



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2007-255

v.

Borough of Roselle (Union)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the September 13, 2010 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 this complaint should be dismissed because the Complainant’s Counsel voluntarily withdrew this complaint from the Office of Administrative Law in a letter to the Honorable Leslie Z. Celentano dated August 19, 2010. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 26th Day of October, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: October 28, 2010



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2007-255

v.

**Borough of Roselle (Union)²
Custodian of Records**

1. The first page from the minutes of each public Borough Council meeting held on or after October 1, 2006.
2. The resolutions, as required by N.J.S.A. 10:4-13, that authorized the first two (2) Borough Council nonpublic (*i.e.* closed or executive) meetings that occurred after October 1, 2006.
3. The resolutions, as required by N.J.S.A. 10:4-13, that authorized the Borough Council's most recent nonpublic (*i.e.* closed or executive) meeting.
4. The minutes from the three nonpublic (*i.e.* closed or executive) meetings authorized by the resolutions responsive to paragraph 2 and paragraph 3 above.

Request Made: September 2, 2007

Response Made: September 18, 2007

Custodian: Rhona C. Bluestein

GRC Complaint Filed: September 30, 2007

Background

June 25, 2008

Government Records Council's ("Council") Interim Order. At its June 25, 2008 public meeting, the Council considered the June 18, 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's Counsel failed to request an extension within five (5) business days of receipt of the Council's Interim Order, the Custodian did provide the requested records within the extended deadline. However, because the Custodian failed to request an extension of time to comply with the Interim Order within five (5) business days following receipt of the Council's Order, the Custodian failed to comply with the Council's April 30, 2008 Interim.

¹ Represented by Walter Luers, Esq., of Law Offices of Walter Luers, LLC (Oxford, NJ).

² Represented by Kraig M. Dowd, Esq., of Weber, Dowd Law Office (West Paterson, NJ).

2. Although the Custodian's initial response to the Complainant's September 27, 2007 OPRA request was untimely and the Custodian failed to request an extension of time to comply with the Council's April 30, 2008 Interim Order until the sixth (6th) business day after receipt of same, the Custodian did provide an appropriate denial of access to request Item No. 1 and provided the requested records within the extended deadline set forth by the GRC. Therefore, 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee under N.J.S.A. 47:1A-6. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

July 2, 2008

Council's Interim Order distributed to the parties.

August 15, 2008

Complaint referred to the Office of Administrative Law ("OAL").

August 19, 2010

Letter from the Complainant's Counsel to the Honorable Leslie Z. Celentano. Counsel withdraws this complaint from consideration.

August 31, 2010

Complaint referred back to the GRC from OAL.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant's Counsel voluntarily withdrew this complaint from the Office of Administrative Law in a letter to the Honorable Leslie Z. Celentano dated August 19, 2010. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 13, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

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INTERIM ORDER

June 25, 2008 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2007-255

v.

Borough of Roselle (Union)
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council (“Council”) considered the June 18, 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. Although the Custodian’s Counsel failed to request an extension within five (5) business days of receipt of the Council’s Interim Order, the Custodian did provide the requested records within the extended deadline. However, because the Custodian failed to request an extension of time to comply with the Interim Order within five (5) business days following receipt of the Council’s Order, the Custodian failed to comply with the Council’s April 30, 2008 Interim.
2. Although the Custodian’s initial response to the Complainant’s September 27, 2007 OPRA request was untimely and the Custodian failed to request an extension of time to comply with the Council’s April 30, 2008 Interim Order until the sixth (6th) business day after receipt of same, the Custodian did provide an appropriate denial of access to request Item No. 1 and provided the requested records within the extended deadline set forth by the GRC. Therefore, 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at



432. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee under N.J.S.A. 47:1A-6. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 25th Day of June, 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, Secretary
Government Records Council

Decision Distribution Date: July 1, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 25, 2008 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2007-255

v.

**Borough of Roselle (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. The first page from the minutes of each public Borough Council meeting held on or after October 1, 2006.
2. The resolutions, as required by N.J.S.A. 10:4-13, that authorized the first two (2) Borough Council nonpublic (i.e. closed or executive) meetings that occurred after October 1, 2006.
3. The resolutions, as required by N.J.S.A. 10:4-13, that authorized the Borough Council's most recent nonpublic (i.e. closed or executive) meeting.
4. The minutes from the three nonpublic (i.e. closed or executive) meetings authorized by the resolutions responsive to paragraph 2 and paragraph 3 above.

