



State of New Jersey
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 25, 2019 Government Records Council Meeting

Charles Street
Complainant

Complaint No. 2017-103 and 2017-104

v.

North Arlington School District (Bergen)
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 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’s failure to locate responsive records until after she conducted a more reasonable search, following receipt of the Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional e-mails responsive to Complainant’s OPRA request located in connection with the second search. N.J.S.A. 47:1A-6; Schneble v. N.J. 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 declines to order disclosure of those records because the Custodian disclosed same to the Complainant on October 24, 2017.
2. The requested lockdown camera footage is exempt from disclosure under OPRA’s emergency and security exemptions. N.J.S.A. 47:1A-1.1; Gilleran v. Bloomfield, 227 N.J. 159 (2016). Specifically, disclosure of the footage under OPRA would jeopardize procedures in place for a lockdown drill and would create a risk to the safety of the persons within the District’s schools. See also WNBC-TV v. Allendale Bd. of Educ., 2015 N.J. Super. Unpub. LEXIS 1330 (June 4, 2015). Thus, the Custodian lawfully denied access to the requested footage. N.J.S.A. 47:1A-6.
3. In relation to the April 13, 2017 OPRA request, the Custodian unlawfully denied access to several e-mails because she failed to perform a sufficient search. Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013). However, the Custodian lawfully denied access to the video footage responsive to the Complainant’s March 2, 2017 OPRA request. N.J.S.A. 47:1A-6; Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 174-177 (2016). 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 25th Day of June 2019

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: June 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Charles Street¹
Complainant**

**GRC Complaint Nos. 2017-103
& 2017-104**

v.

**North Arlington School District (Bergen)²
Custodial Agency**

Records Relevant to Complaint:

March 2, 2017 OPRA request: Copies of video footage from the Washington School gym on Thursday February 23, 2017 spanning Ms. Luciano’s gym class and subsequent lockdown drill.³

April 13, 2017 OPRA request: All e-mails “from or to Mrs. Jaume, Dr. Yurchak, and Mr. Asmus” that mention the Complainant, his wife, or his daughter (in the subject or body) from February 15, 2017 through April 13, 2017.

Custodian of Record: Kathleen Marano

Request Received by Custodian: March 2, 2017; April 13, 2017

Response Made by Custodian: March 10, 2017; April 25, 2017

GRC Complaint Received: May 6, 2017

Background⁴

Request and Response:

On March 2, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 10, 2017, the Custodian responded in writing denying access to footage occurring during the lockdown but offering inspection of footage prior to commencement of the lockdown. The Custodian argued that the lockdown footage was exempt under N.J.S.A. 47:1A-1.1; Gilleran v. Bloomfield, 227 N.J. 159 (2016); WNBC-TV v. Allendale Bd. of Educ., 2015 N.J. Super. Unpub. LEXIS 1330 (June 4, 2015). The Custodian offered inspection of the pre-lockdown footage in accordance with D.D.K. v. Readington Twp. Bd. of Educ., Docket No. HNT-L-343-14 (October 17, 2014), noting that the

¹ No legal representation listed on record.

² Represented by Amy E. Canning, Esq., of Fogarty & Hara, Esqs. (Fair Lawn, NJ).”

³ This OPRA request is the subject of GRC 2017-103.

⁴ 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Complainant could access only those portions of the records regarding his daughter. See K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337 (App. Div. 2011). The Custodian asked that the Complainant contact Dr. Yurchak to schedule an inspection.

On April 10, 2017, the Complainant e-mailed Ann Treacy stating that he wished “to see the footage that is being granted” and would file a Denial of Access Complaint “for the footage being denied.” The Complainant thus requested an inspection date and time. Ms. Treacy responded directing the Complainant to Principal Elain D. Jaume. On April 11, 2017, Principal Jaume advised the Complainant that she was available on April 13, 2017 at either 9:30 a.m. or 10:30 a.m. Ms. Jaume asked the Complainant to let her know which time he preferred. On April 12, 2017, the Complainant e-mailed Principal Jaume advising that he was unavailable on April 13, 2017 and that he would e-mail to schedule time after “spring break.”

On April 13, 2017, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On April 25, 2017, the Custodian responded in writing granting access to multiple e-mails, with redactions. The Custodian stated that some of the redactions were for exempt personnel information. N.J.S.A. 47:1A-10; McGee v. Twp. of East Amwell, 416 N.J. Super. 602 (App. Div. 2010). Further, the Custodian stated that she redacted “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” from the e-mails. N.J.S.A. 47:1A-1.1. Finally, the Custodian stated that she redacted the Complainant’s cell phone number per his prior request to not save same within the North Arlington School District’s (“District”) servers.

