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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0604-21**

MARY B. COLVELL,

Appellant,

v.

HIGHTSTOWN POLICE  
DEPARTMENT (MERCER),

Respondent.

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Submitted November 15, 2022 – Decided December 9, 2022

Before Judges Geiger and Berdote Byrne.

On appeal from the Government Records Council,  
Complaint No. GRC 2019-134.

Mary B. Colvell, appellant pro se.

Ansell Grimm & Aaron, PC, attorneys for respondent  
Hightstown Police Department (Frederick C. Raffetto,  
of counsel; Rahool Patel, on the brief).

Matthew J. Platkin, Attorney General, attorney for  
respondent Government Records Council (Debra A.  
Allen, Deputy Attorney General, on the statement in  
lieu of brief).

## PER CURIAM

Appellant Mary B. Colvell appeals a final decision of the Government Records Council (GRC), which found respondent Hightstown Police Department (HPD or Hightstown) did not commit a knowing and willful violation of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, by initially denying records responsive to her requests that were later disclosed and locating additional records during a supplemental records search. We affirm.

The records relate to a May 2, 2019 incident that involved Colvell's son, Kevin Colvell, who was arrested and charged with stalking and harassing M.C.<sup>1</sup> Colvell submitted several OPRA requests to Hightstown.

Colvell's May 10, 2019 OPRA request sought the following records relating to the incident:

1. Kevin Colvell – 05/02/2019 – All documentation (complaint-warrant, police reports, notes, etc.); all audio/video related to incident – during arrest, transports, police station.
2. Colvell family – All information in CAD system; all police records, tickets, complaints made to [HPD], etc. in past; any audio/video.
3. [M.C.] – All documentation, police records, tickets, audio/video of investigation for complaint-warrant; any

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<sup>1</sup> We refer to alleged victim by initials to protect her privacy.

telephone communications, records, etc. (May 2019 and any previous/past history).

4. 05/08/2019 – Audio/video of discussion with Sgt. Benjamin Miller #1113 in lobby of [HPD].

On May 20, 2019, Nancy Alexander, Hightstown's Administrative Assistant and Records Clerk, denied Colvell's request, indicating: (1) the request was overly broad as to the documents pertaining to the Colvell family and M.C.; (2) the documents were not "public records provided by law," because they affected the "[s]afety of persons or public," and included "[v]ictim records"; and (3) the requested "[a]udio/video does not exist."

On May 22, 2019, Colvell submitted two revised OPRA requests. The first sought the following records:

1. All documentation related to this matter – etc. (complaint-warrant, police reports, identity of arresting and investigative officers, length of investigation).
2. Information of circumstances surrounding the arrest – all audio/video of officers related to prior, during, transports and police station, etc.

The second sought the following additional records:

1. Police record of [M.C.] (complaint-summons history).
2. The audio/video of investigation for complaint-warrant.

3. Any telephone communications from [M.C.] to HPD for investigation.

4. Any police reports regarding complaint-warrant.

Alexander responded on May 30, 2022. Regarding the first set of requests, Alexander stated that information pertaining to the incident and arrest could not be provided because the case was "still under investigation and being reviewed by the Mercer County Prosecutor's Office." Regarding the second set of requests, Alexander provided responsive records as to Item No. 1 relating to M.C. but stated that Item Nos. 2-4 could not be provided because the case was "still under investigation and being reviewed by the Mercer County Prosecutor's Office."

On July 9, 2019, Colvell filed a Denial of Access complaint with the GRC that claimed the Hightstown failed to properly respond to her request. On July 12, 2019, the GRC requested a Statement of Information (SOI), which provided "an opportunity [for the Custodian of records] to respond to the [c]omplaint." The GRC requested the SOI within five business days. On July 24, 2019, the GRC sent a letter stating that it was "not yet in receipt of [the] SOI." That same day, Debra L. Sopronyl, Hightstown's Custodian of records (the Custodian) filed her SOI. The Custodian argued that the denied records fell under OPRA's criminal investigatory exception. The Custodian also asserted that the denied

records fell under OPRA's victim exception, and that Colvell was not the victim of the alleged crimes. The Custodian found OPRA did not mandate release of the denied records.

On February 2, 2021, the GRC requested additional information from the Custodian. In particular, the GRC requested the Custodian provide a "legal certification" in response to the following inquiries:

1. In searching for responsive records, did you locate any "telephone communications" between [M.C.] and HPD pertaining to the relevant incident?
2. In searching for responsive records, did you locate any "audio/video from officers" pertaining to the relevant incident?
3. Please describe the search undertaken to locate the above responsive records.

