



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
*Governor*

TAHESHA L. WAY  
*Lieutenant Governor*

JACQUELYN A. SUÁREZ  
*Commissioner*

### FINAL DECISION

#### May 21, 2024 Government Records Council Meeting

Yanming Xiao  
Complainant

Complaint No. 2021-324

v.

NJ State Police  
Custodian of Record

At the May 21, 2024 public meeting, the Government Records Council (“Council”) considered the May 14, 2024 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian has failed to establish in his request for reconsideration of the Council’s February 27, 2024 Final Decision that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian failed to establish that the complaint should be reconsidered based on mistake and illegality. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian’s interpretation of OPRA’s exemption for victims’ records does not comport with the Legislature’s intent to grant victims greater access to their own records. Thus, the Custodian’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **Thus, the Council’s February 29, 2024 Final Decision remains in effect and the Custodian shall comply accordingly.**

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 21<sup>st</sup> Day of May 2024

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 23, 2024**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*

**Supplemental Findings and Recommendations of the Executive Director  
May 21, 2024 Council Meeting**

**Yanming Xiao<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-324**

**v.**

**New Jersey State Police<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copy via e-mail of “Investigation Report (H350-2019-00010).”

**Custodian of Record:** Donald Wyckoff

**Request Received by Custodian:** September 30, 2021

**Response Made by Custodian:** October 12, 2021

**GRC Complaint Received:** December 13, 2021

**Background**

**February 27, 2024 Council Meeting:**

At its February 27, 2024 public meeting, the Council considered the February 20, 2024 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian may have unlawfully denied access to the Complainant’s OPRA request seeking the Investigation Report identified with the case number H350-2019-00010. N.J.S.A. 47:1A-6. As the victim in the incident, the Complainant is entitled to access under OPRA. N.J.S.A. 47:1A-1.1. Thus, the Custodian must locate and produce the record to the Complainant.
2. **The Custodian shall comply with conclusion No. 1 above within ten (10) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council’s Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

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

<sup>2</sup> Represented by Deputy Attorney General Andrew C. Matlock.

### Procedural History:

On March 4, 2024, the Council distributed its Final Decision to all parties. On March 18, 2024, the Custodian filed a request for reconsideration of the Council's February 27, 2024 Final Decision based on a mistake and illegality.

The Custodian argued that the GRC's decision was based upon an improper reading of OPRA, and flawed reasoning thereof. The Custodian further argued that if the GRC's reading was proper, it would have far-reaching negative consequences for lawful enforcement investigations, and interests protected by OPRA's other exemptions.

The Custodian first argued that the GRC did not adhere to the ordinary canons of statutory construction and overlooked OPRA's plain meaning. The Custodian asserted that courts must first look "to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words it has chosen." Marino v. Marino, 200 N.J. 315, 329 (2009) (citing Pizzullo v. N.J. Mrs. Ins. Co., 196 N.J. 251, 264 (2008)). The Custodian cited further cases to outline the standard that courts should rely on a statute's plain meaning and to not rewrite the enactment under a presumption that the Legislature intended something other than the plain meaning. See Saccone v. Bd. of Trs. of Police & Firemen's Ret. Sys., 219 N.J. 369 (2014); D'Annunzio v. Prudential Ins. Co. of Am., 383 N.J. Super. 270, 279 (App. Div. 2006), aff'd as modified and remanded, 192 N.J. 110 (2007); Brewer v. Porch, 53 N.J. 167, 174 (1969).

Regarding access to "victims' records," the Custodian asserted that while the Council correctly found that victims can access their own records under N.J.S.A. 47:1A-1.1, the Council overlooked the circumstances in which a victim can obtain a copy of their records. The Custodian argued that OPRA's plain language defines "victims' records" as those held by a "victim's rights agency" ("VRA") which in turn is defined as:

a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board . . . and continued as the Victims of Crime Compensation Office . . . .

[Ibid.]

The Custodian therefore argued that OPRA's plain language prohibits access to victims' records to both victims and non-victims, unless the victim's request is made to a VRA. The Custodian asserted that the New Jersey State Police ("NJSP") clearly does not qualify as a VRA, but is instead a law enforcement agency. The Custodian therefore argued that the record remains exempt from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1.

The Custodian argued that the Council's reasoning was flawed. The Custodian first argued that the 2014 OPRA amendment did not broaden a victim's access to records held by any agency but instead precluded charging fees to victim's seeking their own records and to exempt OPRA requests of victims seeking records they are entitled to.