On April 26, 2017, Dr. Yurchak sent a letter to the Complainant advising that he was re-disclosing a March 10, 2017 memorandum because it was previously disclosed with excessive redactions in error. Dr. Yurchak noted that the redactions were comprised of personnel information and ACD material.⁵

Denial of Access Complaint:

On May 6, 2017, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council (“GRC”).

Regarding GRC 2017-103, the Complainant contended that the District’s denial was unlawful. The Complainant argued that WNBC-TV did not apply here because the requested footage only contained the time of the drill. The Complainant further argued that they knew what the kids were doing during the drill because “[they] speak about it often.”

Regarding GRC 2017-104, the Complainant contended that he only received a small number of responsive records that existed. The Complainant contended that it appeared the District only disclosed e-mail regarding a single incident. The Complainant argued that to the contrary, his

⁵ Dr. Yurchak also addressed whether custodians were required to provide a “Vaugh Index” as part of a response to an OPRA request. This portion of the letter appeared to be in response to some type of communication from the Complainant. It is unclear whether that communication was written or verbal.

request sought “all e-mails” regarding him, his wife, or his daughter during the specified time period.⁶

Supplemental Response:

On October 12, 2017, the Custodian provided a supplemental response to the Complainant’s March 2, 2017 OPRA request. Therein, the Custodian maintained that the District would not disclose copies of the responsive video footage per N.J.S.A. 47:1A-1.1. The Custodian stated that in the alternative, attached were redacted video stills showing the interaction between the Complainant’s daughter and a District employee. The Custodian noted that the stills were somewhat unclear, but that the District’s ability to sharpen still images reduced once footage was transferred to the server for preservation.

Statement of Information:⁷

On October 13, 2017, the Custodian filed a Statement of Information (“SOI”) in GRC 2017-103. The Custodian certified that she received the Complainant’s OPRA request on March 2, 2017. The Custodian certified that she directed the Mr. Asmus, Director of Technology, to search for and preserve any responsive footage that existed. The Custodian certified that the footage was located and preserved accordingly. The Custodian noted that the video system automatically overwrote itself after two (2) weeks, thus necessitating action to preserve it. The Custodian certified that she responded in writing on March 10, 2017 advising that the request was denied in part and granted in part. The Custodian affirmed that although the Complainant expressed an interest in inspecting the non-exempt portion of the footage, he never made an appointment.

The Custodian contended that she properly denied access to the responsive security footage under OPRA security exemption. The Custodian noted that the New Jersey Supreme Court engaged in an in-depth analysis of the security exemption in Gilleran, 227 N.J. 159. The Custodian averred that the Gilleran Court’s decision to not disclose municipal hall security camera footage based on that analysis was consistent with the WNBC-TV court’s holding that “Security Drill Record Forms” (“Forms”) were exempt from disclosure. The Custodian argued that security drill footage should not be shown to any member of the public regardless of relationship to the District. The Custodian asserted that disclosure would reveal drill security protocols and lockdown procedures, including movement and location of students, drill duration, and specific drill procedures. The Custodian noted that she was not suggesting that the Complainant would use the recordings for nefarious purposes, but that the footage is nonetheless exempt from disclosure. The Custodian asserted that requiring disclosure here would set a dangerous precedent regarding the public’s ability to access confidential footage.

Finally, the Custodian stated that the District understood the Complainant’s rationale for seeking access to security footage, given that an incident occurred between his daughter and a

⁶ The Complainant did not challenge the redactions contained in the disclosed e-mails.

⁷ On June 16, 2017, both GRC 2017-103 and 2017 104 was referred to mediation. On October 2, 2017, GRC 2017-103 was referred back to the GRC for adjudication. On October 11, 2017, GRC 2017-104 was referred back to the GRC for adjudication.

District employee during that drill. The Custodian noted that, to this end, on October 12, 2017 the District provided to the Complainant copies of redacted stills taken from the video.

The Custodian asserted that the Complainant did not identify whether he sought a copy of the footage; thus, she preemptively denied a copy and offered inspection. The Custodian noted that her response was similar to defendants' response in D.D.K., Docket No. L-343-14, where the trial court held that they properly denied access to a copy of a video recording involving multiple students. The Custodian further asserted that the Complainant appeared to only suggest he wanted to inspect the record (per his April 7, 2017 e-mail); however, she nonetheless denied access to a copy of the footage.

