



**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 25, 2020 Government Records Council Meeting**

Steven Schragger  
Complainant

Complaint No. 2019-31

v.

Middlesex County Prosecutor's Office  
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council ("Council") considered the August 18, 2020 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 the:

1. The Custodian complied with the Council's July 28, 2020 Interim Order because she responded in the prescribed time frame providing records, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian failed to timely respond to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), and unlawfully denied access to the requested arrest reports. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the remainder of the Complainant's OPRA request and cured the unlawful denial by disclosing the arrest reports in accordance with the Council's July 28, 2020 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 25<sup>th</sup> Day of August 2020

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: August 27, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
August 25, 2020 Council Meeting**

**Steven Schrager<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-31**

v.

**Middlesex County Prosecutor's Office<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard or electronic copies of:<sup>3</sup>

1. Arrest reports pertaining to Anthony Desilvio, file nos. 13001390, 14000602, 14000952, 16000236, 17001445.
2. Police reports pertaining to Anthony Desilvio, file nos. 13001390, 14000602, 14000952, 16000236, 17001445.

**Custodian of Record:** Andrea Boulton  
**Request Received by Custodian:** September 12, 2018  
**Response Made by Custodian:** October 9, 2018  
**GRC Complaint Received:** February 13, 2019

**Background**

July 28, 2020 Council Meeting:

At its July 28, 2020 public meeting, the Council considered the July 21, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v.

---

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

<sup>2</sup> Represented by Alessandra A. Baldini, Esq., Deputy County Counsel. Previously represented by Jeanne-Marie Scollo, Esq., Deputy County Counsel (New Brunswick, N.J.).

<sup>3</sup> The Complainant sought other records that are not at issue in this complaint.

Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

2. The Custodian may have unlawfully denied access to the Complainant's OPRA request Item No. 1 seeking arrest reports pertaining to Anthony Desilvio and the identified case numbers. N.J.S.A. 47:1A-6; Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008). The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.
3. **The Custodian shall comply with conclusion No. 2 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>**
4. Notwithstanding the Custodian's "deemed" denial, the Complainant's OPRA request Item No. 2 seeking police reports is exempt from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 546 (2017); Janeczko v. N.J. Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6. Accordingly, the Council declines to address the remaining defenses raised by the Custodian.
5. 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 July 29, 2020, the Council distributed its Interim Order to all parties. That same day, the Custodian responded to the Council's Interim Order. The Custodian provided the GRC with redacted copies of the arrest reports withheld from disclosure. The Custodian also provided a document index explaining the basis for each redaction.

---

<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.

On July 30, 2020, the GRC responded to the Custodian, stating that the Interim Order required the Custodian to provide the requested arrest reports directly to the Complainant. Later than same day, the Custodian forwarded the records to the Complainant, copying the GRC. The Custodian also provided a certified confirmation of compliance to the Executive Director.

### **Analysis**

#### **Compliance**

At its July 28, 2020 meeting, the Council ordered the Custodian to provide the Complainant with copies of the withheld arrest reports and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On July 29, 2020, 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 August 5, 2020.

On July 29, 2020, the same date of receipt of the Council's Order, the Custodian responded in writing, attaching copies of the requested arrest reports as well as a redaction index. On July 30, 2020, the Custodian forwarded the records to the Complainant, and provided a certified confirmation of compliance.

Therefore, the Custodian complied with the Council's July 28, 2020 Interim Order because she responded in the prescribed time frame providing records, and simultaneously provided certified confirmation of compliance to the Executive Director.

#### **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 instant matter, the Custodian failed to timely respond to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), and unlawfully denied access to the requested arrest reports. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the remainder of the Complainant's OPRA request and cured the unlawful denial by disclosing the arrest reports in accordance with the Council's July 28, 2020 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 complied with the Council's July 28, 2020 Interim Order because she responded in the prescribed time frame providing records, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian failed to timely respond to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), and unlawfully denied access to the requested arrest reports. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the remainder of the Complainant's OPRA request and cured the unlawful denial by disclosing the arrest reports in accordance with the Council's July 28, 2020 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 18, 2020



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

**INTERIM ORDER**

**July 28, 2020 Government Records Council Meeting**

Steven Schragger  
Complainant

Complaint No. 2019-31

v.

