



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 24, 2021 Government Records Council Meeting

Asher Stockler
Complainant

Complaint No. 2020-88

v.

Long Branch Police Department (Monmouth)
Custodian of Record

At the August 24, 2021 public meeting, the Government Records Council (“Council”) considered the August 17, 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. Although the Custodian responded in writing to the Complainant’s OPRA request in a timely manner, the Custodian’s response was insufficient because she referred the Complainant to another public agency notwithstanding that the Long Branch Police Department maintained responsive records. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g). See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. Notwithstanding the Custodian’s initial denial of access based on an investigation in progress, the responsive reports and mobile video recording footage is exempt under the criminal investigation exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Mella v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2016-217 (August 2018). Thus, the Custodian ultimately lawfully denied access to the responsive records, although under the exemption originally cited. N.J.S.A. 47:1A-6; Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.) (certif. denied, 193 N.J. 292 (2007)).
3. The Custodian’s response was insufficient because she referred the Complainant to another agency even though Long Branch Police Department was maintaining responsive records. N.J.S.A. 47:1A-5(g). However, the responsive reports and mobile video recording footage are exempt from disclosure under OPRA and no unlawful denial of access occurred. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 24th Day of August 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: August 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 24, 2021 Council Meeting**

**Asher Stockler¹
Complainant**

GRC Complaint No. 2020-88

v.

**Long Branch Police Department (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Copies of the April 3, 2020 police report documenting a suicide and “any other related materials located in the case file.”

Custodian of Record: Linda Costa
Request Received by Custodian: April 7, 2020
Response Made by Custodian: April 14, 2020
GRC Complaint Received: April 27, 2020

Background³

Request and Response:

On April 6, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 14, 2020, the Custodian responded in writing that the Complainant should contact the Monmouth County Prosecutor’s Office (“MCPO”) to request the records.

On April 15, 2020, Deputy Clerk Mary Moss sent an e-mail to the Complainant advising that per Lieutenant Charles F. Shirley, Jr, the Complainant should contact the MCPO. Later in the day, the Complainant e-mailed the Custodian advising that MCPO told him to contact the Long Branch Police Department (“LBPD”) to obtain records. The Complainant asserted that he believed the LBPD maintained the responsive records and sought clarification as to whether this was true. On the same day, the Custodian responded stating that no records could be disclosed because an investigation was still on going and “nothing is complete yet.” The Complainant responded disputing the Custodian’s response. The Complainant asserted that the Custodian failed to properly respond to his OPRA request and further failed to provide a specific lawful basis for that denial.

¹ No legal representation listed on record.

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, LLC (Iselin, 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.

Schwarz v. N.J. Dep't of Human Serv., GRC Complaint No. 2004-60 (February 2005). The Complainant also argued that the Custodian failed to prove why disclosure of the requested records would be “inimical to the public interest.” N.J.S.A. 47:1A-3(a). The Complainant thus asserted that the Custodian’s continued failure to properly process his OPRA request may result in a Denial of Access Complaint.

Denial of Access Complaint:

On April 27, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to comply with OPRA by misdirecting him to MCPO and refusing to conduct a search due to “an on-going investigation.”

Statement of Information:

On July 2, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 7, 2020. The Custodian certified that she responded in writing on April 14, 2020 directing the Complainant to the MCPO. The Custodian certified that after receiving additional e-mails from the Complainant on August 15, 2020, she again denied access to investigation reports and mobile video recording (“MVR”) footage due to an ongoing investigation.

The Custodian confirmed that LBPD investigated the potential suicide in question and did not complete its reports until May 7, 2020. The Custodian stated that the reports contained specific details of the incident, medical information, witness statements, and autopsy information. The Custodian argued that she lawfully applied the investigation in progress exemption because at the time of the Complainant’s OPRA request, which was three (3) days after the incident occurred, LBPD were still conducting their investigation. N.J.S.A. 47:1A-3; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017). The Custodian noted that the N. Jersey Media Grp., Inc. Court noted that “[e]arly disclosure will often be ‘inimical to the public interest’.” Id. at 574.

