



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 28, 2007 Government Records Council Meeting

John Paff
Complainant
v.
City of Plainfield
Custodian of Record

Complaint No. 2006-103

At the February 28, 2007 public meeting, the Government Records Council ("Council") considered the February 21, 2007 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 based on the Custodian's January 12, 2007 certification, the Custodian has complied with the Council's December 14, 2006 Interim Order by releasing the minutes.

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 February, 2007

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

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



Kathryn Forsyth
Government Records Council

Decision Distribution Date: March 7, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 28, 2007 Council Meeting**

John Paff¹
Complainant

GRC Complaint No. 2006-103

v.

City of Plainfield²
Custodian of Records

Records Relevant to Complaint:

Any minutes of the City Council's closed (executive) session meetings held during April 2003, May 2005, and March 2006.³

Request Made: April 1, 2006

Response Made: April 12, 2006

Custodian: Laddie Wyatt

GRC Complaint Filed: June 5, 2006

Background

December 14, 2006

Government Records Council's ("Council") Interim Order. At its December 14, 2006 public meeting, the Council considered the December 7, 2006 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. Since the Custodian did not completely and properly bear her burden of proving that the denial of access is authorized by law at the time of the denial as is required under N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i., the Custodian has unlawfully denied access to the requested records by not properly denying access within the statutorily mandated seven (7) business day time frame.
2. OPRA provides that when the custodian of a government record asserts that part of the record is exempt from public access, the custodian must delete

¹ No legal representation listed on record.

² Represented by Daniel Williamson, Esq. (Plainfield, NJ).

³ There were other records requested that are not relevant to this complaint.

from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record under N.J.S.A. 47:1A-5.g. Therefore, the Custodian's failure to release at least redacted copies of the requested minutes to the Complainant resulted in a violation of N.J.S.A. 47:1A-5.g.

3. **The Custodian shall disclose the requested executive session minutes with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director if the requested closed session minutes were approved by the governing body prior to the date of this OPRA request.**
4. **The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian shall provide certified confirmation to the Executive Director that the minutes were not approved by the governing body prior to the date of this OPRA request within five (5) business days from receipt of this Interim Order.**

December 19, 2006

Council's Interim Order distributed to the parties.

January 5, 2007

Council's Interim Order sent to the Custodian via facsimile. (The Custodian asserts that she did not receive the Council's Interim Order due to being on vacation.)

January 12, 2006

Custodian's certification pursuant to NJ Court Rules. The Custodian certifies that the Complainant was provided with true and accurate copies of the minutes requested.

Pursuant to the GRC's December 19, 2006 Interim Order directing the Custodian to certify whether or not the requested minutes had been approved by the governing body, the Custodian certifies that the requested executive session minutes for April 21, 2003, May 9, 2005, and March 13, 2006 were approved by the governing body prior to the OPRA request.

Analysis

Whether the Custodian complied with the Council's December 14, 2006 Interim Order?

The Custodian certifies that the Complainant was provided with true and accurate copies of the minutes requested. Pursuant to the GRC's December 19, 2006 Interim Order directing the Custodian to certify whether or not the requested minutes had been approved by the governing body, the Custodian also certifies that the requested executive session minutes for April 21, 2003, May 9, 2005, and March 13, 2006 were approved by the governing body prior to the OPRA request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that based on the Custodian's January 12, 2007 certification, the Custodian has complied with the Council's December 14, 2006 Interim Order by releasing the minutes.

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

February 21, 2006

INTERIM ORDER
December 14, 2006 Government Records Council Meeting

John Paff
Complainant
v.
City of Plainfield
Custodian of Record

Complaint No. 2006-103

At the December 14, 2006 public meeting, the Government Records Council ("Council") considered the December 7, 2006 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:

5. Since the Custodian did not completely and properly bear her burden of proving that the denial of access is authorized by law at the time of the denial as is required under N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i., the Custodian has unlawfully denied access to the requested records by not properly denying access within the statutorily mandated seven (7) business day time frame.
6. OPRA provides that when the custodian of a government record asserts that part of the record is exempt from public access, the custodian must delete from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record under N.J.S.A. 47:1A-5.g. Therefore, the Custodian's failure to release at least redacted copies of the requested minutes to the Complainant resulted in a violation of N.J.S.A. 47:1A-5.g.
7. **The Custodian shall disclose the requested executive session minutes with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director if the requested closed session minutes were approved by the governing body prior to the date of this OPRA request.**
8. **The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian shall provide certified confirmation to the Executive Director that the minutes were not approved by the governing body prior to the date of this OPRA request within five (5) business days from receipt of this Interim Order.**

Interim Order Rendered by the
Government Records Council
On The 14th Day of December, 2006

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: December 19, 2006

**Findings and Recommendations of the Executive Director
December 14, 2006 Council Meeting**

John Paff⁴

GRC Complaint No. 2006-103

Complainant

v.