The GRC requested a response by February 9, 2021. On March 16, 2021, following multiple reminders and status update requests, Alexander submitted a response to the GRC. In the response, Alexander certified that she did not locate any "telephone communications" between M.C. and HPD, and that "in order to locate such records, she would have needed to review sixteen [] separate telephone lines utilized by HPD and maintained by a third-party vendor," and "that she did not review those communication lines because there was an active

criminal investigation pertaining to the incident and [Colvell] was not the alleged victim."

Alexander further certified that "audio/video from officers" was located, but "the incident was still under investigation" and the audio/video "included information about the alleged victim's identity and address." Alexander concluded the record did not need to be released. Finally, in relation to the "search undertaken," Alexander certified that she had searched HPD's records management system and in-car video reporting system. She also certified that at the time of the OPRA request, HPD was not utilizing body-worn cameras.

On March 23, 2021, the GRC issued the Findings and Recommendations of the Executive Director. Regarding Colvell's initial OPRA request, the Director found that Item Nos. 2-3 "did not include a reasonable time frame," and thus required the Custodian to conduct "open-ended research." The Director therefore found those record requests were "invalid."

Regarding the request for the identity of the arresting and investigating officers and the length of the investigation, the Director disagreed with the Custodian, finding OPRA requires disclosure of such information because no exception applied.

Regarding the request for the complaint-warrant, the Director disagreed with the Custodian, finding that the criminal investigatory records exception did not apply. The Director explained that the criminal investigatory records exception applied only if a record: (1) is not required by law to be made, and (2) pertains to a criminal investigation. The Director found that complaint-warrants are required by law to be made and therefore failed the first prong of the test. The Director found the Custodian "unlawfully denied access" to the complaint-warrant and should disclose it "with redactions where applicable."

As to Colvell's request for police records and notes, the Director found the Custodian "lawfully denied access" under the criminal investigatory records exception. The Director noted that "there [was] no evidence in the record demonstrating that 'police reports' and 'notes' are required by law to be maintained," and that "it [was] not in dispute that the relevant incident generating the records pertained to a criminal investigation."

Regarding Colvell's request for audio/video, the Director agreed with the Custodian that certain kinds of audio/video, such as that captured by "body-worn cameras," did not exist. Similarly, the Director found that audio/video of Colvell's "discussion with a specific officer [in] the HPD lobby" did not exist. The Director also agreed with the Custodian that to the extent other kinds of

audio/video existed, they were exempt under the criminal investigatory records exception. The Director therefore concluded that the Custodian "lawfully denied access" to the records.

Regarding Colvell's request for telephone communications between M.C. and HPD, the Director found that "911 calls [are] required by law to be made and retained" and therefore "[can]not fall under OPRA's criminal investigatory records exemption." However, the Director noted that the Custodian "did not conduct a search for responsive records" making it "unknown whether [M.C.] contacted HPD through 911 or a non-emergency line." The Director concluded the Custodian "may have unlawfully denied access" to these records, and that the Custodian should "conduct a search for responsive records and provide [them] to [Colvell] with redactions where applicable."

Finally, the Director concluded that the "ongoing investigation" exemption did not apply to any of the requested records.

On March 30, 2021, the GRC adopted the Director's findings and recommendations. Its March 31, 2021 interim order required the Custodian to supply the identified records within five business days "with appropriate redactions, including a detailed document index explaining the lawful basis for



each redaction." It also required the Custodian to simultaneously deliver a certified confirmation of compliance to the Director.

On April 7, 2021, the identity of the arresting and investigating officers, the complaint-warrant, and the telephone communication between M.C. and HPD were provided to Colvell. The records were redacted based on the victim records and criminal investigatory exceptions. No records of the length of the investigation were found. Alexander certified the information was accurate.

On April 9, 2021, the GRC acknowledged the response, but stated that while Alexander acted on behalf of the Custodian, "the Interim Order required a certification from the Custodian." The Custodian's attorney advised that a certification from the Custodian was forthcoming.

On April 10, 2021, Colvell filed a request for reconsideration of the GRC's interim order, alleging mistake, extraordinary circumstances, and fraud. Colvell argued that the GRC erred when it concluded that audio/video pertaining to the incident did not exist. She claimed Alexander's previous certification indicated the audio/video existed. Colvell noted the Custodian did not timely respond to the GRC's request for additional information and claimed to be unaware she could rebut the additional information provided.

