



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

April 29, 2009 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2008-166

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council (“Council”) considered the April 22, 2009 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 to the Complainant’s June 8, 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 contained in the request individually and provide a specific denial for each. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian certified in the Statement of Information that no April Executive Session meeting minutes which were responsive to the request relevant to this complaint existed at the time of the Complainant’s OPRA request because no April Executive meeting was held, and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to cite a specific lawful basis for the denial within the statutorily required seven (7) business days resulting in a deemed denial, the untimely denial of access is lawful pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian failed to respond to each request item individually within the statutorily mandated seven (7) business days, the Custodian ultimately bore the burden of proving that the February 2008 Executive



Session meeting minutes are exempt from disclosure under OPRA and that the Executive Session meeting minutes for April 2008 do not exist. 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.

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 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: May 4, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-166

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint:

1. Inspection of February 2008 Executive Session meeting minutes.
2. Inspection of April 2008 Executive Session meeting minutes.

Request Made: June 8, 2008

Response Made: June 13, 2008

Custodian: Donald E. Kazar

GRC Complaint Filed: July 31, 2008³

Background

June 8, 2008

Complainant's two (2) Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on two (2) official OPRA request forms.

June 13, 2008

Counsel's response to the OPRA requests. Counsel responds in writing to the Complainant's OPRA requests on the fifth (5th) business day following receipt of such request. Counsel states that access to the requested Executive Session meeting minutes is denied because the minutes involve litigation matters concerning the Borough which are still pending.

July 31, 2008

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

- Complainant's two (2) OPRA requests dated June 8, 2008.
- Letter from the Custodian's Counsel to the Complainant dated June 13, 2008.

¹ No legal representation listed on record.

² Represented by William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

The Complainant states that he submitted two (2) OPRA requests to the Custodian on June 8, 2008. The Complainant states that on June 13, 2008, Counsel responded in writing denying access to the requested Executive Session meeting minutes because they involve litigation matters concerning the Borough which are still pending.

The Complainant contends that the requested Executive Session meeting minutes should be made available even if the minutes contain information that is exempt from disclosure. The Complainant asserts that the Custodian should have redacted that information pertaining to any litigation and allowed inspection of the redacted Executive Session minutes. The Complainant asserts that the Custodian's actions appear to be knowing, willful and deliberate.

The Complainant did not agree to mediate this complaint.

August 6, 2008

Request for the Statement of Information sent to the Custodian.

August 13, 2008

Custodian's Statement of Information ("SOI").⁴

December 2, 2008

Letter from the Custodian's Counsel to the Complainant. Counsel states that any requested Executive Session meeting minutes responsive to the Complainant's two (2) June 8, 2008 OPRA requests are available for inspection.⁵

January 26, 2009

E-mail from the GRC to the Custodian attaching the Custodian's Statement of Information dated August 13, 2008.

The GRC states that the Custodian's SOI, which was provided on August 13, 2008, appears to address an OPRA request different from the two (2) requests relevant to this complaint. The GRC requests that the Custodian review the attached SOI and amend it to address the instant complaint. The GRC requests that the amended SOI be provided by no later than close of business on February 2, 2009.

January 29, 2009

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

- Complainant's two (2) OPRA requests dated June 8, 2008.
- Letter from the Custodian's Counsel to the Complainant dated June 13, 2008.
- Letter from the Custodian's Counsel to the Complainant dated December 2, 2008.

⁴ The SOI provided to the GRC on August 13, 2008 did not address the Complainant's June 8, 2008 OPRA request or Counsel's June 13, 2008 response. The Complainant and Counsel subsequently provided additional correspondence based on the Custodian's incorrect SOI; therefore, the two (2) succeeding communications are not relevant to the adjudication of this complaint.

⁵ Counsel's letter grants access to inspect all Executive Session meeting minutes between September, 2005 and September, 2008.

The Custodian states that he received the Complainant's two (2) OPRA requests on June 8, 2008. The Custodian states that Counsel responded in writing on June 13, 2008 stating that access to the requested Executive Session meeting minutes was denied because the minutes involve litigation matters concerning the Borough which are still pending.

The Custodian contends that the requested February Executive Session meeting minutes involve discussions about a contractual dispute between the Borough and another party. The Custodian asserts that disclosure of the February Executive Session meeting minutes would have revealed attorney-client privileged information and would have created a disadvantage for the Borough. The Custodian states that the February Executive Session meeting minutes were made available to the Complainant on December 2, 2008 because the potential litigation was resolved at that time.

