



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 30, 2021 Government Records Council Meeting

Christopher A. Lombardi
Complainant

Complaint No. 2019-155

v.

Paterson Police Department (Passaic)
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 Custodian’s response was legally insufficient because she failed to respond to each item contained in the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Graumann v. Newfield Police Dep’t (Gloucester), GRC Complaint No. 2014-314 (May 2015). Additionally, the Custodian’s response failed to definitively state that records responsive to the Complainant’s OPRA request item No. 2 and No. 3 in part did not exist. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009).
2. The Complainant’s OPRA request item Nos. 2 and 3 in part, 4, and 5 seeking the names and identities of individuals involved in Incident No. I-2019-44411 are invalid requests for information that fail to seek identifiable government records. See MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford 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, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Thus, there was no unlawful denial of access to this portion of the Complainant’s OPRA request. N.J.S.A. 47:1A-6.
3. Because the responsive CAD report did not pertain to a criminal investigation, it was not exempt under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; 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); Janeczko v. N.J. Dep’t of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq.* (June 2004). Thus, the Custodian unlawfully denied access to the requested CAD report. N.J.S.A. 46:1A-6.

Notwithstanding, the GRC declines to order disclosure since the Custodian did so on December 18, 2019.

4. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 2 and 3 in part. Specifically, the Custodian and Lt. Spagnola certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6. See Pusterhofer v. N.J. Dep't of Educ., GRC 2005-49 (July 2005); and Barkley v. Newark Police Dep't (Essex), GRC Complaint No. 2016-23 (February 2017).
5. The Custodian's failure to definitively state whether a portion of the records sought existed resulted in an insufficient response. N.J.S.A. 47:1A-5(g). Additionally, the Custodian unlawfully denied access to the requested CAD report. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the requested 911 and call transfer recording because no records existed, and ultimately provided the CAD report on December 18, 2019. Further, 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 30th 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: April 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Christopher A. Lombardi¹
Complainant**

GRC Complaint No. 2019-155

v.

**Paterson Police Department (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of records “regarding a CAD ticket bearing Incident No. I-2019-044411, where Public Safety Communicator Carol Ratliff received a call on May 18, 2019 at around 13:54 hours from 525 21st Avenue, Apt. B5, Paterson, NJ”:

1. The CAD log sheet associated with the incident.
2. A copy of the entire 911 call for service recording received by Ms. Ratliff, and the identity of the caller.
3. A copy of the recording and when and who received the transferred call made by Ms. Ratliff after receiving the 911 call.
4. The names and badges numbers of the responding officer(s).
5. The name and badge number of the officer that was given the primary unit of ‘104’.
6. Updated CAD report containing additional information.

Custodian of Record: Sonia L. Gordon

Request Received by Custodian: July 8, 2019

Response Made by Custodian: August 2, 2019

GRC Complaint Received: August 9, 2019

Background³

Request and Response:

On July 3, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 17, 2019, Twydaisha Hilbert responded on behalf of the Custodian requesting an extension of seven (7) business days to respond to the request. On August 2, 2019, the Complainant requested an update on his request. That same day, the Custodian responded in writing denying access as the request sought criminal investigatory records and records pertaining to a grand jury proceeding.

¹ No legal representation listed on record.

² Represented by Harlynn A. Lack, Esq., Assistant Corporation Counsel (Paterson, NJ).

³ 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.

Denial of Access Complaint:

On August 9, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that Incident No. I-2019-44411 involved a minor child calling 911 alleging that her grandmother was using or possessing a controlled substance. The Complainant asserted that based on personally gained knowledge, the responding officer was told by the grandmother that she did not possess or use controlled substances, and was later told by the minor child that she lied when she contacted the police via 911. The Complainant asserted that the officer told the parties that because the Department of Child Protection and Permanency has been in contact with the parties and their family, there was no need to memorialize his response that day.

The Complainant initially argued that for the criminal investigatory records exemption to apply, the record must have been created after the initiation of a criminal investigation. The Complainant argued that even if a 911 call reported criminal activity, the call was still a public record since it was an allegation of criminal activity and not an investigation into same. Thus, the Complainant argued that the 911 call referenced in Incident No. I-2019-44411 could not constitute a criminal investigatory record since the call was made to report an allegation of criminal activity prior to the initiation of a criminal investigation.

