



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

April 30, 2008 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2007-251

v.

Township of Fredon (Sussex)
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council ("Council") considered the April 23, 2008 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 has complied with the provisions of the Council's February 27, 2008 Interim Order by disclosing the requested Executive Session minutes to the Complainant within the required time frame.
2. Because the Custodian complied with the Council's February 27, 2008 Interim Order, it is concluded that 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. However, the Custodian's actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 30th Day of April, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: May 13, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 30, 2008 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2007-251

v.

**Township of Fredon²
Custodian of Records**

Records Relevant to Complaint:

1. Three (3) resolutions most recently passed by the municipal governing body which, in accordance with N.J.S.A. 10:4-13, authorized the governing body to exclude the public from a meeting (i.e. go into closed or executive session).
2. The minutes of each executive session authorized by the resolutions responsive to request Item No. 1.
3. Any ordinance, resolution or other document that sets the fees for the public to purchase copies of government non-paper records, including CDs, audio and video recordings, floppy disks and other types of media.

Request Made: October 3, 2007

Response Made: October 9, 2007

Custodian: Joanne Charner

GRC Complaint Filed: October 15, 2007

Background

March 3, 2008

Government Records Council's ("Council") Interim Order. At its February 27, 2008 public meeting, the Council considered the February 20, 2008 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. Although the Custodian responded in writing granting access to Items No. 1 and No. 3 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.

¹ No legal representation listed on record.

² Represented by William E. Hinkes, Esq., of Hollander, Strelzik, Pasculli, Hinkes, Vandenberg & Hontz, L.L.C. (Newton, NJ).

2. The Custodian has failed to bear her burden of proof that the denial of access to the Executive Session minutes was lawful under N.J.S.A. 47:1A-6. **The Custodian shall disclose the requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g. However, the Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).**
3. **The Custodian shall comply with Item #2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. The Council defers a decision regarding whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances pending compliance with the Council's Interim Order.

March 3, 2008

Council's Interim Order distributed to the parties.

March 5, 2008

Custodian's response to the Council's Interim Order with the following attachments:

- Letter from the Custodian's Counsel to the Complainant dated March 4, 2008.
- Executive Session minutes August 23, 2007, September 13, 2007 and September 27, 2007 (with redactions).

The Custodian certifies that the requested Executive Session minutes with redactions where appropriate were provided to the Complainant on March 4, 2008. The Custodian further certifies that the redactions include a legal explanation.

March 10, 2008

E-mail from the Complainant to the GRC. The Complainant states that pursuant to a prior conversation with the GRC via telephone on March 7, 2008, the Complainant has decided to accept the requested Executive Session minutes without objection.

Analysis

Whether the Custodian complied with the Council's February 27, 2008 Interim Order?

The Custodian certifies that all records responsive with redactions were provided on March 4, 2008. The Complainant states that he has accepted the requested records.

The Custodian has complied with the provisions of the Council's February 27, 2008 Interim Order by disclosing the requested Executive Session minutes to the Complainant within the required time frame.

Whether the Custodian's failure to address the Complainant's preference for delivery of the requested records and failure to provide the requested Executive Session minutes rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

Because the Custodian complied with the Council's February 27, 2008 Interim Order, it is concluded that 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. However, the Custodian's actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the provisions of the Council's February 27, 2008 Interim Order by disclosing the requested Executive Session minutes to the Complainant within the required time frame.
2. Because the Custodian complied with the Council's February 27, 2008 Interim Order, it is concluded that 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. However, the Custodian's actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

February 27, 2008 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2007-251

v.

Township of Fredon (Sussex)
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council ("Council") considered the February 20, 2008 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. Although the Custodian responded in writing granting access to Item's No. 1 and No. 3 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.
2. The Custodian has failed to bear her burden of proof that the denial of access to the Executive Session minutes was lawful under N.J.S.A. 47:1A-6. **The Custodian shall disclose the requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g. However, the Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).**
3. **The Custodian shall comply with Item #2 above within five (5) business days from receipt of the Council's Interim Order and**



simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

4. The Council defers a decision regarding whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances pending compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 27th Day of February, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Government Records Council

Decision Distribution Date: March 3, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 27, 2008 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2007-251

v.

**Township of Fredon (Sussex)²
Custodian of Records**

Records Relevant to Complaint:

1. Three (3) resolutions most recently passed by the municipal governing body which, in accordance with N.J.S.A. 10:4-13, authorized the governing body to exclude the public from a meeting (i.e. go into closed or executive session).
2. The minutes of each executive session authorized by the resolutions responsive to request Item No. 1.
3. Any ordinance, resolution or other document that sets the fees for the public to purchase copies of government non-paper records, including CDs, audio and video recordings, floppy disks and other types of media.

