



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 30, 2022 Government Records Council Meeting

Al-Quan W. White
Complainant

Complaint No. 2021-77

v.

Essex County Prosecutor's Office
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council ("Council") considered the August 23, 2022 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 unlawfully denied access to the Complainant's OPRA request item No. 3 seeking complaint-warrants pertaining to his indictments. See N.J.S.A. 47:1A-6, and Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with copies of the requested complaint-warrants on August 3, 2022.
2. The Complainant's OPRA request item No. 1 seeking police reports is exempt from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 546 (2017); Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6. Additionally, the Council declines to address the other defenses raised by the Custodian.
3. The Custodian lawfully denied access to the Complainant's OPRA request item No. 7 seeking "lab reports" pertaining to his criminal indictments. N.J.S.A. 47:1A-6. Such records constitute criminal investigatory records under OPRA and are therefore exempt from access. See N.J.S.A. 47:1A-1.1; Grossman v. Ocean Cnty. Prosecutor's Office, 2013 N.J. Super. LEXIS 1999, 24 (July 26, 2013); Crook v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2010-92 (March 2011); Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated June 30, 2015).
4. Because Executive Order No. 9 (Gov. Hughes, 1963) ("EO 9") provides that criminal records are exempt from disclosure, and because said Executive Order is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), the Custodian lawfully denied the Complainant access to OPRA request item No. 6 seeking criminal record history of State's witnesses named in his indictments. N.J.S.A. 47:1A-6. See also Lewis v. Union

Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018); Franklin v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2016-308 (April 2018); Abdul-Shabazz v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2017-41 (April 2019); Tyler v. Passaic Cnty. Prosecutor's Office, 2017-30 (March 2019). The Council notes that because the Custodian lawfully denied access to the requested records under EO 9, it declines to address the Custodian's other reasons for denial.

5. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item Nos. 2, 4 and 5 seeking a "Pre-Complaint Warrant", Grand Jury Tally Sheet, and "Pre-Indictment Form" pertaining to his criminal indictments, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
6. The Custodian violated N.J.S.A. 47:1A-6 by failing to provide the Complainant with a copy of the requested complaint-warrants pertaining to his criminal indictments. However, the Custodian demonstrated that he provided the responsive records in response to the GRC's request for additional information on August 3, 2022. The Custodian also lawfully denied access to all remaining OPRA request items. 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 30th Day of August 2022

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: September 1, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting**

**Al-Quan W. White¹
Complainant**

GRC Complaint No. 2021-77

v.

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

Records Relevant to Complaint: Hardcopies via U.S. mail of the following related to State v. Al White a/k/a Al-Quan White, Indictment No. 10-05-1369 & 10-05-1368:

1. Police Reports;
2. Pre-Complaint Warrants Report;
3. Complaint Warrants;
4. Essex County Grand Jury Tally Sheet;
5. Pre-Indictment Plea Form;
6. State and Federal criminal history/judgment of convictions for all witnesses (Antoine Clemons, Ricky Shaw, Frederick Ellis, and Antonio Jones);
7. Lab Reports.

Custodian of Record: Stephen A. Pogany, Esq.
Request Received by Custodian: March 15, 2021
Response Made by Custodian: March 15, 2021
GRC Complaint Received: April 14, 2021

Background³

Request and Response:

On December 10, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 15, 2021, the same date as receipt, the Custodian responded in writing stating that the records were denied on various grounds.

The Custodian first stated that the records was overly broad and failed to name specific

¹ No legal representation listed on record.

² Represented by Olivia Schumann, Esq., Essex County Counsel (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.

documents to be released. Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 38-39 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2009). The Custodian further stated that the request required him to conduct research, which he was not obligated to perform under OPRA. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

Second, the Custodian stated that the prosecutor's criminal investigatory file, open or closed, was not a public record and is exempt from disclosure under N.J.S.A. 47:1A-1.1. Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 591 (2011); Bent, 381 N.J. Super. at 38-39; Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). The Custodian also noted that dash cam videos, investigative reports, and witness statements were covered by the criminal investigatory records exemption since they were not "required by law to be made, maintained, or kept on file," and because the actions of the pertained to an investigation into actual or potential violations of criminal law. N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 569 (2017); Attorney General Law Enforcement Directive No. 2018-1.

