



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
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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

Complaint No. 2021-324

v.

NJ State Police  
Custodian of Record

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).**

Prepared By: Samuel A. Rosado  
Staff Attorney

February 20, 2024