



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 19, 2020 Government Records Council Meeting

Thomas Volscho
Complainant

Complaint No. 2018-205

v.

West Orange Board of Education (Essex)
Custodian of Record

At the May 19, 2020 public meeting, the Government Records Council (“Council”) considered the May 12, 2020 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 April 28, 2020 Interim Order because he responded in the prescribed time frame disclosing the responsive cell phone bills with redactions and a reasonable document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to Superintendent Rutzky’s BOE-issued cell phone bills. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the redacted telephone numbers in the previously disclosed incoming and outgoing call logs. Further, the Custodian timely complied with the Council’s April 28, 2020 Interim Order. 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 19th Day of May 2020

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: May 20, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 19, 2020 Council Meeting**

**Thomas Volscho¹
Complainant**

GRC Complaint No. 2018-205

v.

**West Orange Board of Education (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all phone logs from Superintendent Jeffrey Rutzky’s landline and West Orange Board of Education (“BOE”) issued cell phone from February 1 through August 5, 2018.

Custodian of Record: John Calavano
Request Received by Custodian: August 6, 2018
Response Made by Custodian: August 15, 2018
GRC Complaint Received: September 14, 2018

Background

April 28, 2020 Council Meeting:

At its April 28, 2020 public meeting, the Council considered the April 21, 2020 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 lawfully denied access to the telephone numbers included in Superintendent Rutzky’s incoming and outgoing logs. N.J.S.A. 47:1A-6. Specifically, the Council and courts have routinely supported the nondisclosure of telephone numbers in government records consistent with N.J.S.A. 47:1A-1.1. See Livecchia v. Borough of Mt. Arlington, 421 N.J. Super. 24 (App. Div. 2011); Papiez v. Cnty. of Mercer, GRC Complaint No. 2012-52 (April 2013).
2. The requested detailed cell phone bills, if in existence, fall within the definition of a “government record” under OPRA. N.J.S.A. 47:1A-1.1; Burnett v. Cnty. of Gloucester 415 N.J. Super. 506 (App. Div. 2010). However, the Custodian’s failure to either obtain and disclose them or certify that no such records existed resulted in an unlawful denial

¹ No legal representation listed on record.

² Represented by Bradley D. Tishman, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, NJ).

of access under OPRA. N.J.S.A. 47:1A-6. Thus, the Custodian shall obtain and disclose to the Complainant the responsive bills, with redactions where appropriate. See Papiez v. Cnty. of Mercer, GRC Complaint No. 2012-52 (April 2013). Should the Custodian determine that he is unable to obtain and provide the responsive detailed bills, he must certify to this fact.

3. **The Custodian shall comply with conclusion No. 2 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, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
4. 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 April 29, 2020, the Council distributed its Interim Order to all parties. On May 6, 2020, the Custodian responded to the Council’s Interim Order. Therein, the Custodian certified that the BOE obtained and were disclosing eighty-eight (88) pages of cell phone bills spanning the time period identified in the subject OPRA request. The Custodian noted that, to the best of his knowledge, he redacted all telephone numbers except those belonging to the BOE (twenty-nine (29) entries) or displaying as unavailable (seven (7) entries). The Custodian noted that these redactions were appropriate pursuant to N.J.S.A. 47:1A-1, et seq., N. Jersey Newspapers, Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 127 N.J. 9 (1992), and Gannett N.J. Partners, LP. v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). See also Livecchia v. Borough of Mt. Arlington, 421 N.J. Super. 24 (App. Div. 2011); Smith v. N.J. Dep’t of Corr., GRC Complaint No. 2004-163 (June 2005); Papiez v. Cnty. of Mercer, GRC Complaint No. 2012-52 (April 2013).

Additional Submissions:

On May 6, 2020, the Complainant sent an e-mail to the Government Records Council (“GRC”) arguing that the Custodian’s use of Counsel here represented a knowing and willful violation. The Complainant argued that the practice of referring an OPRA request to legal counsel so that they may deny access to otherwise disclosable records “is the antithesis of the intent of [OPRA].”

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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.

