



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

October 29, 2013 Government Records Council Meeting

Ernest Hemmann
Complainant

Complaint No. 2013-224

v.

Borough of South Toms River (Ocean)
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s September 24, 2013 Interim Order because the Custodian’s Counsel certified in a timely manner that the Custodian attached copies of minutes for meetings held on May 20, 2013, June 17, 2013, and July 15, 2013, to his submission, said submission being forwarded to the Complainant and the Council on the fourth (4th) business day following receipt of the Council’s Interim Order.
2. The Custodian’s failure to respond in writing within the extended time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian unlawfully withheld from disclosure copies of minutes for the Borough’s regular meetings held on May 20, 2013, June 17, 2013 and July 15, 2013. However, the Custodian did fully comply in a timely manner with the Council’s September 24, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s actions 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 29th Day of October, 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: November 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**Ernest Hemmann¹
Complainant**

GRC Complaint No. 2013-224

v.

**Borough of South Toms River (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copies of minutes for the Borough's regular meetings held on May 20, 2013, June 17, 2013 and July 15, 2013.

Custodian of Records: Joseph A. Kostecki, Acting Clerk³

Request Received by Custodian: July 17, 2013

Response Made by Custodian: July 31, 2013

GRC Complaint Received: August 12, 2013

Background⁴

At its September 24, 2013 public meeting, the Government Records Council ("Council") considered the September 17, 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. The Custodian did not bear her burden of proof that she 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 Custodian has failed to bear her burden of proving that the denial of access to the requested meeting minutes was authorized by law. N.J.S.A. 47:1A-6. Therefore, the

¹ No legal representation listed on record.

² Represented by Robert Tarver, Esq. (South Toms River, NJ).

³ Patricia Reeves was the Custodian of record when this complaint was filed.

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.

Ernest Hemmann v. Borough of South Toms River (Ocean), 2013-224 – Supplemental Findings and Recommendations of the Executive Director

Custodian shall disclose to the Complainant copies of minutes for the Borough's regular meetings held on May 20, 2013, June 17, 2013 and July 15, 2013, unless a lawful exemption applies.

3. **The Custodian shall comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. 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.

Procedural History:

On September 25, 2013, the Council distributed its September 24, 2013 Interim Order to all parties. On October 1, 2013, the fourth (4th) business day following receipt of the Council's Interim Order, the Custodian sent a letter to the Complainant with a copy to the GRC, informing "All Parties" that pursuant to the request of the GRC he had attached copies of unredacted minutes for meetings held on May 20, 2013, June 17, 2013, and July 15, 2013.

On October 2, 2013, the GRC sent a letter to the Custodian's Counsel, informing him that the Custodian failed to send a certified confirmation of compliance as directed in the Council's Interim Order. The GRC granted an additional three (3) business day extension of time for the Custodian to comply with the Council's Order.

On October 8, 2013, the Custodian's Counsel delivered a certification to the GRC wherein he stated that he was familiar with the facts set forth in the certification, that due to a shortage of staff the Borough failed to respond to the Complainant's OPRA request in a timely manner, and that the minutes for meetings dated May 20, 2013, June 17, 2013, and July 15, 2013, were attached to the Clerk's submission.⁵

Analysis

Compliance

On September 24, 2013, the Council ordered the above-referenced compliance. On September 25, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On October 1, 2013, four (4) business days after receipt of the Interim Order, the Custodian sent a letter to the Complainant with a copy to the GRC, informing "All Parties" that pursuant to the request of the GRC he had attached copies of unredacted minutes for meetings held on May 20, 2013, June 17, 2013, and July 15, 2013. The Custodian failed to provide certified confirmation of compliance,

⁵ The referenced submission is the Custodian's letter to the Complainant dated October 1, 2013.

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and the GRC granted an additional three (3) business day extension of time for the Custodian to do so. On October 8, 2013, within the extended time period for compliance, the Custodian's Counsel certified that the Custodian had disclosed the requested records to the Complainant in a timely manner.

Therefore, the Custodian complied with the Council's September 24, 2013 Interim Order because the Custodian's Counsel certified in a timely manner that the Custodian attached copies of minutes for meetings held on May 20, 2013, June 17, 2013, and July 15, 2013, to his submission, said submission being forwarded to the Complainant and the GRC on the fourth (4th) business day following receipt of the Council's Interim Order.

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 "... [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 (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)).

The Custodian's failure to respond in writing within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian unlawfully withheld from disclosure copies of minutes for the Borough's regular meetings held on May 20, 2013, June 17, 2013 and July 15, 2013. However, the Custodian did fully comply in a timely manner with the Council's September 24, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions 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 complied with the Council's September 24, 2013 Interim Order because the Custodian's Counsel certified in a timely manner that the Custodian attached copies of minutes for meetings held on May 20, 2013, June 17, 2013, and July 15, 2013, to his submission, said submission being forwarded to the Complainant and the Council on the fourth (4th) business day following receipt of the Council's Interim Order.
2. The Custodian's failure to respond in writing within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian unlawfully withheld from disclosure copies of minutes for the Borough's regular meetings held on May 20, 2013, June 17, 2013 and July 15, 2013. However, the Custodian did fully comply in a timely manner with the Council's September 24, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions 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 D. Minde, Esq.
Executive Director

October 22, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

September 24, 2013 Government Records Council Meeting

Ernest Hemmann
Complainant

Complaint No. 2013-224

v.

