms. Alexander certified that she did not locate any “telephone communications” between Ms. Clark and HPD pertaining to the incident. Ms. Alexander certified that in order to locate such records, she would have needed to review sixteen (16) separate telephone lines utilized by HPD and maintained by a third-party vendor. Ms. Alexander certified that she did not review those communication lines because there was an active criminal investigation pertaining to the incident and the Complainant was not the alleged victim.

Ms. Alexander next certified that “audio/video from officers” was located pertaining to the relevant incident in response the Complainant’s May 22, 2019 OPRA request. However, Ms.

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<sup>4</sup> The Custodian did not address the Complainant’s May 10, 2019 OPRA request.

Alexander certified that because the incident was still under investigation at the time and included information about the alleged victim's identity and address, the records was withheld as a criminal investigatory record and victim's record.

Lastly, Ms. Alexander certified that the search for the above responsive records included a search of HPD's records management system and "SF Mobile Vision Program," which handles in-car video reporting. Ms. Alexander also certified that at the time of the OPRA request, HPD was not utilizing body-worn cameras.

## 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 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 Twp. Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>5</sup> 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).

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<sup>5</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

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. at 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).

Regarding generic requests for “records,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-540. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the complainant’s request item No. 2 seeking “[p]roof of submission” was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012) (accepting the Administrative Law Judge’s finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request) Id. at 12-13.

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in [MAG], [Bent] and the Council’s decisions in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) and Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008).

[Id. See also Schulz v. NJ State Police, GRC Complaint No. 2014-390 (Interim Order dated July 28, 2015) (holding that the portion of the request seeking “all documents” was overly broad and thus invalid).]

Additionally, in Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015), the court held that plaintiff’s request was invalid because it required research. In reaching this conclusion, the court reasoned that:

The custodian in this case would have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

[Id. at 237.]

In Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012), the complainant submitted four (4) OPRA requests, seeking copies of minutes containing motions to approve other minutes to which the custodian had denied access as overly broad. The Council, citing Taylor v. Cherry Hill Bd. of Educ. (Camden), GRC Complaint No. 2008-258 (August 2009) and Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010), determined that the complainant's requests were overly broad:

[S]aid requests do not specify the date or time frame of the minutes sought. Rather, the requests seek those minutes at which the [Union County Board of Education] motioned to approve meeting minutes for four (4) other meetings. Similar to the facts of both Taylor and Ray, the requests herein seek minutes that refer to a topic and would require the Custodian to research the [Union County Board of Education's] meeting minutes in order to locate the particular sets of minutes that are responsive to the Complainant's requests . . . because the Complainant's four (4) requests for minutes "that include a motion made by the Union City Board of Education to approve the minutes . . ." from other meetings fail to identify the specific dates of the minutes sought and would require the Custodian to conduct research in order to locate the responsive records, the Complainant's requests are invalid under OPRA.

[Id. at 10.]

Here, item No. 2 of the Complainant's May 10, 2019 OPRA request sought "[a]ll information in CAD system; all police records, tickets, complaints made to [HPD], etc. in past; any audio/video" pertaining to the Colvell family at their address. Additionally, item No. 3 sought "[a]ll documentation, police records, tickets, audio/video of investigation for complaint-warrant; any telephone communications, records, etc. (May 2019 and any previous/past history)" regarding Ms. Clark. The Custodian asserted that both items were overly broad, leading to the Complainant submitting her May 22, 2019 revised OPRA request.

The GRC is persuaded that both request items are invalid. While the requests identified specific government records, they failed to provide a definitive time frame where the "Colvell family" or Ms. Clark were involved or mentioned in those records. The requests also did not include a reasonable time frame within which the Custodian may have focused her search. Thus, these request items amount to open-ended research of every identified record for any mention of

these individuals. As stated in both Lagerkvist and Valdes, OPRA does not contemplate such research. Thus, the Custodian lawfully denied these request items as invalid.

Accordingly, the Complainant's May 10, 2019 request item Nos. 2 and 3 seeking various police records pertaining to the "Colvell family" and Ms. Clark are invalid because they require research. Lagerkvist, 443 N.J. Super. at 236-237; Valdes, GRC 2011-147. 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 these request items. 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.