The Complainant argued that here, Counsel's reliance on "obscure cases" to justify denying access was "intentional" and "willful." The Complainant contended that the Custodian knew that the responsive records were disclosable and instead deferred to Counsel in unlawfully denying his OPRA request. The Complainant contended the reasons for the denial are not valid and are "prima facie" evidence of Counsel's commission of a knowing and willful violation. The Complainant asserted that the GRC should find that the Custodian is subject to a civil penalty for repeatedly deferring to Counsel for OPRA responses.

The Complainant argued that levying the civil penalty on the Custodian would send a clear message to custodians to stop the practice of "referring to counsel for legal arguments that favor denying" an OPRA request. The Complainant asserted that while penalties against custodians who make a mistake are not prudent, such is not the case here. The Complainant asserted that to not find a knowing and willful violation would permit "a costly scheme to deny public records" to continue.

Finally, the Complainant disputed the document index as a "ruse." The Complainant contended that rather than separately identifying each redaction, the Custodian provided a blanket statement for all redactions. The Complainant asserted that he never intended to obtain personal or parent numbers; rather, he sought to obtain a log of "business calls, their length, their location and their dates." The Complainant thus requested that the GRC require the Custodian to comply with the Council's Order.

Analysis

Compliance

At its April 28, 2020 meeting, the Council ordered the Custodian to obtain and disclose the responsive cell phone bills, with redactions where appropriate. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Executive Director. On April 29, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 6, 2020.

On May 6, 2020, the fifth (5) business day after receipt of the Council's Order, the Custodian disclosed to the Complainant eighty-eight (88) pages of cell phone bills for the time period identified in the subject OPRA request. Those cell phone bills contained redactions of all but thirty-six (36) telephone number entries. The Custodian also included a document index identifying the information redacted and the specific lawful basis for those redactions. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

To briefly address the Complainant's rebuttal arguments, the GRC is not persuaded that the document index was insufficient. Specifically, it is obvious from a review of the records that the Custodian only redacted telephone numbers. Further, the document index identifies telephone numbers as the only redaction, as well as the specific lawful basis for said redactions that is consistent with conclusion No. 2 of the Council's Order. See also Papiez, GRC 2012-52. It is not

the case here that the Custodian was disclosing records containing various redactions based on multiple exemptions contained in OPRA. Thus, the GRC finds that the document index is reasonable to identify the redactions contained in the disclosed records.

Therefore, the Custodian complied with the Council's April 28, 2020 Interim Order because he responded in the prescribed time frame disclosing the responsive cell phone bills with redactions and a reasonable document index. Further, the Custodian 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)).

The GRC begins by briefly addressing the Complainant's contention that Custodian's use of Counsel here amounted to a knowing and willful violation. OPRA does not prohibit a party from utilizing legal counsel at any point during the statutory process. For this reason, whether a custodian seeks assistance from legal counsel in responding to an OPRA request or Denial of Access Complaint is of no moment. Simply put, OPRA and the GRC have no authority to direct how a party utilizes legal counsel. N.J.S.A. 47:1A-7.

In the matter before the Council, the Custodian unlawfully denied access to Superintendent Rutzky's BOE-issued cell phone bills. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the redacted telephone numbers in the previously disclosed incoming and outgoing call logs. Further, the Custodian timely complied with the Council's April 28, 2020 Interim Order. 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.

Finally, the GRC notes that knowing and willful violations are determined based on the totality of the circumstances present in this complaint. Here, while it is the case that the Council found an unlawful denial of access to the responsive cell phone bills, it also found a lawful denial of access to the redacted telephone numbers contained in the incoming and outgoing call logs. Further, upon receiving the Council's Order, the Custodian timely complied. The Complainant, by his own admission, is now in possession of the exact information he sought, albeit as a result of the Council's Order. That is, he received cell phone logs of Superintendent Rutzky's "business calls, their length, their location and their dates" absent any nondisclosable telephone numbers. Thus, and as noted above, the totality of the circumstances does not warrant a knowing and willful finding here.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's April 28, 2020 Interim Order because he responded in the prescribed time frame disclosing the responsive cell phone bills with redactions and a reasonable document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to Superintendent Rutzky's BOE-issued cell phone bills. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the redacted telephone numbers in the previously disclosed incoming and outgoing call logs. Further, the Custodian timely complied with the Council's April 28, 2020 Interim Order. 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: Frank F. Caruso
Executive Director

May 12, 2020



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 28, 2020 Government Records Council Meeting

Thomas Volscho
Complainant

Complaint No. 2018-205

v.

