



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 15, 2016 Government Records Council Meeting

Jody Street
Complainant

Complaint No. 2015-137

v.

North Arlington Board of Education (Bergen)
Custodian of Record

At the November 15, 2016 public meeting, the Government Records Council ("Council") considered the November 9, 2016 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 the Council dismisses the complaint because the Complainant withdrew it in writing via e-mail to the GRC on October 26, 2016. Therefore, no further adjudication is required.

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 15th Day of November, 2016

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: November 17, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 15, 2016 Council Meeting**

**Jody Street¹
Complainant**

GRC Complaint No. 2015-137

v.

**North Arlington Board of Education (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via pick-up of:

1. All e-mails, archived on the North Arlington Board of Education's ("BOE") systems, that pertain to A.S. (a minor) and the Complainant's husband; "admin [and] teachers."
2. Video of A.S. being sent from Spanish Class to the Office on March 2, 2015, as referenced in incident number PD 15-001710 by Mrs. Russo.
3. Video from the front door in the NAMS office and inside the office on April 15, 2015, from 1:45 p.m. to 2:30 p.m.

Custodian of Record: Kathleen Marano³
Request Received by Custodian: April 22, 2015
Response Made by Custodian: None
GRC Complaint Received: May 18, 2015

Background

October 25, 2016 Council Meeting:

At its October 25, 2016 public meeting, the Council considered the October 18, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the edited findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's three (3) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests, 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

¹ Represented by Julie M.W. Warshaw, Esq., of Warshaw Law Firm, LLC (Warren, NJ).

² Represented by Stephen R. Fogarty, Esq., of Fogarty & Hara, Esqs. (Fair Lawn, NJ).

³ Peggy Zukatus was named as the Custodian of Record in the Denial of Access Complaint.

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).

2. The Complainant's request No. 1 is invalid because it failed to provide ample identifiers necessary (date or range of dates) for the Custodian to locate responsive records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Ciszewski v. Newton Police Dep't (Sussex), GRC Complaint No. 2013-90 (October 2013); Gartner v. Borough of Middlesex (Middlesex), GRC Complaint No. 2014-203 (Interim Order dated February 24, 2015). The Custodian has therefore lawfully denied access. N.J.S.A. 47:1A-6.
3. The Custodian has unlawfully denied access to the videos responsive to the Complainant's OPRA request Nos. 2 and 3. N.J.S.A. 47:1A-6; Gilleran v. Twp. of Bloomfield, 440 N.J. Super. 490 (App. Div. 2015)(*cert. granted* November 6, 2015). The Custodian shall disclose the responsive videos to the Complainant.
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On October 26, 2016, the Council distributed its Interim Order to all parties. On the same day, the Complainant withdrew this complaint in writing via e-mail to the GRC.

⁴ "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."

⁵ 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.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss the complaint because the Complainant withdrew it in writing via e-mail to the GRC on October 26, 2016. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

November 9, 2016



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

October 25, 2016 Government Records Council Meeting

Jody Street
Complainant

Complaint No. 2015-137

v.

North Arlington Board of Education (Bergen)
Custodian of Record

At the October 25, 2016 public meeting, the Government Records Council (“Council”) considered the October 18, 2016 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. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s three (3) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests, 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 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).
2. The Complainant’s request No. 1 is invalid because it failed to provide ample identifiers necessary (date or range of dates) for the Custodian to locate responsive records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Ciszewski v. Newton Police Dep’t (Sussex), GRC Complaint No. 2013-90 (October 2013); Gartner v. Borough of Middlesex (Middlesex), GRC Complaint No. 2014-203 (Interim Order dated February 24, 2015). The Custodian has therefore lawfully denied access. N.J.S.A. 47:1A-6.
3. The Custodian has unlawfully denied access to the videos responsive to the Complainant’s OPRA request Nos. 2 and 3. N.J.S.A. 47:1A-6; Gilleran v. Twp. of Bloomfield, 440 N.J. Super. 490 (App. Div. 2015)(*cert. granted* November 6, 2015). The Custodian shall disclose the responsive videos to the Complainant.



4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of October, 2016

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: October 26, 2016

¹ "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."

² 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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 25, 2016 Council Meeting**

**Jody Street¹
Complainant**

GRC Complaint No. 2015-137

v.

**North Arlington Board of Education (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via pick-up of:

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2. Video of A.S. being sent from Spanish Class to the Office on March 2, 2015, as referenced in incident number PD 15-001710 by Mrs. Russo.
3. Video from the front door in the NAMS office and inside the office on April 15, 2015, from 1:45 p.m. to 2:30 p.m.

Custodian of Record: Kathleen Marano³
Request Received by Custodian: April 22, 2015
Response Made by Custodian: None
GRC Complaint Received: May 18, 2015

Background⁴

Request and Response:

On April 22, 2015, the Complainant submitted three (3) Open Public Records Act ("OPRA") requests to the Custodian seeking the above-mentioned records. The Custodian did not respond to the subject OPRA request.