### **Ongoing Investigation**

Furthermore, OPRA provides that in order withhold access to records under N.J.S.A. 47:1A-3(a) ("Section 3(a)"), the agency must show that the records "pertain to an investigation in progress by any public agency," that disclosure will "be inimical to the public interest," and also show that the records were not available to the public prior to the beginning of the investigation. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 573 (2017).

In N. Jersey Media Grp., the Court noted that section 3(a) has seen little analysis in published decisions, stating:

In Serrano v. South Brunswick Township, 358 N.J. Super. 352, 367, 817 A.2d 1004 (App. Div. 2003), the Appellate Division rejected a claim that the release of a 9-1-1 tape could make it difficult to impanel a jury in a murder case and might call for a change of venue. Even if that were to happen, the panel observed, the "inconveniences to the prosecutor" did not make disclosure "inimical to the public interest." Ibid. The panel also initially noted that the tape "was created hours before the police investigation began" and was "open for public inspection" at that time. Id. at 366, 817 A.2d 1004 (quoting N.J.S.A. 47:1A-3(a)). Section 3(a) expressly carves that type of record out of the ongoing investigations exception.

...

[I]n [Paff v. Ocean Cnty. Prosecutor's Office, 446 N.J. Super. 163, 189-90 (App. Div. 2016)], the Appellate Division briefly addressed section 3(a). In light of the facts of the case, which are discussed above, a majority of the panel found that the MVR recordings preceded any investigation and that their release would not be inimical to the public interest.

[229 N.J. at 573-74.]

In summary, the Court found that the custodian must demonstrate that disclosure of the record will “be inimical to the public interest.” Section 3(a).

In the instant matter, the Complainant’s May 10, 2019 and May 22, 2019 OPRA requests sought access to records and information pertaining to Mr. Colvell, Ms. Clark and an incident investigated by HPD. In response, Ms. Alexander denied access stating that the requested records and information pertained to an active investigation being conducted by MCPO. The Custodian maintained this position in the SOI. Although the Custodian did not specifically reference Section 3(a), the Custodian’s initial basis relied on the assertion that the records pertained to an active investigation. However, the Custodian did not elaborate further beyond the initial claim. Thus, the Custodian failed to show that disclosure of the records would be “inimical to the public interest” and hinder the course of the investigation. N. Jersey Media Grp., 229 N.J. at 573-74.

### Criminal Investigatory Records

The GRC next addresses whether the requested records and information fall under OPRA’s criminal investigatory records exemption. 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, 380-81 (App. Div. 2006).

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., 229 N.J. 541 (2017), aff’ing in part, rev’ing in part, 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 565. Additionally, 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. Id. at 568.

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.*, 441 N.J. Super. at 105).<sup>6</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, 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>7</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.

### 3(b) Information

OPRA provides that:

Notwithstanding the provisions of [OPRA], the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

...

if an arrest has been made, information as to the defendant’s name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;

information as to the text of any charges such as the *complaint, accusation* and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;

*information as to the identity of the investigating and arresting personnel and agency and the length of the investigation . . . .*

[N.J.S.A. 47:1A-3(b) (emphasis added) (“Section 3(b)”)]

In *N. Jersey Media Grp.*, the Court agreed with the Appellate Division that the text of the OPRA statute did not specify how information identified under Section 3(b) was to be disseminated. 229 N.J. at 572. However, the Court found that Section 3(b) information can be withheld from disclosure if the agency can show that disclosure would “jeopardize the safety of

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<sup>6</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.

any person . . . or any investigation in progress” or “would be harmful to a bona fide law enforcement purpose or the public safety.” N. Jersey Media Grp., 229 N.J. at 572 (quoting Section 3(b)). Notwithstanding, “generic reasons alone cannot satisfy the statutory test. A more particularized showing is required.” Id. OPRA “does not grant law enforcement agencies sole discretion to withhold information.” Id.