The Complainant also asserted that Incident No. I-2019-44411 ultimately pertained to a civil matter rather than a criminal matter based upon records received from prior OPRA request. The Complainant asserted that the on-scene investigation conducted by PPD determined that no crime existed and that the allegations of criminal activity made in the 911 call were erroneous. The Complainant also noted that in response to his previous requests, PPD informed him that no investigation reports existed pertaining to Incident No. I-2019-44411. The Complainant asserted that the CAD sheet he previously obtained via a separate OPRA request noted that Incident No. I-2019-44411 was classified as a civil matter, and not a criminal complaint. Thus, the Complainant argued that none of the requested records or information fell under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1.

Statement of Information:⁴

On December 18, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 8, 2019. The Custodian certified that her search included looking through Paterson Police Department’s (“PPD”) CAD system for reports and 911 calls. The Custodian certified that a CAD report was located, but that no 911 call existed. The Custodian certified that she responded in writing on August 2, 2019, stating that the request sought criminal investigatory records and records pertaining to a grand jury proceeding.

The Custodian asserted that the requested CAD report contained details such as phone numbers and additional information which could impede a “potential” criminal investigation if

⁴ On August 22, 2019, the matter was transferred to mediation. On November 22, 2019, the matter was transferred back from mediation for adjudication.

disclosed. However, the Custodian asserted that after further review, PPD decided to release the requested CAD report and attached a copy of same to the SOI.

The Custodian asserted that all the remaining information sought by the Complainant was contained in the CAD report, apart from the name of the individual who placed the 911 call. The Custodian also certified that the 911 call itself did not exist, asserting that such recordings were automatically destroyed every thirty-one (31) days.

Additional Submissions:

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

1. In your search for responsive records, was a record of the call transfer located?
2. Please describe the search undertaken to search for the 911 recording and the call transfer recording.

On February 12, 2021, Custodian's Counsel responded to the GRC's request, providing a certification from Det/Lt. Louis Spagnola ("Lt. Spagnola") of the PPD. Lt. Spagnola certified that at the time of the request, he searched PPD's CAD system for any relevant 911 calls transferred to PPD on the requested date, but did not locate any records. Lt. Spagnola also certified that if a 911 call was not initially answered by PPD but with the New Jersey State Police Telecommunications Center, then PPD would not receive a copy of the transferred call unless an open investigation existed.

Analysis

Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)." In Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015), the subject OPRA request sought multiple items in a single paragraph, as opposed to an enumerated list. In her response, the custodian only addressed a portion of the OPRA request. The Council determined that the custodian's response was insufficient because it failed to address each request item individually. In reaching this conclusion, the Council reasoned that the custodian "completely failed to acknowledge or address the balance of the request."

Additionally, OPRA provides that if a ". . . custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor . . . on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g) (emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, the custodian must definitively state that records did not exist at the time of the initial response. See Shanker v. Borough of Cliffside

Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). See also Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013).

Here, the Complainant's OPRA request was divided into enumerated items pertaining to Incident No. I-2019-44411. In her initial response, the Custodian stated that the request was denied as criminal investigatory records and records pertaining to a grand jury proceeding. After the filing of the Denial of Access Complaint, the Custodian certified in the SOI that a search was conducted in PPD's CAD system for reports and 911 calls. The Custodian certified that a CAD report was located that was responsive to most, but not all, of the Complainant's request items.

Additionally, the Custodian certified in the SOI that no 911 recording responsive to item No. 2 was located, stating that such recordings were destroyed after thirty-one (31) days. Moreover, in response to the GRC's request for additional information, Lt. Spagnola certified that no recording of a transferred call was located that was partially responsive to item No. 3. Thus, the Custodian's SOI and Lt. Spagnola's certifications definitively indicated that no responsive records existed regarding item Nos. 2 and 3, whereas the Custodian's initial response only provided a general denial under the criminal investigatory records exemptions and/or grand jury proceedings.

