



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

June 29, 2021 Government Records Council Meeting

Erv-Wikine Pryor
Complainant

Complaint No. 2020-63

v.

Essex County Prosecutor's Office
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council ("Council") considered the June 22, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council's May 18, 2021 Interim Order because he responded in the prescribed time frame disclosing to the Complainant two (2) responsive records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's OPRA request item Nos. 1 and 5. However, the Custodian lawfully denied access to the remainder of the Complainant's OPRA request because portions were invalid, or the records sought were exempt from disclosure. 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 29th Day of June 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: July 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 29, 2021 Council Meeting**

**Erv-Wikine Pryor¹
Complainant**

GRC Complaint No. 2020-63

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of:

1. All arrest reports, detective notes by Police Officer Marcado and Burrows regarding the Complainant's name; "particularly regarding criminal Indictment No(s). 17-09-0251 and 02452."
2. All video footage regarding criminal complaints filed against the Complainant regarding all criminal indictments.
3. All DNA specimens recovered, all medical records, photographs, mug shots, crime scene photos, e-mails, phone records, text messages, and inter-office communications "accumulated during the investigation process."
4. All polygraph examination records, fingerprint cards, saliva taken, 911 reports and "any records in relation to them."
5. All open and closed warrants issued against the Complainant, statements, police reports, and data collected during the investigations leading to the "aforementioned criminal charges/indictments."

Custodian of Record: Stephen Pogany, Esq.
Request Received by Custodian: January 28, 2020
Response Made by Custodian: January 31, 2020
GRC Complaint Received: March 12, 2020

Background

May 18, 2021 Council Meeting:

At its May 18, 2021 public meeting, the Council considered the May 11, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

¹ No legal representation listed on record.

² Represented by Olivia Schumann, Esq. (Newark, NJ).

1. The portion of the Complainant's request item No. 3 seeking certain correspondence is invalid because it failed to include a date or range of dates and sender or recipient. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2015-276 (Final Decision dated November 13, 2018). Further, the portions of the Complainant's request item Nos. 4 and 5 seeking generic "records" and "data" are invalid because they fail to identify a specific record and require research. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37, (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to the Complainant's request because it was invalid in its totality. N.J.S.A. 47:1A-6. However, the remainder of the Complainant's OPRA request is valid, and the Custodian unlawfully denied access to them on this basis.

2. The Custodian unlawfully denied access to the requested arrest reports and arrest warrants sought in a portion of the Complainant's OPRA request item Nos. 1 and 5. 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); Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall search for and disclose these records, with redactions where applicable. Should a search yield no responsive records, the Custodian must certify to this fact inclusive of a detailed explanation of the search conducted.

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 deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**

4. The balance of the Complainant's OPRA request because those records, to the extent that any exist, are exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002); Executive

³ 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.

⁴ "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."

⁵ 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.

Order No. 69 (Gov. Whitman, 1997). Thus, the Custodian lawfully denied access to the remaining request items. N.J.S.A. 47:1A-6.

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 May 19, 2021, the Council distributed its Interim Order to all parties. On May 25, 2021, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that on this date, he sent to the Complainant two (2) records via U.S. mail. The Custodian noted that he redacted social security numbers in the second disclosed record: a probable cause affidavit and warrant.

Analysis

Compliance

At its May 18, 2021 meeting, the Council ordered the Custodian to search for and disclose any responsive arrest reports and warrants sought in the Complainant's OPRA request item Nos. 1 and 5. The Council further ordered the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On May 19, 2021, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 26, 2021.

On May 25, 2021, the fourth (4th) business day after receipt of the Council's Order, the Custodian responded to the Council's Order certifying that he disclosed to the Complainant two (2) records responsive to the Complainant's OPRA request item Nos. 1 and 5. The Custodian also included certified confirmation of compliance. Thus, the evidence of record supports that compliance has been achieved.

Therefore, the Custodian complied with the Council's May 18, 2021 Interim Order because he responded in the prescribed time frame disclosing to the Complainant two (2) responsive 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)).