Here, the Complainant’s May 22, 2019 OPRA request sought in part the “identity of arresting and investigative officers” and “length of investigation” pertaining to the arrest of Mr. Colvell on May 2, 2019.<sup>7</sup> As noted above, OPRA grants access to this information under Section 3(b) unless the law enforcement agency can show that disclosure of such information would jeopardize the safety of individuals or the investigation in progress. In both the response and SOI, the Custodian asserted that the incident was part of an active investigation but did not elaborate further in detail. Thus, in accordance with N. Jersey Media Grp., the Custodian’s basis was insufficient to withhold disclosure.

Therefore, the Custodian unlawfully denied access to the portion of the Complainant’s May 22, 2019 OPRA request seeking the “identity of arresting and investigative officers” and “length of investigation” pertaining to the arrest of Mr. Colvell on May 2, 2019, since such information is required to be disclosed under N.J.S.A. 47:1A-3(b). N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose the information to the Complainant.

#### Complaint-Warrant

The Council has previously held that warrants are subject to disclosure under OPRA. Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). In Seabrooks, the Council found that “‘arrest warrants’ are required by law to be made pursuant to R. 3:2-3(a), which provides that ‘[a]n arrest warrant shall be made on a Complaint-Warrant (CDR2) form.’” Id. Additionally, R. 3:2-3(b) states that any probable cause finding and/or affidavit would be part of the complaint-warrant form.

In the current matter, both Complainant’s OPRA requests sought the complaint-warrant pertaining to the arrest of Mr. Colvell on May 2, 2019. Ms. Alexander denied access, stating that the records fell under the criminal investigatory records exemption and the ongoing investigation from MCPO. However, as noted above, the complaint-warrant form is required by law to be made, and thus fails the first prong in the test. N. Jersey Media Grp., 229 N.J. at 566.

Therefore, the Custodian unlawfully denied access to the portion of the Complainant’s OPRA requests seeking the complaint-warrant pertaining to the arrest of Mr. Colvell on May 2, 2019. N.J.S.A. 47:1A-6; Seabrooks, GRC 2012-230. The Custodian shall disclose the responsive record with redactions where applicable. Alternatively, if no responsive record exists, the Custodian shall certify to same.

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<sup>7</sup> Although the Complainant references EO 69, the relevant language contained therein was codified under Section 3(b) of OPRA.



### Telephone Communications

In Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 364-65 (App. Div. 2003)<sup>8</sup>, the Appellate Division found that 911 calls were required by law to be made and retained for “no less than 31 days,” and were therefore government records under OPRA. Citing N.J.A.C. 17:24-2.4. Thus, 911 recordings could not fall under OPRA’s criminal investigatory records exemption.

However, 911 recordings could be subject to other exemptions, such as the privacy interests of the callers. In Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312 (September 28, 2004), the newspaper argued that the reference to a reasonable expectation of privacy in the first section of OPRA was not a limitation on its right to obtain the 911 call, because that section was labeled as legislative findings. The court looked beyond the label and determined, from the language used, the legislative history, and the recognition of victims' rights in New Jersey constitutional and statutory law, that the Legislature intended the exception to be a substantive part of the statute. After hearing the tape *in camera*, the court concluded that the pain family members of the victim who called would suffer upon the release of the call required that it be confidential. Even a redacted version of a transcript, deleting the victim's side of the conversation, would have impermissibly violated the expectation of privacy, because much of what the dispatcher said simply repeated, to obtain confirmation, what the victim had previously said. The court denied the request to release the tape or the transcript.

In Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), the Complainant requested the name, address and phone number of a citizen who filed a noise complaint with the Police Department. After conducting a balancing test, the Council held that “[t]he Complainant’s stated need for access does not outweigh the citizen’s expectation of privacy. In arriving at this conclusion, the potential harm of unsolicited contact and confrontation between the citizen and the OPRA complainant and/or its agents or representatives was considered. Therefore, the name, address and phone number of the citizen who brought the complaint to the Borough’s attention should remain redacted from the requested documentation.”

