



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

May 28, 2008 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2007-272

v.

Willingboro Board of Education (Burlington)
Custodian of Record

At the May 28, 2008 public meeting, the Government Records Council ("Council") considered the May 21, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.
2. Although the Complainant asserts that he tendered payment for the requested records on September 7, 2007, the Custodian submitted a receipt for payment of \$5.25 dated October 11, 2007. The parties agree that certain requested records were disclosed on October 11, 2007. Therefore, there was no delay in the release of records to the Complainant because the requested records were sent upon receipt of payment from the Complainant.
3. The GRC has no authority over the legibility of records produced pursuant to Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005).
4. Because the special meeting Executive Session minutes were not yet approved by the Board at the time of the Complainant's OPRA request, these minutes are exempt from disclosure under OPRA as ACD material pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) and N.J.S.A. 47:1A-1.1. The Custodian has borne his burden



of proof that the denial of access to the Special meeting Executive Session minutes was lawful under N.J.S.A. 47:1A-6.

5. Additionally, O'Shea v. Kearny Board of Education, Docket No. HUD-L-856-07 is a disclosure order from the Law Division of the Superior Court of New Jersey. A disclosure order at the trial level is only binding on the parties in that particular case and is not a general ruling on the disclosure of meeting minutes. Therefore, the order of disclosure in O'Shea v. Kearny Board of Education, Docket No. HUD-L-856-07 is not binding in the matter now before the Council.
6. Although the Custodian failed to respond to each request item individually within the statutorily mandated seven (7) business days resulting in a deemed denial regarding those items of the OPRA request, the Custodian bore the burden of proving that the unapproved special meeting Executive Session minutes are exempt from disclosure under OPRA and did provide all other records responsive to the Complainant on October 11, 2007. 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 unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
7. The Complainant failed to achieve the desired result of disclosure of a requested record because the Custodian provided all records upon receipt of payment from the Complainant with the exception of the special meeting Executive Session meeting minutes which had not been approved by the Board at the time of the Complainant's OPRA request and are therefore exempt from disclosure under OPRA as advisory, consultative, or deliberative material. The Complainant, therefore, is not entitled to prevailing party attorney's fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

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 28th Day of May, 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: June 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2008 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2007-272

v.

**Willingboro Board of Education (Burlington)²
Custodian of Records**

Records Relevant to Complaint:

1. The public notice that announced the private meeting (“special meeting”) referred to in this letter where four members of the Board met with the Mayor and Manager on August 7, 2007 at 6 p.m.
2. Any other private notices that invited members of the Board, the Mayor, Manager or any others to the special meeting.
3. The agenda of the special meeting.
4. Any minutes or notes taken at the special meeting.
5. Any list of attendees at the special meeting.
6. Any audio or video recording of the special meeting.
7. Any record evidencing or memorializing that President Owens “created the committee Monday night to facilitate the meeting with the Mayor,” as mentioned in the attached *Burlington County Times* article.
8. Any motion or resolution passed at the July 23, 2007 meeting at which the Board “voted ... to meet in full with the Mayor.”
9. Any resolution passed, in accordance with N.J.S.A. 10:4-13, that authorized any closed or executive (i.e. nonpublic) meeting of the Board held on August 7, 2007.
10. Any minutes or notes of any closed or executive (i.e. nonpublic) meeting of the Board held on August 7, 2007.
11. Any Board policy, bylaw or other authority which, similar to Section 9325.1 of the West Milford Township Board’s policies, defines a quorum of the Willingboro Board of Education.

Request Made: August 28, 2007

Response Made: September 7, 2007

Custodian: Kelvin Smith³

GRC Complaint Filed: November 2, 2007

Background

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

² No representation listed on file.

³ The Complainant names D. Stokes in the Denial of Access complaint.

August 28, 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 7, 2007

The Custodian's Response to the OPRA request. The Custodian responds in writing via facsimile to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that the following items are available upon receipt of payment:

- Special meeting notice for August 7, 2007.
- Agenda for special meeting on August 7, 2007.
- Resolution of the Willingboro Board of Education ("WBOE") for Executive Session.
- Policy 9325.1 Re: Quorum.

The Custodian further states that the special meeting minutes of August 7, 2007 have not been approved by the Board and are not available. The Custodian requests that the Complainant remit a payment of \$5.25 for seven (7) pages of copies.

September 8, 2007

Letter from the Complainant to the Custodian. The Complainant states that he is in receipt of the Custodian's letter dated September 8, 2007. The Complainant states that a payment of \$5.25 is enclosed.