Request Made: October 3, 2007

Response Made: October 9, 2007

Custodian: Joanne Charner

GRC Complaint Filed: October 15, 2007

Background

October 3, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant requests that these records be provided in the least costly of the following two forms: a) by e-mail attachment or b) by regular mail. The Complainant further advises that should both methods cost the same, he would prefer to receive the records by e-mail.

October 9, 2007

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that she will provide the requested resolutions in Item No. 1 once she has received a payment from the Complainant in the amount of \$2.25. The Custodian further states that the Executive Session minutes requested in Item No. 2

¹No legal representation listed on record.

²Represented by William E. Hinkes, Esq. of Hollander, Strelzik, Pasculli, Hinkes, Vandenberg & Hontz, L.L.C. (Newton, NJ).

will not be made available to the Complainant until after such time as it is appropriate for the contents of the minutes to be disclosed to the public.

The Custodian finally states that she is providing a copy of the record requested in Item No. 3: the Township ordinance citing a fee schedule to purchase copies. The Custodian states that the Complainant's total charge for copies of the requested records will be \$3.00.

October 15, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated October 3, 2007.
- Letter from the Custodian to the Complainant dated October 9, 2007.

The Complainant states that he faxed an OPRA request to the Township of Fredon on October 3, 2007. The Complainant states that he included the following language:

"I would like to have the records transmitted whichever of the following ways are least costly to me: a) By e-mail attachment to ... or b) By regular mail to my address above. If transmission by the two above methods costs the same, I wish for the records to be transmitted according to the above order of preference, where e-mail is the most preferred and regular mail is the least preferred."

The Complainant states that he received a response from the Custodian on October 9, 2007. The Complainant states that this response did not acknowledge the Complainant's preference, but simply states that the records could be mailed to the Complainant once a payment was received.

The Complainant states that in Sharkey v. Borough of Oceanport, GRC Complaint No. 2004-67 (December 2004), the complainant requested records in electronic form and filed a Denial of Access complaint after the Custodian failed to provide the records in the requested medium. The Complainant states that the GRC held that:

"As evidenced in the Deputy Clerk's statement, the records are routinely maintained in paper format, but there have been prior instances when the Borough has converted some documents into an "excel spread sheet" and downloaded onto a floppy disk when requested... However, the Custodian has not met the burden of proving why the requested records cannot be converted into an electronic format pursuant to N.J.S.A. 47:1A-5.d."

The Complainant further states that the GRC ordered the Custodian to provide the records in the medium sought.

The Complainant asserts that he does not know how the Custodian of the Township of Fredon keeps her records. The Complainant further asserts that the Custodian may maintain records in paper form only and may not have access to the proper equipment to convert records into computer files. The Complainant asserts that while it would be cheaper to pay \$3 for paper copies instead of incurring the cost to have a vendor scan the records for electronic transmission, sending the records via e-mail would certainly be less expensive and more effective.

The Complainant contends that in accordance with the Council's decision in Sharkey, *supra*, the Custodian has a duty to address the Complainant's preference of having the responsive records e-mailed to him. The Complainant further contends that a sufficient response would have addressed whether the records exist electronically and whether the cost would be greater than paper copies. The Complainant also contends that by failing to addressing the Complainant's preference, the Custodian is inviting speculation that electronic copies may exist but that the Custodian is using copying costs to burden a requestor.

The Complainant requests a finding that the Custodian violated the Open Public Records Act by failing to address his stated preference to have responsive records e-mailed to him.³

October 23, 2007

Offer of Mediation sent to both parties.

October 23, 2007

The Complainant declines mediation.

October 24, 2007

Request for the Statement of Information sent to the Custodian.

October 29, 2007

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated October 3, 2007.
- Letter from the Custodian to the Complainant dated October 9, 2007.

The Custodian certifies that paper copies of the requested records are part of the Township's files and were readily available for retrieval.

The Custodian also certifies that the records responsive to this request are permanent records and are maintained in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian states that she received the Complainant's OPRA request on October 3, 2007. The Custodian further states that she responded to the Complainant in

³ The Complainant also states that "I specifically *do not* request a finding that the Fredon [Custodian's] response was in any way knowing and willful."

writing on October 9, 2007 advising that request Items No. 1 and No. 3 could be obtained after the Custodian had received payment of \$3.00. The Custodian states that she advised the Complainant that the Executive Session minutes requested in Item No. 2 could not be released until the contents of those minutes may be disclosed to the public.