Request Made: September 2, 2007

Response Made: September 18, 2007

Custodian: Rhona C. Bluestein

GRC Complaint Filed: September 30, 2007

Background

April 30, 2008

Government Records Council's ("Council") Interim Order. At its April 30, 2008 public meeting, the Council considered the April 23, 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. The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the Complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

¹ Represented by Walter Luers, Esq., of Law Offices of Walter Luers, LLC (Oxford, NJ).

² Represented by Ira Karasick, Esq. (Bloomfield, NJ).

2. The Custodian's denial of access to request Item No. 1, while untimely, is appropriate pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian is not required to provide this record to the Complainant.
3. Because the Complainant identifies a type of government record (resolutions and executive meeting minutes) within a specific date (the most recent meeting prior to the Complainant's OPRA request and the first two (2) meetings after October 1, 2006), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding meetings and provide resolutions and meeting minutes.
4. The Custodian failed to bear her burden of proving that the denial of access to request Item No. 2, No. 3 and No. 4 was authorized under OPRA, as required by N.J.S.A. 47:1A-6.
5. **The Custodian shall disclose the requested records responsive to Item No. 2, No. 3 and No. 4 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.**
6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
7. 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.
8. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

April 30, 2008

Council's Interim Order distributed to the parties.

May 8, 2008

The Custodian's Counsel verbally requests an extension of time to comply with the Council's April 30, 2008 Interim Order.

May 8, 2008

E-mail from the GRC to the Custodian. The GRC states that pursuant to the Custodian Counsel's request, the GRC grants the Custodian an extension until May 12, 2008 to comply with the Council's April 30, 2008 Interim Order.

May 12, 2008

Custodian's response to the Council's Interim Order attaching proof of mailing. The Custodian states that she has complied with Items No. 5 and No. 6 of the Council's April 30, 2008 Interim Order.

May 16, 2008

E-mail from the GRC to the Custodian. The GRC states that the Council's April 30, 2008 Interim Order requested that the Custodian send proof of compliance along with certified confirmation in accordance with N.J. Court Rule 1:4-4. The GRC states that the Custodian's May 12, 2008 response to the GRC contains no certification language. The GRC requests that the Custodian resubmit the letter of confirmation with the appropriate certification language by close of business on May 20, 2008.

May 20, 2008

Letter from the Custodian to the GRC. The Custodian certifies that all records responsive were provided to the Complainant on May 12, 2008.

Analysis

Whether the Custodian complied with the Council's April 30, 2008 Interim Order?

The Custodian's Counsel requested an extension of time to comply with the Council's April 30, 2008 Interim Order six (6) days after receipt of the Council's Interim Order. Further, the Custodian certified to providing the requested records to the Complainant on May 12, 2008, or within the extended deadline set forth by the GRC.

Although the Custodian's Counsel failed to request an extension within five (5) business days of receipt of the Council's Interim Order, the Custodian did provide the requested records within the extended deadline. However, because the Custodian failed to request an extension of time to comply with the Interim Order within five (5) business days following receipt of the Council's Order, the Custodian failed to comply with the Council's April 30, 2008 Interim.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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 at 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 (Berg); 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 (App. Div. 1996) at 107).

Although the Custodian’s initial response to the Complainant’s September 27, 2007 OPRA request was untimely and the Custodian failed to request an extension of time to comply with the Council’s April 30, 2008 Interim Order until the sixth (6th) business day after receipt of same, the Custodian did provide an appropriate denial of access to request Item No. 1 and provided the requested records within the extended deadline set forth by the GRC. Therefore, 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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:
institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...”