The Custodian next argued that the Council improperly relied on statements made by Governor Christie on the 2014 amendment. The Custodian asserted that the Council should not have relied on the statements at all when the plain language is clear. The Custodian also asserted that even if the Council could look to other sources, little weight is given to statements made by the executive branch when ascertaining Legislative intent. See Cornblatt v. Barow, 153 N.J. 218, 235 (1998). The Custodian further argued that the Council misread Governor Christie's statement. The Custodian asserted that Governor Christie did not expand access to victims' records, but instead reiterated the level of access already understood based on the plain reading. The Custodian thus argued that the Council's decision was made on a palpable misunderstanding of the law, and reconsideration is appropriate.

The Custodian next argued that even beyond the misinterpretation, there would be significant negative consequences if a victim could obtain their own records from any agency. The Custodian maintained that OPRA's exemption grants access to victims' records only when held by a VRA, expanding that access would contravene other exemptions typically used on records held by law enforcement agencies, such as the criminal investigatory records or the ongoing investigation exemption. See N.J.S.A. 47:1A-1.1 & -3. The Custodian contended that the instant case is an example of this situation. The Custodian argued that OPRA's provisions are valid only when read in their entirety and within context, and therefore argued that the Council should reconsider its decision, find that the denial was lawful, and dismiss the complaint.

## **Analysis**

### **Reconsideration**

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian filed the request for reconsideration of the Council's Order dated February 27, 2024 on March 18, 2024, ten (10) days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a

“palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Upon reviewing the submissions from the Custodian, it is recommended that the Council reject their request for reconsideration. The Custodian’s arguments center on the premise that the GRC improperly treated the 2014 amendment as an expansion of access for victims. However, the amendment and its legislative history provided the context needed to accurately ascertain the Legislature’s intent behind OPRA’s exemption for “victim’s records”.

Initially, the Legislature directed that OPRA “shall be construed in favor of the public’s right of access” when there is a question on the limitation of access. N.J.S.A. 47:1A-1. Additionally, the New Jersey Supreme Court has held that if “the plain language of a statute is not clear or if it is susceptible to more than one meaning or interpretation, the Court looks to extrinsic secondary sources to serve as its guide.” Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009). The Court gave examples such as legislative history, statements of the sponsor or sponsors of the bill, and the Governor’s press release as aids in ascertaining the Legislature’s intent. Ibid.

While the Custodian contended that the statutory language is clear, the actual text belies this assertion. The exemption states that the following is not a government record under OPRA: “victims’ records, except that a victim of a crime shall have access to the victim’s own records.” N.J.S.A. 47:1A-1.1. Next, OPRA defines a “victim’s record” as: “an individually-identifiable file or document held by a [VRA] which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim’s own records.” Id. The issue presented is the apparent redundancy of including “except that a victim of a crime shall have access to the victim’s own records” in both the “victims’ records” exemption and the definition of “victim’s record.” While the Custodian asserts that the statute limits a victim’s access to their own records to only those held by a VRA, it is argued that the statute’s intent was to limit non-victims’ access to victims’ records held by a VRA.

Further, the GRC looks to the legislative hearings on the 2014 amendment which eliminated costs to victims seeking access to records of their victimization, as well as prohibiting from access a victim’s OPRA request seeking those records. The Assembly Judiciary Committee (“AJC”) held a hearing on February 24, 2014. Assembly Judiciary Committee Meeting, (Monday, February 14, 2014) (<https://www.njleg.state.nj.us/archived-media/2014/AJU-meeting-list>). The first witness and author of the bill, Fraidy Reiss, described her difficulties obtaining copies of

temporary restraining orders and police reports, particularly the costs of obtaining them. *Id.* at 02:08. Ms. Reiss then asserted that the removal of fees for victims would not substantially impact the budgets of “government entities”. *Id.* at 03:05. The third witness, Mark Faraz, referenced the varying costs charged for copies of police reports retrieved from “municipalities”. *Id.* at 06:48. After the conclusion of the witnesses, Assemblyman Michael Patrick Carroll asked the bill’s sponsor, Assemblyman Gordon M. Johnson, whether the bill was an unfunded mandate. *Id.* at 08:18. Assemblyman Johnson stated that the cost would be minimal. *Id.* at 08:25. Assemblyman Carroll stated his agreement, but added that the AJC should, “or anytime the Legislature enacts a mandate on *municipalities*, put in a funding source . . . the State should come up with the [funds] to attend to those *municipal* costs.” *Id.* at 08:40 (emphasis added). Assemblyman Johnson responded stating that the protections for victims was “more important than a few dollars that [it will] cost these *municipalities*.” *Id.* at 09:05 (emphasis added).