Regarding her claim of fraud, Colvell maintained that: (1) the Custodian: failed to provide information regarding the arresting officers; (2) the information regarding the investigative officers was identified through "additional records" that were not listed in the original SOI; and (3) the additional records were created "after the requested time period."

Colvell also argued the SOI indicated that there were email correspondences between the prosecutor's office and HPD, but the Custodian failed to provide those documents. Colvell further argued that the complaint-warrant provided by the Custodian in response to the GRC's interim order was incomplete. Colvell noted that the complaint-warrant was a ten-page document, but that she only received a two-page document. Finally, Colvell stated that the disclosed telephone conversation between M.C. and HPD could not be "verified as a true recording," and that the Custodian's response to the GRC's interim order did not identify whether "additional telephone calls" existed. Colvell contended "the Custodian . . . knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances."

On April 23, 2021, the Custodian submitted a certification of compliance with the interim order and opposed Colvell's request for reconsideration. The Custodian maintained the audio/video Alexander identified was captured during

an October 2, 2019 in-car transport and was not in existence at the time Colvell made her OPRA requests in May 2019.

The Custodian next argued that it had supplied "the names of all HPD representatives who were involved" in the incident. To the extent that this information was not disclosed earlier, the Custodian certified that the relevant documents were created after Colvell's OPRA requests and the SOI, and "could not have been provided [earlier]."

The Custodian further certified that the complaint-warrant was "issued by the victim" and not by an HPD officer "or at the HPD" and the HPD was not in possession of the remaining pages. The Custodian also certified that a search of HPD's sixteen telephone lines did not reveal any other telephonic communications between M.C. and the HPD.

On August 17, 2021, the GRC issued the Supplemental Findings and Recommendations of the Executive Director. As an initial matter, the Director noted that the Custodian did not fully comply with the interim order:

On March 31, 2021, the [GRC] distributed its [i]interim [o]rder to all parties, providing the Custodian five [] business days to comply with the terms of said [o]rder. Thus, the Custodian's response was due by close of business on April 8, 2021.

On April 7, 2021, . . . [the Custodian's attorney] . . . provid[ed] responsive records and information in

accordance with the [o]rder. . . [but] did not provide a certified confirmation of compliance to the Executive Director within the prescribed time frame.

Despite this finding, the Director found that Colvell failed to establish that reconsideration was appropriate:

[A]lthough [Alexander] did state that an audio/video recording pertaining to the incident was located, the Custodian later certified that the record was created after [Colvell] submitted her OPRA requests. . . . [T]hus, there was no mistake pertaining to [Colvell's audio/video requests].

Additionally, [Colvell's] remaining arguments regarding fraud and extraordinary circumstances did not pertain to the [GRC's] [i]nterim [o]rder, but rather expressed dissatisfaction [with] the Custodian's response . . . . [T]he GRC has consistently held that it does not have the authority to gauge the integrity or content of the provided records.

The Director acknowledged that the Custodian "unlawfully denied access to portions of [Colvell's] OPRA request," and "did not provide a certified confirmation of compliance . . . within the [interim order's] prescribed time frame." However, he noted the Custodian provided responsive records to Colvell in accordance with the interim order. The Director concluded the Custodian's actions "[did] not rise to the level of a knowing and willful violation of OPRA."

The GRC unanimously adopted the Director's supplemental findings and recommendations and issued its final decision. This appeal followed.

Colvell raises the following points for our consideration:

POINT ONE

THE [GRC] AND CUSTODIAL RESPONSIBILITIES.

POINT TWO

SEVERAL OPRA REQUESTS SHOULD HAVE BEEN DISCLOSED ORIGINALLY.

POINT THREE

DESTRUCTION OF RECORDS AND REDACTION OF E-MAILS.

POINT FOUR

FAILURE BY GRC TO ADDRESS RECORDS AND INFORMATION PROVIDED BY COMPLAINANT DATED APRIL 23, 2021.

POINT FIVE

THE CUSTODIAN OF RECORDS CHANGED AND CERTIFICATION ISSUES.

"The GRC is an administrative agency created to, among other things, adjudicate disputes concerning access to public records under OPRA." McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 613 (App. Div. 2010). "Our scope

of review of administrative decisions is narrowly circumscribed." Paff v. N.J. Dep't of Lab. (Paff I), 392 N.J. Super. 334, 340 (App. Div. 2007). We ordinarily will not disturb the GRC's "determinations or findings unless there is a clear showing that (1) the [GRC] did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." McGee, 416 N.J. Super. at 612 (quoting In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008)).