The Complainant advises that he has two (2) concerns. The Complainant first asks if it is a policy of the WBOE not to make meeting minutes publicly available until after they are approved. The Complainant states that in Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51, the GRC held that unapproved meeting minutes constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are presumed to be exempt from the disclosure unless the requestor demonstrates an overriding need for the record.

The Complainant contends that while WBOE's denial of access is authorized under OPRA, N.J.S.A. 10:4-14 of the Open Public Meetings Act ("OPMA") requires meeting minutes to be made "promptly available." The Complainant states that the enclosed court order in the case of O'Shea and Paff v. Kearny Board of Education, Docket No. HUD-L-856-07 requires the Kearny Board of Education to "grant access to the minutes of public meetings no later than three (3) business days prior to the next meeting." The Complainant asserts that unapproved meeting minutes fall into a category of records that are exempt from disclosure under OPRA but obtainable under another statute, in this case OPMA. The Complainant asserts that he therefore challenges the Custodian's denial of access to the August 7, 2007 meeting minutes simply because they have not yet been approved.

The Complainant also contends that his August 28, 2007 OPRA request asked for eleven (11) records, but the Custodian only granted access to five (5) of the requested

items. The Complainant requests that the Custodian advise in writing the specific basis for each denial of access to the remaining six (6) requested items.

October 11, 2007

Mailing from the Custodian to the Complainant. The Custodian provides the following records:

- A Receipt of Payment Acknowledgement dated October 11, 2007.
- A special meeting notice dated August 2, 2007.
- An Affidavit of Service allegedly evidencing that the August 7, 2007 Board meeting was advertised in the *Burlington County Times*. An illegible copy of the notice placed in the newspaper is also provided.
- A two (2) page Agenda of the Board's August 7, 2007 special meeting.
- A two (2) page "Resolution of the Willingboro Township Board of Education to go into Executive Session."
- A page from the Board's policy manual 9325.1 defining "Quorum."
- Fourteen (14) pages of minutes from the Board's special meeting of Tuesday, August 7, 2007.

November 2, 2007

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

- Melissa Hayes, [Willingboro] Mayor Meets with Board Members, *Burlington County Times*, August 8, 2007.
- Complainant's OPRA request dated August 28, 2007.
- Letter from the Custodian to the Complainant dated September 7, 2007.
- Letter from the Complainant to the Custodian dated September 8, 2007.
- A Receipt of Payment Acknowledgement dated October 11, 2007.
- A special meeting notice dated August 2, 2007.
- An Affidavit of Service allegedly evidencing that the August 7, 2007 Board meeting was advertised in the *Burlington County Times*. An illegible copy of the notice placed in the newspaper is also provided.
- A two (2) page Agenda of the Board's August 7, 2007 special meeting.
- A two (2) page Resolution of the Willingboro Township Board of Education to go into Executive Session.
- A page from the Board's policy manual 9325.1 defining "Quorum."
- Fourteen (14) pages of minutes from the Board's special meeting of Tuesday, August 7, 2007.⁴

The Complainant's Counsel states that the Complainant submitted an OPRA request to the Custodian on August 28, 2007 following an article published in the *Burlington County Times* about an August 7, 2007 closed meeting between WBOE and

⁴ The Complainant also attaches two (2) ethical misconduct and OPMA violations complaints filed with the New Jersey Department of Education, Office of Compliance Investigation Unit against the custodial agency.

the Mayor of Willingboro. The Complainant's Counsel states that the Custodian responded on September 7, 2007 in writing via facsimile requesting a payment of \$5.25 for copies and stating that the minutes of the August 7, 2007 meeting had not been approved yet and are not available. The Complainant's Counsel states that the Complainant responded to the Custodian on September 8, 2007 attaching a payment of \$5.25 and arguing that pursuant to O'Shea v. Kearny Board of Education, Docket No. HUD-L-856-07, meeting minutes must be made available no later than three (3) business days before the next meeting. The Complainant's Counsel further states that the Complainant noted that the Custodian only responded to five (5) of the eleven (11) request items and requests that the Custodian advise in writing the status of each request item.