In the Assembly Appropriations Committee hearing on the amendment, Ms. Reiss again contended that the costs to municipalities would be minimal. Assembly Appropriations Committee Meeting, (Thursday, May 8, 2014) (<https://www.njleg.state.nj.us/archived-media/2014/AAP-meeting-list>) at 20:30. Sue Flynn, the third witness, reiterated the minimal cost that would be imposed on municipalities. *Id.* at 24:12.

Lastly, the Office of Legislative Services (“OLS”) produced a fiscal estimate on the amendment to determine its potential costs. See Legislative Fiscal Estimate, (May 13, 2014) ([https://pub.njleg.state.nj.us/Bills/2014/A2000/1676\\_E1.PDF](https://pub.njleg.state.nj.us/Bills/2014/A2000/1676_E1.PDF)). Therein, OLS identified the affected agencies as: Department of Law and Public Safety; Division of State Police; Municipal Government; Local Law Enforcement; and the Victims of Crime Compensation Office. *Id.* at 1. OLS further stated that the provisions of the bill could have an impact on both the State and municipalities. *Id.*

The above statements by the bill’s sponsor, author, advocates, and the OLS all support the contention that victims are not limited to obtaining records of their victimization only from a VRA. If the Custodian’s interpretation was accurate, there would be no need to discuss the potential costs against municipalities should the bill pass. Just as NJSP does not fall under the definition of a VRA, neither would a municipality or local law enforcement agency. At no point in any of the hearings was it questioned whether a victim was permitted to obtain their own records from a municipality or other non-VRA government agency. Thus, it can be inferred that each of the above parties assumed that a victim was entitled to obtain access to their own records from any agency which may possess them.

Furthermore, the Custodian’s interpretation would substantially subvert the Legislature’s intent of favoring the public’s right of access, but more specifically the victims of crimes. In the Assembly hearings, the parties and the bill’s sponsor placed heavy emphasis on the bill’s impact on a crime victim’s access to their own records. However, the Custodian’s interpretation limits a victim’s ability to obtain their own records to a handful of VRAs in the State, compared to the hundreds of local and state agencies that would more likely possess the requested records in the first place.

In contrast, the GRC's interpretation looks to rationalize the Legislature's decision to place the caveat, "except that a victim of a crime shall have access to the victim's own records" in both the exemption and definition. When first reading the definition of "victim's record", the caveat ensures that a victim is still entitled to access their own records when possessed by a VRA. Thus, if the exemption's caveat was similarly limited to preserve access from a VRA, the caveat would be redundant, as the Legislature need only state the term "victims' records" in the exemption and still preserve a victim's access at a VRA. Rather, it is more in line with the Legislature's intent to assert that the "victims' records" exemption was to limit access to victims' records by non-victims when requested at a VRA, with the exemption's caveat preserving a victim's general access to their own records, regardless of where they are held.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be reconsidered based on mistake and illegality. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Custodian's interpretation of OPRA's exemption for victims' records does not comport with the Legislature's intent to grant victims greater access to their own records. Thus, the Custodian's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6. **Thus, the Council's February 29, 2024 Final Decision remains in effect and the Custodian shall comply accordingly.**

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has failed to establish in his request for reconsideration of the Council's February 27, 2024 Final Decision that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian failed to establish that the complaint should be reconsidered based on mistake and illegality. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian's interpretation of OPRA's exemption for victims' records does not comport with the Legislature's intent to grant victims greater access to their own records. Thus, the Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **Thus, the Council's February 29, 2024 Final Decision remains in effect and the Custodian shall comply accordingly.**

Prepared By: Samuel A. Rosado  
Staff Attorney

May 14, 2024





## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
*Governor*

TAHESHA L. WAY  
*Lieutenant Governor*

JACQUELYN A. SUÁREZ  
*Acting Commissioner*

### FINAL DECISION

#### February 29, 2024 Government Records Council Meeting

Yanming Xiao

Complainant

v.

