



**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 30, 2022 Government Records Council Meeting**

John R. Lanza, Esq. (o/b/o Wayne Klein)  
Complainant

Complaint No. 2020-159

v.  
Essex County Prosecutor's Office  
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council ("Council") considered the August 23, 2022 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 the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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 30<sup>th</sup> Day of August 2022

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: September 1, 2022**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
August 30, 2022 Council Meeting**

**John R. Lanza, Esq. (on Behalf of Wayne Klein)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-159**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of arrest reports, blotter entries, and security videos pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1.<sup>3</sup>

**Custodian of Record:** Stephen A. Pogany

**Request Received by Custodian:** June 8, 2020

**Response Made by Custodian:** June 22, 2020

**GRC Complaint Received:** August 17, 2020

**Background**

June 28, 2022 Council Meeting:

At its June 28, 2022 public meeting, the Council considered the June 21, 2022 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, found that:

1. The Custodian complied with the Council's May 31, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's request for an arrest report. N.J.S.A. 47:1A-6. However, the Custodian complied with the Council's May 31, 2022 Interim Order by providing the Complainant with responsive records. 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

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<sup>1</sup> The Complainant represents Wayne Klein.

<sup>2</sup> Represented by Olivia Schumann, Esq., Essex County Counsel (Newark, NJ).

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

willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's May 31, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to locate and provide the Complainant with responsive records to his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

#### Procedural History:

On June 29, 2022, the Council distributed its Interim Order to all parties. On August 3, 2022, the Custodian notified the GRC that a settlement had been reached between the parties, with a payment of \$2,000.00 to be paid within twenty (20) business days. On August 23, 2022, the GRC requested confirmation from the Complainant that a settlement had been reached between the parties. On August 24, 2022, the Complainant responded to the GRC, confirming the settlement as expressed by the Custodian.

#### Analysis

##### Compliance

At its June 28, 2022 meeting, the Council ordered the parties to "confer in an effort to decide the amount of reasonable attorney's fees" and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel "shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13." On June 29, 2022, the Council distributed its Interim Order to all parties providing them twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by August 3, 2022.

On August 3, 2022, the last day of the allotted period, the Custodian notified the GRC that the parties settled the fee issue. The Custodian added that as part of the agreement, Essex County would pay the Complainant's Counsel \$2,000.00 within twenty (20) business days from August 3, 2022. On August 24, 2022, the Complainant confirmed the settlement and resolution of the fee issue.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado  
Staff Attorney

August 23, 2022



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**

**June 28, 2022 Government Records Council Meeting**

John R. Lanza, Esq. (o/b/o Wayne Klein)  
Complainant

Complaint No. 2020-159

v.  
Essex County Prosecutor's Office  
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council ("Council") considered the June 21, 2022 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 complied with the Council's May 31, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's request for an arrest report. N.J.S.A. 47:1A-6. However, the Custodian complied with the Council's May 31, 2022 Interim Order by providing the Complainant with responsive records. 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.
3. Pursuant to the Council's May 31, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to locate and provide the Complainant with records responsive to his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties**

**cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of June 2022

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: June 29, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 28, 2022 Council Meeting**

**John R. Lanza, Esq. (on Behalf of Wayne Klein)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-159**

**v.**

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

**Records Relevant to Complaint:** Electronic copies via e-mail of arrest reports, blotter entries, and security videos pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1.<sup>3</sup>

**Custodian of Record:** Stephen A. Pogany

**Request Received by Custodian:** June 8, 2020

**Response Made by Custodian:** June 22, 2020

**GRC Complaint Received:** August 17, 2020

**Background**

**May 31, 2022 Council Meeting:**

At its May 31, 2022 public meeting, the Council considered the April 19, 2022 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 OPRA request seeking "arrest reports", "blotter entries", and "security videos" pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1 was not overly broad and invalid. Rather, the request sought specifically identifiable records and would not cause the Custodian to conduct research to process. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-49 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. New Jersey Builders Ass'n v. New Jersey Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2009); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007).

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<sup>1</sup> The Complainant represents Wayne Klein.