West Orange Board of Education (Essex)
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 21, 2020 Findings and Recommendations of the Council Staff 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 lawfully denied access to the telephone numbers included in Superintendent Rutzky’s incoming and outgoing logs. N.J.S.A. 47:1A-6. Specifically, the Council and courts have routinely supported the nondisclosure of telephone numbers in government records consistent with N.J.S.A. 47:1A-1.1. See Livecchia v. Borough of Mt. Arlington, 421 N.J. Super. 24 (App. Div. 2011); Papiez v. Cnty. of Mercer, GRC Complaint No. 2012-52 (April 2013).
2. The requested detailed cell phone bills, if in existence, fall within the definition of a “government record” under OPRA. N.J.S.A. 47:1A-1.1; Burnett v. Cnty. of Gloucester 415 N.J. Super. 506 (App. Div. 2010). However, the Custodian’s failure to either obtain and disclose them or certify that no such records existed resulted in an unlawful denial of access under OPRA. N.J.S.A. 47:1A-6. Thus, the Custodian shall obtain and disclose to the Complainant the responsive bills, with redactions where appropriate. See Papiez v. Cnty. of Mercer, GRC Complaint No. 2012-52 (April 2013). Should the Custodian determine that he is unable to obtain and provide the responsive detailed bills, he must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 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, if applicable. Further, the Custodian shall simultaneously deliver¹**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

4. 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.

Interim Order Rendered by the
Government Records Council
On The 28th Day of April 2020

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: April 29, 2020

² "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."

³ 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
April 28, 2020 Council Meeting**

**Thomas Volscho¹
Complainant**

GRC Complaint No. 2018-205

v.

**West Orange Board of Education (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all phone logs from Superintendent Jeffrey Rutzky’s landline and West Orange Board of Education (“BOE”) issued cell phone from February 1 through August 5, 2018.

Custodian of Record: John Calavano
Request Received by Custodian: August 6, 2018
Response Made by Custodian: August 15, 2018
GRC Complaint Received: September 14, 2018

Background³

Request and Response:

On August 5, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 15, 2018, the Custodian allegedly⁴ responded in writing providing access to Superintendent Rutzky’s Verizon summary (6 pages) in its entirety. The Custodian further noted that he could not disclose a landline log because it was impossible to differentiate between Superintendent Rutzky’s calls from others made by BOE staff members.

On August 29, 2018, the Custodian again allegedly⁵ responded in writing disclosing a log for Superintendent Rutzky’s incoming (13 pages) and outgoing (19 pages) calls redacting all telephone numbers present in the log.

¹ No legal representation listed on record.

² Represented by Bradley D. Tishman, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, 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.

⁴ Neither the Custodian nor Complainant provided a copy of the response as part of their filings.

⁵ Ibid.

Denial of Access Complaint:

On September 14, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s responses to the subject OPRA request.

The Complainant asserted that instead of providing a responsive cell phone bill, the Custodian provided him a billing summary. The Complainant asserted that the Custodian also asserted at that time that he could not produce a log of Superintendent Rutzky’s landline because there was “no way to differentiate” between calls he and other BOE employees made. The Complainant stated that the Custodian subsequently disclosed to him a redacted landline logs in contradiction of the initial response.

The Complainant argued that previously sought and received a landline call log for the Director of Social Services. The Complainant noted that the Custodian disclosed the prior record without redactions. The Complainant contended that the previous log clearly identified the caller/receiver by extension number, which further contradicted the Custodian’s “differentiation” argument. The Complainant noted that OPRA provided for a civil penalty where a “public official, officer, employee, or custodian” knowingly and willfully violates OPRA. N.J.S.A. 47:1A-11.

