



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

FINAL DECISION

July 25, 2023 Government Records Council Meeting

Patrick Wall
Complainant

Complaint No. 2021-257

v.

Newark Public Schools (Essex)
Custodian of Record

At the July 25, 2023 public meeting, the Government Records Council (“Council”) considered the July 18, 2023 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 did not unlawfully deny access to the portion of the Complainant’s OPRA request seeking e-mails related to Shabazz High School student and staff safety during the 2019-2020 school year. N.J.S.A. 47:1A-6. Specifically, the responsive e-mails clearly relate to several individual students and the Complainant is not qualified as an authorized person able to access those records under N.J.A.C. 6A:32-7.5(e). N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-2.1.
2. The Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant’s OPRA request seeking text messages. Specifically, the Custodian and Superintendent Leon certified, and the record reflects, that no records responsive text messages exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of July 2023

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 27, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2023 Council Meeting**

**Patrick Wall¹
Complainant**

GRC Complaint No. 2021-257

v.

**Newark Public Schools (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Any e-mails and text messages sent or received by Superintendent Roger Leon related to student and staff safety at Malcom X. Shabazz High School during the 2019-2020 school year related to discussions of fights, assaults, violence, incident reports, or other disciplinary and/or safety issues from September 1, 2019 through June 30, 2020.
2. Any e-mails and text messages sent or received by Assistant Superintendent Mario Santos related to student and staff safety at Malcom X. Shabazz High School during the 2019-2020 school year related to discussions of fights, assaults, violence, incident reports, or other disciplinary and/or safety issues from September 1, 2019 through June 30, 2020.

Custodian of Record: Pamela Luke

Request Received by Custodian: August 24, 2021

Response Made by Custodian: September 2, 2021

GRC Complaint Received: October 25, 2021

Background³

Request and Response:

On August 24, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 2, 2021, the Custodian responded in writing advising that an extension until September 3, 2021 was required because of inclement weather issues resulting in her working remotely. On September 3, 2021, the Custodian responded in writing obtaining an extension of time through September 13, 2021 to respond to the subject OPRA request. On September 13, 2021, the Custodian responded in writing

¹ No legal representation listed on record.

² Represented by Brenda C. Liss, Esq. (Newark, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

again obtaining an extension of time until September 17, 2021 to respond to the subject OPRA request.

On September 17, 2021, the Custodian responded obtaining another extension of time until September 30, 2021 to respond to the subject OPRA request. On the same day, the Complainant sought an explanation for the extension per Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). On September 20, 2021, the Custodian responded advising that the additional extension was “[t]o perform a diligent inquiry.” On September 28, 2021, the Custodian responded in writing advising that no text messages responsive to either OPRA request item existed. The Custodian further stated that responsive e-mails were exempt from disclosure as “student records” not disclosable under N.J.S.A. 47:1A-1.1.

On October 1, 2021, the Complainant e-mailed the Custodian asking whether the Custodian “conducted a search” of Superintendent Leon and Assistant Superintendent Santos’s texts and e-mails. The Complainant noted that he has “seen texts” sent to Superintendent Leon during the relevant time frame that fall within the identified subject/content. The Complainant further asserted that e-mails were sent to Assistant Superintendent Santos during that period and do not contain “student records.”

Denial of Access Complaint:

On October 25, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s denial of access because he has “evidence that text messages were sent to” Superintendent Leon that are responsive to his OPRA request. The Complainant contended that he could supply screenshots of the messages but wished to obtain an explanation from Superintendent Leon if they no longer existed. The Complainant similarly argued that both individuals sent and received e-mails that are responsive to the subject OPRA request, but it is “not clear that those e-mails contained [‘]student records[‘].” The Complainant requested that the GRC perform an *in camera* review of the responsive e-mails to determine their disclosability.

Statement of Information:

On November 22, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 24, 2021. The Custodian certified that her search included contacting Superintendent Leon and Assistant Superintendent Santos to conduct searches of their cell phones and e-mail accounts. The Custodian certified that both did not locate any text messages responsive to the subject OPRA request. The Custodian affirmed that multiple e-mails were located and reviewed to determine their disclosability. The Custodian certified, following multiple extensions of time, she responded in writing on September 28, 2021 denying access to 100 pages of e-mails under the “student records” exemption. N.J.S.A. 47:1A-1.1. The Custodian affirmed that she also advised the Complainant that no text messages existed.