Denial of Access Complaint:

On May 18, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that on April 22, 2015, she

¹ Represented by Julie M.W. Warshaw, Esq., of Warshaw Law Firm, LLC (Warren, NJ).

² Represented by Stephen R. Fogarty, Esq., of Fogarty & Hara, Esqs. (Fair Lawn, NJ).

³ Peggy Zukatus was named as the Custodian of Record in the Denial of Access Complaint.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

hand-delivered three (3) OPRA requests to the BOE and requested that they date-stamp copies for her records. The Complainant argued that she had not received a response to date.

Statement of Information:⁵

On November 25, 2015, the Custodian filed a Statement of Information (“SOI”). On February 3, 2016, the GRC requested that the Custodian submit a revised SOI because of the overwhelming presence of mediation communications.⁶

On February 10, 2016, the Custodian submitted a revised SOI.⁷ The Custodian certified that the BOE received the Complainant’s OPRA request No. 1 on April 22, 2015. The Custodian certified that she believed the OPRA request seeking e-mails to be invalid. MAG Entm’t LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Elcavage v. W. Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Custodian certified that, notwithstanding the forgoing, Dr. Oliver Stringham, Superintendent, directed Michael Asmus, Director of Information Technology, to perform a search of the BOE’s server for potentially responsive records. The Custodian certified that Mr. Asmus located responsive e-mails for the time period from September 1, 2013, to April 24, 2015, and saved all e-mails on a disc. *See* Certification of Michael Asmus at ¶ 2-3.

However, the Custodian also certified that she inadvertently neglected to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business day time frame. The Custodian certified that the BOE received the instant complaint on May 26, 2015.

Analysis

Preface

The GRC first addresses the fact that both parties improperly divulged mediation communications in a number of their submissions. According to the Uniform Mediation Act, those communications are not dispositive in the GRC’s adjudicatory process. N.J.S.A. 2A:23C-4. The GRC notes that it initially returned the SOI to the Custodian, requesting that she revise same to omit any references to mediation. Unfortunately, beyond the basic facts leading up to the filing of the instant complaint, the Custodian again linked certain actions to mediation. *See* Letter from the Custodian’s Counsel to the Complainant’s Counsel, dated August 18, 2015 (copying the mediator); Item No. 9 of the SOI at 17; Item No. 12 (linking apparent disclosures to mediation through date recognition). Despite admonitions by the GRC, the parties continued to submit correspondence alluding to mediation.

⁵ On June 2, 2015, the complaint was referred to mediation. Following unsuccessful efforts to mediate, the complaint was referred back to the GRC for adjudication on November 9, 2015.

⁶ Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

⁷ The Custodian only presented arguments regarding OPRA request No. 1.

Based on the foregoing, the only way that the GRC can properly adjudicate the complaint and still be consistent with the requirements of the Uniform Mediation Act is to consider only the basic facts that lead up to the SOI and disregard any subsequent interactions between the parties. Therefore, the GRC will determine the following issues on the record properly before it: 1) whether the Custodian timely responded to the Complainant's three OPRA requests; 2) whether the Complainant's OPRA request No. 1 was invalid; and 3) whether the Custodian unlawfully denied access to any responsive records, where applicable.

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).⁸ 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).

In the instant matter, the Complainant argued that the Custodian failed to respond to her three (3) OPRA requests within the statutorily mandated time frame. In the SOI, the Custodian admitted that she did not respond timely to OPRA request No. 1. Further, the Custodian also submitted no proof that she timely responded to OPRA request Nos. 2 and 3. Thus, the facts support that the Custodian's failure to respond to all three (3) OPRA requests resulted in a "deemed" denial of access.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's three (3) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests, 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 pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

⁸ 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.

OPRA Request No. 1

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

MAG, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁹ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The GRC has a long-standing precedent on the acceptable criteria that a requestor must include when seeking access to e-mails. In Elcavage, GRC 2009-07, the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that an OPRA request for e-mails must: “(1) [contain] the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) . . . identify the sender and/or the recipient thereof.” Id. at 5 (emphasis omitted). *See also* Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The GRC notes that the Council has routinely determined that requests omitting the specific date or range of dates are invalid. *See* Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC

⁹ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014).

Additionally, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the Court held that the defendant “performed a search and was able to locate records responsive . . .” which “. . . belied any assertion that the request was lacking in specificity or was overbroad.” Id. at 177. *See also Gannett v. Cnty. of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005)(holding that “[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right the County may have had to deny Gannett’s entire OPRA request on the ground that it was improper.” Id. at 213).

Generally, in situations where a request was overly broad on its face but the custodian nonetheless was able to locate records, the Council has followed Burke in determining that the request contained sufficient information for record identification. *See Bond v. Borough of Washington (Warren)*, GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); *Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). However, there have been instances where, notwithstanding the custodian’s ability to locate certain records, the Council has determined that the request was nevertheless invalid. *See Ciszewski v. Newton Police Dep’t (Sussex)*, GRC Complaint No. 2013-90 (October 2013) at 4-5; *Gartner v. Borough of Middlesex (Middlesex)*, GRC Complaint No. 2014-203 (Interim Order dated February 24, 2015).