Third, the Custodian stated that the request constituted "inter-agency or intra-agency advisory, consultative, or deliberative material" ("ACD") exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Bent, 381 N.J. Super. at 40. Fourth, the Custodian then stated that the requested records were denied on the separate and independent ground that the requested records are unfiled discovery materials and as such exempt from disclosure. N.J.S.A. 47:1A-9(b); Drinker Biddle & Reath, LLP v. N.J. Dep't of Law and Public Safety, Div. of Law, 421 N.J. Super. 489, 498-98 (App. Div. 2011).

Fifth, the Custodian stated that the request was being denied on the separate and independent ground that Executive Order No. 69 (Gov. Whitman, 1997) ("EO 69") prevents disclosure of any requested crime scene photographs. N.J.S.A. 47:1A-9(a); McCrone (The Trenton Times) v. Burlington Cnty. Prosecutor's Office, GRC Complaint No. 2005-146 (November 2005); Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009). Sixth, the Custodian stated that the request was intended to circumvent the discovery process, which was not OPRA's intent. MAG, 375 N.J. Super. at 546-49.

Denial of Access Complaint:

On April 14, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he clearly specified the documents he requested, including his indictment numbers. The Custodian then stated that the records fell under discovery rule N.J. Court Rules, R. 3:13-3, and was therefore entitled to the records.

The Complainant noted that his criminal case was still pending in the Superior Court on remand. The Complainant asserted that while the Essex County Prosecutor's Office ("ECPO") provided some documents in response to his discovery request, most of those documents were briefs and motions filed on his behalf and not the records he sought.

Statement of Information:

On May 3, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 15, 2021. The Custodian certified that he responded in writing on March 15, 2021, denying access on multiple grounds.

The Custodian argued that he lawfully denied access to the Complainant’s OPRA request for all the same reasons stated in his March 15, 2021 response.

Additional Submissions:

On July 29, 2022, the GRC requested additional information from the Custodian. Specifically, the GRC asked:

1. Regarding the Complainant’s request seeking “Pre-Complaint Warrants Report”, does such a record exist? If so, under what basis are you denying access?
2. Regarding the Complainant’s request seeking “Pre-Indictment Plea Form”, does such a record exist? If so, under what basis are you denying access?
3. For the remaining requested documents please confirm whether any responsive records in fact exist.

On August 3, 2022, the Custodian responded to the GRC, providing a certification. As to the first two (2) inquiries, the Custodian certified that no records exist in in the indictment files, and also certified that the documents were “vague and unrecognizable” and did not appear in any court rule or statute. As to the third (3rd) inquiry, the Custodian certified that a “complaint-warrant” did exist and was mistakenly withheld from the Complainant. The Custodian certified that a copy of same was being provided to the Complainant with redactions.

As to the other records, the Custodian certified that no records exist regarding the “grand jury tally sheet”. The Custodian certified that records did exist for “police reports” and “lab reports” but constituted criminal investigatory records under OPRA. N.J.S.A. 47:1A-1.1. The Custodian also certified that criminal histories did exist but were exempt from disclosure under the National Crime Prevention and Privacy Compact (“NCPPC”), N.J.S.A. 53:1-32, -20.5 through -20.37, and N.J.A.C. 13:59-1.1 through -2.4.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA defines a criminal investigatory record as “a record which is not required by law to be made, maintained, or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” N.J.S.A. 47:1A-1.1. Therefore, for a record to be considered exempt from disclosure under OPRA as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1, that record must meet both prongs of a two-prong test. See O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 380-381 (App. Div. 2006).

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc., 229 N.J. at 564. 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.

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. (citing O’Shea, 410 N.J. Super. at 365). Although the Court agreed with the Appellate Division’s analysis 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. Id. at 566.

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).⁴ Therefore, the Court reasoned that determining whether such records pertain to a criminal investigation requires a “case-by-case analysis.” However, the Court pointed out that police records that stem from “an investigation into *actual or potential* violations of criminal law,” such as “detailed investigative reports and witness statements,” will satisfy the second prong of OPRA’s criminal investigatory records exemption. Id. (emphasis added).