However, in Ponce v. Town of West New York, 2013 N.J. Super. Unpub. LEXIS 436 (App. Div. February 27, 2013), the court held differently. Defendants, Town of West New York and the Custodian of Records, appeal from a trial court’s ruling granting plaintiff’s application to review an unredacted recording of a 911 call reporting an alleged illegal parking violation. The recording reveals the identity of the caller who complained that plaintiff’s car was blocking his driveway. The trial court conducted a balancing test using the seven (7) factors discussed in Burnett v. Cnty. of Bergen, 198 N.J. 408, 427, 968 A.2d 1151 (2009) and determined that the caller's ostensible expectation of privacy in this context is subordinate to the public's right to access and review a "government record," as defined under OPRA.

Here, the Complainant’s May 22, 2019 OPRA request also sought “telephone communications” between Ms. Clark and HPD pertaining to the incident. In the SOI, the Custodian asserted that the records were withheld under the criminal investigatory records exemption. In response to the GRC’s request for additional information, Ms. Alexander certified that HPD

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<sup>8</sup> On appeal from Serrano v. South Brunswick Twp., GRC Complaint No. 2002-33 (Interim Order dated January 17, 2003).

utilizes sixteen (16) separate telephone lines, maintained by a third-party vendor. Ms. Alexander certified that instead of conducting a search of each line of communication, she notified the Complainant that the records were part of an investigation.

Because Ms. Alexander did not conduct a search for responsive records, it is unknown whether Ms. Clark contacted HPD through 911 or a non-emergency line, or even whether responsive records exist. Thus, it is unclear whether the requested communications fall under OPRA's criminal investigatory records exemption.

Thus, the Custodian may have unlawfully denied access to this portion of the Complainant's May 22, 2019 OPRA request seeking telephone communications between Ms. Clark and HPD dated May 2, 2019, pertaining to the investigation. N.J.S.A. 47:1A-6; Serrano, 358 N.J. Super. at 364-65. The Custodian shall conduct a search for responsive records and provide same to the Complainant, with redactions where applicable. Alternatively, if no responsive records exist, the Custodian shall certify to same.

### Police Reports & Notes

The GRC has previously held that police reports were exempt from disclosure where they met the two (2) prong test required to be a criminal investigatory record under OPRA. See Cheatham v. Borough of Fanwood Police Dep't, GRC Complaint No. 2013-262 (March 2014) (holding that incident reports and related records that summarize information contained in such reports are exempt from disclosure under OPRA as criminal investigatory records). See also Nance v. Scotch Plains Twp. Police Dep't (Atlantic), GRC Complaint No. 2003-125 (January 2005). The GRC has also held that "notes" written by law enforcement can be withheld as criminal investigatory records. See Boretsky v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2016-220 (February 2018).

In the instant matter, the Complainant sought "police reports" and "notes" pertaining to the relevant incident. As to the first prong, there is no evidence in the record demonstrating that "police reports" and "notes" are required by law to be maintained. See Cheatham, GRC 2013-262; Boretsky, GRC 2016-220. Secondly, it is not in dispute that the relevant incident generating the records pertained to a criminal investigation, ultimately leading to an arrest. Therefore, both prongs have been met under N. Jersey Media Grp., 229 N.J. at 566.

Thus, the Custodian lawfully denied access to the portion of the Complainant's May 22, 2019 OPRA request seeking "police reports" and "notes" pertaining to the incident in which Mr. Colvell was arrested on May 2, 2019. N.J.S.A. 47:1A-6. The evidence of record demonstrates that such records fell under OPRA's criminal investigatory records exemption. See N. Jersey Media Grp., 229 N.J. at 566; Cheatham, GRC 2013-262; and Boretsky, GRC 2016-220.

### Audio/Video Pertaining to Incident

In N. Jersey Media Grp., the Court held that unlike the Use of Force reports, there was no evidence indicating that police officers were "required by law" to create and maintain mobile video recorders ("MVR"). 229 N.J. at 569. Furthermore, the Court found that MVRs can pertain to a

criminal investigation, “albeit in its earliest stages.” Id. (quoting N. Jersey Media Grp., 441 N.J. Super. at 104-05.