The Complainant thus argued that he should have been given access to an unredacted copy of the incoming and outgoing logs, as the BOE already set such a precedent in response to the prior OPRA request. The Complainant further argued that the Custodian should have provided him access to Superintendent Rutzky’s BOE-issued cell phone call log. The Complainant noted that he contacted Verizon, who advised that a log could be accessed by logging into the account on the internet and downloading .pdf files. The Complainant further asserted that no costs or research were required to perform this task. Paff v. Galloway Twp., 229 N.J. 340 (2017).

Statement of Information:⁶

On November 29, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 6, 2018. The Custodian certified that his search included forwarding the subject OPRA request to the BOE’s Technology Department. The Custodian affirmed that the Technology Department provided to him the responsive landline logs. The Custodian affirmed that he also compiled the monthly Verizon summaries, which did not include call details. The Custodian certified that he responded in writing on August 15, 2018 and 29, 2018 disclosing the cell phone summaries and redacted call logs respectively. The Custodian noted that following receipt of the instant Denial of Access Complaint, he contacted Verizon to obtain call detail logs.

The Custodian contended that he lawfully redacted the incoming and outgoing landline records based on a plethora of precedential case law. See e.g. N. Jersey Newspapers, Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 127 N.J. 9 (1992). The Custodian argued that in Gannett N.J. Partners, LP. v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), the Appellate Division

⁶ On September 28, 2018, this complaint was referred to mediation. On October 30, 2018, this complaint was referred back to the GRC for adjudication.

affirmed the holding that responsive telephone billing records were exempt from disclosure. Citing N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-5(g); N. Jersey, 127 N.J. 9. The Custodian stated the Gannett court reasoned that due to the likely presence of unlisted telephone numbers, there was no reasonable method to extract them from the bills. Id. at 217. The Custodian noted that the court also held that the identity of private citizens calling the public official was “private.” Id. 217-218.

The Custodian also argued that the court’s decision in Livecchia v. Borough of Mt. Arlington, 421 N.J. Super. 24 (App. Div. 2011) provides additional support for non-disclosure. The Custodian stated that there, the appellant sought access to the phone bills to determine whether the caller exceeded authorized call limits. The Custodian averred that the court noted that the requestor was not seeking access to the individual numbers and that the unredacted call locations were sufficient to meet her purpose. Id. at 29. The Custodian averred that the court ultimately decided that the respondent properly redacted telephone numbers from the responsive bills. See also Smith v. N.J. Dep’t of Corr., GRC Complaint No. 2004-163 (June 2005); Papiez v. Cnty. of Mercer, GRC Complaint No. 2012-52 (April 2013).

The Custodian argued that here, the Complainant sought access to the incoming and outgoing landline records because he wanted to see the actual numbers of those calls on Superintendent Rutzky’s phone. The Custodian argued that he had a clear obligation under OPRA to “redact from that record any information which discloses the unlisted telephone number . . . of any person.” N.J.S.A. 47:1A-5(g). The Custodian also noted that the incoming and outgoing landline records did not include call locations.

The Custodian further contended that he did not unlawfully deny access to the requested detailed cell phone bills. The Custodian argued that the BOE did not receive in the course of official business detailed call logs as part of the monthly bill. The Custodian thus contended that no responsive records existed, and he was under no obligation to contact Verizon to obtain them. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005).

The Custodian argued that to the extent that the requested cell phone bills from the BOE-supplied cell phone were considered “government records,” Livecchia, 421 N.J. Super. 24 controlled the nondisclosure of them. The Custodian further argued that Superintendent Rutzky was clearly a public official during the time frame identified in the Complainant’s OPRA request. The Custodian thus contended that, as in Gannett, 379 N.J. Super. 205, disclosure of the cell phone log would have violated the privacy rights of numerous individuals.

Analysis

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 provides that certain personal identifying information is exempt from access to include “that portion of any document which discloses . . . unlisted telephone number . . .” N.J.S.A. 47:1A-1.1.