Borough of South Toms River (Ocean)
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council ("Council") considered the September 17, 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 did not bear her burden of proof that she 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 Custodian has failed to bear her burden of proving that the denial of access to the requested meeting minutes was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant copies of minutes for the Borough's regular meetings held on May 20, 2013, June 17, 2013 and July 15, 2013, unless a lawful exemption applies.
3. **The Custodian shall comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. 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.

Interim Order Rendered by the
Government Records Council
On The 24th Day of September, 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: September 25, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 24, 2013 Council Meeting**

**Ernest Hemmann¹
Complainant**

GRC Complaint No. 2013-224

v.

**Borough of South Toms River (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copies of minutes for the Borough's regular meetings held on May 20, 2013, June 17, 2013 and July 15, 2013.

Custodian of Records: Patricia Reeves
Request Received by Custodian: July 17, 2013
Response Made by Custodian: July 31, 2013
GRC Complaint Received: August 12, 2013

Background³

Request and Response:

On July 17, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above-listed records. On July 31, 2013, the tenth (10th) business day following receipt of said request, the Custodian responded by telephoning the Complainant and denying the request because the Custodian stated that disclosure of minutes is not required under OPRA and same are not ready.

Denial of Access Complaint:

On August 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he personally delivered the OPRA request to the Custodian on July 14, 2013, but did not receive a response from the Custodian.⁴ The Complainant stated that on July 31, 2013, he telephoned the Custodian's office to say that he needed the requested records by August 2, 2013. The Complainant further stated

¹ No legal representation listed on record.

² Represented by Robert Tarver, Esq. (South Toms River, NJ).

³ 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.

⁴ The Complainant stated that he personally delivered his OPRA request to the Custodian on Wednesday, July 14, 2013; however, July 14, 2013 was a Sunday. July 17, 2013 was a Wednesday. Moreover, the internet access date on the Complainant's request is July 17, 2013.

that the Custodian informed him that disclosure of minutes is not required under OPRA and that, “Ms. Harris said to Mrs. Reeves minutes aren’t ready yet.”

The Complainant states that he asked the Custodian for a letter setting forth the Custodian’s reason for denying him access to the requested records and that the Custodian told him such a letter would be forwarded to him on August 2, 2013. The Complainant contends that as of the date of complaint he neither received the requested records nor a letter stating the reason for denial.

Statement of Information:

The Custodian did not respond to the GRC’s August 13, 2013 request for the Statement of Information (“SOI”).

Analysis⁵

Timeliness

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. *Id.* Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ 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, the Complainant stated that the Custodian verbally denied him access to the requested records on July 31, 2013, only after he questioned the status of his request. The Complainant stated that he specifically asked the Custodian for a written denial but never received one.

Therefore, the Custodian did not bear her burden of proof that she 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, supra.

⁵ 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.

⁶ 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.

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.

The Complainant stated that the Custodian told him that disclosure of minutes is not required under OPRA and that, “Ms. Harris said to Mrs. Reeves minutes aren’t ready yet.” The Complainant further stated that he asked for a written reason why disclosure of minutes is not required under OPRA but did not receive a reply from the Custodian.

The Custodian’s reason for denying access to the requested records is incorrect. The Council has repeatedly held that meeting minutes are subject to disclosure under OPRA. *See Moore v. Twp. of Washington (Bergen)*, GRC Complaint No. 2002-72 (January 2003), in which the Council held that regular meeting minutes “...are government records subject to public access.” *See also Kumka (Northern Valley Suburbanite) v. City of Englewood (Bergen)*, GRC Complaint No. 2007-07 (January 2010), which held that a custodian failed to bear her burden of proving that the denial of access to records was authorized by law when she failed to respond to an OPRA request for meeting minutes.

Furthermore, the Custodian’s purported statement that, “Ms. Harris said to Mrs. Reeves minutes aren’t ready yet”, is nebulous. If the meeting minutes were not yet approved as of the date of the OPRA request, the Custodian would not have been obligated to disclose them. In *Donato v. Borough of Emerson*, GRC Complaint No. 2005-125 (February 2007), the Council held that “[b]ecause the *unapproved, draft meeting minutes* of the Borough Council’s meetings constitutes inter-agency or intra-agency advisory, consultative, or deliberative material, they are not government records pursuant to the definition of same in N.J.S.A. 47:1A-1.1, and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and *Dina Parave-Fogg v. Lower Alloways Creek Twp.*, GRC Complaint No. 2006-51 (August 2006).” (Emphasis added.) The Custodian here, however, failed to provide a legal reason for denying access, and even failed to formulate one when the Complainant subsequently asked the Custodian to provide him with a reason in writing. Moreover, the Custodian would have had an opportunity to explain the legal reason for denying access if she submitted an SOI as requested by the GRC, but she failed to do so.

Accordingly, the Custodian has failed to bear her burden of proving that the denial of access to the requested meeting minutes was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant copies of minutes for the Borough’s regular meetings held on May 20, 2013, June 17, 2013 and July 15, 2013, unless a lawful exemption applies.

Knowing & Willful

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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she 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 Custodian has failed to bear her burden of proving that the denial of access to the requested meeting minutes was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant copies of minutes for the Borough's regular meetings held on May 20, 2013, June 17, 2013 and July 15, 2013, unless a lawful exemption applies.
3. **The Custodian shall comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Executive Director.⁸**
4. 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.

Prepared By: John E. Stewart, Esq.

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

September 17, 2013

⁷ "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."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.