<sup>2</sup> Represented by Olivia Schumann, Esq., Essex County Counsel (Newark, NJ).

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

2. The Custodian may have unlawfully denied access to the portion of the Complainant's OPRA request seeking arrest reports pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. 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 may have unlawfully denied access to the portion of the Complainant's OPRA request seeking blotter entries pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. N.J.S.A. 47:1A-6; Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004); Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated December 20, 2011). The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.
4. The Custodian may have unlawfully denied access to the portion of the Complainant's OPRA request seeking security camera footage obtained regarding N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. N.J.S.A. 47:1A-6. The Complainant, as representing the victim of a crime, is entitled to access the victim's own records pertaining to their victimization. N.J.S.A. 47:1A-1.1. The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.
5. **The Custodian shall comply with conclusion Nos. 2-4 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 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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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.



### Procedural History:

On June 1, 2022, the Council distributed its Interim Order to all parties. On June 8, 2022, the Custodian responded to the Council's Interim Order, providing certified confirmation of compliance to the Executive Director. The Custodian certified that on June 8, 2022, he disclosed via e-mail a copy of Rashawn Williams' arrest report to the Complainant in accordance with the Interim Order. The Custodian certified that redactions were made to the report and attached a document index explaining the basis for the redactions. The Custodian further certified that there were no other responsive records in the Essex County Prosecutor's Office's ("ECPO") possession.

### Analysis

#### Compliance

At its May 31, 2022 meeting, the Council ordered the Custodian to locate and disclose to the Complainant responsive records, or to certify if none exist. 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 June 1, 2022, 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 June 8, 2022.

On June 8, 2022, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian responded in writing, providing certified confirmation of compliance to the Executive Director. The Custodian certified that on June 8, 2022, he delivered to the Complainant a copy of an arrest report with redactions along with a document index. The Custodian further certified that no other responsive records exist in ECPO's possession.

Therefore, the Custodian complied with the Council's May 31, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously providing 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)).

The Custodian unlawfully denied access to the Complainant's request for an arrest report. N.J.S.A. 47:1A-6. However, the Custodian complied with the Council's May 31, 2022 Interim Order by providing the Complainant with responsive records. 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.

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

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), the Appellate Division held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct"(quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court held that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." *Id.* at 603 (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees,

in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

[196 N.J. at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff's litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the instant matter, the Complainant requested arrested reports, blotter entries, and security videos pertaining to a criminal case. The Custodian denied access, asserting that the request was invalid. The Complainant filed this instant matter asserting that the request was unlawfully denied as it sought specific government records.

In determining whether the Complainant is a prevailing party entitled to attorney's fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council's May 31, 2022 Interim Order, the Custodian provided the

Complainant with responsive records, which was one of the intended result of the instant complaint. Thus, a causal nexus exists between this complaint and the change in the Custodian's conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.

Therefore, pursuant to the Council's May 31, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian was ordered to locate and provide the Complainant with records responsive to his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 31, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's request for an arrest report. N.J.S.A. 47:1A-6. However, the Custodian complied with the Council's May 31, 2022 Interim Order by providing the Complainant with responsive records. 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.
3. Pursuant to the Council's May 31, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to locate and provide the Complainant with records responsive to his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387

**N.J. Super. at 432, and Mason, 196 N.J. at 71. Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado  
Staff Attorney

June 21, 2022



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**

**May 31, 2022 Government Records Council Meeting**

John R. Lanza, Esq. (o/b/o Wayne Klein)  
Complainant

Complaint No. 2020-159

v.  
Essex County Prosecutor's Office  
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council ("Council") considered the April 19, 2022 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 OPRA request seeking "arrest reports", "blotter entries", and "security videos" pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1 was not overly broad and invalid. Rather, the request sought specifically identifiable records and would not cause the Custodian to conduct research to process. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-49 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. New Jersey Builders Ass'n v. New Jersey Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2009); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007).
2. The Custodian may have unlawfully denied access to the portion of the Complainant's OPRA request seeking arrest reports pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. 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 may have unlawfully denied access to the portion of the Complainant's OPRA request seeking blotter entries pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. N.J.S.A. 47:1A-6; Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004); Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated December 20, 2011). The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.