Supplemental Response (Continued):

On October 24, 2017, the Custodian provided a supplemental response to the Complainant's April 13, 2017 OPRA request. Therein, the Custodian described the original search undertaken to see access to records responsive to his April 13, 2017 OPRA request. The Custodian stated that following receipt of GRC 2017-104, the District determined that it had too narrowly construed the request to seek e-mails "between" the individuals identified. The Custodian stated that as it is now clear that the request sought communications to or from the identified individuals and "any individual," Mr. Asmus conducted a new search. The Custodian certified that copies of the records located were being provided to the Complainant, with certain exceptions for e-mails exempt under the attorney-client privilege.

Statement of Information (Continued):

On October 30, 2017, the Custodian filed a Statement of Information ("SOI") in GRC 2017-104 attaching a legal certification from Mr. Asmus. The Custodian certified that she received the Complainant's OPRA request on April 13, 2017. The Custodian certified that she sent the request to Mr. Asmus for review and a search. The Custodian affirmed that Mr. Asmus interpreted the request to seek e-mails only including the individuals identified and no other parties. See Asmus Cert. at ¶ 4. The Custodian certified that she subsequently responded in writing on April 25, 2017 disclosing those records Mr. Asmus located. The Custodian affirmed that on April 26, 2017, Dr. Yurchak rediscovered one record with less redactions.

The Custodian certified that following receipt of the Denial of Access Complaint, the District realized it may have construed the Complainant's OPRA request too narrowly. The Custodian affirmed that in September 2017, Dr. Yurchak asked Mr. Asmus to perform a new search with broader parameters. Asmus Cert. at ¶ 6. The Custodian certified that she provided the resulting records from that search to the Complainant on October 24, 2017. The Custodian also affirmed that no additional records exist. See also Asmus Cert. at ¶ 8.

The Custodian asserted that this request derived from an incident involving the Complainant's daughter during a security lockdown drill. The Custodian noted that the Complainant has "vocally and strenuously objected" to the District's handling of the situation, so far as to participate in a Board hearing. The Custodian also noted that the Complainant sent his request via e-mail, which included a statement that he was seeking e-mails "to and from" the

individuals. The Custodian noted that the e-mail message was different from the “partially legible” attached OPRA request, which contained the verbiage “[f]rom or to.” The Custodian thus argued that it was reasonable for the District initially misinterpret the request to seek e-mails only between the three (3) identified individuals.⁸

Analysis

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. N.J. 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. 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. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (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.

Here, the Custodian initially responded to the Complainant’s April 13, 2017 OPRA request providing access to multiple e-mails. Thereafter, the Complainant submitted GRC 2017-104 arguing that the Custodian failed to provide all records that existed. The Complainant argued that the Custodian appeared to only disclose e-mails relating to a single incident.

In the SOI, the Custodian argued that the District appeared to construe the Complainant’s OPRA request too narrowly. The Custodian alleged that the Complainant sent a “partially legible” OPRA request via e-mail with varying verbiage. Specifically, the Custodian argued that the e-mail sought all e-mails “to and from” the identified individuals, whereas the attached OPRA request contained the verbiage “[f]rom or to.” The Custodian argued that it was reasonable to interpret the Complainant’s request as seeking e-mails between the three (3) identified individuals, as opposed to e-mails to and from them. Notwithstanding, the Custodian certified that upon realizing the

⁸ Following submission of the SOI, the Complainant e-mailed both the GRC and Mediator alleging that the Custodian disclosed mediation communications in violation of the Uniform Mediation Act. N.J.S.A. 2A:23C-1 et seq. This allegation was predicated on the District’s October 12, and 24, 2017 supplemental responses sent to the Complainant after both complaints were referred from mediation to the GRC for adjudication. On October 16, 2017, the Mediator advised the Complainant that no violations occurred, noting that communications submitted to the GRC were after the complaints had been referred from mediation. Upon review, the GRC agrees that the Custodian and District collectively did not violate the Uniform Mediation Act’s confidentiality provision.

District's mistake, Mr. Asmus conducted a second search based on the "from or to" term and she disclosed the resulting records to the Complainant on October 24, 2017.

Having reviewed the copy of the OPRA request submitted as part of the Denial of Access Complaint and SOI, the GRC does not agree that it was reasonable for the Custodian to cause a search based solely on the e-mail verbiage of "to and from." The GRC does not characterize the OPRA request as partially legible; it was able to read the terms "[f]rom or to" easily in the Denial of Access Complaint copy. Contrary to the Custodian's assertion, it was even easier to see the inclusion of "[f]rom or to" in the SOI copy of the OPRA request. That the verbiage may have differed from the Complainant's e-mail is of no moment; the Complainant's OPRA request was clear enough and should have been followed accordingly. Thus, the evidence of record supports that the Custodian's initial search was insufficient and resulted in an unlawful denial of access. Such a finding is consistent with the Council's decision in Weiner, GRC 2013-52 and its progeny.