In the matter before the Council, the Custodian unlawfully denied access to the Complainant’s OPRA request item Nos. 1 and 5. However, the Custodian lawfully denied access to the remainder of the Complainant’s OPRA request because portions were invalid, or the records sought were exempt from disclosure. 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 May 18, 2021 Interim Order because he responded in the prescribed time frame disclosing to the Complainant two (2) responsive records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request item Nos. 1 and 5. However, the Custodian lawfully denied access to the remainder of the Complainant’s OPRA request because portions were invalid, or the records sought were exempt from disclosure. 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: Frank F. Caruso
Executive Director

June 22, 2021



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 18, 2021 Government Records Council Meeting

Erv-Wikine Pryor
Complainant

Complaint No. 2020-63

v.

Essex County Prosecutor's Office
Custodian of Record

At the May 18, 2021 public meeting, the Government Records Council ("Council") considered the May 11, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The portion of the Complainant's request item No. 3 seeking certain correspondence is invalid because it failed to include a date or range of dates and sender or recipient. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2015-276 (Final Decision dated November 13, 2018). Further, the portions of the Complainant's request item Nos. 4 and 5 seeking generic "records" and "data" are invalid because they fail to identify a specific record and require research. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37, (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to the Complainant's request because it was invalid in its totality. N.J.S.A. 47:1A-6. However, the remainder of the Complainant's OPRA request is valid, and the Custodian unlawfully denied access to them on this basis.
2. The Custodian unlawfully denied access to the requested arrest reports and arrest warrants sought in a portion of the Complainant's OPRA request item Nos. 1 and 5. 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); Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall search for and disclose these records, with redactions where applicable. Should a search yield no responsive records, the Custodian must certify to this fact inclusive of a detailed explanation of the search conducted.

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 deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
4. The balance of the Complainant's OPRA request because those records, to the extent that any exist, are exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002); Executive Order No. 69 (Gov. Whitman, 1997). Thus, the Custodian lawfully denied access to the remaining request items. N.J.S.A. 47:1A-6.
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 18th Day of May 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: May 19, 2021

¹ 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.

² "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."

³ 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 18, 2021 Council Meeting**

**Erv-Wikine Pryor¹
Complainant**

GRC Complaint No. 2020-63

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of:

1. All arrest reports, detective notes by Police Officer Marcado and Burrows regarding the Complainant's name; "particularly regarding criminal Indictment No(s). 17-09-0251 and 02452."
2. All video footage regarding criminal complaints filed against the Complainant regarding all criminal indictments.
3. All DNA specimens recovered, all medical records, photographs, mug shots, crime scene photos, e-mails, phone records, text messages, and inter-office communications "accumulated during the investigation process."
4. All polygraph examination records, fingerprint cards, saliva taken, 911 reports and "any records in relation to them."
5. All open and closed warrants issued against the Complainant, statements, police reports, and data collected during the investigations leading to the "aforementioned criminal charges/indictments."

Custodian of Record: Stephen Pogany, Esq.
Request Received by Custodian: January 28, 2020
Response Made by Custodian: January 31, 2020
GRC Complaint Received: March 12, 2020

Background³

Request and Response:

On January 21, 2020, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 31, 2020, the Custodian

¹ No legal representation listed on record.

² Represented by Olivia Schumann, Esq. (Newark, NJ).

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

responded in writing denying the subject OPRA request as invalid because it was overly broad and would require research. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007).

Denial of Access Complaint:

On March 12, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed that the subject OPRA request was invalid. The Complainant argued that the OPRA request was “direct and clear” and did not require research.

Statement of Information:⁴

On March 24, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 28, 2020. The Custodian certified that he responded in writing on January 31, 2020 denying the request as invalid.

The Custodian contended that he lawfully denied access to the subject OPRA request because it was invalid. Bent, 381 N.J. Super. 30; N.J. Builders, 390 N.J. Super. 166. The Custodian argued that said request failed to identify specific records and required him to conduct research. MAG, 375 N.J. Super. 534. The Custodian also noted that the request sought a variety of criminal investigatory records otherwise exempt from disclosure. N.J.S.A. 47:1A-1.1.

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

⁴ On February 25, 2021, this complaint was referred to mediation. On March 12, 2021, this complaint was referred back to the GRC for adjudication.

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, 381 N.J. Super. at 37;⁵ N.J. Builders, 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. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Regarding requests for communications, including e-mails, text messages, and written correspondence, the GRC has established criteria deemed necessary under OPRA to request them. In Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), the Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). The GRC notes that the Council has determined that requests seeking correspondence but omitting the specific date or range of dates are invalid. See Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014). The Council has also found that an OPRA request not containing a sender and/or recipient is invalid. See Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2015-276 (Final Decision dated November 13, 2018).

Regarding generic requests for “records,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license

⁵ Affirmed on appeal regarding Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-540. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the complainant’s request item No. 2 seeking “[p]roof of submission” was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012) (accepting the Administrative Law Judge’s finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request) Id. at 12-13.

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

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

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

Here, a portion of the Complainant’s request item No. 3 sought e-mails, phone records, text messages, and inter-office communications “accumulated during the investigation process.” Further, a portion of the Complainant’s request item No. 4 “any records in relation” to polygraph records, fingerprint cards, saliva, and 911 reports. Also, a portion of the Complainant’s request item No. 5 sought “data collected during the investigation” of any criminal charges or indictments. The Custodian responded denying access to the entirety of the Complainant’s OPRA request as invalid. In the Denial of Access Complaint, the Complainant disagreed with the denial, arguing that his request was “direct and clear” and did not require research. In the SOI, the Custodian maintained his position that the subject request was invalid, adding that the request clearly sought criminal investigatory records.

Upon review of the subject request compared to MAG and its progeny, the GRC is persuaded that the Custodian lawfully denied access to the above portions of the Complainant’s request item Nos. 3, 4 and 5 because they were invalid. The portion of request item No. 3 seeking correspondence fails to include all criteria necessary to be considered valid under Elcavage, GRC 2009-07. Specifically, the Complainant failed to include a date or range of dates and senders or recipients. See also Tracey-Coll, GRC 2009-206; Caggiano, GRC 2015-276. Further, the portions

of request item Nos. 4 and 5 sought generic “records” and “data” relating to an unknown number of “investigation(s)” that would have required the Custodian to review every record maintained by ECPO over an undefined time period. Such actions clearly constitute research; the Custodian was not obligated to conduct same to satisfy the request. See Feiler-Jampel, GRC 2007-190.

However, the GRC is not persuaded that the remainder of the request is invalid. The remaining items and item portions not discussed herein seek identifiable records related to the Complainant, including those associated with Indictment Nos. 17-09-0251 and 17-09-0251. Those records include arrest reports, video footage, DNA specimens, fingerprint cards, and warrants among other identifiable records. For these items, the Custodian could not rely on the validity denial.

Accordingly, the portion of the Complainant’s request item No. 3 seeking certain correspondence is invalid because it failed to include a date or range of dates and sender or recipient. Elcavage, GRC 2009-07; Tracey-Coll, GRC 2009-206; Caggiano, GRC 2015-276. Further, the portions of the Complainant’s request item Nos. 4 and 5 seeking generic “records” and “data” are invalid because they fail to identify a specific record and require research. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Feiler-Jampel, GRC 2007-190. Thus, the Custodian lawfully denied access to the Complainant’s request because it was invalid in its totality. N.J.S.A. 47:1A-6. However, the remainder of the Complainant’s OPRA request is valid, and the Custodian unlawfully denied access to them on this basis.

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. v. Twp. of Lyndhurst, 229 N.J. 541 (2017), 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).⁶ 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. In Janeczko, GRC Complaint No. 2002-79, *et seq.*, the Council held that “criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed.”⁷ Moreover, with respect to concluded investigations, the Council pointed out in Janeczko that, “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete.” Id.

In the matter before the Council’s, the Custodian argued in the SOI that the OPRA request clearly sought criminal investigatory records not subject to disclosure. The GRC thus addresses each of those items, or portions thereof, that have been identified as valid.

OPRA request item No. 1 – Arrest Reports
OPRA request item No. 5 – Warrants

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). Further, the Council has also held that warrants are subject to disclosure under OPRA. Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013).

In the current matter, a portion of the Complainant’s OPRA request item No. 1 seeks arrest reports regarding him, as well as Indictment Nos. 17-09-0251 and 17-09-02452. Further, a portion of the Complainant’s OPRA request item No. 5 sought all warrants issued to him. Although the

⁶This is instructive for police agencies because it underscores the fact that their role in society is multi-faceted; hence, not all of their duties are focused upon investigation of criminal activity. And only those records created in their capacity as criminal investigators are subject to OPRA’s criminal investigatory records exemption.

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

Custodian argued in the SOI that the records were exempt under the criminal investigatory exemption, prevailing case law supports their disclosure. Thus, the Custodian unlawfully denied access to the arrest reports and warrants sought by the Complainant.