Middlesex County Prosecutor's Office  
Custodian of Record

At the July 28, 2020 public meeting, the Government Records Council ("Council") considered the July 21, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. The Custodian may have unlawfully denied access to the Complainant's OPRA request Item No. 1 seeking arrest reports pertaining to Anthony Desilvio and the identified case numbers. N.J.S.A. 47:1A-6; Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008). The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.
3. **The Custodian shall comply with conclusion No. 2 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>1</sup>**

---

<sup>1</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.

**certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**

4. Notwithstanding the Custodian's "deemed" denial, the Complainant's OPRA request Item No. 2 seeking police reports is exempt from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 546 (2017); Janeczko v. N.J. Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6. Accordingly, the Council declines to address the remaining defenses raised by the Custodian.
5. 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.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of July 2020

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: July 29, 2020**

---

<sup>2</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>3</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.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 28, 2020 Council Meeting**

**Steven Schrager<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-31**

**v.**

**Middlesex County Prosecutor's Office<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard or electronic copies of:<sup>3</sup>

1. Arrest reports pertaining to Anthony Desilvio, file nos. 13001390, 14000602, 14000952, 16000236, 17001445.
2. Police reports pertaining to Anthony Desilvio, file nos. 13001390, 14000602, 14000952, 16000236, 17001445.

**Custodian of Record:** Andrea Boulton

**Request Received by Custodian:** September 12, 2018

**Response Made by Custodian:** October 9, 2018

**GRC Complaint Received:** February 13, 2019

**Background<sup>4</sup>**

**Request and Response:**

On September 12, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On October 9, 2018, the eighteenth (18<sup>th</sup>) business day after receipt of the OPRA request, the Custodian responded in writing denying access to the responsive records under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1.

**Denial of Access Complaint:**

On February 13, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Middlesex County

---

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

<sup>2</sup> Represented by Jeanne-Marie Scollo, Esq., Deputy County Counsel (New Brunswick, N.J.).

<sup>3</sup> The Complainant sought other records that are not at issue in this complaint.

<sup>4</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.

Prosecutor's Office ("MCPO") improperly denied access to his records under N.J.S.A. 47:1A-3(b). The Complainant also asserted that the MCPO failed to respond within seven (7) business days, which constituted a "deemed" denial of access.

#### Statement of Information:

On March 5, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on September 12, 2018. The Custodian certified that her search included utilizing MCPO's "Promis Gavel" database. The Custodian certified that in addition to the case numbers she also searched using the individual's name, locating five (5) case files associated with the individual. The Custodian certified that she responded in writing on October 9, 2018.

The Custodian asserted that under N.J.S.A. 47:1A-1.1, all requested records were considered criminal investigatory records and cannot be released to the public. See Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 591 (2011); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 38-39 (App. Div. 2005). The Custodian also noted that the GRC has also held that the exemption applied to all investigations, "resolved and unresolved." Janeczko v. N.J. Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). The Custodian further asserted that the Appellate Division in N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015), aff'd in part and rev'd in part, 229 N.J. 541 (2017) determined that certain documents fell under the exemption and could not be released. N.J.S.A. 47:1A-1.1.

The Custodian also argued that the requested "police reports" were overly broad pursuant to Bent, 381 N.J. Super. at 37, 39. The Custodian asserted that she was not required to speculate what the Complainant sought or survey agency employees regarding the request. Bart v. Passaic Cnty. Pub. Hous. Agency, 406 N.J. Super. 445, 451-52 (App. Div. 2009). The Custodian also argued that she was not obligated to perform research on behalf of the Complainant. See Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 172 (App Div.), certif. denied, 190 N.J. 394 (2007); Librizzi v. Twp. of Verona Police Dep't, GRC Complaint No. 2009-213 (August 2010).

### Analysis

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>5</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of

---

<sup>5</sup> A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

In the instant complaint, the Complainant argued that the Custodian failed to timely respond to his OPRA request. In the SOI, the Custodian certified that she received the Complainant’s OPRA request on September 12, 2018. The Custodian further affirmed that she did not respond to the subject OPRA request until October 9, 2018, or the eighteenth (18<sup>th</sup>) business day after receipt of the subject OPRA request. Thus, the evidence supports that a “deemed” denial of access occurred here.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA 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 (App. Div. 2009).

