

## The Ongoing Investigation Exemption

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Often, public agencies deny requests for records relating to misconduct or crime and claim that the records are part of an “investigation in progress” and therefore not subject to OPRA. It is true that OPRA does provide an exemption for ongoing investigations, but it is important to know how this exemption is applied.

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First, OPRA specifically states that ongoing investigation does not apply to records that were “open for public inspection, examination, or copying before the investigation commenced.” N.J.S.A. 47:1A-3a. This means that a video recording that recorded a crime taking place, or audio of a 911 call in which the crime was reported, should not be subject to the ongoing investigation because both are government records that were created before any investigation began. Not every record that is tied to an investigation is exempt simply because an investigation has begun. For example, if the prosecutor’s office begins an investigation into possible embezzling of funds from a public agency’s bank accounts, the bank statements of those accounts are still available to the public because they were accessible public records before the investigation began. New reports and records that were created directly as part of the investigation would not be subject to OPRA, however.

Second, the exemption is not automatically applied whenever a record is created after an investigation has commenced – access may only be denied “if the inspection, copying or examination of such record or records shall be inimical to the public interest.” The burden rests upon the public agency to prove that the exemption applies and our courts have held that a record does not “become cloaked in confidentiality simply because the prosecutor declares it so.”

And finally, pursuant to OPRA, certain information concerning a criminal investigation and the circumstances surrounding an arrest are available to the public for immediate access, “including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession

and nature and use of weapons and ammunition by the suspect and by the police.” N.J.S.A. 47:1A-3(b). These records must be released unless the public agency can demonstrate that release of such information would jeopardize public safety or the investigation.