4. The Custodian may have unlawfully denied access to the portion of the Complainant's OPRA request seeking security camera footage obtained regarding N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. N.J.S.A. 47:1A-6. The Complainant, as representing the victim of a crime, is entitled to access the victim's own records pertaining to their victimization. N.J.S.A. 47:1A-1.1. The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.
5. **The Custodian shall comply with conclusion Nos. 2-4 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>1</sup> 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>**
6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of May 2022

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: June 1, 2022**

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<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.

<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  
May 31, 2022 Council Meeting**

**John R. Lanza, Esq. (on Behalf of Wayne Klein)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-159**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of arrest reports, blotter entries, and security videos pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1.<sup>3</sup>

**Custodian of Record:** Stephen A. Pogany

**Request Received by Custodian:** June 8, 2020

**Response Made by Custodian:** June 22, 2020

**GRC Complaint Received:** August 17, 2020

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

**Request and Response:**

On June 8, 2020, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 22, 2020, the Custodian responded in writing stating that the records were denied on various grounds.

The Custodian first stated that the request was overly broad and failed to name specific documents to be released. Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 38-39 (App. Div. 2005); New Jersey Builders Ass'n v. New Jersey Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2009). Second, the Custodian stated that the prosecutor's criminal investigatory file, open or closed, was not a public record and is exempt from disclosure under N.J.S.A. 47:1A-1.1. Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 591 (2011); Bent, 381 N.J. Super. at 38-39; Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). The Custodian also noted that dash cam videos, investigative reports, and witness statements were covered by the criminal investigatory records exemption since they were not "required by law to be made, maintained, or kept on file," and because the actions of the

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<sup>1</sup> The Complainant represents Wayne Klein.

<sup>2</sup> Represented by Olivia Schumann, Esq., Essex County Counsel (Newark, NJ).

<sup>3</sup> The Complainant sought additional 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.

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pertained to an investigation into actual or potential violations of criminal law. N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 569 (2017); Attorney General Law Enforcement Directive No. 2018-1.

Third, the Custodian stated that the request constituted, “inter-agency or intra-agency advisory, consultative, or deliberative [“(ACD”)”] material” exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Bent, 381 N.J. Super. at 40. Fourth, the Custodian then stated that the requested records were denied on the separate and independent ground that the requested records are unfiled discovery materials and as such exempt from disclosure. N.J.S.A. 47:1A-9(b); Drinker Biddle & Reath, LLP v. New Jersey Dep’t of Law and Public Safety, Div. of Law, 421 N.J. Super. 489, 498-98 (App. Div. 2011).

Fifth, the Custodian stated that the request was intended to circumvent the discovery process, which was not OPRA’s intent. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546-549 (App. Div. 2005). Sixth, the Custodian stated that Executive Order No. 69 (Gov. Whitman, 1997) (“EO 69”) prevented the disclosure of crime scene photographs. Leak v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009). The Custodian therefore stated that crime scene photographs were exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); EO 26.

#### Denial of Access Complaint:

On August 17, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant initially stated that his law firm represented Mr. Wayne Klein, who was shot in the leg by Rashawn Williams. The Complainant further stated that he filed the instant OPRA request on Mr. Klein’s behalf, seeking records pertaining to the incident. The Complainant thereafter disputed each basis raised by the Custodian in denying his OPRA request.

First, the Complainant argued that the request was valid since the Custodian was able to identify the requested records contained within the prosecutor’s case file, namely “police reports”, “blotter entries”, and “security videos.” Second, the Complainant asserted that the requested records did not fall under the criminal investigatory records exemption, particularly the arrest reports (N.J.S.A. 47:1-A-3(b)) and police blotters (Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004)). The Complainant also asserted that he represents the victim of the incident surrounding the OPRA request and seeks the security videos retained on file by the Essex County Prosecutor’s Office (“ECPO”).