Additional Submissions:

On March 6, 2023, the GRC sought additional information from the Complainant. The GRC stated the Complainant refuted the Custodian's response that no text messages existed by stating that he had "seen texts[.]" The GRC further noted that in his complaint, the Complainant stated that he could supply the referenced text messages upon request. The GRC thus requested that the Complainant provide the alleged evidence and certify to their authenticity. The GRC requested that the Custodian provide his legal certification by close of business on March 9, 2023.

On March 9, 2023, the Complainant responded to the GRC's request for additional information. Therein, the Complainant certified that in he obtained and was attaching a text message sent to Superintendent Leon from an employee at High School in February 2020. The Complainant noted that the text message was also referenced in a concurrently published Chalkbeat article. Wall, Patrick "'You can't keep my kids safe': How violence shook a Newark high school, despite pleas for help" Chalkbeat, February 5, 2020.⁴

On May 12, 2023, the GRC sought additional information from the Complainant. The GRC stated that in the SOI, the Custodian stated that multiple parties conducted a search of their cell phones and determined that no records existed; however, the Complainant has now provided evidence that at least one text message did exist. The GRC thus requested that the Custodian respond to the following:

1. Are Superintendent Roger Leon and Assistant Superintendent Mario Santos issued cell phones by Newark Public Schools ("NPS")?
 - a. If no, include separate certifications from both parties detailing the search of their personal devices and whether same are set to automatic or manual deletion of text messages.
 - b. If yes, provide separate certifications from both parties detailing whether they searched both their NPS-issued device and any additional personal devices for responsive text messages. Similarly include in the response whether text messages are automatically or manually deleted from any of the relevant devices.
2. Are Superintendent Leon and Assistant Superintendent Santos currently maintaining text messages on either NPS-issued or additional personal devices that are responsive to the subject OPRA request?
 - a. If yes, please provide an updated document index including all responsive messages.
 - b. If no, please certify whether potentially responsive records were, to the best of their knowledge, deleted automatically or manually.

The GRC requested that the Custodian provide his legal certification by close of business on May 17, 2023.

On May 17, 2023, the Custodian responded to the GRC's request for additional information. Therein, the Custodian certified that Assistant Superintendent Santos retired effective

⁴ <https://newark.chalkbeat.org/2022/1/11/22876668/malcolm-x-shabazz-high-school-violence-covid-newark-student-behavior> (accessed May 31, 2023).

June 30, 2022. The Custodian affirmed that upon receipt of the subject OPRA request, she asked Assistant Superintendent Santos to search for responsive records and; based upon belief, he searched both his District-issued and personal cell phone. The Custodian certified that on September 2, 2021, he e-mailed the Custodian stating that he did not possess any text messages responsive to the OPRA request.

The Custodian also submitted a legal certification from Superintendent Leon. Therein, Superintendent Leon certified that he searched both his District-issued and personal cell phone for responsive text messages “on or about August 24, 2021.” Superintendent Leon certified that he did not locate any responsive text messages. Superintendent Leon noted that he manually deletes text messages from both phones and does not maintain any texts responsive to the subject OPRA request because he manually deleted them shortly after receiving them and before the NPS received the subject OPRA request.

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.

E-mails

OPRA provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor . . . any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a).]

At the time of the Complainant’s OPRA request, the regulations of the State Board of Education and the Commissioner define a “student record” as “. . . information related to an individual student *gathered within or outside the school district and maintained within the school district*, regardless of the physical form in which it is maintained.” N.J.A.C. 6A:32-2.1 (emphasis added). The regulations of the State Board of Education and the Commissioner of Education provide that “[o]nly authorized organizations, agencies or persons as defined herein shall have access to student records . . .” and goes onto list those individual categories of authorized parties. N.J.A.C. 6A:32-7.5(e). Finally, the regulations require that “[i]n complying with this section, individuals shall adhere to requirements pursuant to [OPRA] and Family Educational Rights and

Privacy Act [(“FERPA”).]” N.J.A.C. 6A:32-7.5(g).⁵ To this end, the Council has looked to these exceptions in determining whether a complainant can access “student records” in part or whole under OPRA. See, e.g., Martinez v. Edison Bd. of Educ. (Middlesex), GRC Complaint No. 2014-126 (May 2015); but see Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014).