Therefore, the Custodian's response was legally insufficient because she failed to respond to each item contained in the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272. See also Graumann, GRC 2014-314. Additionally, the Custodian's response failed to definitively state that records responsive to the Complainant's OPRA request item No. 2 and No. 3 in part did not exist. N.J.S.A. 47:1A-5(g); Shanker, GRC 2007-245.

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 Alcoholic Beverage Control, 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. at 549 (emphasis added). Bent v. Stafford 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, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Regarding requests seeking information or asking questions, there are instances in OPRA specifically identifies pieces of information as a “government record.” OPRA states that “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” N.J.S.A. 47:1A-3(b) (emphasis added). Notwithstanding, in LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant’s request was a request for information, holding that “because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to MAG Entm’t, 375 N.J. Super. at 546 and Bent, 381 N.J. Super. at 37” Id. at 6. In Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009), the Council held that the Complainant’s request for the name of an individual was an invalid request for information.

Request Item Nos. 2-5

In the instant matter, the Complainant’s OPRA request sought in part the identity of the 911 caller (item No. 2 in part), name and badge number of the officer who received the call from Ms. Ratliff (item No. 3), the name(s) and badge number(s) of the responding officers (item No. 4), and the name of the officer with the unit number of “104” (item No. 5). The Custodian initially responded stating that the entire request sought criminal investigatory records. However, in the SOI the Custodian disclosed the requested CAD report after further review, asserting that the report contained most of the requested information.

Although the Custodian did not argue in the SOI that the request items were invalid, the Council is permitted to raise additional defenses regarding the disclosure of records. Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (certif. denied, 193 N.J. 292 (2007)).⁵ In this instance, item Nos. 2 and 3 in part, 4, and 5 sought information rather than specific government records. As was the case in Ohlson, the Complainant’s request items sought the identity of the 911 caller along with PPD officers involved in the incident rather than specific government records. Furthermore, a review of the CAD report indicates that PPD classified Incident No. I-2019-44411 as a civil matter rather than a criminal complaint, and therefore the disclosure requirements under Section 3(b) would not apply.

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

Accordingly, the Complainant's OPRA request item Nos. 2 and 3 in part, 4, and 5 seeking the names and identities of individuals involved in Incident No. I-2019-44411 are invalid requests for information that fail to seek identifiable government records. See MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; LaMantia, GRC 2008-140; Ohlson, GRC 2007-233. Thus, there was no unlawful denial of access to this portion of the Complainant's OPRA 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.

Request Item Nos. 1 and 6

OPRA defines a criminal investigatory record as "a record which is not required by law to be made, maintained, or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." N.J.S.A. 47:1A-1.1. Therefore, for a record to be considered exempt from disclosure under OPRA as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1, that record must meet both prongs of a two-prong test. See O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 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).⁶

⁶This 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.

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.”⁷ 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 the current matter, the Complainant’s OPRA request item Nos. 1 and 6 sought the “CAD sheet” and “CAD report” pertaining to Incident No. I-2019-44411. The Complainant asserted that even if the contents of the 911 call alleged criminal activity, the call was made before the commencement of any investigation into same. The Complainant also asserted that the CAD sheet he received from a previous OPRA request indicated that Incident No. I-2019-44411 was classified by the PPD as a civil rather than a criminal matter. The Custodian initially denied access under the criminal investigatory records exemption and records pertaining to a grand jury proceeding. In the SOI, the Custodian asserted that the responsive CAD report was withheld under the criminal investigatory exemption, arguing that disclosing phone numbers and additional information could impede a “potential” investigation, but ultimately decided to disclose the report.

Applying the first prong of the test, the court in N. Jersey Media Grp. found no evidence indicating that CAD reports, sheets, or similar documents are required by law to be made, maintained, or kept on file. 441 N.J. Super. at 107. However, the GRC does not find that the withheld CAD report “pertained” to a criminal investigation in accordance with the test’s second prong. N. Jersey Media Grp., 229 N.J. at 569. In the CAD sheet provided by the Complainant along with the withheld CAD report, Incident No. I-2019-44411 was classified as a “civil” rather than criminal matter. Furthermore, the evidence in the record demonstrates that Incident No. I-2019-44411 produced no witness statements, investigative reports, or statements from the responding officer(s) to suggest that a criminal investigation occurred. Moreover, although the Custodian initially responded that the requested records also pertained to a grand jury proceeding, the claim was not elaborated further or even raised in the SOI. Thus, the evidence of record does not find that the CAD report documented the results of a criminal investigation.