The Complainant's Counsel states that the Complainant received the following on October 11, 2007:

- A Receipt Acknowledgement of payment dated October 11, 2007.
- A special meeting notice dated August 2, 2007.
- An Affidavit of Service allegedly evidencing that the August 7, 2007 Board meeting was advertised in the *Burlington County Times*. An illegible copy of the notice placed in the paper is also the newspaper is also provided.
- A two (2) page Agenda of the Board's August 7, 2007 special meeting.
- A two (2) page Resolution of the Willingboro Township Board of Education to go into Executive Session.
- A page from the Board's policy manual 9325.1 defining "Quorum."
- Fourteen (14) pages of minutes from the Board's special meeting of Tuesday, August 7, 2007.

The Complainant's Counsel asserts that the Custodian violated OPRA in three (3) ways.

First, the Complainant's Counsel contends that the Custodian received the Complainant's payment on September 8, 2007 but failed to disclose the records responsive until October 11, 2007. The Complainant's Counsel asserts that the Custodian's failure to provide these records for more than a month violates OPRA pursuant to N.J.S.A. 47:1A-5.g.

Next, the Complainant's Counsel asserts that the Custodian's failure to respond to request Items No. 2, No. 6, No. 7, No. 8 and No. 10 results in a deemed denial and violates OPRA pursuant to N.J.S.A. 47:1A-5.i. The Complainant's Counsel states that in DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-25, the GRC held that a custodian's failure to respond within seven (7) business days after receipt of the request results in a deemed denial.

Finally, the Complainant's Counsel contends that the Custodian's actions evince a purposeful and willful refusal to comply with the Complainant's OPRA request. The

Complainant's Counsel asserts that one of the disclosed records is completely illegible, which does not comply with OPRA.⁵

The Complainant's Counsel requests the following relief:

1. A finding that the WBOE denied access and violated OPRA by not responding to the Complainant's records request within seven (7) business days.
2. A finding that the WBOE denied access and violated OPRA by not providing specific, legal bases for withholding records from disclosure.
3. An Order requiring the Custodian to provide immediate access to all of the records requested by the Complainant.
4. A finding that the Complainant is a "prevailing party" and awarding a reasonable attorneys fee as provided by N.J.S.A. 47:1A-6.
5. If, after investigation, it is found that the Custodian knowingly and willfully violated OPRA, fining the Custodian in accordance with N.J.S.A. 47:1A-11.

The Complainant declines mediation.

November 26, 2007

Request for the Statement of Information sent to the Custodian.

December 4, 2007

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

- Melissa Hayes, [Willingboro] Mayor Meets with Board Members, *Burlington County Times*, August 8, 2007.
- Complainant's OPRA request dated August 28, 2007
- Facsimile from the Custodian to the Complainant confirming receipt of the Complainant's OPRA request dated August 28, 2007.
- Letter from the Custodian to the Complainant dated September 7, 2007.
- Mail Receipt form dated September 7, 2007
- A special meeting notice dated August 2, 2007.
- An Affidavit of Service allegedly evidencing that the August 7, 2007 Board meeting was advertised in the *Burlington County Times*. An illegible copy of the notice placed in the newspaper is also provided.
- A two (2) page Agenda of the Board's August 7, 2007 special meeting.
- A two (2) page Resolution of the Willingboro Township Board of Education to go into Executive Session.
- A page from the Board's policy manual 9325.1 defining "Quorum."
- Fourteen (14) pages of minutes from the Board's special meeting of Tuesday, August 7, 2007.

⁵ The Complainant's Counsel also states that the Department of Education Office of Compliance Investigation performed two (2) investigations based on allegations of ethical misconduct and OPMA violations against WBOE and issued a report. The Complainant's Counsel states that both reports concluded that the WBOE had violated OPMA by not making minutes available to the public as required. The Complainant's Counsel attaches a copy of both reports to the Denial of Access complaint.

The Custodian certifies that his search for the requested records included locating all records responsive held on the premises of the WBOE's office.

The Custodian states that he received the Complainant's OPRA request on August 28, 2007. The Custodian states that he replied in writing on September 7, 2007 requesting a payment of \$5.25 for copies of the requested records and that the Executive Session minutes have not been approved yet and are therefore not available. The Custodian further states that the requested records were mailed on October 11, 2007 after the Complainant's payment was received.⁶

The Custodian certifies that a majority of requested records were disclosed to the Complainant in a timely manner. The Custodian certifies that the only record not disclosed were the minutes of the August 7, 2007 Executive Board meeting, which were not approved by the Board yet. The Custodian provides in his document index that:

Requested Records	Provided?	Legal Authority for Denial
Item No. 1 – Special meeting Public Notice for August 7, 2007.	Special meeting Notice for August 7, 2007 (1 page). Sent September 7, 2007.	Not applicable.
Item No. 2 – Any other private notices that invited members of the Board, Mayor, Manager or any others to the Special meeting.	No.	No records responsive exist.
Item No. 3 – Special meeting agenda.	Special meeting agenda for August 7, 2007 (2 pages). Sent September 7, 2007.	Not applicable.
Item No. 4 – Public meeting minutes for special meeting.	Public minutes of special meeting for August 7, 2007 (17 pages), sent September 7, 2007. It should be noted that these minutes were not included in the September 7, 2007 letter.	Not applicable.