In Ciszewski, GRC 2013-90, the complainant sought, among other things, correspondence between himself and the Newtown police Department (“NPD”). Notwithstanding the lack of a time frame (and subject), the original custodian in that matter searched for, located, and disclosed responsive records. In the Denial of Access Complaint, the complainant argued that the custodian failed to provide a number of responsive records. In the SOI, the custodian argued that the request was invalid; however, the original custodian went beyond her legal obligation in locating and disclosing records. The Council determined that the request was invalid, reasoning that the request lacked all required Elcavage criteria and that the original custodian’s “failure to provide the responsive records sought reinforces that the request did not reasonably identify the records sought.” Id. at 5.

Further, in Gartner, 2014-203, the complainant sought “communications” between certain parties regarding a specific subject. Again, notwithstanding the lack of a time frame, the custodian searched for, located, and disclosed responsive records. In the Denial of Access Complaint, the complainant argued that the custodian failed to disclose records from as far back as 2011. The Council, looking to Ciszewski, GRC 2013-90, determined that the request was invalid because of a lack of time frame. The Council noted that “the [c]ustodian could not have reasonably assumed that the [c]omplainant’s request sought correspondence as far back as 2011 because the [c]omplainant did not indicate this in his initial OPRA request.” Id. at 7.

Here, the Complainant’s OPRA request No. 1 is similar to those contemplated in Gartner, 2014-203. Specifically, the request contained the subject and/or content of e-mails sought as well as generally identifiable “senders” and “recipients” (“admin [and] teachers”). However, contrary to the Council’s holding in Elcavage, GRC 2009-07, the Complainant neglected to include a date

or range of dates within which the Custodian could focus a search. Notwithstanding this deficiency, the Custodian certified in the SOI that, at the direction of Dr. Stringham, Mr. Asmus was able to locate multiple e-mails, utilizing a manufactured time frame, and save same to a compact disc ("CD"). Further, the Custodian argued in the SOI that the request was invalid.

The GRC is satisfied that the facts here align with in both Ciszewski, GRC 2013-90, and Gartner, GRC 2014-203, and that the Council should hold accordingly. Specifically, the request did not contain all required criteria necessary to constitute a valid OPRA request in accordance with Elcavage, GRC 2009-07. Moreover, Mr. Asmus' ability to locate records initially, despite the absence of a time frame, does not outweigh the invalidity of the request.

Therefore, the Complainant's request No. 1 is invalid because it failed to provide ample identifiers necessary (date or range of dates) for the Custodian to locate responsive records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Elcavage, GRC 2009-07; Ciszewski, GRC 2013-90; Gartner, GRC 2014-203. The Custodian has therefore lawfully denied access. N.J.S.A. 47:1A-6.

OPRA Request Nos. 2 and 3

Here, the Complainant's OPRA request Nos. 2 and 3 sought video of two areas of a school. The first OPRA request included a date and incident number. The second OPRA request included a date, a narrow time frame, and a definitive location within the school. In the SOI, the Custodian provided no arguments as to whether she responded to these two (2) requests. Further, the Custodian did not indicate whether she disclosed the videos, nor did she provide any arguments indicating that the videos were exempt from disclosure.

In the absence of any arguments against disclosure, the Council must determine that the Custodian unlawfully denied access to these records. Specifically, the Custodian has not argued that the records are exempt, and there is no evidence in the record to suggest otherwise. *See Gilleran v. Twp. of Bloomfield*, 440 N.J. Super. 490 (App. Div. 2015)(*cert.* granted November 6, 2015)(holding that the custodian's denial of access "not sufficiently specific to establish a risk to the safety of any person or property or jeopardy to the security measures taken for the building." Id. at 498).

Accordingly, the Custodian has unlawfully denied access to the videos responsive to the Complainant's OPRA request Nos. 2 and 3. N.J.S.A. 47:1A-6; Gilleran, 440 N.J. Super. 490. The Custodian shall disclose the responsive videos to the Complainant.

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party 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 did not bear her burden of proof that she timely responded to the Complainant's three (3) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests, 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 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).
2. The Complainant's request No. 1 is invalid because it failed to provide ample identifiers necessary (date or range of dates) for the Custodian to locate responsive records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Ciszewski v. Newton Police Dep't (Sussex), GRC Complaint No. 2013-90 (October 2013); Gartner v. Borough of Middlesex (Middlesex), GRC Complaint No. 2014-203 (Interim Order dated February 24, 2015). The Custodian has therefore lawfully denied access. N.J.S.A. 47:1A-6.
3. The Custodian has unlawfully denied access to the videos responsive to the Complainant's OPRA request Nos. 2 and 3. N.J.S.A. 47:1A-6; Gilleran v. Twp. of Bloomfield, 440 N.J. Super. 490 (App. Div. 2015)(*cert. granted* November 6, 2015). The Custodian shall disclose the responsive videos to the Complainant.
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁰ to the Executive Director.¹¹**

¹⁰ "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."

¹¹ 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.

5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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