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a Complainant is a “prevailing party” if he or she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the Custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the Complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under N.J.S.A. § 47:1A-6 and N.J.S.A. § 47:1A-7.f. against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency which falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated state licensing rules and reported the results of its investigation to the Complainant. The Complainant received the records she requested upon entering into a settlement with DYFS. The court found that the Complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. Teeters, supra, 387 N.J. Super. at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the court found that the Complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

In the complaint now before the Council, the Custodian was ordered to disclose records requested and provide a subsequent certification to the GRC within five (5) business days of receipt of the Council’s April 30, 2008 Interim Order, and the Custodian did in fact disclose the records requested within the extension of time granted by the GRC. Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee under N.J.S.A. 47:1A-6. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian’s Counsel failed to request an extension within five (5) business days of receipt of the Council’s Interim Order, the Custodian did provide the requested records within the extended deadline. However, because the Custodian failed to request an extension of time to comply with the Interim Order within five (5) business days following receipt of the

Council's Order, the Custodian failed to comply with the Council's April 30, 2008 Interim.

2. Although the Custodian's initial response to the Complainant's September 27, 2007 OPRA request was untimely and the Custodian failed to request an extension of time to comply with the Council's April 30, 2008 Interim Order until the sixth (6th) business day after receipt of same, the Custodian did provide an appropriate denial of access to request Item No. 1 and provided the requested records within the extended deadline set forth by the GRC. Therefore, 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee under N.J.S.A. 47:1A-6. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

June 18, 2008



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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

INTERIM ORDER

April 30, 2008 Government Records Council Meeting

John Paff

Complainant

v.

Borough of Roselle (Union)

Custodian of Record

Complaint No. 2007-255

At the April 30, 2008 public meeting, the Government Records Council (“Council”) considered the April 23, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimous to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the Complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Custodian’s denial of access to request Item No. 1, while untimely, is appropriate pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian is not required to provide this record to the Complainant.
3. Because the Complainant identifies a type of government record (resolutions and executive meeting minutes) within a specific date (the most recent meeting prior to the Complainant’s OPRA request and the first two (2) meetings after October 1, 2006), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian’s search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding meetings and provide resolutions and meeting minutes.



4. The Custodian failed to bear her burden of proving that the denial of access to request Item No. 2, No. 3 and No. 4 was authorized under OPRA, as required by N.J.S.A. 47:1A-6.
5. **The Custodian shall disclose the requested records responsive to Item No. 2, No. 3 and No. 4 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.**
6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
7. 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.
8. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Interim Order 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: April 30, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

John Paff¹
Complainant

GRC Complaint No. 2007-255

v.

Borough of Roselle (Union)²
Custodian of Records

Records Relevant to Complaint:

1. The first page from the minutes of each public Borough Council meeting held on or after October 1, 2006.
2. The resolutions, as required by N.J.S.A. 10:4-13, that authorized the first two (2) Borough Council nonpublic (i.e. closed or executive) meetings that occurred after October 1, 2006.
3. The resolutions, as required by N.J.S.A. 10:4-13, that authorized the Borough Council's most recent nonpublic (i.e. closed or executive) meeting.
4. The minutes from the three nonpublic (i.e. closed or executive) meetings authorized by the resolutions responsive to Paragraph 2 and Paragraph 3 above.

Request Made: September 2, 2007

Response Made: September 18, 2007

Custodian: Rhona C. Bluestein

GRC Complaint Filed: September 30, 2007

Background

September 2, 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.

September 18, 2007

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the tenth (10th) business day following receipt of such request. The Custodian states the following:

1. "The documents requested in Item No. 1 are in process and also require the review and approval of the governing body and the Borough attorney. These documents will be provided to you immediately after that has been accomplished (a month)."

¹ Represented by Walter Luers, Esq., of Law Offices of Walter Luers, LLC (Oxford, NJ).

² Represented by Ira Karasick, Esq. (Bloomfield, NJ).

2. “Your “Supplement” Item No. 2 does not identify a document, but rather requires that a work task be done by a government employee.”
3. “Your “Supplement” Item No. 3 does not identify a document, but rather requires that a work task be done by a government employee.”
4. “Your “Supplement” Item No. 4 does not identify a document, but rather requires that a work task be done by a government employee.”

Finally, the Custodian states that the Complainant must identify a specific document in his description of the records being requested.

