



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 30, 2022 Government Records Council Meeting

Gable J. Smith
Complainant

Complaint No. 2021-7

v.

Cumberland County Utilities Authority
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 2022 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 extended period results in a “deemed” denial of the said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the Council declines to order disclosure of the portion of the request seeking November 19, 2020 audio and video recordings because the Custodian provided same on January 21, 2021.
2. Notwithstanding the Custodian’s “deemed” denial, she bore her burden of proof that she lawfully denied access to the portions of the Complainant’s OPRA request seeking the Cumberland County Utilities Authority’s November 12, 2020 meeting minutes, and any audio or video recordings of the November 23, 2020 meeting. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Notwithstanding the Custodian’s “deemed” denial, she bore her burden of proof that she lawfully denied access to the portion of the Complainant’s OPRA request seeking “notes” stemming from the November 19 and November 23, 2020 Cumberland County Utilities Authority meetings. N.J.S.A. 47:1A-6. The evidence of record demonstrates that the records constitute advisory, consultative, or deliberative material and therefore exemption from disclosure under OPRA. N.J.S.A. 47:1A-1.1; O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007); Sage v. Freehold Reg’l High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (November 2011).



4. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant's OPRA request. However, the Custodian demonstrated that she provided records as part of the Statement of Information on January 21, 2021, and lawfully denied access to the remainder of the request. 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 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.

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 30th Day of August 2022

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 1, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting**

**Gable J. Smith¹
Complainant**

GRC Complaint No. 2021-7

v.

**Cumberland County Utilities Authority²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Meeting minutes: “Nov. 12, 2020 2PM, between [Cumberland County Utilities Authority (“CCUA”)] Employee Reps., Employee Relations Committee, Executive Director, and General Council [sic].”
2. “All notes, audio, and video for the Nov. 19th and Nov. 23rd, 2020 meetings. Nov. 19th, 2020 board meeting. Nov. 23rd, 2020 contract negotiations.”

Custodian of Record: Stephanie Mick
Request Received by Custodian: December 4, 2020
Response Made by Custodian: N/A
GRC Complaint Received: January 11, 2021

Background³

Request and Response:

On December 4, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 10, 2020, the Custodian responded in writing seeking a ten (10) day extension of time to respond to the OPRA request. The Custodian stated that she was trying to compile the requested records, but they still needed board approval.

Denial of Access Complaint:

On January 11, 2021, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² Represented by James K. Grace, Esq., of The Law Offices of James K. Grace, Esq. (Hainesport, NJ) and Gregg L. Zeff, Esq., at Zeff Law Firm, LLC (Mt. Laurel, 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.

Government Records Council (“GRC”). The Complainant asserted that as of January 9, 2021, the Custodian has not responded to his request.

Supplemental Responses:

On January 11, 2021, the Custodian e-mailed the Complainant, stating that she spoke to then-CCUA Executive Director Steve Errickson who in turn told her to reach out to CCUA’s General Counsel about the Complainant’s request. The Custodian stated that she sent an e-mail reminder to Counsel who then told her to resend the OPRA request. The Custodian stated her apologies to the Complainant and expressed that she was being ignored about the requested minutes.

On January 19, 2021, the Complainant provided the GRC with the additional correspondence he received from the Custodian on January 11, 2021. The Complainant also stated that CCUA’s General Counsel claimed that the public meeting minutes were exempt from disclosure.

Statement of Information:

On January 21, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 4, 2021. The Custodian certified that the minutes from the November 23, 2020 meeting have not been transcribed, and there were no recordings of same.

The Custodian argued that the “notes, audio, and video” of the November 23, 2020 meeting should not be disclosed since they pertained to “contract negotiations”, which were explicitly exempt under OPRA. N.J.S.A. 47:1A-1.1. The Custodian argued that disclosure would give the other party an unfair advantage. The Custodian also asserted that the notes contained information relating to ongoing negotiations between CCUA and its employees and no agreements have been made between the parties. The Custodian thus argued that the notes would be exempt under OPRA’s ongoing investigations exemption. N.J.S.A. 47:1A-3.

The Custodian further asserted that the notes were draft documents, and therefore not subject to disclosure under Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div. 2018).

As part of the SOI, the Custodian included written and digital copies of the November 19, 2020 meeting minutes, as well as a thumb drive containing the audio and video recording of the November 19, 2020 meeting.

Additional Submissions:

On June 29, 2022, the GRC e-mailed the Custodian confirming whether she provided the Complainant with a copy of the SOI containing an audio and video recording and written copy of the November 19, 2020 meeting minutes. On June 30, 2022, the Custodian responded to the GRC stating that a copy of the SOI was provided to the Complainant on January 21, 2021.

On June 30, 2022, the GRC requested additional information from the Custodian. Specifically, the GRC asked whether the Custodian provided any response to the Complainant regarding the request for the November 12, 2020 meeting minutes, since it was not referenced in the SOI. On July 6, 2022, the Custodian responded to the GRC's request for additional information. Therein, the Custodian certified that no response was provided regarding the portion of the request seeking the November 12, 2020 meeting minutes. The Custodian further certified that no record of the meeting was created, and she was not obligated to create a record under OPRA. The Custodian also certified that the meeting pertained to collective negotiations with public employees.

Analysis

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).⁴ 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

Moreover, in Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

[Id.]

In the instant matter, the Custodian extended the deadline to respond by ten (10) business days. The Complainant filed the instant complaint on January 11, 2021, asserting that the

⁴ 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.

Custodian had failed to provide a response within the extended period. That same day, the Custodian e-mailed the Complainant stating that she was told that the General Counsel for CCUA was taking care of the OPRA request and apologized for the delay. The Custodian would not provide any response to the request until filing the SOI, which included an audio and video recording and written copy of the November 19, 2020 meeting minutes. No responsive records were provided regarding the November 12, 2020 and November 23, 2020 meetings.