The Council has also long held that once a record is determined to be a criminal investigatory record, it is exempt from access. See Janeczko, GRC 2002-79, holding that “criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed.⁵ 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.”

⁴This 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.

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

Complaint-Warrants

The Council has previously 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, the Complainant's OPRA request item No. 3 sought complaint-warrants pertaining to his indictments. Although the Custodian initially argued in the SOI that the records were exempt under the criminal investigatory records exemption, prevailing case law supports its disclosure. Further, the Custodian recognized this fact and disclosed those warrants that existed (with redactions) to the Complainant on August 3, 2022. Thus, the Custodian unlawfully denied access to the complaint-warrants sought by the Complainant.

Accordingly, the Custodian unlawfully denied access to the Complainant's OPRA request item No. 3 seeking complaint-warrants pertaining to his indictments. See N.J.S.A. 47:1A-6, and Seabrooks, GRC 2012-230. However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with copies of the requested complaint-warrants on August 3, 2022.

Police Reports

The GRC has previously held that police reports were exempt from disclosure where they met the two (2) prong test required to be a criminal investigatory record under OPRA. See Nance v. Scotch Plains Twp. Police Dep't, GRC Complaint No. 2003-125 (January 2005) (holding that incident reports are exempt from disclosure under OPRA as criminal investigatory records). However, the Council has found these records can be disclosable where they did not meet the criminal investigatory test. See 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). In the instant complaint, the GRC must determine whether the responsive records meet the N. Jersey Media Grp. test and act accordingly based on the result.

Regarding the first prong, there is no evidence in the record indicating that police reports sought in OPRA request item No. 1 are required by law to be made, maintained, or kept on file in the ECPO's course of official business. As to the second prong, the Complainant explicitly asserted that the documents pertained to his own criminal indictments. Furthermore, as discussed above the Complainant sought complaint-warrants associated with the identified indictment numbers in his request. Based on the foregoing, the GRC is satisfied that the requested police reports fell under the criminal investigatory records exemption and are not subject to disclosure. N.J.S.A. 47:1A-1.1.

Therefore, the Complainant's OPRA request item No. 1 seeking police reports is exempt from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., 229 N.J. at 546; Janeczko, GRC 2002-79, *et seq.* The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6. Additionally, the Council declines to address the other defenses raised by the Custodian.

Lab Reports

In Grossman v. Ocean Cnty. Prosecutor's Office, 2013 N.J. Super. LEXIS 1999, 24 (July 26, 2013), the Appellate Division stated that long-standing case law supports that the criminal investigatory exemption survives the conclusion of a criminal matter. See also Janeczko, GRC 2002-79 *et seq.* The court upheld defendant's denial of access to several categories of records under the criminal investigatory exemption to include the contents of the investigation file and various lab reports. Grossman, slip op. at *25.

In the instant matter, the Complainant's OPRA request item No. 7 requested "lab reports" pertaining to his criminal cases. The Complainant disputed the denial of access but did not provide any additional arguments to support his position beyond the need for his appeal. In response to the GRC's request for additional information, the Custodian certified that records responsive to item No. 7 exist but were exempt from disclosure as criminal investigatory reports.

The evidence of record indicates that the requested "lab reports" fall within the criminal investigatory exemption at N.J.S.A. 47:1A-1.1. The court's analysis in Grossman, although an unpublished opinion, is instructive here. Specifically, the court upheld defendants' denial of the investigative file containing reports, either similar or comparable to the findings and field reports at issue here. Further, there is no evidence suggesting that lab reports are required by law to be made, maintained or kept on file by the ECPO. For that reason, the Council's decision in Crook v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2010-92 (March 2011), upholding a denial of access to toxicology reports, applies here. See also Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated June 30, 2015) (upholding a denial of access to, among other records, toxicology reports under the criminal investigatory exemption).