⁶ The Custodian attaches a receipt for \$5.25 dated October 11, 2007.

Item No. 5 – Any list of attendees at the special meeting.	Page 1 of Public Minutes of special meeting for August 7, 2007 (1 page). Sent September 7, 2007.	Not applicable.
Item No. 6 – Any audio or video recording of the Special meeting.	No.	No records responsive exist.
Item No. 7 – Any record evidencing or memorializing that President Owens created the committee meeting Monday night to facilitate the meeting with the Mayor.	No.	No records responsive exist.
Item No. 8 – Any motion or resolution passed at the July 23, 2007 meeting at which the Board voted... to meet in full with the Mayor	Minutes of special meeting for August 7, 2007 (1 page). Sent September 7, 2007.	Not applicable.
Item No. 9 – Any resolution passed, in accordance with <u>N.J.S.A. 10:4-13</u> , that authorized any closed or executive meeting of the Board held on August 7, 2007.	Resolution of the WBOE to into Executive Session (2 pages). Sent September 7, 2007.	Not applicable.
Item No. 10 – Any minutes or notes of any closed or executive meeting of the Board held on August 7, 2007.	Executive Session minutes for special meeting will be provided on December 4, 2007 if the Board approves the minutes.	Executive Session minutes will be provided on December 4, 2007 if the Board approves the minutes.
Item No. 11 – Any Board policy, bylaw or other authority which, similar to Section 9325.1 of the West Milford Township Board’s policies, defines a quorum of the WBOE.	Board Policy No. 9325.1 (1 page). Sent September 7, 2007.	Not applicable.

March 10, 2008

E-mail from the GRC to the Complainant’s Counsel. The GRC states that it has been unsuccessful in locating O’Shea v. Kearny Board of Education, Docket No. HUD-L-856-07 and requests that the Complainant’s Counsel submit a copy to the GRC.

March 10, 2008

E-mail from the Complainant’s Counsel to the GRC attaching the Kearny Order.

Analysis

Whether the Custodian unlawfully denied access to the Complainant's August 28, 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.

The Complainant's Counsel asserts that the Custodian violated OPRA by failing to respond to each of the Complainant's request items individually within seven (7) business days. OPRA specific states that a custodian "shall promptly comply with a request... [for] a government record." (Emphasis added.) N.J.S.A. 47:1A-5.g. Additionally, in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005), the GRC held that the Custodian's initial response that the Complainant's request was a duplicate of a previous request to the Complainant's June 22, 2007 request was legally insufficient because the Custodian has a duty to answer each request individually. Based on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request.

Although the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i, the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.

The Complainant's Counsel further asserts that the Custodian violated OPRA by failing to disclose the records responsive to the Complainant's August 28, 2007 OPRA request until October 11, 2007, even after the Complainant sent payment to the Custodian on September 8, 2007. The Custodian contends that all records were provided in a timely manner with the exception of the special meeting Executive Session minutes, which would be disclosed after the December 4, 2007 Council meeting if the minutes are approved.

Although the Complainant asserts that he tendered payment for the requested records on September 7, 2007, the Custodian submitted a receipt for payment of \$5.25 dated October 11, 2007. The parties agree that certain requested records were disclosed on October 11, 2007. Therefore, there was no delay in the release of records to the Complainant because the requested records were sent upon receipt of payment from the Complainant.

The Complainant's Counsel also contends that the Custodian provided an illegible copy of one of the requested records. However, pursuant to N.J.S.A. 47:1A-7.b, which delineates the Council's powers and duties, the GRC does not have the authority over the condition of records provided by a Custodian. Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005). Therefore, the GRC has no authority over the legibility of records produced to the Complainant in this matter pursuant to the GRC's decision in Toscano.

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.

The Custodian’s response to the Complainant’s OPRA request denied access to the special meeting minutes requested because “the minutes... have not been approved by the Board and are not available.” Additionally, the Custodian certifies that the Public Session minutes were provided to the Complainant on September 7, 2007 and that the Executive Session minutes would be provided pending approval at a December 4, 2007 Council meeting.