We accord a strong presumption of reasonableness to the GRC's decision. Paff I, 392 N.J. Super. at 340. "[A] court must be mindful of, and deferential to, [an] agency's 'expertise and superior knowledge of a particular field.'" Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009).

"We do not, however, simply rubber stamp [an] agency's decision." Paff I, 392 N.J. Super. at 340. "We are constrained to engage in 'a careful and principled consideration of the agency record and findings,'" Williams v. Dep't of Corr., 330 N.J. Super. 197, 204 (App. Div. 2000) (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)), and "we are 'in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue,'" Utley v. Bd. of Rev., Dep't of Lab., 194 N.J. 534, 551 (2008) (quoting Mayflower, 64 N.J. at 93). At the same time, "when an agency is authorized to

interpret and apply a [specific] statute," and "[does] so 'in a manner that is reasonable, not arbitrary or capricious, and not contrary to the evident purpose of the statute, [the agency's] interpretation should be upheld.'" McGee, 416 N.J. Super. at 612 (quoting Blecker v. State, 323 N.J. Super. 434, 442 (App. Div. 1999)). Because the GRC is authorized to interpret OPRA, we apply this deferential standard to its decisions. Id. at 613 (citing N.J.S.A. 47:1A-7(b)).

"[T]he general purpose of OPRA is to 'maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Ciesla v. N.J. Dep't of Health and Senior Servs., 429 N.J. Super. 127, 136-37 (App. Div. 2012) (quoting Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)). In other words, OPRA seeks "to promote transparency in the operation of government." Paff v. Ocean Cnty. Prosecutor's Off. (Paff II), 235 N.J. 1, 16 (2018) (quoting In re N.J. Firemen's Ass'n Obligation, 230 N.J. 258, 276 (2017)). As such, OPRA provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest." N.J.S.A. 47:1A-1. OPRA defines "government record" broadly:

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan,

photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.

[N.J.S.A. 47:1A-1.1.]

"However, this broad definition is tempered by a number of exceptions within OPRA itself." McGee, 416 N.J. Super. at 614. Among these exceptions is the "ongoing investigation" exemption, also known as the "investigation in progress" exemption, N.J.S.A. 47:1A-3, and the "criminal investigatory records" exemption, N.J.S.A. 47:1A-1.1.

The GRC found that "[a]lthough the Custodian did not specifically reference [the ongoing investigation exemption], the Custodian's initial basis [for denying access to certain records] relied on the assertion that the records pertained to an active investigation." As a result, the GRC analyzed the ongoing investigation exemption and concluded that it was not applicable. We concur.

To avail itself of the [ongoing investigation] exemption, 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.

[N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 573 (2017) (quoting N.J.S.A. 47:1A-3(a)).]

The GRC found that "the Custodian failed to show that disclosure of the [requested] records would be 'inimical to the public interest.'" This finding is supported by the record, and HPD does not contest it on appeal.

The Custodian also asserted the criminal investigatory records exemption. The GRC concluded that the exemption applied to police reports, notes, audio, and video, but not the complaint-warrant. The GRC also concluded the exemption might apply to telephone conversations between M.C. and HPD, and therefore required disclosure.

"[OPRA] defines a 'criminal investigatory record' as 'a record[] which is not required by law to be made'" and "which pertains to any criminal investigation or related civil enforcement proceeding." Lyndhurst, 229 N.J. at 556 (quoting N.J.S.A. 47:1A-1.1). "[A]n agency seeking to withhold a record from disclosure as a criminal investigatory record must satisfy 'both prongs of the exception.'" Paff II, 235 N.J. at 18 (quoting Lyndhurst, 229 N.J. at 556).

The police records and notes satisfy both prongs of the criminal investigatory records test. There is no evidence they were prepared pursuant to "guidelines, directives, and policies" adopted by the Attorney General "that bind police departments throughout the State." Lyndhurst, 229 N.J. at 565. Moreover, the reports and notes pertained to a criminal investigation that resulted in criminal charges being filed. The police records and notes were properly exempted.

Regarding audio/video recordings, the GRC found that the October 2, 2019 in-car video was not responsive because it was created after plaintiff's OPRA requests. Even if responsive, the GRC correctly concluded that it would be exempt as a criminal investigatory record.