September 30, 2007

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

- Complainant’s OPRA request dated September 2, 2007
- Letter from the Custodian to the Complainant dated September 18, 2007

The Complainant’s Counsel contends that the Complainant filed his September 2, 2007 OPRA request for the records relevant to this complaint in response to a newspaper report in the *Star Ledger* on September 1, 2007 which suggested that the Borough of Roselle had not created or maintained meeting minutes since October, 2006. The Complainant’s Counsel contends that the Complainant faxed this request Sunday, September 2, 2007 and that the Custodian admitted to receiving the request on September 4, 2007, therefore giving the Custodian until September 13, 2007 to respond to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.i. The Complainant’s Counsel asserts that the Custodian responded in writing on September 18, 2007 without requesting an extension of time prior to that date.

The Complainant’s Counsel asserts that the Custodian violated OPRA in three ways. The Complainant’s Counsel asserts that the Custodian failed to respond within seven (7) business pursuant to N.J.S.A. 47:1A-5.i. The Complainant’s Counsel further contends that the Custodian’s denial of request Item No. 1 did not cite to a specific law or authority supporting the Custodian’s denial. The Complainant’s Counsel cites to Schwarz v. New Jersey Department of Human Services, GRC Complaint No. 2004-60 (June 2004) and N.J.S.A. 47:1A-5.g., which provides that a custodian must provide a specific basis for denying an OPRA request.

Finally, the Complainant’s Counsel contends that the Borough denied access to public records by refusing to search for identifiable public records. The Complainant’s Counsel states that in Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the GRC held that the Custodian violated OPRA because she refused to search her files for identifiable records in response to the Complainant’s request for all accident reports for the time period between September 5 and September 15, 2005. The Complainant’s Counsel further contends that the Custodian in that complaint, similar to the Custodian in this complaint, denied access to requested records because the request did not contain “specific dates, times, locations...” in reference to a requested record. The Complainant’s Counsel states that the GRC rejected that argument and held that the Custodian violated OPRA and further held that the Custodian must search her files to find

the identifiable government records listed in the Complainant's OPRA request. The Complainant's Counsel asserts that the complaint now before the GRC is governed by Donato and that the same result should follow.

The Complainant's Counsel requests the following relief:

1. Finding that the Custodian denied access and violated OPRA by not responding to the Complainant's records request within seven (7) business days.
2. Finding that the Custodian denied access and violated OPRA by not providing specific, legal bases for withholding documents from production.
3. Finding that the Custodian denied access and violated OPRA by refusing to search her files for identifiable records.
4. Ordering the Custodian to provide immediate access to all of the records requested by the Complainant.
5. Finding that the Complainant is a "prevailing party" and awarding a reasonable attorney's fee as provided by N.J.S.A. 47:1A-6.
6. If, after investigation, it is found that the Custodian knowingly and willfully violated OPRA, fining the Custodian for violating OPRA.

October 25, 2007

Offer of Mediation sent to both parties.

October 31, 2007

The Complainant declines mediation.³

November 1, 2007

Request for the Statement of Information sent to the Custodian.

November 8, 2007

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

- Complainant's OPRA request dated September 2, 2007.
- Letter from the Custodian to the Complainant dated September 18, 2007.

The Custodian certifies that her search for the requested records included searching binders of minutes which displayed that some of the minutes were in process, but had not been approved by the Mayor and Council. The Custodian certifies that she also searched the files of handwritten notes from the Council meetings and found that the notes had not yet been composed into meeting minutes.

The Custodian's Counsel asserts that the Custodian received the Complainant's September 2, 2007 OPRA request on September 4, 2007. The Custodian's Counsel further asserts that the Custodian responded in writing on September 18, 2007.

³ The Custodian submitted a signed Mediation Agreement form on November 1, 2007.
John Paff v. Borough of Roselle (Union), 2007-255 – Findings and Recommendations of the Executive Director

The Custodian's Counsel contends that OPRA requires a requestor to specifically identify the records being sought so that a custodian may search for a specific record. The Custodian's Counsel asserts that OPRA does not require a custodian and/or other municipal personnel to perform new tasks that require cross-referencing, compiling lists or information, originating new documents, performing research for the requestor or performing new tasks.

The Custodian's Counsel asserts that the Custodian will provide the records requested in Item No. 1 following their approval by the Mayor and Council. The Custodian's Counsel contends that the Complainant mischaracterizes the term "search," when in fact, the Custodian did do the necessary search. The Custodian's Counsel further contends that there was no denial of access and that the Custodian's response was not due to a lack of searching.