The Custodian also argued that the responsive records were exempt under Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”). N.J.S.A. 47:1A-9(a). The Custodian averred that both the reports and the MVR footage relate to the suicide investigation. The Custodian argued that in Posnock v. Monmouth Cnty. Sheriff’s Office, GRC Complaint No. 2006-44 (November 2006), the Council held that the requested suicide investigation reports were exempt under EO 26. The Custodian argued that the Council’s decision in Posnock applies here and the GRC should similarly hold that the responsive records are exempt from disclosure under EO 26.⁴

Additional Submissions:

On July 10, 2020, the Complainant submitted a letter brief in response to the Custodian’s SOI. The Complainant first contended that the Custodian’s response violated OPRA by failing to include a specific lawful basis for denying access. Paff v. Borough of Lavallette (Ocean), GRC

⁴ The Custodian also argued that the response was timely; however, timeliness issues are not presently before the GRC for consideration.

Complaint No. 2007-209 (December 2008). The Complainant further argued that the Custodian's response suggests that she did not perform a search for potentially responsive records, which is also a violation of OPRA. Schneble v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2007-220 (April 2008). The Complainant also contended that the Custodian referring him to MCPO effectively created additional improper barriers to access, which the Council has previously held was improper. Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007).

The Complainant stated that on April 3, 2020, Monmouth County Prosecutor Christopher J. Gramiccioni told reporters that his office was "investigating [the incident as] a possible homicide."⁵ The Complainant noted that the next day, the MCPO ruled the death a suicide.⁶ The Complainant argued that although the Custodian initially implied that "no such records existed," she untimely advanced specific exemptions in the SOI.

The Complainant contended that the Custodian's reliance on N. Jersey Media Grp., Inc., is misplaced: the incident was deemed a suicide prior to the subject OPRA request and the investigation "has now been closed." The Complainant further argued that the Custodian only advanced generic reasons for applying N.J.S.A. 47:1A-3(a), which the N. Jersey Media Grp., Inc. Court held were not sufficient to prove that disclosure of records would be "inimical to the public interest." The Complainant further argued that because the initial investigation was criminal in nature, the Custodian was required to disclose that information identified in N.J.S.A. 47:1A-3(b) where no arrest had been made. The Complainant noted that although there is an exception to disclosure in N.J.S.A. 47:1A-3(b), it did not apply here because the Custodian failed to present any colorable argument against disclosure.

The Complainant argued that responsive footage should be disclosed based on the N. Jersey Media Grp., Inc. Court's analysis of the common law interest in disclosing dash camera footage there. The Complainant further argued that EO 26 and Posnock, GRC 2006-44 do not apply here because LBPD "is not known to be in possession" of the decedent's extensive personal medical history. The Complainant contended that Posnock contemplated the far greater risk of exposing exempt information than in the instant matter. The Complainant also argued that applying EO 26 so broadly would result in the "absurd outcome" of exempting any report relating to an individual's death. The Complainant contended that such an interpretation is contrary to OPRA.

The Complainant acknowledged the Council has routinely held that records coming into existence after submission of an OPRA request need not be disclosed. Collazo v. Passaic Cnty. Superintendent of Elections, GRC Complaint No. 2013-339 (June 2014). The Complainant nonetheless argued that the GRC should require disclosure of all responsive records at issue here because of the Custodian's erroneous handling of the subject OPRA request. The Complainant further requested that the GRC order disclosure of the responsive records with redactions for any medical information exempt from disclosure under EO 26.

⁵ <https://www.app.com/story/news/crime/jersey-mayhem/2020/04/03/wife-former-long-branch-mayor-huhn-found-shot-death/2940749001/> (last accessed May 28, 2021).

⁶ Ibid.

Analysis

Sufficiency of Response

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, it must be specific and sufficient to prove that a custodian’s denial is authorized by OPRA. See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Morris v. Trenton Police Dep’t (Mercer), GRC Complaint No. 2007-160 (May 2008).

Here, the Custodian initially responded to the Complainant’s OPRA request referring him to the MCPO. However, after the MCPO referred the Complainant back to the LBPB and he questioned the Custodian, she asserted an exemption in denying access to the OPRA request. The Complainant argued in the Denial of Access Complaint that the Custodian’s initial response constituted an insufficient one. The GRC agrees: the Custodian’s response did not grant access, deny access, seek clarification, or obtain an extension of time. Instead, the Custodian’s initial response implied that LBPB did not maintain any responsive records. However, the Custodian’s statement made in the SOI that LBPB possessed the responsive records contradicted her initial response to the OPRA request. Thus, it follows that the Custodian’s referral to another agency even though the LBPB maintained responsive records resulted in an insufficient response.

Accordingly, although the Custodian responded in writing to the Complainant’s OPRA request in a timely manner, the Custodian’s response was insufficient because she referred the Complainant to another public agency notwithstanding that the LBPB maintained responsive records. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g). See DeAppolonio, GRC 2008-62.