More recently, the Appellate Division addressed OPRA and the disclosure of “student records” in L.R. v. Camden City Public Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). In one of the four (4) consolidated cases, the trial court ordered the school district to disclose student records requested under OPRA, with redactions made to all personally identifying information (“PII”). The Appellate Division held that redacting PII from a document does not remove its classification as a “student record.” Id. at 83. The court found that “N.J.A.C. 6A:32-7.5(g) does not expressly incorporate FERPA’s provisions for the redaction of PII into the [New Jersey Pupil Records Act (“NJPR”) or its regulations. Moreover, nothing in the NJPR or its regulations states that sufficiently anonymized documents, with all PII removed, are no longer ‘student records’ under N.J.A.C. 6A:32-1.” Id. at 85.

The court further discussed the interplay between the NJPR, FERPA and OPRA:

We do not read the language in N.J.A.C. 6A:32-7.5(g), which cross-references OPRA and FERPA, to signify that those other two statutes allow courts to disregard the access limitations within our State’s regulations concerning student records. Subsection 7.5(g) of N.J.A.C. 6A:32 merely states that, “[i]n complying with [the Section 7.5 access provisions], individuals shall adhere to requirements pursuant to . . . [OPRA and FERPA.]” Id. Yet, no provisions within OPRA or FERPA explicitly “require” school districts to turn over records that are protected under state law.

It is reasonable to conclude that N.J.A.C. 6A:32-7.5(g) centrally concerns functionality—a district’s *processing* of student record requests from an authorized person or organization. See K.L., supra, 423 N.J. Super. at 350, 32 A.3d 1136 (“In providing access to school records in accordance with N.J.A.C. 6A:32-7.5, school districts must also comply with the requirements of OPRA and FERPA, N.J.A.C. 6A:32-7.5(g).”). For instance, if a school district receives an OPRA request from an authorized person or organization listed under N.J.A.C. 6A:32-7.5(e), then it must process that request in compliance with OPRA and FERPA requirements. Nothing in the plain language of N.J.A.C. 6A:32-7.5(g), however, supersedes or nullifies the limitations of “authorized” parties, as set forth at N.J.A.C. 6A:32-7.5(a) and (e). Hence, we agree with the judge in the Hillsborough case that a requestor cannot gain access to a student record unless the requestor satisfies one of the “[a]uthorized” categories listed in N.J.A.C. 6A:32-7.5(e)(1) through (16).

[Id. at 85-87 (emphasis in original).]⁶

⁵ On July 5, 2022, the New Jersey Department of Education amended the definition of a “student record” by adding that “[i]n the absence of any ‘information related to an individual student,’ the document(s) no longer meets the definition of “student record.” N.J.A.C. 6A:32-2.1.

⁶ Affirmed by equal division in L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547, 569 (2019).

Based on the forgoing, the NJPRA supports that “student records” are not disclosable under OPRA, regardless of redaction, unless the requestor can prove that they are authorized to obtain same per N.J.A.C. 6A:32-7.5.

In the matter before the Council, the Complainant submitted his OPRA request seeking in part e-mails from the 2019-2020 school year related to student and staff safety at Shabazz High School, including discussions of fights, assaults, violence, incident reports, or other disciplinary issues. The Custodian responded denying access on the basis that responsive e-mails were exempt under OPRA as “student records.” This complaint followed, wherein the Complainant asserted that it was unclear whether the e-mails were exempt from disclosure and asked the GRC to perform an *in camera* review. In the SOI, the Custodian identified in the document index the topics of the responsive e-mails: they exclusively related to matters involving individual students.

Initially, the GRC notes in Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the court held that the GRC had a responsibility to perform an *in camera* review where “necessary to a determination of the validity of a claimed exemption,” (Id. at 355). The court also held that it did not “imply that *in camera* review is required in a case in which the document is per se exempt from access under OPRA.” Id. Thus, there may be situations where the GRC does not need to perform an *in camera* review where the evidence clearly supports that the cited exemption applied to the withheld record.