The Custodian contends that the Complainant is taking issue with the Custodian's alleged inadequate reply and request for payment of copies. The Custodian further asserts that the Complainant may have preferred the records requested electronically, but that the Township of Fredon does not maintain the requested records electronically nor does the Township have the equipment and computer capability to efficiently permit scanning and e-mailing of the records. The Custodian finally asserts that her response requesting \$3.00 in copying charges was the least costly method for obtaining the requested records in an "other meaningful medium" pursuant to N.J.S.A. 47:1A-5.d.

November 6, 2007

The Complainant's Response to the Custodian's SOI. The Complainant asserts that he believes that this complaint presents the following question for adjudication:

"If a requestor asks for records to be transmitted to him/her by e-mail or regular mail, which ever is less costly to the requestor, does the custodian satisfy his/her burden by offering the requestor paper copies by mail without addressing the question of whether e-mailing the records would be less expensive?"

The Complainant also asserts that the Custodian did not inform him of the Township of Fredon's inability to transfer the requested records electronically until after the Complainant filed this complaint.

November 8, 2007

E-mail from the GRC to the Custodian's Counsel. The GRC requests that the Custodian's Counsel provide a certification from the Custodian clarifying the legal basis for the exemptions stated in the Custodian's October 9, 2007 response letter for the requested meeting minutes. The GRC requests that the Custodian's Counsel submit this certification by close of business on Friday, November 16, 2007.

November 14, 2007

Legal certification from the Custodian to the GRC.

The Custodian certifies that municipal counsel advised her that executive meeting minutes are to remain confidential for as long as topics referenced therein are among the areas from which the public may be excluded pursuant to N.J.S.A. 10:4-12. The Custodian further certifies that the following information subject to exemption was addressed:

- August 23, 2007: (1) information which would give an unfair advantage to bidders/anticipated contract negotiations or (2) information related to a criminal investigation or for use by a law enforcement agency.

- September 13, 2007: (1) information which would give an unfair advantage to bidders/anticipated contract negotiations, (2) information related to a criminal investigation or for use by a law enforcement agency, or (3) information relating to pending or threatened litigation.
- September 27, 2007: (1) information which would give an unfair advantage to bidders/anticipated contract negotiations, (2) information related to a criminal investigation or for use by a law enforcement agency, (3) information relating to pending or threatened litigation or (4) communication within the attorney-client privilege and related to pending litigation.

December 17, 2007

E-mail from the GRC to the Custodian’s Counsel. The GRC requests that the Custodian’s Counsel provide an additional certification from the Custodian specifically identifying how meeting minutes and resolutions are created. The GRC requests that the Custodian’s Counsel submit this certification by close of business on Friday, December 21, 2007.

December 18, 2007

Legal certification from the Custodian to the GRC. The Custodian certifies that resolutions to go into executive session are made by motion verbally at the appropriate time during a public meeting. The Custodian certifies that this action is noted in the minutes and that no separate documents are created to memorialize a resolution to go into executive session.

The Custodian further certifies that she uses her meeting notes to type draft minutes using Microsoft Word at the computer at the Custodian’s desk. The Custodian certifies that these draft minutes are then printed and disseminated to the Council for review and approval.

January 3, 2008

E-mail from the GRC to the Custodian’s Counsel. The GRC requests that the Custodian submit a certification clarifying whether the Custodian has the capability to convert Microsoft Word files into PDFs.⁴ The GRC requests that the Custodian’s Counsel submit this certification by close of business on Friday, December 21, 2007.

January 14, 2008

Legal certification from the Custodian to the GRC. The Custodian certifies that she does not possess the ability to convert Microsoft Word documents into PDF files.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

⁴ A PDF is a file type that is does not allow the alteration of any text within the file.
Martin O’Shea v. Township of Fredon (Sussex), 2007-251 – Findings and Recommendations of the Executive Director

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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. 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

In the matter before the Council, the Complainant contends that the Custodian’s response to his OPRA request was insufficient because it does not address his preference for e-mailed records over paper copies via regular mail. The Complainant requests that the Custodian be found to have violated OPRA for failing to address the Complainant’s

preference for receiving the requested records in the Custodian's October 9, 2007 written response.

The Custodian certifies in her Statement of Information that the Township of Fredon maintains their records in paper format and does not have the equipment capable to convert records into electronic form. The Custodian later certifies that meeting minutes are in fact prepared electronically using the computer at the Custodian's desk. Additionally, the Custodian also maintains an e-mail address through Fredon Township. However, the Custodian also certifies that she does not have the ability to convert files into PDF format.