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc., 229 N.J. 541. Therein, the Court affirmed that OPRA’s criminal investigatory records exemption applies to police records which originate from a criminal investigation. However, the Court stated that “to qualify for the exception — and be exempt from disclosure — a record (1) must not be ‘required by law to be made,’ and (2) must ‘pertain[ ] to a criminal investigation.’ N.J.S.A. 47:1A-1.1.” Id. at 564.

The Court made it clear that if the first prong cannot be met because such a record is required by law to be made, then that record “cannot be exempt from disclosure under OPRA’s criminal investigatory records exemption. N.J.S.A. 47:1A-1.1.” Id. at 365. Although the Court agreed with the Appellate Division’s analysis in O’Shea, 410 N.J. Super. at 382, that a clear statement of policy to police officers from the State Attorney General has “the force of law for police entities,” it refused to conclude that records retention schedules adopted by the State

Records Committee meet OPRA's "required by law" standard.

The Court also noted that even if a record is not required by law to be made, it must still be found to pertain to a criminal investigation. The Court reiterated the Appellate Division's observation that "some police records relate to an officer's community-caretaking function; others to the investigation of a crime." *Id.* at 569 (citing N. Jersey Media Grp., Inc., 441 N.J. Super. at 105).<sup>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 long held that once a record is determined to be a criminal investigatory record, it is exempt from access. See Janeczko, GRC Complaint No. 2002-79, *et seq.*, holding that "criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed."<sup>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."

#### Item No. 1 (Arrest Reports)

The Council has held that arrest reports are disclosable, with redactions for information otherwise exempt under OPRA. See Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008).

Here, the Complainant's OPRA request Item No. 1 sought any arrest reports pertaining to Anthony Desilvio, identifying five (5) case numbers. The Custodian argued in her response and in the SOI that such records were exempt under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. Such a response is contrary to the Council's decision in Morgano. However, it is also unclear from the evidence of record whether such records exist in each file.

Accordingly, the Custodian may have unlawfully denied access to the Complainant's OPRA request Item No. 1 seeking arrest reports pertaining to Anthony Desilvio and the identified case numbers. N.J.S.A. 47:1A-6; Morgano, GRC 2007-156. The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.

#### Item No. 2 (Police Reports)

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 Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005) (holding that

---

<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.

<sup>7</sup>The GRC's ruling was affirmed in an unpublished opinion of the Appellate Division.

incident reports are exempt from disclosure under OPRA as criminal investigatory records). However, the Council has found these records may be disclosable where they did not meet the criminal investigatory test. See De La Cruz, Esq. v. City of Union City (Hudson), GRC Complaint No. 2015-14 (May 2017) (holding that certain incident reports were disclosable where they were not criminal investigatory, medical, or otherwise exempt under State regulations). In the instant complaint, the GRC must determine whether the responsive records meet the N. Jersey Media Grp. test and act accordingly based on the result.

Regarding the first prong, there is no evidence in the record indicating that police reports are required by law to be made in the MCPO's course of official business. As to the second prong, the Complainant included in his Denial of Access Complaint copies of complaint-warrants and complaint-summons provided in response to the OPRA request at issue. Upon review, the record demonstrates that the Complainant sought police reports pertaining to criminal indictments against Anthony Desilvio. Furthermore, as discussed above the Complainant also sought arrest reports associated with the identified file numbers in his request. Based on the foregoing, the GRC is satisfied that the requested police reports fall under the criminal investigatory records exemption and are not subject to disclosure. N.J.S.A. 47:1A-1.1.

Therefore, notwithstanding the Custodian's "deemed" denial, the Complainant's OPRA request Item No. 2 seeking police reports is exempt from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., 229 N.J. at 546; Janeczko, GRC 2002-79, *et seq.* The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6. Accordingly, the Council declines to address the remaining defenses raised by the Custodian.

### **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 Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. The Custodian may have unlawfully denied access to the Complainant's OPRA request Item No. 1 seeking arrest reports pertaining to Anthony Desilvio and the identified case

numbers. N.J.S.A. 47:1A-6; Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008). The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.

3. **The Custodian shall comply with conclusion No. 2 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>8</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> to the Executive Director.<sup>10</sup>**
4. Notwithstanding the Custodian's "deemed" denial, the Complainant's OPRA request Item No. 2 seeking police reports is exempt from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 546 (2017); Janeczko v. N.J. Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6. Accordingly, the Council declines to address the remaining defenses raised by the Custodian.
5. 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  
Staff Attorney

July 21, 2020

---

<sup>8</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>9</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>10</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.