Upon review of the evidence of record in this complaint, a “deemed” denial of access occurred. Although the Custodian’s December 10, 2020 extension was timely, she did not respond until January 21, 2021 as part of the SOI. Thus, the facts here are like those discussed in Kohn, GRC 2007-124 and support a “deemed” denial of access.

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 extended period results in a “deemed” denial of the said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124. However, the Council declines to order disclosure of the portion of the request seeking the November 19, 2020 audio and video recordings because the Custodian provided same on January 21, 2021.

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 GRC initially notes that it declines to address the portion of the Complainant’s OPRA request seeking audio and video records pertaining to the November 19, 2020 meeting since same were disclosed to the Complainant on January 21, 2021.

November 12, 2020 Meeting Minutes; November 23, 2020 Audio and Video Recordings

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). In the instant matter, the Custodian certified in the SOI that there were no responsive records to the portion of the Complainant’s request seeking audio and video recordings of the November 23, 2020 meeting, though the Custodian certified that meeting minutes would be available once approved. Additionally, in response to the GRC request for additional information, the Custodian certified that there were no responsive records to the portion of the Complainant’s request seeking minutes of the November 12, 2020 meeting. To date, the Complainant has not submitted any evidence contradicting the Custodian’s certification.

Therefore, notwithstanding the Custodian's "deemed" denial, she bore her burden of proof that she lawfully denied access to the portions of the Complainant's OPRA request seeking the CCUA's November 12, 2020 meeting minutes, and any audio or video recordings of the November 23, 2020 meeting. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. See Pusterhofer, GRC 2005-49.

November 19, 2020 and November 23, 2020 Meeting Notes

OPRA provides that the definition of a government record "shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material." N.J.S.A. 47:1A-1.1. When the exception is invoked, a governmental entity may "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Center, 198 N.J. at 285 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also 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. Educ. Law Ctr., 198 N.J. 274.

Regarding the "notes" portion of the Complainant's OPRA request, in O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007), the Appellate Division stated that handwritten notes of a meeting were exempt from disclosure as ACD material. Subsequently, in Sage v. Freehold Reg'l High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (November 2011), the Council was tasked with determining whether a student's handwritten notes were exempt as ACD material. There, the complainant argued that O'Shea, did not apply because the notes were not taken during a public meeting and thereafter used as a memory aid. However, the Council conducted an *in camera* review and held that ". . . because the handwritten student note contain[ed] information of an alleged incident . . . and was used in preparation of . . . Final Incident Report." Id. (Final Decision dated November 29, 2011) at 6. See also Lotito v. N.J. Dep't of Labor, Div. of Unemployment Ins., GRC Complaint No. 2013-67 (Interim Order dated March 25, 2014).

In the instant matter, the Complainant's OPRA request expressly sought "notes" stemming from the November 19, 2020 and November 23, 2020 meetings, rather than completed minutes. In the ensuing complaint, the Complainant identified "notes" as part of the "Records Denied List" portion of his OPRA request. Accordingly, the evidence demonstrates that this portion of the Complainant's OPRA request seeks notes paralleling those found exempt under O'Shea, 391 N.J. Super. at 538. Moreover, in the SOI the Custodian noted that the November 23, 2020 notes in particular pertained to ongoing negotiations between the CCUSA and its employees, of which no finalized agreements have been made. Therefore, like the notes in O'Shea or Sage, GRC 2010-108, the requested notes are not finalized documents or a reflection of CCUA policy, and therefore are exempt as ACD material.

Accordingly, notwithstanding the Custodian's "deemed" denial, she bore her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request seeking "notes" stemming from the November 19 and November 23, 2020 CCUA meetings. N.J.S.A. 47:1A-6. The evidence of record demonstrates that the records constitute ACD material and

therefore exemption from disclosure under OPRA. N.J.S.A. 47:1A-1.1; O’Shea, 391 N.J. Super. at 538; Sage, GRC 2010-108.

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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

In the instant matter, the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant’s OPRA request. However, the Custodian demonstrated that she provided records as part of the SOI on January 21, 2021, and lawfully denied access to the remainder of the request. 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 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.

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 extended period results in a “deemed” denial of the said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11

(Interim Order dated October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the Council declines to order disclosure of the portion of the request seeking November 19, 2020 audio and video recordings because the Custodian provided same on January 21, 2021.

2. Notwithstanding the Custodian’s “deemed” denial, she bore her burden of proof that she lawfully denied access to the portions of the Complainant’s OPRA request seeking the Cumberland County Utilities Authority’s November 12, 2020 meeting minutes, and any audio or video recordings of the November 23, 2020 meeting. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Notwithstanding the Custodian’s “deemed” denial, she bore her burden of proof that she lawfully denied access to the portion of the Complainant’s OPRA request seeking “notes” stemming from the November 19 and November 23, 2020 Cumberland County Utilities Authority meetings. N.J.S.A. 47:1A-6. The evidence of record demonstrates that the records constitute advisory, consultative, or deliberative material and therefore exemption from disclosure under OPRA. N.J.S.A. 47:1A-1.1; O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007); Sage v. Freehold Reg’l High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (November 2011).
4. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant’s OPRA request. However, the Custodian demonstrated that she provided records as part of the Statement of Information on January 21, 2021, and lawfully denied access to the remainder of the request. 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 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.

Prepared By: Samuel A. Rosado
Staff Attorney

August 23, 2022⁵

⁵ This matter was originally scheduled for the Council’s July 26, 2022 meeting but was tabled for further review.