The Custodian's Counsel asserts that other factors have also affected the Custodian's response to this request, including:

1. The Borough has not provided the necessary experienced staff and resources for the Custodian, who performs many other functions in addition to responding to OPRA requests, in an office lacking the appropriate automated systems needed to catch up on the backlog of meeting minutes (which has been a historical situation prior to the Custodian).
2. The Custodian was preparing for and attending two Council meetings at the time of the Complainant's OPRA request, leaving little time during regular business hours for many of the Custodian's other duties and responsibilities.
3. The Custodian observed an annual religious holiday during which time there was no replacement to assume the Custodian's duties.
4. The Mayor and Council placed additional responsibilities upon the Custodian at the time of the Complainant's OPRA request.
5. The Custodian was seeking and waiting on advice of the Borough Attorney before completing an initial response to the Complainant.

Analysis

Whether the Custodian responded in a timely manner to the Complainant's September 2, 2007 OPRA request?

OPRA provides that:

"...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. 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 mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, the custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.

In the instant complaint, the Custodian responded in writing on the tenth (10th) business day following the Complainant’s OPRA request. The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i,

results in a “deemed” denial of the Complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Whether the Custodian unlawfully denied access to the requested records?

Item No. 1 of Records Request

In her response to the Complainant, the Custodian asserts that “[t]he documents requested in Item No. 1 are in process and also require the review and approval of the Governing Body and the Borough Attorney. These documents will be provided to you immediately after that has been accomplished (a month).” In Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), 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. Therefore, the Custodian’s denial of access to request Item No. 1, while untimely, is appropriate pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian is not required to provide this record to the Complainant.

Item No. 2, No. 3 and No. 4 of Records Request

The Custodian asserts in her response to the Complainant that Items No. 2, No. 3 and No. 4 do not identify a specific document, but rather require that a “work task” be done by a government employee.

The Custodian’s Counsel contends that several factors, including lack of staff and resources, additional responsibilities and awaiting the Borough attorney’s advice, prevented the Custodian from efficiently handling this OPRA request. However, OPRA does not recognize these factors as a lawful basis for a denial of access. Further, the GRC has previously ruled that awaiting municipal attorney’s advice is not a lawful basis for failing to respond in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.i. and Cottrell v. Borough of Glassboro, GRC Complaint No. 2005-247 (April 2006).

The Complainant specifically requested resolutions and minutes of closed or executive session meetings. Further, the Complainant requested specific resolutions for the most recent Borough meeting prior to the submission of this OPRA request, as well as two (2) meetings following October 1, 2006, with minutes for each of the three (3) meetings. The Custodian would therefore only be required to identify the two (2) meetings following October 1, 2006 and the most recent meeting prior to the submission of the Complainant’s request in order to identify the records responsive to this request.

Additionally, the New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*” (Emphasis added.) MAG Entertainment,

LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only "identifiable" government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (App. Div. 2005)⁴, the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁵ *Id.*

Because the Complainant identifies a type of government record (resolutions and executive meeting minutes) within a specific date (the most recent meeting prior to the Complainant's OPRA request and the first two (2) meetings after October 1, 2006), MAG and Bent do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding meetings and provide resolutions and meeting minutes.

Therefore, the Custodian failed to bear her burden of proving that the denial of access to request Items No. 2, No. 3 and No. 4 was authorized under OPRA as required by 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-5.g.

Whether the Custodian's delay in access to the requested records 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 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.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

⁴ Affirming the Council's decision in Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁵ As stated in Bent.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the Complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Custodian's denial of access to request Item No. 1, while untimely, is appropriate pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian is not required to provide this record to the Complainant.
3. Because the Complainant identifies a type of government record (resolutions and executive meeting minutes) within a specific date (the most recent meeting prior to the Complainant's OPRA request and the first two (2) meetings after October 1, 2006), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding meetings and provide resolutions and meeting minutes.
4. The Custodian failed to bear her burden of proving that the denial of access to request Item No. 2, No. 3 and No. 4 was authorized under OPRA, as required by N.J.S.A. 47:1A-6.
5. **The Custodian shall disclose the requested records responsive to Item No. 2, No. 3 and No. 4 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.**
6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
7. 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.

8. The Council defers analysis of whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008