The Complainant’s Counsel contends that although Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) exempts unapproved minutes from disclosure, a disclosure order in O’Shea v. Kearny Board of Education, Docket No. HUD-L-856-07 ordered that Kearny Board of Education meeting minutes must be made available no later than three business days before the next meeting. The Complainant’s Counsel asserts that even though the minutes might not be available under OPRA, the minutes can be obtained through another statute: OPMA.

In Parave-Fogg, however, the GRC held that meeting minutes not approved at the time an OPRA request is made are exempt from disclosure as intra-agency advisory, consultative and deliberative (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1. In this complaint, the Custodian responded in a timely manner stating that the minutes have not been approved by the Board and are not available.

Therefore, because the special meeting Executive Session minutes were not yet approved by the Board at the time of the Complainant’s OPRA request, these minutes are exempt from disclosure under OPRA as ACD material pursuant to Parave-Fogg and N.J.S.A. 47:1A-1.1. The Custodian has borne his burden of proof that the denial of access to the special meeting Executive Session minutes was lawful under N.J.S.A. 47:1A-6.

Additionally, O’Shea v. Kearny Board of Education, Docket No. HUD-L-856-07 is a disclosure order from the Law Division of the Superior Court of New Jersey. A disclosure order at the trial level is only binding on the parties in that particular case and is not a general ruling on the disclosure of meeting minutes. Therefore, the order of disclosure in Kearny is not binding in the matter now before the Council.

Whether the Custodian’s actions rise 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 failed to respond to each request item individually within the statutorily mandated seven (7) business days, resulting in a deemed denial regarding those items of the OPRA request, the Custodian bore the burden of proving that the unapproved special meeting Executive Session minutes are exempt from disclosure under OPRA and did provide all other records responsive to the Complainant on October 11, 2007. 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 unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

OPRA provides that:

“... [i]f it is determined that access has been improperly denied, the court or agency [GRC] head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

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. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). A complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.*

In the matter before the Council, the Complainant failed to achieve the desired result of disclosure of a requested record because the Custodian provided all records upon receipt of payment from the Complainant with the exception of the special meeting Executive Session meeting minutes which had not been approved by the Board at the time of the Complainant’s OPRA request and are therefore exempt from disclosure under OPRA as ACD. The Complainant, therefore, is not entitled to prevailing party attorney’s fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.
2. Although the Complainant asserts that he tendered payment for the requested records on September 7, 2007, the Custodian submitted a receipt for payment of \$5.25 dated October 11, 2007. The parties agree that certain requested records were disclosed on October 11, 2007. Therefore, there was no delay in the release of records to the Complainant because the requested records were sent upon receipt of payment from the Complainant.
3. The GRC has no authority over the legibility of records produced pursuant to Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005).
4. Because the special meeting Executive Session minutes were not yet approved by the Board at the time of the Complainant’s OPRA request, these minutes are exempt from disclosure under OPRA as ACD material pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51

(August 2006) and N.J.S.A. 47:1A-1.1. The Custodian has borne his burden of proof that the denial of access to the Special meeting Executive Session minutes was lawful under N.J.S.A. 47:1A-6.

5. Additionally, O’Shea v. Kearny Board of Education, Docket No. HUD-L-856-07 is a disclosure order from the Law Division of the Superior Court of New Jersey. A disclosure order at the trial level is only binding on the parties in that particular case and is not a general ruling on the disclosure of meeting minutes. Therefore, the order of disclosure in O’Shea v. Kearny Board of Education, Docket No. HUD-L-856-07 is not binding in the matter now before the Council.
6. Although the Custodian failed to respond to each request item individually within the statutorily mandated seven (7) business days resulting in a deemed denial regarding those items of the OPRA request, the Custodian bore the burden of proving that the unapproved special meeting Executive Session minutes are exempt from disclosure under OPRA and did provide all other records responsive to the Complainant on October 11, 2007. 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 unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
7. The Complainant failed to achieve the desired result of disclosure of a requested record because the Custodian provided all records upon receipt of payment from the Complainant with the exception of the special meeting Executive Session meeting minutes which had not been approved by the Board at the time of the Complainant’s OPRA request and are therefore exempt from disclosure under OPRA as advisory, consultative, or deliberative material. The Complainant, therefore, is not entitled to prevailing party attorney’s fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

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May 21, 2008