City of Plainfield⁵

Custodian of Records

Records Relevant to Complaint:

Any minutes of the City Council's closed (executive) session meetings held during April 2003, May 2005 and March 2006.⁶

Request Made: April 1, 2006

Response Made: April 12, 2006

Custodian: Laddie Wyatt

GRC Complaint Filed: June 5, 2006

Background

April 1, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests any minutes of the City Council's closed (executive) session meetings held during April 2003, May 2005, and March 2006.

April 12, 2006

Custodian's response to the Complainant. In the Custodian's response to the OPRA request seven (7) business days following the date the request was received, the Custodian states consistent with the law, the closed session minutes for the months and years requested remain in closed session until such time the City Attorney deems that said minutes no longer are an endangerment to the public interest.

June 5, 2006

⁴ No legal representation listed.

⁵ Represented by Daniel Williamson, Esq. (Plainfield, NJ).

⁶ There were other records requested that are not relevant to this complaint.

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachment:

- Complainant’s OPRA Request dated April 1, 2006.

The Complainant asserts that the law is clear. Public agencies are required to release their closed session minutes to the extent that disclosure will not undermine the basis for excluding the public from the closed meetings.

The Complainant cites Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556-57 (1997), stating that N.J.S.A. 47:1A-6 burdens the Custodian with providing that every denial is lawful, and N.J.S.A. 47:1A-5.g. requires the Custodian to indicate the specific basis for any denial of access. The Complainant also asserts that beyond stating the specific basis for redactions, the Custodian is also required to produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 323, 382-83 (App. Div. 2003).

The Complainant further asserts that the Custodian’s denial is based on the Custodian’s assertion that the City Attorney has yet to “deem” that the requested minutes are no longer an endangerment to the public interest. The Complainant states that this bald assertion makes it impossible for any member of the public to determine whether the denial is justified. The Complainant also states that since the Custodian has failed to sufficiently justify her denial, he is entitled to receive unredacted versions of the requested closed session minutes.

The Complainant acknowledges that the Custodian, upon receipt of the complaint, may wish to provide the Complainant with redacted minutes and more detailed justification for the denial. The Complainant states that the Custodian may raise the argument of being entitled to supplement the record by virtue of N.J.S.A. 47:1A-7.e.

The Complainant asserts that while this provision certainly permits the Custodian to explain and defend how the Custodian’s blanket denial satisfies the burden of proof, it does not entitle the Custodian to raise new justifications and reasons that were not included within her original denial. The Complainant also asserts that a public agency, when denying a record in whole or part, is obliged to thoroughly justify any denials within its original notice. The Complainant further asserts that allowing an agency to assert new and additional justification deprives a requestor of the summary or expedited procedure that OPRA promises and invites record custodians to provide casual and even cavalier justifications in their initial denials, comfortable in knowing that they can always supplement or alter their justifications if the requestor complains.

The Complainant states that the GRC sometimes conducts *in camera* reviews in matters such as this one. The Complainant objects to such a review because it is the Custodian’s burden to prove that its redactions are lawful, not to just give the unredacted minutes to the GRC to decide which portions shall be released.

The Complainant requests an order declaring that the Custodian violated OPRA. The Complainant also requests an order compelling the Custodian to disclose its unredacted minutes from the executive session meetings within the scope of the request.

June 5, 2006

Offer of Mediation sent to both parties. The Complainant agreed to mediation. The Custodian did not respond.

June 14, 2006

Request for Statement of Information sent to the Custodian.

June 28, 2006

No Defense Letter from the GRC to the Custodian. The letter states that the GRC provided the Custodian with a request for a Statement of Information on June 14, 2006 and to date has not received a response. It also states that if no submission is made within three (3) business days of receipt of this letter, this case may proceed to adjudication before the GRC with the documents already on file.

July 23, 2006

Custodian's Statement of Information ("SOI") with the following attachments⁷:

- Letter from the Custodian to the Complainant dated April 12, 2006.
- Executive session minutes for April 2003, May 2005 and March 2006.

The Custodian states that it is to her understanding that the executive session minutes were the only outstanding items. The Custodian states that her office never denied the Complainant review of, or refused submission of any minutes at any time. The Custodian also states that her statement does not indicate a denial of access. The Custodian further states that upon review of the specific minutes, it has been concluded that said minutes will no longer cause endangerment.

The Custodian attests that on or about June 17, 2006, a GRC staff member called her inquiring about information that was sent to the Custodian via e-mail. The Custodian informed the GRC that due to time constraints and minimal staff, she was unable to read her e-mails on a timely basis.

The Custodian asserts that she informed the GRC staff member that from June 19, 2006 through June 23, 2006, she was scheduled to attend the Municipal Clerk's Spring Conference in Atlantic City. The Custodian also asserted that due to the Council meetings scheduled for June 19, 2006 through June 21, 2006, she was obligated to attend

⁷ Other irrelevant documents were attached.

the City Council's Agenda Fixing Session on June 19, 2006, which finally adjourned at 12:45 a.m. on Tuesday morning of June 20, 2006.