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).⁷ 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 v. N.J. Dep’t of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq.* (June 2004), 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.”⁸ 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.

Further, with respect to records subject to an investigation in progress, OPRA provides that “where it shall appear that the record or records . . . pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA] . . . may be denied if the inspection, copying, or examination of such record or records shall be inimical to the public interest . . .” N.J.S.A. 47:1A-3(a). In N. Jersey Media Grp., Inc., the Court stated that in order for the exemption to apply, a public agency “must show that (1) the requested records ‘pertain to an investigation in progress by any public agency,’ (2) disclosure will ‘be inimical to the public interest,’ and (3) the records were not available to the public before the investigation began.” Id. at 573. Further, the Court acknowledged that “[f]ew reported decisions have analyzed the exception” but that those

⁷This 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.

⁸The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

few case provided that records coming into existence prior to the investigation could not fall under the exemption. Id. at 573-574 (citing Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 367 (App. Div. 2003); Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003); and Paff v. Ocean Cnty. Prosecutor's Office, 446 N.J. Super. 163, 189-190 (App. Div. 2016) (rev'd 235 N.J. 1 (2018)).

Finally, a public agency has an obligation to disclose certain information regarding a criminal investigation "within 24 hours or as soon as practicable." N.J.S.A. 47:1A-3(b). Where no arrest has been made, agencies are required to disclose "information as to the type of crime, time, location and type of weapon, if any." Id. This provision contains a caveat allowing for nondisclosure where "disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety." Id.

Additionally, the Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.) (certif. denied, 193 N.J. 292 (2007)).⁹ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff'd, 24 N.J. 139 (1957)).

Before analyzing whether a lawful denial of access occurred, the GRC must first provide context by discussing the incident that precipitated the subject OPRA request. In the early morning

⁹ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

hours of April 3, 2020, police were called to a residence in Long Branch to investigate an apparent fatal gunshot wound. That day, the Asbury Park Press reported that the MCPO was “investigating a possible homicide.”¹⁰ However, the Asbury Park Press updated their story on April 4, 2020 to state that the MCPO ruled the decedent’s death a suicide. The Complainant filed his OPRA request two (2) days and again sought access to the responsive records from LBPB nine (9) days later. According to the Custodian’s SOI certification, LBPB’s investigation of the incident did not conclude until May 7, 2020.

At issue in this complaint are investigative reports and MVRs related to the incident. The Custodian has argued that the records are exempt under the investigation in progress exemption and EO 26. Citing N.J. Media Grp., Inc., 229 N.J. 541 and Posnock, 2006-44. The Complainant disputed the denial on several bases. First, the Complainant argued that certain information should have been disclosed in accordance with N.J.S.A. 47:1A-3(b). Second, the Complainant argued that the Custodian failed to prove sufficiently that the investigation in progress exemption applied to the records. The Complainant noted that not only did the MCPO rule the death a suicide prior to the subject OPRA request, but the investigation “has now been closed.” Third, the Complainant argued that he had a common law right to access the MVR footage, as per the Court’s decision in N.J. Media Grp., Inc. Fourth, the Complainant argued that Posnock did not apply here and that the Custodian’s interpretation of EO 26 would negatively impair transparency in all reports involving a death. The Complainant finally argued that although the GRC has previously found that records not existing at the time of an OPRA request need not be disclosed, it should order disclosure of the investigative reports because of the Custodian’s handling of the subject OPRA request.

After considering the records identified as responsive to the request, the underlying incident, and the arguments of the parties, the GRC cannot hold that the records in question are exempt from disclosure under the investigation in progress exemption. While the MCPO’s announcement on April 4, 2020 calls into question the length of LBPB’s investigation, the Complainant correctly notes that the Custodian set forth an anemic argument that does not prove that disclosing the responsive investigation report and related MVRs would be inimical to the public’s interest in access to records. The GRC acknowledges that there existed a relatively short time period between the incident and the subject OPRA request. However, the MCPO’s April 4, 2020 statement gives substantial weight to the Complainant’s argument that disclosure of responsive records would not be inimical to the public interest. It should be noted that the Custodian’s SOI statements regarding the existence of reports taken along with the MCPO’s statements gives minor weight to the non-existence of the reports at the time of the OPRA request. However, the Custodian has identified them as responsive to the subject OPRA request and thus the GRC proceeds with the understanding that they were in existence at or prior to the Complainant’s OPRA requests.