Accordingly, the Custodian's failure to locate responsive records until after she conducted a more reasonable search, following receipt of the Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional e-mails responsive to Complainant's OPRA request located in connection with the second search. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220; Weiner, GRC 2013-52. However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on October 24, 2017.

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 exempts disclosure of records that contain "*emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein.*" N.J.S.A. 47:1A-1.1 (emphasis added). OPRA further exempts access to "*security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property.*" Id. (emphasis added).

In Gilleran, 227 N.J. 159, the Supreme Court held that security footage within a government building is exempt from disclosure under OPRA's security and surveillance exemption at N.J.S.A. 47:1A-1.1. In reaching this conclusion, the Court set forth a detail explanation of how security footage met the exemption:

Current events since the new millennium make evident the present[-]day difficulties of maintaining daily security for public buildings and people using them. The security exceptions prevent OPRA requests from interfering with such security efforts. Even if the Legislature could not have predicted precisely all the many types of criminal, terroristic events that have happened since OPRA was

enacted, the Legislature created flexible exceptions to preserve public safety and security. Now, we know that knowledge of the vulnerabilities of a security system could allow an ill-motivated person to know when and where to plant an explosive device, mount an attack, or learn the movements of persons, placing a public building or persons at risk. Information that reveals the capabilities and vulnerabilities of surveillance cameras that are part of a public facility's security system is precisely the type of information that the exceptions meant to keep confidential in furtherance of public safety.

...

A sensible application of the security exceptions supports denying release of information that undermines the operation of a government facility's security system. Compelling the wholesale release to the public of videotape product of any security camera, or combination of cameras, from a government facility's security system would reveal information about a system's operation and also its vulnerabilities. Once OPRA is interpreted to require unfettered access to the work product of any camera that is part of a governmental facility's security system, then footage from security cameras in all governmental facilities—police stations, court houses, correctional institutions—would be subject to release on demand. It takes no stretch of the imagination to realize that that would make it possible for any person to gather the information necessary to dismantle the protection provided by such security systems.

Requests for videotape product from surveillance cameras protecting public facilities are better analyzed under the common law right of access where the asserted need for access can be weighed against the needs of governmental confidentiality. (Citations omitted).

[Id. at 174-177.]

In WNBC-TV, 2015 N.J. Super. Unpub LEXIS 1330, the New Jersey Superior Court Law Division reviewed how this exemption applied to school security drill records. There, plaintiff filed a cause of action after several school districts provided access to Forms with redactions for the exact dates, times, and drill durations. Defendants collectively argued that the information was exempt under N.J.S.A. 47:1A-1.1 as “emergency and security information.” Defendants also provided the court with a detailed description applying the exemption to the redacted information. The Court agreed, holding that defendants lawfully redacted the responsive Forms. The court reasoned that disclosure of the information would necessarily pose a threat to the students and faculty, as well as the applicable buildings. The Court further noted that an individual’s ability to discern patterns useful for causing harm warranted redaction of the dates, times, and durations as “emergency and security information.”

Here, the record at issue is video surveillance footage taken from a camera in a school gym during a lockdown drill. The Custodian initially denied access to all footage taken during the drill under N.J.S.A. 47:1A-1.1, citing Gilleran and WNBC-TV. In his Denial of Access Complaint, the

Complainant argued that WNBC-TV did not apply because the footage only showed time. Further, the Complainant noted that he had knowledge of the students' actions during the drill because "[they] speak about it often."

In the SOI, the Custodian maintained that the responsive lockdown footage was exempt from disclosure. The Custodian added that disclosure would reveal security protocols and lockdown procedures, including student movement and location, drill durations, and specific drill procedures. The Custodian also noted that she was not alleging that the Complainant would use the video for nefarious purposes; however, disclosure here would set a dangerous precedent. The Custodian also noted that she ultimately provided redacted stills to the Complainant on October 12, 2017.

A practical application of Gilleran supports that the Custodian lawfully denied access to the requested camera footage in its totality under OPRA. In reaching this conclusion, the GRC agrees with the Supreme Court in its concerns for disclosure of security camera footage. Safety in New Jersey's schools is paramount – the recent escalation in school shootings drives the need for school districts statewide to take measures protecting the security of its buildings and occupants. Those measures necessarily include safeguarding security camera footage from disclosure to anyone under OPRA. Further, and as noted by the Gilleran Court, "[c]ompelling the wholesale release . . . of videotape product of any security camera . . . would reveal information about a system's operation and also its vulnerabilities." Id. at 176.