N.J.S.A. 47:1A-5.g. states that if a Custodian is "unable to comply with a request for access, then the Custodian shall indicate the specific basis" for noncompliance. In this complaint, the Complainant elaborated in his request that a preference of e-mailing the requested records over having to pay copying costs would be ideal. According to language of N.J.S.A. 47:1A-5.g., the Custodian was given two ways to comply and should have, therefore, responded acknowledging the Complainant's preferences with a sufficient response for each.

Although the Custodian responded in writing granting access to Item's No. 1 and No. 3 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.

Additionally, the Complainant cites to the Council's holding in Sharkey v. Borough of Oceanport, GRC Complaint No. 2004-67 (December 2004), stating that the Custodian failed to bear her burden of proving that the records responsive could not be converted from paper copy into the requested electronic medium. However, Sharkey is inapposite to this complaint before the Council because in the instant matter, the Complainant identifies *two* acceptable methods of delivery: electronic records or paper copies via US mail, whichever costs less. Although the Custodian was not required to convert the requested records to one of the two mediums in order to respond to the request, she was required to explain why one of the two methods requested was not available.

Whether the Custodian's denial of access to the requested Executive Session minutes was authorized by law?

OPRA also provides that:

"[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA] as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record." N.J.S.A. 47:1A-5.g.

Further, OPRA holds that:

“[t]he provisions of this act ... *shall not abrogate* or *erode* any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” (Emphasis added.) N.J.S.A. 47:1A-9.b.

Additionally, OPMA allows that:

“A public body may exclude the public only from that portion of a meeting at which the public body discusses ... [a]ny collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body... [a]ny matter involving the purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed... [a]ny investigations of violations or possible violations of the law... [a]ny pending or anticipated litigation or contract negotiation ... in which the public body is, or may become a party... [a]ny matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.” N.J.S.A. 10:4-12.b.

The Custodian’s response to the Complainant’s OPRA request granted access to Executive Session minutes requested in Item No. 2 “once it is appropriate for the contents of the minutes to be disclosed to the public.” Additionally, the Custodian certified that she was advised by municipal counsel that the minutes are to remain confidential as long as topics are referenced therein from which the public are excluded pursuant to N.J.S.A. 10:4-12, until such time as the basis of these topics is no longer relevant. The Custodian further certifies that the following information subject to exemption was addressed at the subject Executive Sessions:

- August 23, 2007: (1) information which would give an unfair advantage to bidders/anticipated contract negotiations or (2) information related to a criminal investigation or for use by a law enforcement agency.
- September 13, 2007: (1) information which would give an unfair advantage to bidders/anticipated contract negotiations, (2) information related to a criminal investigation or for use by a law enforcement agency, or (3) information relating to pending or threatened litigation.
- September 27, 2007: (1) information which would give an unfair advantage to bidders/anticipated contract negotiations, (2) information related to a criminal investigation or for use by a law enforcement agency, (3) information relating to

pending or threatened litigation or (4) communication within the attorney-client privilege and related to pending litigation.

In a prior GRC decision, Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007), the Custodian granted access to Executive Session minutes, but stated that the Complainant would receive the requested records once the City Attorney had decided that the records were deemed to no longer present any danger to the public interest. The GRC held that this response was insufficient and that the Custodian had therefore failed to bear her burden of proving that the denial of access was lawful pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-6. The GRC ordered the Custodian to provide the requested Executive Session minutes to the Complainant with proper redactions where necessary and to certify as to whether the minutes were approved at the time of the request (citing Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006 in which the GRC held that meeting minutes not approved prior to an OPRA request date are exempt from disclosure as intra-agency advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1.). Similarly, in this complaint, the Custodian responded in a timely manner but failed to provide a lawful response pursuant to Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007).

Therefore, the Custodian has failed to bear her burden of proof that the denial of access to the Executive Session minutes was lawful under N.J.S.A. 47:1A-6. The Custodian should, therefore, disclose the responsive records to the Complainant with any necessary redactions and provide a general nature description of those redactions, if necessary, as well as the lawful basis for such redactions, pursuant to N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i.

Whether the Custodian's failure to address the Complainant's preference for delivery of the requested records and failure to provide the requested Executive Session minutes rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers a decision regarding whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under a totality of the circumstances pending compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing granting access to Item's No. 1 and No. 3 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.

2. The Custodian has failed to bear her burden of proof that the denial of access to the Executive Session minutes was lawful under N.J.S.A. 47:1A-6. **The Custodian shall disclose the requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g. However, the Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).**
3. **The Custodian shall comply with Item #2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. The Council defers a decision regarding whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances pending compliance with the Council's Interim Order.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

February 20, 2008