In the instant matter, the Complainant sought “audio/video” related to the investigation between Ms. Clark and Mr. Colvell. In response to the GRC’s request for additional information, Ms. Alexander certified that “audio/video” records were located but were withheld under the criminal investigator records exemption. Although it was not specified what type of recording was located, Ms. Alexander certified that the search for records included reviewing HPD’s in-car reporting system, and that at the time of the OPRA requests, HPD was not utilizing body-worn cameras. In accordance with N. Jersey Media Grp., the record is not required by law to be made, passing the first prong of the test. 229 N.J. at 569. Further, as noted above, it is not in dispute that the relevant incident pertained to a criminal investigation. Therefore, the record located by Ms. Alexander satisfied the test under N. Jersey Media Grp., 229 N.J. at 566.

Accordingly, the Custodian lawfully denied access to the portion of the Complainant’s OPRA requests seeking “audio/video” related to the incident involving the arrest of Mr. Colvell on May 2, 2019. N.J.S.A. 47:1A-6. The evidence of record demonstrates that the record fell under OPRA’s criminal investigatory records exemption. See N. Jersey Media Grp., 229 N.J. at 569.

#### Audio/Video of Officers

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>9</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

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<sup>9</sup> 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 Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA requests sought "audio/video of officers" and "audio/video" of a discussion with a specific officer at the HPD lobby on May 8, 2019. In the SOI, the Custodian asserted that the records were exempt under the criminal investigatory records exemption. However, in response to the GRC's request for additional information, Ms. Alexander certified that at the time of the OPRA requests, HPD was not using body-worn cameras. Therefore, the evidence of record demonstrates that no responsive records exist. Additionally, the Complainant has not provided evidence to refute Ms. Alexander's certification.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA requests seeking "audio/visual of officers" pertaining to his criminal case, because the Custodian certified in the SOI that no responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

### **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 May 10, 2019 request item Nos. 2 and 3 seeking various police records pertaining to the "Colvell family" and Ms. Clark are invalid because they require research. Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012). See also Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>10</sup> 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 these request items. N.J.S.A. 47:1A-6.
2. The Custodian unlawfully denied access to the portion of the Complainant's May 22, 2019 OPRA request seeking the "identity of arresting and investigative officers" and "length of investigation" pertaining to the arrest of Mr. Colvell on May 2, 2019, since

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<sup>10</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

such information is required to be disclosed under N.J.S.A. 47:1A-3(b). N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose the information to the Complainant.

3. The Custodian unlawfully denied access to the portion of the Complainant's OPRA requests seeking the complaint-warrant pertaining to the arrest of Mr. Colvell on May 2, 2019. N.J.S.A. 47:1A-6; Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall disclose the responsive record with redactions where applicable. Alternatively, if no responsive record exists, the Custodian shall certify to same.
4. The Custodian may have unlawfully denied access to this portion of the Complainant's May 22, 2019 OPRA request seeking telephone communications between Ms. Clark and Hightstown Police Department dated May 2, 2019, pertaining to the investigation. N.J.S.A. 47:1A-6; Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 364-65 (App. Div. 2003). The Custodian shall conduct a search for responsive records and provide same to the Complainant, with redactions where applicable. Alternatively, if no responsive records exist, the Custodian shall certify to same.
5. **The Custodian shall comply with conclusion Nos. 2, 3, & 4 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 deliver<sup>11</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>12</sup> to the Executive Director.**<sup>13</sup>
6. The Custodian lawfully denied access to the portion of the Complainant's May 22, 2019 OPRA request seeking "police reports" and "notes" pertaining to the incident in which Mr. Colvell was arrested on May 2, 2019. N.J.S.A. 47:1A-6. The evidence of record demonstrates that such records fell under OPRA's criminal investigatory records exemption. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 573 (2017); Cheatham v. Borough of Fanwood Police Dep't, GRC Complaint No. 2013-262 (March 2014); and Boretsky v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2016-220 (February 2018).
7. The Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA requests seeking "audio/visual of officers" pertaining to his criminal case, because the Custodian certified in the SOI that no

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<sup>11</sup> 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.

<sup>12</sup> "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."

<sup>13</sup> 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.

responsive records exist, and the record reflects the same. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

8. 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  
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March 23, 2021