Accordingly, the Custodian unlawfully denied access to the requested arrest reports and arrest warrants sought in a portion of the Complainant's OPRA request item Nos. 1 and 5. N.J.S.A. 47:1A-6; Morgano, GRC 2007-156; Seabrooks, GRC 2012-230. The Custodian shall search for and disclose these records, with redactions where applicable. Should a search yield no responsive records, the Custodian must certify to this fact inclusive of a detailed explanation of the search conducted.

Remaining OPRA request items

The GRC has previously held that many of the identified records were exempt from disclosure where they met the two (2) prong test required to be a criminal investigatory record under OPRA or were specifically identified as exempt under OPRA. See *e.g.* Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order February 25, 2009) (holding that crime scene photographs are exempt from disclosure); Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010) (witness statements are exempt from disclosure); 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).

Additionally, OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

Executive Order No. 26 (Gov. McGreevey, 2002) ("EO 26") states in part that, "[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation" are not government records subject to access under OPRA. Moreover, Executive Order No. 69 (Gov. Whitman, 1997) ("EO 69"), which superseded Executive Order No. 9 (Gov. Hughes, 1963) ("EO 9"), states that:

The following records shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the provisions of [OPRA], as amended: *fingerprint cards*, plates and *photographs* and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.

[Id. (emphasis added).]

To this end, the Council has previously found that photographs pertaining to a criminal investigation are exempt from disclosure under OPRA. See e.g. Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005) (mug shots are exempt from disclosure under the criminal investigatory exemption); Lynn v. Middlesex Cnty. Prosecutor's Office, GRC Complaint No. 2015-186 (January 2017) (photographs associated with a criminal investigation are exempt from disclosure under OPRA).⁸

As to the remaining items not already addressed, the Complainant sought a multitude of various investigatory records including notes, police reports, video footage, various forensic reports, medical records, 911 "reports," and statements regarding investigations into alleged criminal charges against him. However, based on all statutes, executive orders, and case law highlighted above, any responsive records are not disclosable under OPRA. The most compelling evidence supporting this conclusion is a plain reading of the records sought compared to those expressly exempt either under OPRA or pursuant to precedential case law. Further, the Complainant clearly stated that he sought records associated with criminal investigations and identified two (2) criminal matters. Finally, there is no evidence presented here to prove that each of the categories of records identified in the OPRA request would not meet the two-prong criminal investigatory test set forth in N. Jersey Media Grp., Inc..

Accordingly, the balance of the Complainant's OPRA request because those records, to the extent that any exist, are exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc., 229 N.J. 541; N.J.S.A. 47:1A-9(a); EO 26; EO 69. Thus, the Custodian lawfully denied access to the remaining request items. N.J.S.A. 47:1A-6.

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 portion of the Complainant's request item No. 3 seeking certain correspondence is invalid because it failed to include a date or range of dates and sender or recipient. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2015-276 (Final Decision dated November 13, 2018). Further, the portions of the Complainant's request item Nos. 4 and 5 seeking generic "records" and "data" are invalid because they fail to identify a specific record and require research. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37, (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council

⁸ Affirmed on appeal in Lynn v. Middlesex Cnty. Prosecutor's Office, 2018 N.J. Super. Unpub. LEXIS 370 (App. Div. 2018).

on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to the Complainant's request because it was invalid in its totality. N.J.S.A. 47:1A-6. However, the remainder of the Complainant's OPRA request is valid, and the Custodian unlawfully denied access to them on this basis.

2. The Custodian unlawfully denied access to the requested arrest reports and arrest warrants sought in a portion of the Complainant's OPRA request item Nos. 1 and 5. 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); Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). The Custodian shall search for and disclose these records, with redactions where applicable. Should a search yield no responsive records, the Custodian must certify to this fact inclusive of a detailed explanation of the search conducted.
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 deliver⁹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ to the Executive Director.¹¹**
4. The balance of the Complainant's OPRA request because those records, to the extent that any exist, are exempt from disclosure as criminal investigatory records. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002); Executive Order No. 69 (Gov. Whitman, 1997). Thus, the Custodian lawfully denied access to the remaining request items. N.J.S.A. 47:1A-6.
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.

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Executive Director

May 11, 2021

⁹ 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.

¹⁰ "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."

¹¹ 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.