The Custodian also certifies that no Executive Session meeting was conducted in April 2008; therefore, no records responsive to this portion of the request exist.

Analysis

Whether the Custodian unlawfully denied access to the requested Executive Session meeting minutes?

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 ...If the custodian of a government record asserts that part of a particular record is exempt from public access...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.

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:

“[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 Open Public Meetings Act also provides:

“[a] public body may *exclude* the public only from that portion of a meeting at which the public body discusses...*any pending or anticipated litigation* or contract negotiation other than in subsection b.(4) herein *in which the public body is, or may become a party*. Any 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.” (Emphasis added.) N.J.S.A. 10:4-12.b (7).

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 specifically 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 Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that:

“[a]lthough 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.”

Based on OPRA and the GRC’s holding in Paff, *supra*, a custodian is vested with the responsibility to respond to each individual request item contained in an OPRA request within seven (7) business days after receipt of such request.

In this complaint, Counsel responded on June 13, 2008 stating that access to the requested Executive Session meeting minutes was denied because they involve litigation matters which are still pending. However, the Custodian’s initial response failed to identify whether access was denied to both February and April 2008 Executive Session meeting minutes for the same reason. The Custodian later certified in the SOI that no April Executive Session meeting was held in 2008.

Therefore, based on the evidence of record, although the Custodian responded in writing to the Complainant’s June 8, 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 contained in the request individually and provide a specific reason for denial for each. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff, *supra*.

Additionally, the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., (“OPMA”), contains an exemption at N.J.S.A. 10:4-12.b(7) to prohibit public access to those portions of meeting minutes at which litigation matters or matters involving anticipated litigation to which a public agency may become a party are discussed. Pursuant to N.J.S.A. 47:1A-9.b, the exemption from disclosure set forth at N.J.S.A. 10:4-12.b (7) applies to the meeting minutes requested by the Complainant herein. However, the exemption to access under N.J.S.A. 10:4-12.b (7) is not absolute: N.J.S.A. 47:1A-5.g. provides that if a custodian “asserts that part of a particular record is exempt from public access,” that custodian must redact such information and “shall promptly permit access to the remainder of the record.”

In this complaint, Counsel denied access to the requested February 2008 Executive Session meeting minutes stating that they involved pending litigation matters. However, the Custodian certified in the SOI that the Complainant was provided with a chance to inspect the requested February 2008 Executive Session meeting minutes in their unredacted state on December 2, 2008, after the litigation matter had been resolved.

Therefore, because the Custodian disclosed the requested record in unredacted form, the question of whether the exemption from disclosure cited by the Custodian in his June 13, 2008 response to the OPRA request was supported by law is moot. However, the appropriate response from the Custodian should have been to redact from the record all

material not subject to disclosure and grant access to the remainder of the record.⁶ See Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556-57 (1997).

Further, the Custodian certifies in the SOI that no April 2008 Executive Session meeting was held; therefore, no records responsive exist. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian certified in the SOI that no records responsive to the Complainant's request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Similarly, in this complaint, the Custodian certified in the SOI that no April Executive Session meeting minutes which were responsive to the request relevant to this complaint existed at the time of the Complainant's OPRA request because no April Executive meeting was held, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to cite a specific lawful basis for denial within the statutorily required seven (7) business days resulting in a deemed denial, the untimely denial of access is lawful pursuant to Pusterhofer, supra.

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

⁶ The Custodian's response providing access to inspect the February Executive Session meeting minutes came after the filing of this complaint but prior to the April 29, 2009 date of adjudication by the Council. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-166 – Findings and Recommendations of the Executive Director

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, the Custodian ultimately bore the burden of proving that the February 2008 Executive Session meeting minutes are exempt from disclosure under OPRA and that the Executive Session meeting minutes for April 2008 do not exist. 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant's June 8, 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 contained in the request individually and provide a specific denial for each. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian certified in the Statement of Information that no April Executive Session meeting minutes which were responsive to the request relevant to this complaint existed at the time of the Complainant's OPRA request because no April Executive meeting was held, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to cite a specific lawful basis for the denial within the statutorily required seven (7) business days resulting in a deemed denial, the untimely denial of access is lawful pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian failed to respond to each request item individually within the statutorily mandated seven (7) business days, the Custodian ultimately bore the burden of proving that the February 2008 Executive Session meeting minutes are exempt from disclosure under OPRA and that the Executive Session meeting minutes for April 2008 do not exist. 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.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 22, 2009