



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**January 28, 2014 Government Records Council Meeting**

Jason Todd Alt  
(On behalf of the Daily Journal)  
Complainant

Complaint No. 2013-126

v.

Vineland Board of Education  
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 Supplemental 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 complied with the Council’s December 20, 2013 Interim Order because he responded in the prescribed time frame providing the record and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian initially violated N.J.S.A. 47:1A-5(g), the Custodian has provided the Complainant with all records responsive to the request. 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 28<sup>th</sup> Day of January, 2014

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: January 30, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 28, 2014 Council Meeting**

**Jason Todd Alt (On behalf of the Daily Journal)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-126**

v.

**Vineland Board of Education<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Unredacted footage of camera on bus driven by William L. Bartley on the morning of January 15, 2013.

**Custodian of Record:** Cherie Ludy<sup>3</sup>  
**Request Received by Custodian:** April 26, 2013  
**Response Made by Custodian:** April 26, 2013  
**GRC Complaint Received:** May 3, 2013

**Background**

**December 20, 2013 Council Meeting:**

At its December 20, 2013 public meeting, the Council considered the December 10, 2013 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, found that:

1. The Custodian has not borne his burden of showing that he lawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian shall disclose to the Complainant an unredacted copy of the requested video or, in the alternative, provide to the GRC and Complainant a certified Statement of Information, with appropriate legal citations, detailing why the redacted portion of the requested video is not subject to disclosure.
2. **The Custodian shall comply with item Number One (#1) above within five (5) business days from receipt of the Council's Interim Order and, if disclosing a copy of the requested record, simultaneously provide certified confirmation of**

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> The Custodian is represented by Robert DeSanto, Esq. (Vineland, NJ).

<sup>3</sup> In an email to the GRC dated October 17, 2013, Counsel for the Custodian states that Herbert Schectman is the current Custodian of Record.

**compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On December 23, 2013, the Council distributed its Interim Order to all parties.

On January 8, 2014, the Custodian responded to the Council's Interim Order. The Custodian provided a certification stating, in relevant part, that:

4. Due to the closure of school for the holidays, I did not receive a copy of the December 20, 2013 Interim Order and the December 23, 2013 correspondence from Executive Director Minde until January 2, 2014. Consequently, this response is submitted within five days of January 2, 2014 as required by the Interim Order.
5. I have forwarded an unredacted reproduction of the video tape requested by Complainant on January 6, 2014 by certified mail, return receipt requested.

Certification of Herbeck Schectman (January 6, 2014).

#### Analysis

#### Compliance

At its December 20, 2013 meeting, the Council ordered the Custodian to disclose to the Complainant an unredacted copy of the requested video or, in the alternative, provide to the GRC and Complainant a certified Statement of Information, with appropriate legal citations, detailing why the redacted portion of the requested video is not subject to disclosure within five (5) business days from receipt of same and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On December 23, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian certified that he received the Council's Order on January 2, 2014; thus, compliance was due by January 9, 2014.

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<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>5</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On January 8, 2014, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian complied with the Council's Order by providing certified confirmation that he had disclosed an unredacted copy of the requested video to the Complainant.

Therefore, the Custodian complied with the Council's December 20, 2013 Interim Order because he responded in the prescribed time frame providing the record and simultaneously provided certified confirmation of compliance to the Executive Director.

### **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)).

Although the Custodian initially violated N.J.S.A. 47:1A-5(g), the Custodian has provided the Complainant with all records responsive to the request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's December 20, 2013 Interim Order because he responded in the prescribed time frame providing the record and simultaneously provided certified confirmation of compliance to the Executive Director.
  
2. Although the Custodian initially violated N.J.S.A. 47:1A-5(g), the Custodian has provided the Complainant with all records responsive to the request. 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.

Prepared By: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

January 21, 2014



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

December 20, 2013 Government Records Council Meeting

Jason Todd Alt  
Complainant

Complaint No. 2013-126

v.

Vineland Board of Education  
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 2013 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 has not borne his burden of showing that he lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian shall disclose to the Complainant an unredacted copy of the requested video or, in the alternative, provide to the GRC and Complainant a certified Statement of Information, with appropriate legal citations, detailing why the redacted portion of the requested video is not subject to disclosure.
2. **The Custodian shall comply with item Number One (#1) above within five (5) business days from receipt of the Council’s Interim Order and, if disclosing a copy of the requested record, simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

<sup>1</sup> “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the  
Government Records Council  
On The 20th Day of December, 2013

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: December 23, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 20, 2013 Council Meeting**

**Jason Todd Alt<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-126**

v.