In Paff II, the Court held that in-car police recordings satisfy the first prong of the criminal investigatory records exemption if not "made and retained . . . in compliance with [a] law or directive carrying the force of law." 235 N.J. at 22. In contrast, the Court held that in-car police recordings "made and retained in accordance with a local police chief's order to his subordinates" satisfy the first prong. Ibid. Here, as in Paff II, there is no evidence that the in-car recording was required by "[a] law or directive carrying the force of law." Accordingly, the first prong of the test is satisfied. Moreover, while a "recording

of a routine traffic stop, in which a suspect obeyed the police and pulled over" may not pertain to a criminal investigation, the "pursuit of a suspected criminal violation of law . . . may pertain to a criminal investigation . . . in its earliest stages." Lyndhurst, 229 N.J. at 569. Here, the identified video pertained to an "in-car transport," that went beyond a "routine traffic stop." Ibid. Moreover, Colvell does not dispute that the recording pertained to a criminal investigation. Therefore, the record was properly exempted.

Regarding the telephone conversation between M.C. and HPD through a "hotline" that was used for "emergency 911 calls," the GRC correctly concluded the criminal investigatory records exemption did not apply since "911 calls are required by law to be recorded by a government agency" and "do[] not qualify as a 'criminal investigatory record.'" Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 364-65 (App. Div. 2003). The GRC properly required disclosure. The GRC went further by requiring the Custodian to search its "[n]on-emergency and administrative call[]" records. While such calls might be exempt as criminal investigatory records, no additional records were found.

The GRC found the complaint-warrant is not a criminal investigatory record because it is required by law to be made. The GRC thus required disclosure. HPD complied. Colvell now asserts that the Custodian "violated

[her] OPRA request" because the complaint-warrant is a ten-page document, but she only received a two-page document. However, the Custodian certified that the complaint-warrant was "issued by the victim and not by an officer of the HPD or at the HPD" and therefore "the HPD [was] not in possession of . . . the remaining pages." The Custodian cannot be compelled to deliver a document that she does not possess. See O'Boyle v. Borough of Longport, 426 N.J. Super. 1, 14-15 (App. Div. 2012) (finding that when a document is possessed by a third-party, and the government was not the "controlling hand" that caused such possession, disclosure under OPRA is not required).

We also find that certain portions of Covell's May 10, 2019 OPRA request were overly broad. Relevant here, that request sought:

[As to the Colvell family]: all information in CAD system; all police records, tickets, complaints made to [HPD], etc. in past; any audio/video.

[As to M.C.]: all documentation, police records, tickets, audio/video of investigation for complaint-warrant; any telephone communications, records, etc. (May 2019 and any previous/past history).

"OPRA does not authorize unbridled searches of an agency's property." Doe v. Rutgers State Univ. of N.J., 466 N.J. Super. 14, 28 (App. Div. 2021) (quoting Bent v. Twp. of Stafford Police Dep't, Custodian of Recs., 381 N.J. Super. 30, 37 (App. Div. 2005)). "[A]n OPRA applicant 'must identify with

reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.'" Ibid. (quoting Bent, 381 N.J. Super. at 37). The GRC correctly concluded that the requests at issue were overly broad.

We find the GRC properly required disclosure of the identity of the arresting and investigative officers and the length of the investigation. N.J.S.A. 47:1A-3(b) "requires the release of specific information about a criminal investigation." Lyndhurst, 229 N.J. at 570. This includes "information as to the identity of the investigating and arresting personnel . . . and the length of the investigation." N.J.S.A. 47:1A-3(b).

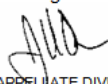
Finally, we address whether the Custodian committed a knowing and willful OPRA violation. "[A] public official, officer, employee or custodian who 'knowingly and willfully violates' [OPRA] and 'unreasonably denie[s] access under the totality of the circumstances' is . . . subject to a civil penalty." Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 617 (App. Div. 2008) (third alteration in original) (quoting N.J.S.A. 47:1A-11). To constitute a knowing and willful violation, the custodian must have "had actual knowledge that his actions were wrongful" and there must be "a positive element of conscious wrongdoing." Id. at 619. The GRC's finding that the Custodian's

errors, which were all corrected, did not meet this exacting standard is supported by the record.

In sum, we conclude that the GRC's final decision was based on controlling law, supported by substantial evidence, and was not arbitrary, capricious, or unreasonable.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION