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Governor

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Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 25, 2017 Government Records Council Meeting

Robert P. Vacchiano
Complainant

Complaint No. 2016-64

v.

City of Newark (Essex)
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided a specific deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); and Starkey v. NJ Dep’t of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009)7. Accordingly, there is no “deemed” denial of the Complainant’s request.
2. The Custodian’s failure to contact the Division as part of his search for the responsive camera footage until after he received the instant Denial of Access Complaint resulted in an insufficient search. N.J.S.A. 47:1A-6; Schneble v. NJ Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013). However, the GRC cannot conclude that the Custodian’s insufficient search resulted in an unlawful denial of access because it is unclear whether a record existed at the time that the Complainant submitted his OPRA request.
3. The Custodian violated OPRA by failing to contact the Division to allow sufficient time to locate a responsive record, if any, prior to the live stream loop being overwritten. The violation resulted in a basic hindrance to the Complainant’s right of access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1; Zayas, GRC 2008-31. This is notwithstanding the potential that no record existed at the time of the request. However, because the evidence now supports that no record exists, the GRC declines



to order disclosure. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

4. The Custodian failed to conduct a sufficient search to locate responsive records, which hindered disclosure of a responsive record, if any, and resulted in a violation of OPRA. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1. However, the Custodian timely responded and requested an extension of time properly. Further, the evidence supports that no records exists at this time. 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.

Notwithstanding the Custodian's "deemed denial," the Custodian did not unlawfully deny the Complainant access to requested item number 3 of his October 27, 2015.

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 25th Day of July, 2017

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: July 28, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Robert P. Vacchiano¹
Complainant**

GRC Complaint No. 2016-64

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: Pick up or e-mail of all video camera footage (including traffic and police department cameras) showing Market Street between Broad and Beaver Streets in the City of Newark (“City”) on January 28, 2016, between the hours of 8:00am and 9:00am.

Custodian of Record: Kenneth Louis

Request Received by Custodian: January 29, 2016

Response Made by Custodian: February 1, 2016

GRC Complaint Received: February 23, 2016

Background³

Request and Response:

On January 29, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 1, 2016, the first (1st) business day after receipt of the OPRA request, the Custodian responded in writing, advising that his office forwarded the subject OPRA request to the City of Newark Police Department (“NPD”) to begin searching for the responsive records. The Custodian stated that he anticipated a response from NPD on or before February 22, 2016.

On February 5, 2016, Soraida Lara e-mailed the Complainant, recapitulating a conversation between them earlier in the day. Therein, Ms. Lara advised the Complainant that she would advise NPD of the Complainant’s concerns over preservation of any responsive records. Additionally, Ms. Lara noted that the City would make every attempt to respond by the due date of February 22, 2016. On the same day, Ms. Lara forwarded her e-mail to Hatim Najah. On February 7, 2016, the Complainant e-mailed Ms. Lara, confirming that he received the Custodian’s response and spoke with Ms. Hatim. The Complainant noted that Ms. Najah

¹ No legal representation listed on record.

² Represented by Willie Parker, Esq. (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.

mentioned that videos were purged after thirty (30) days but that the City would be able to complete its search within that time frame.

On February 16, 2016, Sergeant Beatrice Golden, NPD, sent a memorandum to Ana Golinski, City Clerk's Office, advising that no video surveillance cameras view the identified location. On February 18, 2016, two (2) business days before the expiration of the extended time frame, the Custodian responded to the Complainant, advising him that no video surveillance cameras view the location. The Custodian also attached Sgt. Golden's memorandum as part of his response.

On February 18, 2016, the Complainant sent a letter to the Custodian to dispute the denial of access. The Complainant stated that the intersection of Market and Broad Streets contain at least eight (8) visible surveillance cameras. The Complainant further noted that at least one of those eight (8) cameras is pointed at the exact location identified in the OPRA request. The Custodian also expressed concern on the amount of time it took the Custodian to respond, noting that he waited much longer than the time allotted under OPRA. The Complainant requested that, due to the absence of any search explanation to date, the Custodian immediately undertake a good faith search for the requested record.

Denial of Access Complaint:

On February 23, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant reasserted all arguments presented in his February 18, 2016 letter to the Custodian.

Statement of Information:

On March 14, 2016, the Custodian filed a Statement of Information ("SOI"), which included supplemental legal certifications from himself, Sgt. Golden, and Jack Nata, who is the Manager of the Department of Engineering, Division of Traffic and Signals ("Division"). The Custodian certified that he received the Complainant's OPRA request on January 29, 2016. The Custodian certified that his staff sent the subject OPRA request to NPD via Quickbase, the City's electronic tracking system, and sent a letter to the Complainant advising that a response would be forthcoming by February 22, 2016. The Custodian certified that his staff received Sgt. Golden's memorandum, which asserts that no video camera surveillance cameras view the identified location. The Custodian certified that he responded to the Complainant on February 18, 2016, advising of NPD's response.

The Custodian certified that subsequent to receiving and reviewing this complaint, he requested that his staff reach out to the Division. Specifically, the Custodian affirmed that he wanted staff to find out whether the Division operated cameras at the intersection in question. The Custodian certified that the Division replied by stating that they maintained one camera at the intersection that monitors traffic in real time but does not record the live feeds. The Custodian certified that his staff was unaware that the Division maintained the camera.

The Custodian certified that no records responsive to the Complainant's OPRA request existed. However, the Custodian noted that upon receipt of the OPRA request, staff was unaware that the Division managed cameras at the identified location. The Custodian certified that the oversight was caused because his office routinely forwards requests for surveillance cameras to NPD. The Custodian certified that NPD's response confirmed that no police surveillance cameras existed at that location. *See* Sgt. Golden's legal certification at ¶4. The Custodian reiterated that staff did not send the OPRA request to the Division due to their lack of knowledge regarding the traffic cameras.

The Custodian contended that, even if staff had knowledge of the Division's control of a traffic camera at the intersection, they would not have known whether the Division was actively recording traffic. The Custodian stated that the Division has advised that they do not record live traffic streams, the camera is on a continuous loop, and video footage is overwritten after approximately five (5) days. *See* Jack Nata's Legal certification at ¶12 and 13. The Custodian also noted that the Division advised that the camera, mounted at the southwest corner of Broad and Market Streets, is fixed in one position and can be manually changed by a City engineer to view all traffic. *Id.* at ¶9. The Custodian noted that the Division advised, if manually moved, the camera would revert to its original position after about five (5) minutes. *Id.* The Custodian asserted that neither he nor the Division have any way of knowing whether: 1) the camera captured live feed at the date and time specified; or 2) whether the camera was appropriately positioned to capture the identified location. The Custodian regrets that staff did not forward the subject OPRA request to the Division but asserts that such inaction was not knowing or willful.

The Custodian finally argued that even if staff forwarded the OPRA request to the Division, his response that no records exist was still appropriate. The Custodian asserted that the Division has no legal obligation to record live traffic streams. *Id.* at ¶19. The Custodian thus contended that the temporary live feed residing on the City's server was not a "government record" for purposes of OPRA.

Additional Submissions:

On March 17, 2016, the Complainant submitted a rebuttal to the SOI. Therein, the Complainant contended that the Custodian failed to respond in a timely manner. N.J.S.A. 47:1A-5(i). The Complainant asserted that "the City's practice of taking several weeks" to respond undercuts any argument that it tried to provide a response in good faith. The Complainant asserted that this is especially true, given that City acknowledged that it only maintained the requested record for 31 or fewer days.

Next, the Complainant contended that the Custodian's SOI belies any argument that the City sufficiently searched for and responded to his OPRA request. Specifically, the Complainant argued that the Custodian failed to forward the OPRA request to the Division, even though it specifically identified "traffic camera" footage as a responsive record. The Complainant also noted that the SOI confirms that the Custodian still made no effort to search beyond the NPD and Division. The Complainant contended that the insufficient search resulted in a false response that no surveillance cameras are present at the identified location.

The Complainant reiterated from his February 18, 2016 letter that there are at least eight (8) visible cameras at Broad and Market Streets and that one of them consistently points in the direction of the location identified in the OPRA request. The Complainant noted that the intersection is highly traveled and tends to be a high-crime area: that, he claims, explains the high number of cameras. The Complainant contended that the SOI instead only focuses on one camera and that camera was pointed in the wrong direction. The Complainant contended that the Custodian at no point has addressed any of the other cameras at the intersection. The Complainant contended that all evidence conflicts with the NPD's assertion that no cameras are present at the intersection. The Complainant contends that the City's failure to perform an adequate search resulted in an "unlawful denial of access."

Finally, the Complainant disputed the Custodian's argument that the Division footage was not a "government record" for purposes of OPRA. The Complainant contended that OPRA broadly defines a "government record" as any record "made, maintained, or kept on file . . ." N.J.S.A. 47:1A-1.1. The Complainant stated that OPRA's enactment officially ended the former Right to Know Law's standard that a disclosable record must be "required by law" to be "made, maintained, or kept on file." North Jersey Media Grp. V. Twp. of Lyndhurst, 441 N.J. Super. 70, 93 (App. Div. 2015). The Complainant asserted that it was troubling that the Custodian would attempt to apply an outdated definition to video maintained for a five (5) day period. The Complainant contended that the subsequent withholding of the responsive footage constituted a knowing and willful violation.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

OPRA also provides that a custodian may request an extension of time to respond to the complainant's OPRA request but that a specific date on which the custodian will further respond must be provided. N.J.S.A. 47:1A-5(i). OPRA also provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th)

⁴ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

business day, seeking an extension of time to respond to the request and providing an anticipated deadline date when the requested records would be made available. The complainant did not agree to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i)."

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant's OPRA request. The Council concluded that because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date when the requested records would be made available, the Custodian properly requested the extension pursuant to OPRA. In rendering the decision, the Council cited as legal authority Rivera, GRC 2009-317; Criscione, GRC 2010-68; Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); and Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009).

This is not to say that the Council will unquestioningly find valid every request for an extension of time containing a date certain deadline. *Cf.* Ciccarone v. NJ Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014), where the Council found that, notwithstanding the fact that extensions are rooted in well-settled case law, the custodian cannot

exploit same to deny access continuously by repeatedly rolling over an extension once it is obtained. In reaching its conclusion, the Council looked to what is “reasonably necessary.”

Here, there is no dispute that the Custodian responded in writing on the first (1st) business day by obtaining an extension of time. There is also no dispute between the parties that, at the time of his initial response, the Custodian sought an extension of time to a date certain; *viz.*, February 22, 2016, to further respond to the Complainant’s request. Finally, there is no dispute between the parties that the City responded on February 18, 2016, two (2) business days prior to the expiration of the extended time frame.

The Complainant’s only claim is that the Custodian took sixteen (16) business days to comply with the request, thereby violating OPRA. Although he did not specifically argue against the extension request, the Complainant alluded to a “deemed” denial arising from the Custodian’s failure to disclose the requested records within the statutorily mandated time frame. The Complainant ignored the extended time period sought by the Custodian because he claimed that the Custodian provided a legally insufficient reason for the extension.

The Custodian responded on the first (1st) business day of the initial response time frame, seeking an eight (8) business day⁵ extension of time to comply with the request. This should certainly not appear to be an excessive amount of time, knowing that the Custodian and his staff would have to rely on the NPD to conduct a search of its video surveillance records to locate responsive records. Given the facts of this complaint, an eight (8) business day extension of time for the Custodian to comply with the request was not unreasonable.

Therefore, because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided a specific deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). *See Rivera*, GRC 2009-317; *Criscione*, GRC 2010-68; and *Werner*, GRC 2011-151. *See also Rivera*, GRC 2008-112; *O’Shea*, GRC 2009-223; and *Starkey*, GRC 2007-315, 316, and 317. Accordingly, there is no “deemed” denial of the Complainant’s request.

Insufficient Search

It is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. In Schneble v. NJ Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant’s OPRA request existed. GRC Complaint No. 2007-220 (April 2008). The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found records responsive to the complainant’s request. *Id.* The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. *Id.* *See also Lebbing v. Borough of Highland Park*

⁵ This time frame acknowledges that the City was likely closed for the President’s Day, which was observed on February 15, 2016.

(Middlesex), GRC Complaint No. 2009-251 (January 2011).

Moreover, in Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013), the custodian initially responded to the complainant's request, producing four (4) responsive records and stating that no other records existed. However, after receiving the denial of access complaint, the custodian performed another search and discovered several other records. Id. In accordance with Schneble, the Council held that the custodian failed to perform an adequate initial search and unlawfully denied access to those additional records. Weiner, GRC 2013-52.

In the instant matter, the Custodian initially sent the Complainant's OPRA request to NPD. In making that decision, the Custodian assumed that the NPD would be the only agency maintaining surveillance camera footage. However, the Custodian argued in the SOI that he and his staff had no knowledge that the Division also maintained a camera at the intersection until after he received and reviewed the instant complaint. Unfortunately, the inquiry ended after the Division advised that the camera recorded on a five (5) day loop. Thus, it was unclear whether a record ever existed at the time that the Complainant submitted his request, but it is clear that the Custodian cannot now provide a responsive record.

