



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**February 23, 2021 Government Records Council Meeting**

Ali Ibn Karim  
Complainant

Complaint No. 2020-22

v.  
Essex County Prosecutor's Office  
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council ("Council") considered the February 16, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the requested transcripts/audio of interviews of residents at 304-306 Chadwick Avenue by Detective Ramirez are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. N.J. Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq.* (June 2004); Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010). Thus, the Custodian lawfully denied access to the requested records. N.J.S.A. 47:1A-6.

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 23<sup>rd</sup> Day of February 2021

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council



**Decision Distribution Date: February 25, 2021**

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**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 23, 2021 Council Meeting**

**Ali Ibn Karim<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-22**

v.

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

**Records Relevant to Complaint:** Hardcopies via U.S. mail of “any and all transcripts/audio or written” statements from interviews conducted or residents at 304-306 Chadwick Avenue by Detective Jose Ramirez on September 19, 2010.

**Custodian of Record:** Stephen A. Pogany, Esq.  
**Request Received by Custodian:** December 10, 2019  
**Response Made by Custodian:** December 16, 2019  
**GRC Complaint Received:** January 25, 2020

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

**Request and Response:**

On an unknown date, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 16, 2019, the Custodian responded in writing denying the Complainant’s OPRA request. The Custodian stated that the records were exempt under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 591 (2011); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 38-39 (App. Div. 2005); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. N.J. Dep’t of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq.* (June 2004).

**Denial of Access Complaint:**

On January 25, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he only recently became aware of extensive interviews conducted by Det. Ramirez when reviewing his trial transcript. The

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

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

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Complainant argued that the defense never received these records and Det. Ramirez denied conducting said interviews. The Complainant contended that the responsive records were “[d]iscovery’ that was never provided to [himself] or [his] co-defendant.” The Complainant argued that the State had an obligation to produce these records to the defense when they entered the photographs taken during the interviews. The Complainant argued that the State’s failure to do so resulted in an unfair trial.

#### Statement of Information:

On March 6, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 10, 2019. The Custodian certified that he responded in writing on December 16, 2019 denying access to the requested records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.

The Custodian contended that he lawfully denied access to the requested records under OPRA, which were witness interviews conducted during a criminal investigation. N.J.S.A. 47:1A-1.1. The Custodian further argued that OPRA was not intended to circumvent or supplement discovery. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005).

### Analysis

#### 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>4</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.”

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

In the matter before the Council, the Complainant’s OPRA request sought transcripts or audio of witness interviews conducted at 304-306 Chadwick Avenue. The Custodian responded denying access under the criminal investigatory exemption. The Complainant argued in the Denial of Access Complaint that the requested records were not provided to him or his co-defendant as part of their trial. The Complainant further argued that the State had an obligation to disclose these interviews and that their failure to do so resulted in an unfair trial. In the SOI, the Custodian maintained his position that the records were exempt under N.J.S.A. 47:1A-1.1.

In applying the two prongs of the criminal investigatory exemption found in N. Jersey Media Grp., Inc., 229 N.J. 541 to this portion of the OPRA request, the GRC is satisfied that the

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<sup>4</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.

Custodian lawfully denied access to the requested records. Of pertinent note, the responsive records relate to a criminal investigation resulting in the Complainant being tried of multiple offenses related to a police pursuit,<sup>5</sup> convicted, and sentenced to time in prison.<sup>6</sup> As the police pursuit in question concluded in the area<sup>7</sup> identified by the Complainant, it is logical to conclude that statements obtained by Det. Ramirez related to the criminal investigation. Parker, GRC 2009-225. Further, whether said records were subject to disclosure as discovery is not within the GRC's authority to adjudicate under N.J.S.A. 47:1A-7, nor does it impact their disclosability under OPRA. Thus, as discussed above, precedential case law supports the inclusion of these records under the criminal investigatory exemption when they meet the two-prong test, regardless of the investigation status. Janeczko, GRC 2002-79, *et seq.*

Accordingly, the requested transcripts/audio of interviews of residents at 304-306 Chadwick Avenue by Det. Ramirez are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541; Janeczko, GRC 2002-79, *et seq.*; Parker, GRC 2009-225. Thus, the Custodian lawfully denied access to the requested records. N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the requested transcripts/audio of interviews of residents at 304-306 Chadwick Avenue by Detective Ramirez are exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. N.J. Dep't of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq.* (June 2004); Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010). Thus, the Custodian lawfully denied access to the requested records. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso  
Executive Director

February 16, 2021

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<sup>5</sup> Details of the incident can be found in State v. Karim, 2015 N.J. Super. Unpub. LEXIS 2576 (App. Div. 2015) (on appeal from Indictment Nos. 11-06-01110, 11-06-01111 and 11-06-01112).

<sup>6</sup> <http://www.njecpo.org/?p=2378> (accessed February 5, 2021).

<sup>7</sup> [https://www.nj.com/news/2010/09/suspects\\_lead\\_police\\_on\\_dramat.html](https://www.nj.com/news/2010/09/suspects_lead_police_on_dramat.html) (accessed February 5, 2021).