**Vineland Board of Education<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Unredacted footage of camera on bus driven by William L. Bartley on the morning of January 15, 2013.

**Custodian of Record:** Cherie Ludy<sup>3</sup>  
**Request Received by Custodian:** April 26, 2013  
**Response Made by Custodian:** April 26, 2013  
**GRC Complaint Received:** May 3, 2013

**Background<sup>4</sup>**

**Request and Response:**

On April 26, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned video footage. There is no evidence in the record showing when the Custodian responded to the Complainant; however, the Complainant states that his request was denied “immediately.”

**Denial of Access Complaint:**

On May 3, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant, a newspaper editor, states that one of his reporters filed an OPRA request with the Vineland Board of Education (“Board”) on January 16, 2013 for a copy of the video footage referenced above. The Complainant further states that he took over all communications regarding the OPRA request in March 2013, upon learning that the video had not been provided and was in the custody of the Vineland Police Department.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> The Custodian is represented by Robert DeSanto, Esq. (Vineland, NJ).

<sup>3</sup> In an email to the GRC dated October 17, 2013, the Counsel for the Custodian states that Herbert Schectman is the current Custodian of Record.

<sup>4</sup> 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.

The Complainant also states that on March 28, 2013, the Board informed him that a copy of the video was available to pick-up, and that when he retrieved the video approximately 20 minutes had been redacted “due to students being on the bus during that time.” The Complainant further states that Counsel for the Custodian (“Counsel”) told him in an email that under the Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 USCS 1232(g), “student ‘personally identifiable’ information should not be disclosed . . . we believe that photographs or video of students would be considered information that identifies students.”

The Complainant asserts that the federal government has not explicitly said whether or not a surveillance video is a student record under FERPA. The Complainant also contends that New Jersey school districts have only asserted that a surveillance video is subject to FERPA when it has become part of a student’s record “due to [a] disciplinary incident.”

#### Statement of Information:

On July 19, 2013, the GRC sent the Custodian a Statement of Information (“SOI”) request form. On August 21, 2013, having not yet received an SOI from the Custodian, the GRC contacted the Custodian to inquire as to the SOI. The GRC has not received the SOI in response to either communication.

#### Additional Submissions:

On October 17, 2013, the GRC received an unsolicited email from Counsel suggesting that the GRC “order the tape to be produced under a protective order that requires [the Complainant] to confer with [Counsel] if [Complainant] intends to disclose . . . information regarding the identity of students . . . .” Despite this email, the Custodian still has not completed the SOI.

### Analysis<sup>5</sup>

#### 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. Further, under the GRC’s promulgated regulations:

Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council in all instances for which mediation is declined, mediation is not accepted by either party, or in

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<sup>5</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

which mediation is accepted but through which the parties do not fully resolve the issues presented. . . .

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff. . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

A custodian's failure to submit a completed and signed SOI, and to serve the complainant with the SOI, may result in the Council's issuing a decision in favor of the complainant.

N.J.A.C. 5:105-2.4(a), (f), (g) (citations omitted).

Here, the Custodian and Counsel did not respond to the GRC's two (2) separate requests for the SOI. *See* N.J.A.C. 5:105-2.4(a). Counsel's October 17, 2013 email, arriving approximately three (3) months after the GRC first contacted the Custodian regarding the need to submit an SOI, is insufficient. *Id.* The Custodian has offered no support, based in case law, OPRA, or any other statute, as to why the redacted video segment requested by the Complainant is exempt from public access. Thus, the Custodian's failure to comply with GRC regulations may result in the complaint being adjudicated in the Complainant's favor based on his submissions. N.J.A.C. 5:105-2.4(f), (g).

Therefore, the Custodian has not borne his burden of showing that he lawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian shall disclose to the Complainant an unredacted copy of the requested video or, in the alternative, provide to the GRC and Complainant a certified Statement of Information, with appropriate legal citations, detailing why the redacted portion of the requested video is not subject to disclosure.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not borne his burden of showing that he lawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian shall disclose to the Complainant an unredacted copy of the requested video or, in the alternative, provide to the GRC and Complainant a certified Statement of Information, with appropriate legal citations, detailing why the redacted portion of the requested video is not subject to disclosure.

2. **The Custodian shall comply with item Number One (#1) above within five (5) business days from receipt of the Council's Interim Order and, if disclosing a copy of the requested record, simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Brandon D. Minde, Esq.  
Executive Director

December 10, 2013

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<sup>6</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>7</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.