Here, the Complainant provided in her SOI limited descriptions of the e-mails withheld from disclosure to include student initials and basic topics. However, that limited information is sufficient for the GRC to determine that the e-mails clearly met the threshold to be considered “student records” under N.J.A.C. 6A:32-2.1 and are thus not subject to disclosure under OPRA through the NJPRA. Also, the need for an *in camera* review is negated by the GRC’s ability to determine that e-mails are obviously “student records” based on the SOI document index. Additionally, the Complainant has not argued, nor does N.J.A.C. 6A:32-7.5 of the NJPRA support, that he is an authorized party able to access the requested “student records.”

Accordingly, the Custodian lawfully denied access to the portion of the Complainant’s OPRA request seeking e-mails related to Shabazz High School student and staff safety during the 2019-2020 school year. N.J.S.A. 47:1A-6. Specifically, the responsive e-mails clearly relate to several individual students and the Complainant is not qualified as an authorized person able to access those records under N.J.A.C. 6A:32-7.5(e). N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-2.1.

Text Messages:

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). However, should a complainant provide competent, credible evidence to refute a legal certification, the Council held that a custodian violated OPRA. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012).

In the matter before the Council, the Complainant submitted his OPRA request seeking in part text messages from the 2019-2020 school year related to student and staff safety at Shabazz High School, including discussions of fights, assaults, violence, incident reports, or other disciplinary issues. The Custodian responded stating that no responsive text messages existed. This complaint ensued, wherein the Complainant asserted that he had evidence that text messages existed. In the SOI, the Custodian maintained that no responsive text messages existed and noted that both Superintendent Leon and Assistant Superintendent Santos conducted a search that did not yield any records.

After reviewing the submissions, the GRC sought additional information from both parties to further develop the record. For the Complainant, the GRC sought and received the “evidence” mentioned in the Denial of Access Complaint, which was a screenshot of a text message the Complainant believed responsive to his OPRA request. For the Custodian, the GRC asked the Custodian to obtain and submit certifications from both Superintendent Leon and Assistant Superintendent Santos describing their search, whether they looked through both District-issued and personal devices, and whether those devices are set to automatic deletion. The Custodian subsequently responded certifying that although Assistant Superintendent Santos retired, she believed he searched both his District-issued and personal device before advising her that no records existed. Further, Superintendent Leon certified that he also searched both devices and did not locate any responsive text messages. Superintendent Leon also certified that he manually deleted text messages from both devices and did so concurrently to receipt of any that would have been responsive to the subject OPRA request.⁷

In comparing the responses to the facts in both Pusterhofer and Carter, the GRC is persuaded that this complaint is similar to the former and distinguished from the latter. Specifically, and like in Pusterhofer, the Custodian certified that no text messages existed. However, the SOI raised questions as to the search conducted and the Complainant submission of the text message screenshot required additional information. In response to that request, both the Custodian and Superintendent Leon have certified to the searches performed (on multiple devices) and the fact that no texts messages existed contemporaneously to the subject OPRA request. Given these additional certifications, the GRC applies Pusterhofer accordingly.

Therefore, the Custodian has borne her burden of proof that she did not unlawfully deny access to the portion of the Complainant’s OPRA request seeking text messages. Specifically, the Custodian and Superintendent Leon certified, and the record reflects, that no records responsive text messages exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to the portion of the Complainant’s OPRA request seeking e-mails related to Shabazz High School student and staff safety

⁷ The GRC does not have authority over retention schedules. N.J.S.A. 47:1A-7(b); Van Pelt v. Edison Twp. Bd. of Educ. (Middlesex), GRC Complaint No. 2007-179 (January 2008) (the GRC does not have authority over which records a government agency must maintain).

during the 2019-2020 school year. N.J.S.A. 47:1A-6. Specifically, the responsive e-mails clearly relate to several individual students and the Complainant is not qualified as an authorized person able to access those records under N.J.A.C. 6A:32-7.5(e). N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-2.1.

2. The Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request seeking text messages. Specifically, the Custodian and Superintendent Leon certified, and the record reflects, that no records responsive text messages exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

July 18, 2023