The complaint currently before the Council is analogous to Weiner. Specifically, the Custodian directed staff to forward the OPRA request to the NPD on the basis that they always sent surveillance camera requests to them. However, the Custodian did not think to contact the Division until after receiving and reviewing the complaint. Such a failure to reach out to the Division initially is peculiar. This is especially true, given that one would reasonably expect that the Division, by its very function, might maintain a camera mounted to light poles at an intersection. Unfortunately, and marginally different from Weiner and its progeny, the Custodian was unable to produce a record after going to the Division due to the short time period that the camera footage is kept. Notwithstanding, and in accordance with Schneble, the Custodian had a responsibility to perform an adequate initial search and to locate all records responsive but failed to do so. *See also* Watts v. City of Pleasantville (Atlantic), GRC Complaint No. 2015-222 (November 2015).

Accordingly, the Custodian's failure to contact the Division as part of his search for the responsive camera footage until after he received the instant Denial of Access Complaint resulted in an insufficient search. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220; Weiner, GRC 2013-52. However, the GRC cannot conclude that the Custodian's insufficient search resulted in an unlawful denial of access because it is unclear whether a record existed at the time that the Complainant submitted his OPRA request.

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.

In Zayas v. City of Trenton (Mercer), GRC Complaint No. 2008-31 (July 2008), the complainant submitted an OPRA request seeking access to a picture taken from an overhead traffic camera. The custodian extended the time frame and forwarded the request to the Trenton Police Department (“TPD”) to retrieve the record. However, the evidence of record there garnered that TPD personnel mishandled the request due to confusion as to the location of the record. Ultimately, TPD informed the custodian that the responsive record was overwritten. This forced the custodian to respond a month later, stating that the responsive record was “no longer available.” The complainant subsequently filed a complaint, and the custodian certified to her efforts to locate the responsive record. The Council held that the “confusion as to the location of the record materially hindered the [c]omplainant’s right of public access . . . [t]his hindrance should not be borne by a requestor” Id. at 6 (*citing* N.J.S.A. 47:1A-1).

Here, the Custodian instructed staff to send the Complainant’s OPRA request to the NPD because it sought camera footage. However, the Custodian did also contact the Division due to the his (and his staff’s) lack of knowledge that the Division maintained a camera at that intersection. As a consequence, the Division was unable to search for responsive records within the five (5) days during which the live stream loop is maintained. Much like the facts in Zayas, GRC 2008-31, the Custodian’s lack of knowledge led to a potential loss of the responsive record: this hindrance should not have been “borne by the [Complainant].” Id. This is, of course, notwithstanding that any record existed in the first place.

Accordingly, the Custodian violated OPRA by failing to contact the Division to allow sufficient time to locate a responsive record, if any, prior to the live stream loop being overwritten. The violation resulted in a basic hindrance to the Complainant’s right of access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1; Zayas, GRC 2008-31. This is notwithstanding the potential that no record existed at the time of the request. However, because the evidence now supports that no record exists, the GRC declines to order disclosure. *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)).

Here, the Custodian failed to conduct a sufficient search to locate responsive records, which hindered disclosure of a responsive record, if any, and resulted in a violation of OPRA. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1. However, the Custodian timely responded and requested an extension of time properly. Further, the evidence supports that no records exists at this time. 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. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided a specific deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); and Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009)⁷. Accordingly, there is no "deemed" denial of the Complainant's request.
2. The Custodian's failure to contact the Division as part of his search for the responsive camera footage until after he received the instant Denial of Access Complaint resulted in an insufficient search. N.J.S.A. 47:1A-6; Schneble v. NJ Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013). However, the GRC cannot conclude that the Custodian's insufficient search resulted in an unlawful denial of access because it is unclear whether a record existed at the time that the Complainant submitted his OPRA request.
3. The Custodian violated OPRA by failing to contact the Division to allow sufficient time to locate a responsive record, if any, prior to the live stream loop being overwritten. The violation resulted in a basic hindrance to the Complainant's right of

access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1; Zayas, GRC 2008-31. This is notwithstanding the potential that no record existed at the time of the request. However, because the evidence now supports that no record exists, the GRC declines to order disclosure. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

4. The Custodian failed to conduct a sufficient search to locate responsive records, which hindered disclosure of a responsive record, if any, and resulted in a violation of OPRA. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1. However, the Custodian timely responded and requested an extension of time properly. Further, the evidence supports that no records exists at this time. 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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