Accordingly, the Custodian lawfully denied access to the Complainant's OPRA request item No. 7 seeking "lab reports" pertaining to his criminal indictments. N.J.S.A. 47:1A-6. Such records constitute criminal investigatory records under OPRA and are therefore exempt from access. See N.J.S.A. 47:1A-1.1; Grossman, slip op. at *24; Crook, GRC 2010-92; Schulz, GRC 2014-390.

Criminal Histories

Regarding criminal history background information, colloquially known as criminal "rap sheets," OPRA provides that it "shall not abrogate any exemption . . . made pursuant to . . . any . . . Executive Order of the Governor . . ." N.J.S.A. 47:1A-9(a). To this end, Executive Order No. 9 (Gov. Hughes, 1963) ("EO 9") provides that "criminal records required to be made, maintained[,] and kept pursuant to [N.J.S.A. 53:1-20.1] and [N.J.S.A. 53:1-20.2]" are exempt from disclosure. Id. at 2(f). EO 9 is relevant with regard to rap sheets because N.J.S.A. 53:1-20.1 requires this information be collected and submitted into the criminal history background check database through the State Bureau of Identification ("SBI"). Additionally, N.J.S.A. 53:1-20.2 provides that bureaus of identification are established in "the office of the sheriff and . . . prosecutors . . ." Id. Thus, it follows that any information coalesced by county and State SBIs are exempt from access under OPRA in accordance with N.J.S.A. 47:1A-9(a) and EO 9.

To further emphasize the confidential nature of rap sheet information, State agencies have promulgated regulations limiting dissemination to a specific process (with multiple limitations) or outright exempting access to them. See N.J.A.C. 13:59-1, et seq. (New Jersey State Police regulations providing for the specific process of obtaining background checks and the limitations on who can access this information); N.J.A.C. 10A:22-2.3(a)(6) (New Jersey Department of Corrections regulation exempting from access “[c]omprehensive criminal history information (rap sheet) . . .”). Thus, all relevant statutes, regulations, and executive orders addressing rap sheets support that they are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).

In Lewis v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018) the complainant requested, inter alia, criminal “rap sheets.” The Council held that the requested “rap sheets” contained criminal history information exempt from disclosure under EO 9 and N.J.S.A. 47:1A-9(a). See also Tyler v. Passaic Cnty. Prosecutor’s Office, 2017-30 (March 2019).

In Franklin v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2016-308 (April 2018), the complainant sought access to “rap sheets” for six (6) individuals. The custodian asserted that N.J.A.C. 13:59-1.6(c) prohibited a public employee from permitting access to rap sheets beyond those exceptions cited specifically in the regulations. The custodian further noted that multiple statutes, regulations, executive orders, and case law supported her denial of access. The custodian specified that the NCPPC was one such statute. N.J.S.A. 53:1-32. Additionally, the custodian noted that the New Jersey State Police, Department of Corrections, and Adult County Correctional Facilities all maintain regulations barring disclosure of criminal rap sheets. N.J.A.C. 13:59-1.6(c); N.J.A.C. 10A:22-2.3(a)(6); N.J.S.A. 10A:31-6.10(a)(6). The Council held that “rap sheets” were exempt from disclosure under N.J.S.A. 47:1A-9(a) and EO 9.

The Council relied upon this same analysis in Abdul-Shabazz v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2017-41 (April 2019). The complainant sought the “rap sheet” for one individual, a witness in his indictment. The custodian denied access under the NCPPC, N.J.S.A. 53:1-20.5 through -20.37, and EO 9. Specifically, EO 9 provides that said records are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); Lewis, GRC 2016-131; Franklin, GRC 2016-308. Accordingly, the Council held that the Custodian lawfully denied access to the portion of the Complainant’s OPRA request seeking “rap sheets.”

In the instant complaint, the Complainant’s OPRA request item No. 6 sought the “criminal histories/judgement of convictions” of four (4) State’s witnesses named in his indictments. The Custodian initially denied the Complainant’s request under various grounds. However, in response to the GRC’s request for additional information, the Custodian confirmed that responsive records did exist for request item No. 6 but denied access under the NCPPC, N.J.S.A. 53:1-20.5 through -20.37, and N.J.A.C. 13:59-1.1 through -2.4. In accordance with prevailing case law, the Custodian lawfully denied access to the requested criminal record histories as they are not subject to disclosure pursuant to EO 9. N.J.S.A. 47:1A-9(a).

