



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 28, 2015 Government Records Council Meeting

Peter Gartner
Complainant

Complaint No. 2014-422

v.

Borough of Middlesex (Middlesex)
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 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 failed to bear her burden of proving that the denial of access to the September 9, 2014, and September 23, 2014, executive session minutes was authorized by law. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because the evidence of record reveals that the Custodian disclosed said records to the Complainant on December 17, 2014.
2. Although the Custodian failed to bear her burden of proving that the denial of access to the September 9, 2014, and September 23, 2014, executive session minutes was authorized by law, she did disclose said records to the Complainant on December 17, 2014. 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 28th Day of July, 2015

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 30, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2015 Council Meeting**

**Peter Gartner¹
Complainant**

GRC Complaint No. 2014-422

v.

**Borough of Middlesex (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: All the executive session minutes for 2014.³

Custodian of Record: Kathleen Anello
Request Received by Custodian: December 2, 2014
Response Made by Custodian: December 2, 2014
GRC Complaint Received: December 11, 2014

Background⁴

Request and Response:

On December 2, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian, seeking the above-mentioned records. On December 2, 2014, the same day the request was received, the Custodian responded in writing, informing the Complainant that he would find attached to the response the approved executive session minutes for 2014.

Denial of Access Complaint:

On December 11, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he provided his request to the Custodian on December 1, 2014. To support that claim, he attached an “e-mail trail clearly

¹ No legal representation listed on record.

² Represented by Aravind Aithal, Esq., of Bob Smith & Associates (Piscataway, NJ).

³ The Complainant failed to specify a preferred delivery method.

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.

showing that [he] requested the [records] on December 1, 2014.”⁵ The Complainant states that he did not receive a response from the Custodian.⁶

Statement of Information:

On December 19, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 2, 2014, and that she responded to the request in writing on that same date.

The Custodian certifies that the records responsive to the request are the Borough’s 2014 executive session minutes for the following dates: January 14, January 28, February 11, February 25, March 11, March 25, April 8, April 22, May 13, May 27, June 10, July 15, August 7, August 12, August 19, September 9, September 23, October 14, October 28, and November 18. The Custodian certifies that on December 2, 2014, all executive session minutes responsive to the request were disclosed to the Complainant in unredacted form except for the September 9, September 23, and November 18 minutes, which were not disclosed to the Complainant until December 17, 2014, “due to being approved by the Borough Attorney.” The Custodian also certifies that the November 18, 2014, minutes were redacted to exclude information relevant to an unresolved insurance claim.

The Custodian attached to the SOI an e-mail, dated December 11, 2014, from the Complainant to the Custodian, wherein the Complainant informed the Custodian that the Custodian failed to disclose all of the requested records because the minutes for September 9, 2014, September 23, 2014, and November 18, 2014, were not disclosed. The Custodian also attached e-mails, dated December 12, 2014, and December 17, 2014, from the Custodian to the Complainant. In the December 12, 2014, e-mail, the Custodian informed the Complainant that there was no executive session meeting on September 9, 2014. The Custodian also acknowledged that she previously failed to disclose the September 23, 2014, minutes. The Custodian further informed the Complainant that the November 18, 2014, minutes were not adopted until December 9, 2014. In the December 17, 2014, e-mail, the Custodian disclosed to the Complainant the executive session minutes for September 9, 2014, September 23, 2014 and November 18, 2014.

Additional Submissions:

On June 29, 2015, in response to the GRC’s June 25, 2015, request, the Custodian delivered to the GRC a certification, averring that the September 9, 2014, minutes were adopted

⁵ The e-mail request was submitted on December 1, 2014; however, the evidence of record reveals that it was not transmitted to the Custodian until 5:38 p.m. As such, it would not have been considered received by the Custodian until December 2, 2014.

⁶ The Complainant verified his complaint on December 10, 2014, alleging that the Custodian denied access by failing to respond to his request. Ordinarily, the GRC would find the complaint unripe, because the Complainant verified the complaint on the sixth (6th) business day following the Custodian’s receipt of the request (*i.e.*, before the end of the statutory time period for the Custodian to respond to a request for non-immediate access records). However, ripeness is not an issue, because the evidence of record reveals that the Custodian did respond to the request prior to verification of the complaint.

on September 23, 2014, the September 23, 2014, minutes were adopted on October 14, 2014, and the November 18, 2014, minutes were adopted on December 9, 2014.

Analysis

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 evidence of record reveals that the Custodian responded to the request on the same date it was received by informing the Complainant that he would find attached to the response the approved executive session minutes for 2014. The Complainant, by e-mail dated December 11, 2014, informed the Custodian that she failed to disclose the minutes for September 9, 2014, September 23, 2014 and November 18, 2014. The following day, in a reply e-mail to the Complainant, the Custodian acknowledged that she previously failed to disclose the September 23, 2014, minutes. The Custodian also advised the Complainant that the November 18, 2014, minutes were not adopted until December 9, 2014.⁷ The evidence of record reveals that on December 17, 2014, the Custodian disclosed to the Complainant the executive session minutes for September 9, 2014, September 23, 2014 and November 18, 2014.

The Custodian’s SOI was not clear as to whether the September 9, 2014, September 23, 2014, and November 18, 2014, minutes were not yet adopted by the governing body as of the date of request, or whether they were just not approved for disclosure by the Borough’s Attorney. The GRC sought a clarifying certification, and the Custodian certified that the September 9, 2014 and September 23, 2014 minutes had been adopted in September and October, respectively. The Custodian further certified, however, that the November 18, 2014 minutes were not adopted until December 9, 2014, one week after they had been requested.

The Council examined the issue of whether unapproved meeting minutes are subject to disclosure in Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). In that complaint, the custodian denied access to requested meeting minutes pending their approval. In rendering its decision, the Council stated in relevant part that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.” Here, as in Parave-Fogg, the Custodian did not unlawfully deny access to the November 18, 2014, minutes because at the time of the request the minutes had not been approved by the governing body.

⁷ Whether there was an executive session meeting held on September 9, 2014, was an issue disputed between the parties. The Complainant was clearly correct in his assertion that there was such a meeting on that date because the Custodian subsequently disclosed to him a copy of the September 9, 2014, executive session minutes.

Nonetheless, the Custodian failed to bear her burden of proving that the denial of access to the September 9, 2014, and September 23, 2014, executive session minutes was authorized by law. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because the evidence of record reveals that the Custodian disclosed said records to the Complainant on December 17, 2014.⁸

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)).

Here, although the Custodian failed to bear her burden of proving that the denial of access to the September 9, 2014, and September 23, 2014, executive session minutes was authorized by law, she did disclose said records to the Complainant on December 17, 2014. 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:

⁸ The Custodian also included a copy of the November 18, 2014, minutes with this disclosure.

1. The Custodian failed to bear her burden of proving that the denial of access to the September 9, 2014, and September 23, 2014, executive session minutes was authorized by law. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because the evidence of record reveals that the Custodian disclosed said records to the Complainant on December 17, 2014.
2. Although the Custodian failed to bear her burden of proving that the denial of access to the September 9, 2014, and September 23, 2014, executive session minutes was authorized by law, she did disclose said records to the Complainant on December 17, 2014. 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

Reviewed By: Joseph D. Glover
Executive Director

July 21, 2015