Further, the GRC does not agree that EO 26 applies to the records at issue here. This matter is substantially different from both Posnock and the Appellate Division’s decision in Alfano v. Margate City, 2012 N.J. Super. Unpub. LEXIS 2179 (App. Div. 2012). In each of those decisions, the records sought related directly to investigations into suicides without a criminal investigatory component. Here, MCPO definitively stated that the incident was initially treated as a criminal

¹⁰ <https://www.app.com/story/news/crime/jersey-mayhem/2020/04/03/wife-former-long-branch-mayor-huhn-found-shot-death/2940749001/> (last accessed May 28, 2021).

investigation. Also, the Custodian also provides no evidence to support that the reports contained “medical, psychiatric or psychological history, diagnosis, treatment or evaluation.” Instead, and contrary to Posnock, it is clear that the reports pertained to the investigation of the decedent from a criminal investigatory perspective, which ultimately resulted in a suicide finding. Further, the records here differ from Alfano in that the individual at the center of that incident survived and was treated as a result of the incident underlying that case.

However, the GRC relies on its *sua sponte* obligation in finding that the Custodian lawfully withheld the responsive records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. The GRC arrives at this conclusion when looking to precedential case law in N.J. Media Grp., Inc., 229 N.J. 541 and Mella v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2016-217 (August 2018). That is, the N.J. Media Grp., Inc. Court affirmatively found that MVR recordings may be considered criminal investigatory when created as part of an actual or potential criminal investigation. Id. at 569. Further, in Mella, wherein the complainant sought access to multiple records, including reports, regarding a call that concluded with a suicide. In weighing the arguments of the parties there, the Council held that the reports were exempt under the criminal investigatory exemption. The same applies here because: 1) LBPD was called to investigate a fatality at a local residence at which time the MVR footage was created; 2) the MCPO initially stated that the initial investigation was criminal in nature; and 3) LBPD created reports consistent with that criminal investigation. That the investigation did not result in charges or an arrest is of no moment; the criminal investigatory exemption survives regardless of the final disposition. Janeczko, GRC 2002-79 *et seq.*

The GRC finds the Complainant’s remaining arguments insufficient to compel disclosure. As to the argument that records should have been disclosed with information identified in N.J.S.A. 47:1A-3(b), the Complainant did not seek this basic information nor does the provision require an agency to disclose otherwise exempt documents because of said information’s inclusion. In fact, the N.J. Media Grp., Inc. Court similarly held that “the text simply requires disclosure of ‘information’; it does not require an agency to release ‘records.’” Id. at 572. Further, the GRC has no authority over common law records requests and therefore will not address the Complainant’s arguments for records disclosure under the common law. N.J.S.A. 47:1A-7(b); Rowan, Jr. (O.B.O. Express Times) v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013)

Accordingly, notwithstanding the Custodian’s initial denial of access based on an investigation in progress, the responsive reports and MVR footage is exempt under the criminal investigation exemption. N.J.S.A. 47:1A-1.1; N.J. Media Grp., Inc., 229 N.J. 541; Mella, GRC 2016-217. Thus, the Custodian ultimately lawfully denied access to the responsive records, although under the exemption originally cited. N.J.S.A. 47:1A-6; Paff, 2007 N.J. Super. Unpub. LEXIS 2135.

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)).

Here, the Custodian’s response was insufficient because she referred the Complainant to another agency even though LBPD was maintaining responsive records. N.J.S.A. 47:1A-5(g). However, the responsive reports and MVR footage are exempt from disclosure under OPRA and no unlawful denial of access occurred. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian’s violations 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. Although the Custodian responded in writing to the Complainant’s OPRA request in a timely manner, the Custodian’s response was insufficient because she referred the Complainant to another public agency notwithstanding that the Long Branch Police Department maintained responsive records. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g). See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. Notwithstanding the Custodian’s initial denial of access based on an investigation in progress, the responsive reports and mobile video recording footage is exempt under the criminal investigation exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Mella v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2016-217 (August 2018). Thus, the Custodian ultimately lawfully denied access to the responsive records, although under the exemption originally cited.

N.J.S.A. 47:1A-6; Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.) (certif. denied, 193 N.J. 292 (2007)).

3. The Custodian's response was insufficient because she referred the Complainant to another agency even though Long Branch Police Department was maintaining responsive records. N.J.S.A. 47:1A-5(g). However, the responsive reports and mobile video recording footage are exempt from disclosure under OPRA and no unlawful denial of access occurred. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violations 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

August 17, 2021