Therefore, because EO 9 provides that criminal records are exempt from disclosure, and because said Executive Order is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), the Custodian lawfully denied the Complainant access to OPRA request item No. 6 seeking criminal

record history of State's witnesses named in his indictments. N.J.S.A. 47:1A-6. See also Lewis, GRC 2016-131; Franklin, GRC 2016-308; Abdul-Shabazz, GRC 2017-41; Tyler, GRC 2017-30. The Council notes that because the Custodian lawfully denied access to the requested records under EO 9, it declines to address the Custodian's other reasons for denial.

Pre-Complaint Warrants, Grand Jury Tally Sheet, Pre-Indictment Plea Form

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA request item Nos. 2, 4, and 5 sought a "Pre-Complaint Warrant", Grand Jury Tally Sheet, and "Pre-Indictment Form" pertaining to his criminal indictments. In response to the GRC's request for additional information, the Custodian certified that no responsive records exist for the aforementioned records. Additionally, the Complainant provided no evidence to refute the Custodian's certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item Nos. 2, 4 and 5 seeking a "Pre-Complaint Warrant", Grand Jury Tally Sheet, and "Pre-Indictment Form" pertaining to his criminal indictments, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

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 instant matter, the Custodian violated N.J.S.A. 47:1A-6 by failing to provide the Complainant with a copy of the requested complaint-warrants pertaining to his criminal indictments. However, the Custodian demonstrated that he provided the responsive records in response to the GRC's request for additional information on August 3, 2022. The Custodian also lawfully denied access to all remaining OPRA request items. 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 unlawfully denied access to the Complainant's OPRA request item No. 3 seeking complaint-warrants pertaining to his indictments. See N.J.S.A. 47:1A-6, and Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (Interim Order dated June 25, 2013). However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with copies of the requested complaint-warrants on August 3, 2022.
2. The Complainant's OPRA request item No. 1 seeking police reports is exempt from disclosure under the criminal investigatory records exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 546 (2017); Janeczko v. Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). The Custodian thus lawfully denied access to said records. N.J.S.A. 47:1A-6. Additionally, the Council declines to address the other defenses raised by the Custodian.
3. The Custodian lawfully denied access to the Complainant's OPRA request item No. 7 seeking "lab reports" pertaining to his criminal indictments. N.J.S.A. 47:1A-6. Such records constitute criminal investigatory records under OPRA and are therefore exempt from access. See N.J.S.A. 47:1A-1.1; Grossman v. Ocean Cnty. Prosecutor's Office, 2013 N.J. Super. LEXIS 1999, 24 (July 26, 2013); Crook v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2010-92 (March 2011); Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated June 30, 2015).
4. Because Executive Order No. 9 (Gov. Hughes, 1963) ("EO 9") provides that criminal records are exempt from disclosure, and because said Executive Order is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), the Custodian lawfully denied the Complainant access to OPRA request item No. 6 seeking criminal record history of State's witnesses named in his indictments. N.J.S.A. 47:1A-6. See also Lewis v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018); Franklin v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2016-308 (April 2018); Abdul-Shabazz v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2017-41 (April 2019); Tyler v. Passaic Cnty. Prosecutor's Office, 2017-30 (March 2019). The Council notes that because the Custodian lawfully denied access

to the requested records under EO 9, it declines to address the Custodian's other reasons for denial.

5. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item Nos. 2, 4 and 5 seeking a "Pre-Complaint Warrant", Grand Jury Tally Sheet, and "Pre-Indictment Form" pertaining to his criminal indictments, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

6. The Custodian violated N.J.S.A. 47:1A-6 by failing to provide the Complainant with a copy of the requested complaint-warrants pertaining to his criminal indictments. However, the Custodian demonstrated that he provided the responsive records in response to the GRC's request for additional information on August 3, 2022. The Custodian also lawfully denied access to all remaining OPRA request items. 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.

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August 23, 2022