NJ State Police

Custodian of Record

Complaint No. 2021-324

At the February 29, 2024 public meeting, the Government Records Council (“Council”) considered the February 20, 2024 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 may have unlawfully denied access to the Complainant’s OPRA request seeking the Investigation Report identified with the case number H350-2019-00010. N.J.S.A. 47:1A-6. As the victim in the incident, the Complainant is entitled to access under OPRA. N.J.S.A. 47:1A-1.1. Thus, the Custodian must locate and produce the record to the Complainant.
2. **The Custodian shall comply with conclusion No. 1 above within ten (10) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council’s Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

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 29<sup>th</sup> Day of February 2024

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: March 4, 2024**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 27, 2024 Council Meeting**

**Yanming Xiao<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-324**

**v.**

**New Jersey State Police<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copy via e-mail of “Investigation Report (H350-2019-00010).”

**Custodian of Record:** Donald Wyckoff

**Request Received by Custodian:** September 30, 2021

**Response Made by Custodian:** October 12, 2021

**GRC Complaint Received:** December 13, 2021

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

**Request and Response:**

On September 30, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 12, 2021, SFC Paul Dreher responded on the Custodian’s behalf in writing denying the request as seeking criminal investigatory records and therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and N. Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541 (2017).

**Denial of Access Complaint:**

On December 13, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he was a victim of a crime that occurred in December 2018. The Complainant stated that on September 27, 2021, a New Jersey State Police (“NJSP”) investigator informed him that the investigation into his incident had completed. The Complainant asserted he then submitted his OPRA request on September 30, 2021, seeking a copy of the investigation report (“Report”), but was denied by SFC Dreher.

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

<sup>2</sup> Represented by Deputy Attorney General Patrick Jhoo.

<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.

### Statement of Information:

On February 9, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on September 30, 2021. The Custodian certified that he responded in writing on October 12, 2021, denying the request.

The Custodian argued that the requested Report satisfied both prongs in Lyndhurst, stating that the Complainant did not dispute that investigation reports were not required to be made, maintained, or kept on file. The Custodian also asserted that the Complainant conceded that the Report pertained to a criminal investigation conducted by NJSP. The Custodian therefore argued that the Complainant’s request was lawfully denied.

### 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 also 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 Lyndhurst, 229 N.J. 541. 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 *Lyndhurst*, 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 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 and Pub. Safety, Div. of Criminal Justice*, GRC Complaint Nos. 2002-79 and 2002-80 (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.”<sup>5</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.”

Additionally, OPRA provides that “victims’ records” are not government records, “except that a victim of a crime shall have access to the victim’s own records.” N.J.S.A. 47:1A-1.1. Furthermore, OPRA defines a “victim’s record” as “an individually-identifiable file or document held by a victims’ rights agency which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim’s own records.” *Id.*

Under OPRA’s exemption for a victim’s access to their own records, the definition of “victims’ record” implies that such records are those only held by a “victims’ rights agency.” However, in 2014 OPRA was amended to further enhance the rights of crime victims regarding OPRA. *See* 2014 N.J. A.N. 1676. The amendment stated that a crime victim would not have to pay for copies of a record to which the crime victim is entitled to access. The amendment also stated that a “written request by a crime victim for a record to which the victim is entitled to access as provided by this section, including, but not limited to, any law enforcement agency report, domestic violence report, and temporary restraining order” is not a government record subject to access. *Id.* Further, in the “Governor’s Statement Upon Signing Assembly Bill No. 1676 (First Reprint)” dated July 30, 2014, Governor Chris Christie notes the bill’s policy goals of protecting victim’s privacy rights when requesting their own records, without reference to whom the requests were made.

Based upon the amendment’s language and Gov. Christie’s statements, the victims of crime are entitled to access to their own records, regardless of whether the request is made to a victims’ rights agency or other public agency. Furthermore, the amendment’s example requests for a law enforcement agency report confirm that the Complainant is entitled to the Report.

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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.

<sup>5</sup> The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

Therefore, the Custodian may have unlawfully denied access to the Complainant's OPRA request seeking the Report identified with the case number H350-2019-00010. N.J.S.A. 47:1A-6. As the victim in the incident, the Complainant is entitled to access under OPRA. N.J.S.A. 47:1A-1.1. Thus, the Custodian must locate and produce the record to the Complainant.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to the Complainant's OPRA request seeking the Investigation Report identified with the case number H350-2019-00010. N.J.S.A. 47:1A-6. As the victim in the incident, the Complainant is entitled to access under OPRA. N.J.S.A. 47:1A-1.1. Thus, the Custodian must locate and produce the record to the Complainant.
2. **The Custodian shall comply with conclusion No. 1 above within ten (10) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

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