Third, the Complainant disputed the claim that the requested material was subject to the ACD privilege. Fourth, the Complainant asserted that it was unlawful to deny access to an OPRA request on the basis that the requested material could be obtained via discovery. Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004); Bart v. City of Passaic, GRC No. 2007-162 (Interim Order dated February 27, 2008). Fifth, the Complainant asserted that the requested security videos were not “unfiled discovery” because it was not obtained from private party during litigation and were not a “discovery document.” Drinker Biddle & Reath, LLP, 421 N.J. Super. at 498-98. Sixth, the Complainant asserted that EO 69 was not applicable because the

request did not seek “fingerprint cards, plates, and photographs” prepared by police, but a security video created by a private party.

#### Statement of Information:

On September 17, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on June 8, 2020. The Custodian certified that he responded in writing on June 22, 2020 denying access on multiple basis.

The Custodian argued that he lawfully denied access to the Complainant’s OPRA request for all the same reasons stated in his June 22, 2020 response.

### Analysis

#### Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

[MAG, 375 N.J. Super. at 546 (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[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 Police Dep’t,

381 N.J. Super. 30, 37 (App. Div. 2005);<sup>5</sup> N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 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).

In Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008), the complainant filed an OPRA request for two entire prosecutor's office files. The Council relied upon MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; and Asarnow v. Dep't of Labor, GRC Complaint No. 2006-24 (May 2006), in determining that the request was overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific government record. As such, the Council found that the custodian met her burden of proof in denying access to the responsive records.

However, in Donato, GRC 2005-182, the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005, to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

Pursuant to [MAG], the Custodian is obligated to search her files to find the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word search is defined as “to go or look through carefully in order to find something missing or lost.” The word research, on the other hand, means “a close and careful study to find new facts or information.” (Footnotes omitted.)

[Id.]

Here, the Complainant's OPRA request sought “arrest reports”, “blotter entries”, and “security videos” pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. Unlike Morgano, GRC 2010-145, the Complainant identified specific government records contained within a specific case file, compared to simply requesting “all documents” contained within the file. Thus, rather than seeking an entire class of documents, the Complainant's request provided sufficient information for the Custodian to conduct a proper search.

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<sup>5</sup> Affirmed on appeal regarding Bent v. Stafford Police Dep't, GRC Complaint No. 2004-78 (October 2004). John R. Lanza, Esq. (on Behalf of Wayne Klein) v. Essex County Prosecutor's Office, 2020-159 – Findings and Recommendations of the Executive Director

Accordingly, the Complainant's OPRA request seeking "arrest reports", "blotter entries", and "security videos" pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1 was not overly broad and invalid. Rather, the request sought specifically identifiable records and would not cause the Custodian to conduct research to process. MAG, 375 N.J. Super. at 549; Bent, 381 N.J. Super. at 37; N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Donato, GRC 205-182.

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

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc., 229 N.J. 541, on appeal from N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015). In the appeal, the Court affirmed that OPRA's criminal investigatory records exemption applies to police records which originate from a criminal investigation. However, the court stated that "to qualify for the exception — and be exempt from disclosure — a record (1) must not be 'required by law to be made,' and (2) must 'pertain[ ] to a criminal investigation.'" N.J.S.A. 47:1A-1.1." Id. at 564.

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

The Court also noted that even if a record is not required by law to be made, it must still be found to pertain to a criminal investigation. The Court reiterated the Appellate Division's observation that "some police records relate to an officer's community-caretaking function; others to the investigation of a crime." Id. at 569 (citing N. Jersey Media Grp., Inc., 441 N.J. Super. at

105).<sup>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.”

### 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 sought in part arrest reports pertaining to *N.J. v. Rashawn Williams*, Indictment No. 19-11-03177-1. The Custodian argued in his response and in the SOI that such records were exempt under the criminal investigatory exemption. *N.J.S.A.* 47:1A-1.1. It is also unclear whether such records exist in the file. Nevertheless, any arrest reports in the file are subject to disclosure under *Morgano*, GRC 2007-156.

Accordingly, the Custodian may have unlawfully denied access to the portion of the Complainant’s OPRA request seeking arrest reports pertaining to *N.J. v. Rashawn Williams*, Indictment No. 19-11-03177-1. *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.