In Livecchia, 421 N.J. Super. 24, the Appellate Division affirmed the Council’s decision in Livecchia v. Borough of Mt. Arlington (Morris), GRC Complaint No. 2008-80 (Interim Order dated April 8, 2010). There, a portion of the complaint addressed employee cell phone bills that contained telephone numbers, and city and state information which had been redacted. The Council, looking to Smith, GRC 2004-163, held that redactions of the telephone numbers on cell billing records “. . . satisfied the need for confidentiality . . .” Livecchia at 9-10 (citing N. Jersey, 127 N.J. 9). However, the Council ordered the custodian to disclose the records without redactions for the city and state.

The custodian subsequently appealed the Council’s decision arguing in part that the custodian lawfully redacted the city and state information from the responsive bills. In affirming the Council’s decision that the city and state should be disclosed, the court held that:

The privacy interest attached to government telephone records, which protects the person called and his or her telephone number, does not similarly cloak the destination location of calls placed by government employees when necessary to advance the watchful eye of a vigilant public seeking accountability of its municipal representatives.

[Livecchia, 421 N.J. Super. at 19.]

Thereafter, in Papiez, GRC 2012-52, the Council held that the custodian unlawfully denied access to the requested itemized cell phone bills. Id. (Interim Order dated March 22, 2013) at 3. In complying with the Council’s Interim Order, the custodian redacted all telephone numbers on the bills in accordance with Livecchia, GRC 2008-80. The complainant argued that the redactions were unlawful. The Council reviewed the issue and found that the custodian’s response was consistent with Livecchia; thus, no unlawful denial of access occurred. Id. (Final Decision dated April 30, 2013) at 3-4.

In the matter before the Council, the Complainant sought access to Superintendent Rutzky’s ingoing and outgoing call log, as well as a cell phone call log over an estimated six (6) month time frame. The Custodian initially disclosed a cell phone billing statement without call details and stated that he could not disclose an ingoing and outgoing landline call log. The Custodian subsequently was able to disclose landline logs but redacted all telephone numbers therein.

This complaint ensued, wherein the Complainant argued that the Custodian unlawfully denied access to the redacted telephone numbers and failed to disclose the cell phone log. In the SOI, the Custodian argued that he properly redacted the landline logs in accordance with, among other decisions N. Jersey, 127 N.J. 9; Gannett, 379 N.J. Super. 205; and Livecchia, 421 N.J. Super. 24. The Custodian also argued that the BOE did receive or maintain cell phone billing records in the course of ordinary business. Notwithstanding the Custodian contended that to the extent the bills were considered “government records,” he lawfully denied access to them. The Custodian

also noted that he reached out to Verizon about the bills following receipt of the instant complaint. However, the Custodian did not advise whether responsive bills could be obtained and disclosed to the Complainant.

Landline Log Redactions

Regarding the redacted landline logs, the court's decision in Livecchia, 421 N.J. Super. 24, as well as the GRC's decision in Papiez, GRC 2012-52, support the Custodian's redactions here. Further, whether the Custodian previously released a landline log with no redactions is of no moment.⁷ Livecchia is clear that prior decisions addressing the issue affirmed the Council's position that the custodian was only required to disclose the call locations and not the actual telephone numbers. Thus, the Custodian lawfully redacted the logs.

Accordingly, the Custodian lawfully denied access to the telephone numbers included in Superintendent Rutzky's incoming and outgoing logs. N.J.S.A. 47:1A-6. Specifically, the Council and courts have routinely supported the nondisclosure of telephone numbers in government records consistent with N.J.S.A. 47:1A-1.1. See Livecchia, 421 N.J. Super. 24; Papiez, GRC 2012-52.

Detailed Cell Phone Bills

Regarding the cell phone bills, the GRC must first address the Custodian's assertion that the bills are not "government records" for purposes of OPRA. That is, that the BOE did not maintain detailed bills in the course of official business and were under no obligation them from Verizon.

