



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 23, 2013 Government Records Council Meeting

Jerry Burgos
Complainant

Complaint No. 2012-195

v.

Township of Hazlet (Monmouth)
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s May 28, 2013 Interim Order requiring that the Custodian provide (9) copies of the unredacted records; nine (9) copies of the redacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, within five (5) business days from receipt of the Council’s Interim Order
2. The *in camera* examination reveals the Custodian has lawfully denied access to, or redacted portions of, the records disclosed to the Complainant for the reasons set forth in the annexed Index.

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 23 Day of July 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Jerry Burgos,¹
Complainant**

GRC Complaint No. 2012-195

v.

**Township of Hazlet (Monmouth)²
Custodian of Records**

Records Relevant to Complaint:

1. April 24, 2012 Township of Hazlet (“Township”) Committee meeting minutes involving a vote to promote Sergeant Arthur Lynch to Lieutenant and the Complainant to Sergeant.
2. May 15, 2012 Township Committee meeting minutes involving a cease any action of the promotion of the Complainant to the rank of Sergeant.

Custodian of Records: Evelyn A. Grandi

Request Received by Custodian: June 21, 2012

Response Made by Custodian: June 21, 2012

GRC Complaint Received: June 27, 2012

Records Submitted for *In Camera* Examination:

Minutes of the Executive Session of the Hazlet Township Committee:

1. April 24, 2012 redacted and unredacted;
2. May 15, 2012 redacted and unredacted;
3. Certification of the Custodian dated June 6, 2013, including the Redaction Index (“Index”).

Background

At its May 28, 2013 public meeting, the Government Records Council (the “Council”) considered the May 21, 2013 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 No legal representation listed on record.

² Jeanne Ann McManus of Weiner Lesniak LLP (Parsippany, NJ) entered an appearance on behalf of the Custodian. Hazlet was previously represented by James H. Gorman, Esq., (Shrewsbury, NJ).

1. The GRC must conduct an *in camera* review of the following closed session minutes dated April 24, 2012 and May 15, 2012 to determine the validity of the Custodian's assertion that these closed session minutes contain personnel information and attorney client privilege material. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), N.J.S.A. 47:1A-10, and N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 above), nine (9) copies of the redacted closed session minutes, a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. 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.

The Council distributed its Interim Order to all parties on June 3, 2013. On June 10, 2013 the Custodian responded to the Council's Interim Order. The Custodian provided the requisite copies of both the redacted and unredacted minutes together with a Certification of the Custodian which included a redaction index (the "Index").

Analysis⁶

Compliance

The Council's May 28, 2013 order required the Custodian to provide the GRC with unredacted and redacted records, certification of the Custodian in accordance with NJ Court Rule 1:4-4, and a document or redaction index within five (5) days of receipt of their May 28, 2013 Interim order. The GRC received the above-referenced documents from the Custodian, in a timely manner, on June 10, 2013.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

“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 Custodian, in support of the redactions she made, cites to N.J.S.A. 47:1A-1.1 for the definition of a government record and for the exemption of documents containing material that is subject to the attorney-client privilege; and N.J.S.A. 1:A-10, which provides for the exemption of personnel records. In addition, she states that “redactions [were made] of other matters unrelated to the Complainant’s OPRA requests, which are neither “government records” nor “public information pursuant to OPRA.”

The GRC conducted an *in camera* examination of the submitted record, including the certification of the Custodian, the redacted and unredacted minutes and the Index. Upon review of the documents, the GRC is satisfied that the Custodian provided valid legal basis for each of the redactions.

Thus, the Custodian lawfully denied access to the redactions in the responsive records.

Knowing and Willfull

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 “... [i]f 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, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Felder 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, 107 (App. Div. 1996)).

The Council found that the Custodian lawfully denied access to the redacted portions of the closed session minutes from April 24, 2012 and May 15, 2012. Accordingly, there was no denial of access and thus no knowing and willful violation of OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 28, 2013 Interim Order requiring that the Custodian provide (9) copies of the unredacted records; nine (9) copies of the redacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, within five (5) business days from receipt of the Council's Interim Order

2. The *in camera* examination reveals the Custodian has lawfully denied access to, or redacted portions of, the records disclosed to the Complainant for the reasons set forth in the annexed Index.

Prepared By: Dawn R. SanFilippo, Esq.
Senior Attorney

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013