### Blotter Entries

The Council has previously held that blotter entries or call histories may be subject to disclosure under OPRA. See *Perino v. Borough of Haddon Heights*, GRC Complaint No. 2004-128 (November 2004); *Rivera v. Town of West New York (Hudson)*, GRC Complaint No. 2010-208 (Interim Order dated December 20, 2011).

Here, the Complainant’s OPRA request sought in part blotter entries regarding *N.J. v. Rashawn Williams*, Indictment No. 19-11-03177-1. The Custodian argued in his response and in the SOI that such records exempt under the criminal investigatory exemption. *N.J.S.A.* 47:1A-1.1. However, similar to the request for arrest reports above, it is unclear whether such records exist in

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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.

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

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the file. Nevertheless, any blotter entries in the file are subject to disclosure under Perino, GRC 2004-128, and Rivera, GRC 2010-208.

Accordingly, the Custodian may have unlawfully denied access to the portion of the Complainant's OPRA request seeking blotter entries pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. N.J.S.A. 47:1A-6; Perino, GRC 2004-128, Rivera, GRC 2010-208. The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.

### Security Video

OPRA also provides that a "victim of a crime shall have access to the victim's own records[.]" N.J.S.A. 47:1A-1.1. OPRA further provides that "no fee shall be charged to a victim of a crime for a copy or copies of a record to which the crime victim is entitled to access, as provided in [N.J.S.A. 47:1A-1.1]." N.J.S.A. 47:1A-5(b).

In the instant matter, the Complainant sought security camera footage created by a private party pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. The Custodian responded to the Complainant on October 16, 2020, denying access to the request as seeking criminal investigatory records. N.J.S.A. 47:1A-1.1. The Complainant responded by noting that Mr. Klein was the victim of the incident.

Initially, the GRC notes that the requested security camera footage satisfies the two-prong test as a criminal investigatory record because it was part of the investigation and there is no evidence suggesting that same was required by law to be made or maintained. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. at 546. Instead, the Complainant contended in the Denial of Access Complaint that the records was created by a private party and neither party argued that the footage is required by law to be made, maintained or kept on file.

Regardless of the forgoing, the plain language of OPRA demonstrates that a victim is entitled to access records pertaining to their victimization, including records that would normally constitute criminal investigatory records such as police reports and temporary restraining orders. See N.J.S.A. 47:1A-1.1. Furthermore, since the Complainant, as the victim's counsel, certified that he submitted the OPRA request on behalf of the victim, the Complainant is entitled to access the victim's own record.

Therefore, the Custodian may have unlawfully denied access to the portion of the Complainant's OPRA request seeking security camera footage obtained regarding N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. N.J.S.A. 47:1A-6. The Complainant, as representing the victim of a crime, is entitled to access the victim's own records pertaining to their victimization. N.J.S.A. 47:1A-1.1. The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.

### **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.

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

The Council defers analysis of whether the Complainant is a prevailing party 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 OPRA request seeking "arrest reports", "blotter entries", and "security videos" pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1 was not overly broad and invalid. Rather, the request sought specifically identifiable records and would not cause the Custodian to conduct research to process. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-49 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. New Jersey Builders Ass'n v. New Jersey Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2009); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007).
2. The Custodian may have unlawfully denied access to the portion of the Complainant's OPRA request seeking arrest reports pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. 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 may have unlawfully denied access to the portion of the Complainant's OPRA request seeking blotter entries pertaining to N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. N.J.S.A. 47:1A-6; Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004); Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated December 20, 2011). The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.
4. The Custodian may have unlawfully denied access to the portion of the Complainant's OPRA request seeking security camera footage obtained regarding N.J. v. Rashawn Williams, Indictment No. 19-11-03177-1. N.J.S.A. 47:1A-6. The Complainant, as representing the victim of a crime, is entitled to access the victim's own records

pertaining to their victimization. N.J.S.A. 47:1A-1.1. The Custodian shall either: 1) disclose the responsive records, if any; or 2) certify that no responsive records exist.

5. **The Custodian shall comply with conclusion Nos. 2-4 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>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>**
6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado  
Staff Attorney

April 19, 2022<sup>11</sup>

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<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.

<sup>11</sup> On April 26, 2022, the complaint was scheduled for adjudication, but was tabled due to lack of quorum.

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