In Burnett v. Cnty. of Gloucester 415 N.J. Super. 506 (App. Div. 2010), the Appellate Division determined that the defendant was required to obtain settlement agreements from its insurance broker. The court's decision largely fell on the fact that there was no question that the broker was working on behalf of the defendant to execute settlement agreements. The court noted that it previously held that although a third party, such as insurance broker or outside counsel, may execute settlement agreements, "they nonetheless bind the county as principal, and the agreements are made on its behalf." Id. at 513. In determining that the defendant had an obligation to obtain responsive records from the insurance broker, the court distinguished Bent, holding that:

We find the circumstances presented in Bent to be far removed from those existing in the present matter because, as we have previously concluded, the settlement agreements at issue here were "made" by or on behalf of the Board in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. N.J.S.A. 47:1A-1.

⁷ The GRC notes that the prior record disclosed without redactions appears to reflect internal calls between BOE landline extensions, as opposed to calls made to outside parties. Notwithstanding, the lack of redactions there does not bar the Custodian from redacting similar types of records in the future.

[Id. at 517.]

Here, it is apparent that the BOE procured cell phone services through Verizon. Thus, it follows that detailed bills associated with the BOE cell phone accounts would be considered “government records” for purposes of OPRA. So, much like the defendant in Burnett, the BOE had an obligation to obtain those records that were “‘made’ by or on behalf of the” the BOE. Id. at 517. This is notwithstanding that Verizon may not proactively send the detailed bills to the BOE on a monthly basis. The fact that the BOE did not receive detailed billing statements as part of the monthly billing summaries does not alleviate the Custodian’s obligation of obtaining them from Verizon.

Having settled the issue of the Custodian’s obligation to obtain “government records” from a third party, the GRC now turns to the disclosability of the detailed cell phone bills. Currently, it is still unknown whether the Custodian was able to obtain detailed bills from Verizon, electronically or otherwise. This is because the Custodian did not subsequently advise the GRC whether he was able to obtain access to the bills.

In looking to the Council’s decision in Papiez, GRC 2012-52, the GRC finds that the Custodian had an obligation to disclose the responsive detailed cell phone bills with appropriate redactions. However, the Custodian failed to provide these records or certify that Verizon did not have the capability to produce them for disclosure. Based on this, the GRC is persuaded that an unlawful denial to the redacted bills occurred here.

Accordingly, the requested detailed cell phone bills, if in existence, fall within the definition of a “government record” under OPRA. N.J.S.A. 47:1A-1.1; Burnett, 415 N.J. Super. 506. However, the Custodian’s failure to either obtain and disclose them or certify that no such records existed resulted in an unlawful denial of access under OPRA. N.J.S.A. 47:1A-6. Thus, the Custodian shall obtain and disclose to the Complainant the responsive bills, with redactions where appropriate. See Papiez, GRC 2012-52. Should the Custodian determine that he is unable to obtain and provide the responsive detailed bills, he must certify to this fact.

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 lawfully denied access to the telephone numbers included in Superintendent Rutzky’s incoming and outgoing logs. N.J.S.A. 47:1A-6. Specifically, the Council and courts have routinely supported the nondisclosure of telephone numbers in government records consistent with N.J.S.A. 47:1A-1.1. See Livecchia v.

Borough of Mt. Arlington, 421 N.J. Super. 24 (App. Div. 2011); Papiez v. Cnty. of Mercer, GRC Complaint No. 2012-52 (April 2013).

2. The requested detailed cell phone bills, if in existence, fall within the definition of a “government record” under OPRA. N.J.S.A. 47:1A-1.1; Burnett v. Cnty. of Gloucester 415 N.J. Super. 506 (App. Div. 2010). However, the Custodian’s failure to either obtain and disclose them or certify that no such records existed resulted in an unlawful denial of access under OPRA. N.J.S.A. 47:1A-6. Thus, the Custodian shall obtain and disclose to the Complainant the responsive bills, with redactions where appropriate. See Papiez v. Cnty. of Mercer, GRC Complaint No. 2012-52 (April 2013). Should the Custodian determine that he is unable to obtain and provide the responsive detailed bills, he must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 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, if applicable. Further, the Custodian shall simultaneously deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰**
4. 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: Frank F. Caruso
Executive Director

April 21, 2020

⁸ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁹ "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."

¹⁰ 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.