The trial court's decision in WNBC-TV, 2015 N.J. Super. Unpub LEXIS 1330 adds additional credence to the GRC's conclusion above. Although an unpublished decision, the court's well-reasoned analysis on the disclosure of information from "Security Drill Record Forms" is instructive here. The WNBC-TV court surmised that nondisclosure of basic drill information would "prevent a diseased and malignant mind" from obtaining "useful information" he/she could use to harm the students or the building. Id. at 38. The court held that "[a]rmed with the day/time/duration data, a potential assailant could pinpoint when the drills . . . occur . . . creating a 'window of opportunity' in which to . . . inflict maximum damage." Id. at 36-37.

The Complainant asserted that WNBC-TV did not apply here because the footage only contained the "time" of the drill. To the contrary, "time" was one of the pieces of information from the drill forms that the court allowed to be redacted. Further, the GRC finds that the footage requires a higher level of scrutiny than the drill forms. Unlike the forms, the footage provides a visual representation of the faculty/student procedures in a lockdown drill. Thus, allowing disclosure under OPRA would not only give a person basic drill form information, but it would increase their knowledge of movement within the school. Thus, the disclosure of this critical "emergency or security information" would severely jeopardize the safety and security of persons during similar drills.

Also, whether the Complainant has knowledge of the District's drill procedures is of no moment. Additionally, the Complainant being the parent of a child shown in the video does not overcome the security exemption in this instance. The GRC echoes the Custodian's SOI statement that the Complainant has no intent on using the footage for nefarious purposes. Notwithstanding, there are no "need based exceptions" to OPRA's security exemption. N.J.S.A. 47:1A-1.1. Any

attempt to nuance disclosure of security camera footage under OPRA, especially one containing a lockdown drill, is against a plain reading of Gilleran. Also, nuanced disclosure would provide for a dangerous precedent opening the door to future disclosure in direct contradiction to OPRA's security exemptions. As noted by the Court in Gilleran, the Complainant's access to the footage in question is better addressed "under the common law right of access." Id. at 177.⁹

Accordingly, the requested lockdown camera footage is exempt from disclosure under OPRA's emergency and security exemptions. N.J.S.A. 47:1A-1.1; Gilleran. Specifically, disclosure of the footage under OPRA would jeopardize procedures in place for a lockdown drill and would create a risk to the safety of the persons within the District's schools. See also WNBC-TV, 2015 N.J. Super. Unpub. LEXIS 1330. Thus, the Custodian lawfully denied access to the requested footage. N.J.S.A. 47:1A-6.

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, in relation to the April 13, 2017 OPRA request, the Custodian unlawfully denied access to several e-mails because she failed to perform a sufficient search. Wiener, GRC 2013-52. However, the Custodian lawfully denied access to the video footage responsive to the Complainant's March 2, 2017 OPRA request. N.J.S.A. 47:1A-6; Gilleran, 227 N.J. at 174-177. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had

⁹ The GRC does not have the authority to address a requestor's common law right to access records. N.J.S.A. 47:1A-7(b); Rowan, Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013); Kelly v. N.J. Dep't of Transp., GRC Complaint No. 2010-215 (November 2011) at 2. Thus, the GRC does not address the common law right of access to the responsive footage.

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 Council Staff respectfully recommends the Council find that:

1. The Custodian's failure to locate responsive records until after she conducted a more reasonable search, following receipt of the Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional e-mails responsive to Complainant's OPRA request located in connection with the second search. N.J.S.A. 47:1A-6; Schneble v. N.J. 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 declines to order disclosure of those records because the Custodian disclosed same to the Complainant on October 24, 2017.
2. The requested lockdown camera footage is exempt from disclosure under OPRA's emergency and security exemptions. N.J.S.A. 47:1A-1.1; Gilleran v. Bloomfield, 227 N.J. 159 (2016). Specifically, disclosure of the footage under OPRA would jeopardize procedures in place for a lockdown drill and would create a risk to the safety of the persons within the District's schools. See also WNBC-TV v. Allendale Bd. of Educ., 2015 N.J. Super. Unpub. LEXIS 1330 (June 4, 2015). Thus, the Custodian lawfully denied access to the requested footage. N.J.S.A. 47:1A-6.
3. In relation to the April 13, 2017 OPRA request, the Custodian unlawfully denied access to several e-mails because she failed to perform a sufficient search. Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013). However, the Custodian lawfully denied access to the video footage responsive to the Complainant's March 2, 2017 OPRA request. N.J.S.A. 47:1A-6; Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 174-177 (2016). 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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Acting Executive Director

June 18, 2019