



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 27, 2013 Government Records Council Meeting

Larry Kohn
Complainant

Complaint No. 2012-328

v.

Township of Township of Livingston (Essex)
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“Council”) considered the August 20, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The evidence of record revealed that the requested record, Council Memo No. 143, consisted of advisory, consultative, or deliberative material and was to remain as such until a settlement agreement regarding a lawsuit involving the Township’s library was fully-executed. The Custodian therefore lawfully denied access to the requested record because, at the time of the request, said record was advisory, consultative, or deliberative material exempt from disclosure. N.J.S.A. 47:1A-1.1. See also Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009); O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond in writing to the Complainant’s request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian did not unlawfully deny access to the requested record because, at the time of the request, the record constituted ACD material exempt from disclosure. Further, once the record was no longer exempt from disclosure, the Custodian granted access to the Complainant. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and



deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 27th Day of August, 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: August 29, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting**

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2012-328

v.

**Township of Livingston (Essex)²
Custodial Agency**

Record Relevant to Complaint: Letter containing accounting information regarding library settlement agreement referenced by Mayor Santola November 26, 2012.³

Custodian of Records: Glenn Turtletaub
Request Received by Custodian: November 30, 2012
Response Made by Custodian: December 17, 2012
GRC Complaint Received: December 27, 2012

Background⁴

Request and Response:

On November 30, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On December 17, 2012, the eleventh (11th) business day following receipt of said request, the Custodian responded in writing denying the request because he stated the record was exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as advisory material until a settlement agreement was executed.

Denial of Access Complaint:

The Complainant states that at a November 26, 2012 public meeting, the Township of Livingston (“Township”) approved Resolution 220 which authorized the Township to enter into a settlement agreement (“agreement”) regarding a lawsuit which involved a Township library. The Complainant contends that there was a letter containing accounting information regarding the agreement which was referenced by the Mayor during the meeting. The Complainant further states that on November 30, 2012, he filed an OPRA request seeking access to the letter but that

¹ No legal representation listed on record.

² Custodian of Records. Represented by Sharon L. Weiner, Esq., of Murphy, McKeon, P.C. (Riverdale, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

on December 17, 2012, the Custodian denied him access, claiming that until such time as the agreement is executed the record will remain exempt from disclosure as advisory material pursuant to N.J.S.A. 47:1A-1.1

The Complainant states he was unlawfully denied access because “the period of deliberation ended when the Mayor and Council authorized a Settlement Agreement when they voted 11/26/12 on Resolution #220.” (Emphasis in original.) The Complainant states that he telephoned the Custodian on December 21, 2012, to ask why the request was denied since the deliberations had ended. The Complainant contends that the Custodian replied that he denied the request on advice of Counsel. The Complainant states that the Custodian’s response to the OPRA request exceeded seven (7) business days.

Statement of Information:

On January 25, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on November 30, 2012, and that he responded to the request on December 17, 2012.

The Custodian certifies that he determined one (1) twelve (12) page document labeled Council Memo No. 143 and marked “confidential” is the record responsive to the Complainant’s request. The Custodian certifies that the record is a memorandum from the Township Manager to the Mayor and Council regarding settlement of the library litigation and that it contains advisory, consultative, or deliberative (“ACD”) material exempt from access pursuant to N.J.S.A. 47:1A-1.1. The Custodian certifies that the memorandum contains financial information relevant to the settlement, as well as the settlement itself, and it is Counsel’s opinion that there is a possibility not all parties may sign the agreement and it could fail. For this reason, the Custodian certifies that Counsel advised him that the requested record shall remain as ACD material until the agreement is fully-executed. The Custodian stated that after he received the Complainant’s request he requested a copy of the fully-executed agreement from the Township Manager’s office but he was informed their office did not yet have a fully-executed agreement.

The Custodian certifies that pursuant to the Council’s decision in Blau v. Somerset County Clerk, GRC Complaint No. 2003-86 (March 2005), there is no obligation for a custodian to follow up on a request after the initial response. The Custodian certifies that he is only required to provide such responsive records as existed on the date of request. The Custodian certifies that, nevertheless as a good faith gesture, he is disclosing a copy of the requested record to the Complainant along with the Complainant’s copy of the SOI.⁵

Additional Information:

On January 14, 2013, the Complainant submitted a supplement to the Denial of Access Complaint. The Complainant states that he filed an OPRA request subsequent to his November 30, 2012 request, and by doing so, obtained from the Custodian a copy of the agreement. The Complainant asserts that the agreement was fully-executed as of December 3, 2012, when the

⁵ Although it would appear, because the Custodian is now disclosing the requested record, that the settlement agreement in the library lawsuit has been fully-executed, the Custodian did not specifically mention that in the SOI.

Mayor signed it. The Complainant further asserts that the agreement was executed by the Mayor before the Custodian sent him the December 17, 2012 response to his November 30, 2012 request. As such, the Complainant asserts that the Custodian willfully denied him access to the record relevant to the complaint.

On February 11, 2013, the Complainant forwarded a response to the Statement of Information. The Complainant states, among other things, that the Custodian refused to acknowledge that the agreement was fully-executed prior to the date of the Complainant's OPRA request. The Complainant also contends that the requested record which the Custodian disclosed to him with the SOI does not contain ACD material, but "...merely communicate[d] the arrangements on how the agreement will be financed and provide[d] an update on the costs of the library project." The Complainant further states that Blau, *supra*, cited by the Custodian is not applicable to his request because Blau held that the custodian in that matter did not have an obligation to provide future records. The Complainant states that the Custodian is obligated to disclose the record the Complainant sought in his November 30, 2012 request because on November 26, 2012, the Mayor indicated that the record existed.