Accordingly, because the responsive CAD report did not pertain to a criminal investigation, it was not exempt under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541; Janeczko, GRC 2002-79, *et seq.* Thus, the Custodian unlawfully denied access to the requested CAD report. N.J.S.A. 46:1A-6. Notwithstanding, the GRC declines to order disclosure since the Custodian did so on December 18, 2019.

Request Item Nos. 2 and 3 in part

The GRC has previously found that, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's certification, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC 2005-49 (July 2005). In Barkley v. Newark Police Dep't (Essex), GRC Complaint No. 2016-23 (February 2017), the custodian certified that a search revealed that the requested 911 dispatch recording did not exist due to the system's thirty (30) day purging. Additionally, the complainant provided no evidence to refute the custodian's certification. The Council thus held that the custodian bore his burden of proof that he lawfully denied access to the requested 911 dispatch recording, as described in the complainant's OPRA request (citing N.J.S.A. 47:1A-6 and Pusterhofer, GRC 2005-49). See also Regan v. Camden Cnty. Prosecutor's Office, GRC Complaint No. 2016-28 (July 2017).

In the instant matter, the Complainant's OPRA request item No. 2 in part sought a copy of the 911 call pertaining to Incident No. I-2019-44411. Item No. 3 in part sought in part any recording of the transfer from Ms. Ratcliff to the responding officer. The Custodian certified in the SOI that no responsive records exist since the 911 calls are purged automatically after thirty-one (31) days. Additionally, in response to the GRC's request for additional information, Lt. Spagnola certified that he conducted the search for any 911 calls and call transfers pertaining to Incident No. I-2019-44411 but did not locate any responsive records. Moreover, the GRC does not find any competent, credible evidence in the record to refute the Custodian's and Lt. Spagnola's certification. Thus, the evidence of record indicates that no responsive records exist for the requested items.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 2 and 3 in part. Specifically, the Custodian and Lt. Spagnola certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6. See Pusterhofer, GRC 2005-49; and Barkley, GRC 2016-23.

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's failure to definitively state whether a portion of the records sought existed resulted in an insufficient response. N.J.S.A. 47:1A-5(g). Additionally, the Custodian unlawfully denied access to the requested CAD report. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the requested 911 and call transfer recording because no records existed, and ultimately provided the CAD report on December 18, 2019. Further, 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's response was legally insufficient because she failed to respond to each item contained in the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015). Additionally, the Custodian's response failed to definitively state that records responsive to the Complainant's OPRA request item No. 2 and No. 3 in part did not exist. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009).
2. The Complainant's OPRA request item Nos. 2 and 3 in part, 4, and 5 seeking the names and identities of individuals involved in Incident No. I-2019-44411 are invalid requests for information that fail to seek identifiable government records. See MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford 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, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Thus, there was no unlawful denial of access to this portion of the Complainant's OPRA request. N.J.S.A. 47:1A-6.
3. Because the responsive CAD report did not pertain to a criminal investigation, it was not exempt under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; 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); Janeczko v. N.J. Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq.* (June 2004). Thus, the Custodian unlawfully denied access to the requested CAD report. N.J.S.A. 46:1A-6. Notwithstanding, the GRC declines to order disclosure since the Custodian did so on December 18, 2019.

4. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item Nos. 2 and 3 in part. Specifically, the Custodian and Lt. Spagnola certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6. See Pusterhofer v. N.J. Dep't of Educ., GRC 2005-49 (July 2005); and Barkley v. Newark Police Dep't (Essex), GRC Complaint No. 2016-23 (February 2017).
5. The Custodian's failure to definitively state whether a portion of the records sought existed resulted in an insufficient response. N.J.S.A. 47:1A-5(g). Additionally, the Custodian unlawfully denied access to the requested CAD report. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the requested 911 and call transfer recording because no records existed, and ultimately provided the CAD report on December 18, 2019. Further, 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.

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March 23, 2021