Analysis⁶

Timeliness of Response

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, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, there is no dispute between the parties that the Complainant's OPRA request was received by the Custodian on November 30, 2012, and that the Custodian responded to the request on December 17, 2012, which was the eleventh (11th) business day following receipt of the request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7)

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.

⁷ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, supra.

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 “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 excludes from the definition of a government record “... inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that

[N]either the statute nor the courts have defined the terms ... “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

Id.

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in Integrity, *supra*. There, the Court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Integrity, *supra*, at 88. In doing so, the Court noted that:

A document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.

Id. at 84-85 (Citations omitted).

The Court further set out procedural guidelines based upon those discussed in McClain:

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.”

Integrity, *supra*, at 88 (citing McClain, *supra*, at 361-62).

Here, the Custodian certified that the requested record contains information relevant to settlement of a lawsuit. The evidence of record reveals the Township approved a resolution for settlement; however, the Custodian certified there was concern that not all of the parties would sign the settlement agreement, in which case settlement would fail. The Custodian certified that since the requested record contains advice regarding settlement, it is exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1, until such time as the agreement is fully-executed. The Custodian subsequently disclosed the requested record to the Complainant on January 25, 2013.

Although the Complainant refuted the Custodian's assertion that the requested record contains ACD material, he emphasized his position that Township deliberations regarding

settlement of the library lawsuit ended on November 26, 2012, which he stated was the date of the meeting during which the Mayor indicated he was in possession of the requested record. Therefore, by virtue of his own allegations, the Complainant acknowledged that he knew Township officials had been, at least up to the time of the November 26, 2012 meeting, deliberating with respect to settlement of the lawsuit. Moreover, the Complainant stated in his February 11, 2013 response to the Statement of Information that the recently released record disclosed "...arrangements on how the agreement will be financed..." Such information, if revealed before the agreement was fully-executed, could have revealed the strength or weakness of the Township's bargaining position. As such, the Complainant's allegations support the Custodian's certification that the requested record contained ACD material, and therefore it is unnecessary for the GRC to conduct an *in camera* examination of said record.

The Complainant argued that the agreement was fully-executed as of December 3, 2012, when the Mayor signed it. The Complainant further argued that when the Custodian sent him a response to his November 30, 2012 request on December 17, 2012, the Custodian willfully denied him access to the requested record because the agreement was already fully-executed.⁸

The evidence of record does not reveal a fully-executed agreement on December 3, 2012.⁹ However, even if the agreement was fully-executed on December 3, 2012, the Custodian had no obligation at that time to disclose the requested record to the Complainant, because despite the Complainant's assertion to the contrary, the Custodian did not have a continuing obligation to disclose records responsive to the Complainant's request if the records at the time of the request were exempt as ACD material. In Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007), the complainant claimed that the custodian had an obligation to notify him when records, which were nonexistent at the time of the request, became available. The Council held, "[t]he Custodian is not obligated any further than to either grant or deny access at the time of the request..." As such, although the Custodian did disclose the requested record to the Complainant on January 25, 2013, he was under no obligation to have done so.

Accordingly, the evidence of record revealed that the requested record, Council Memo No. 143, consisted of ACD material and was to remain as such until a settlement agreement regarding a lawsuit involving the Township's library was fully-executed. The Custodian therefore lawfully denied access to the requested record because, at the time of the request, said record was ACD material exempt from disclosure. N.J.S.A. 47:1A-1.1. See also Education Law Center, supra; O'Shea, supra.

⁸ The Custodian stated that after he received the Complainant's request he was informed by Counsel that the responsive record was exempt from disclosure as ACD material until the all parties executed and returned the agreement to the Township. The Custodian said he requested a copy of the fully-executed agreement from the Township Manager's office but he was informed their office did not yet have a fully-executed copy.

⁹ The GRC was provided with a copy of the agreement in the Complainant's January 14, 2013 supplement to the Denial of Access Complaint, as well as in the Custodian's January 25, 2013 SOI. No authorized agent or officer on behalf of the Livingston Public Library Board of Trustees signed either copy of the agreement.

Knowing & Willful

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, 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, 107 (App. Div. 1996).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond in writing to the Complainant’s request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian did not unlawfully deny access to the requested record because, at the time of the request, the record constituted ACD material exempt from disclosure. Further, once the record was no longer exempt from disclosure, the Custodian granted access to the Complainant. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The evidence of record revealed that the requested record, Council Memo No. 143, consisted of advisory, consultative, or deliberative material and was to remain as such until a settlement agreement regarding a lawsuit involving the Township's library was fully-executed. The Custodian therefore lawfully denied access to the requested record because, at the time of the request, said record was advisory, consultative, or deliberative material exempt from disclosure. N.J.S.A. 47:1A-1.1. See also Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009); O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond in writing to the Complainant's request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian did not unlawfully deny access to the requested record because, at the time of the request, the record constituted ACD material exempt from disclosure. Further, once the record was no longer exempt from disclosure, the Custodian granted access to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon Minde, Esq.
Executive Director

August 20, 2013