The Custodian states that she further informed the GRC that she returned from the spring conference which also included a workshop presented by the GRC on the morning of June 23, 2006. The Custodian also stated that she told the GRC that she received a call of inquiry from the GRC Mediator regarding an offer of mediation. The Custodian further states that she and the GRC staff member briefly discussed a time table for this matter to be resolved, and the Custodian was advised by the GRC to complete the SOI and return it to the GRC. The Custodian attests that following this day of conversation, there was an eight (8) to ten (10) day shutdown of State agencies, which caused a delay.

Analysis

Whether the Custodian unlawfully denied access to the requested executive (closed) session minutes?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states that:

“...[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA]..., the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record ... “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis thereof on the request from and promptly return it to the requestor.” N.J.S.A. 47:1A-5.g.

OPRA also states that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a Custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request*... In the event a Custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The Complainant asserts that the law is clear. Public agencies are required to release their closed session minutes to the extent that disclosure will not undermine the basis for excluding the public from the closed meetings.

The Complainant cites Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556-57 (1997), stating that N.J.S.A. 47:1A-6 burdens the Custodian with providing that every denial is lawful, and N.J.S.A. 47:1A-5.g. requires the Custodian to indicate the specific basis for any denial of access. The Complainant also asserts that beyond stating the specific basis for redactions, the Custodian is also required to produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 323, 382-83 (App. Div. 2003).

The Complainant further asserts that the Custodian’s denial is based on the Custodian’s assertion that the City Attorney has yet to “deem” that the requested minutes are no longer an endangerment to the public interest. The Complainant states that this bald assertion makes it impossible for any member of the public to determine whether the denial is justified. The Complainant also states that since the Custodian has failed to sufficiently justify her denial, he is entitled to receive unredacted versions of the requested closed session minutes.

The Complainant acknowledges that the Custodian, upon receipt of the complaint, may wish to provide the Complainant with redacted minutes and more detailed justification for the denial. The Complainant states that the Custodian may raise the argument of being entitled to supplement the record by virtue of N.J.S.A. 47:1A-7.e.

The Complainant asserts that while this provision certainly permits the Custodian to explain and defend how the Custodian’s blanket denial satisfies the burden of proof, it does not entitle the Custodian to raise new justifications and reasons that were not included within her original denial. The Complainant also asserts that a public agency, when denying a record in whole or part, is obliged to thoroughly justify any denials within its original notice. The Complainant further asserts that allowing an agency to

assert new and additional justification deprives a requestor of the summary or expedited procedure that OPRA promises and invites record custodians to provide casual and even cavalier justifications in their initial denials, comfortable in knowing that they can always supplement or alter their justifications if the requestor complains.

The Complainant states that the GRC sometimes conducts *in camera* reviews in matters such as this one. The Complainant objects to such a review because it is the Custodian's burden to prove that its redactions are lawful, not to just give the unredacted minutes to the GRC to decide which portions shall be released.

The Complainant requests an order declaring that the Custodian violated OPRA. The Complainant also requests an order compelling the Custodian to disclose its unredacted minutes from the executive session meetings within the scope of the request.

The Custodian states that her office never denied the Complainant review of, or refused submission of any minutes at any time. The Custodian also states that upon review of the specific minutes it has been concluded that said minutes will no longer cause endangerment.

The Custodian attests that on or about June 17, 2006, she informed the GRC that from June 19, 2006 through June 23, 2006, she was scheduled to attend the Municipal Clerk's Spring Conference in Atlantic City. The Custodian also attests that she informed the GRC that she returned from the spring conference which also included a workshop presented by the GRC on the morning of June 23, 2006. The Custodian further attests that she and the GRC staff member briefly discussed a time table for this matter to be resolved, and the Custodian was advised by the GRC to complete the SOI and return it to the GRC. The Custodian states that following this day of conversation, there was an eight (8) to ten (10) day shutdown of State agencies, which caused a delay.

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. 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.

In prior GRC decision, Pincus v. Newark Police Department, GRC Complaint No. 2005-219 (April 2006), the Council found that pursuant to N.J.S.A. 47:1A-6, the Custodian did not bear their burden of proving that the denial of access to the requested photographs was authorized by law. Therefore, the Custodian unlawfully denied access to the requested records by not appropriately responding within the statutorily mandated seven (7) business day timeframe pursuant to N.J.S.A. 47:1A-5.i.

In this case, the Custodian provided the Complainant with an incomplete basis for denial by stating that the closed session minutes for the months and years requested remain in closed session until such time the City Attorney deems that said minutes no longer are an endangerment to the public interest. Since the Custodian did not completely and properly bear her burden of proving that the denial of access is authorized

by law at the time of the denial as is required under N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i., the Custodian has unlawfully denied access to the requested records by not properly denying access within the statutorily mandated seven (7) business day's timeframe.

Additionally, OPRA provides that when the custodian of a government record asserts that part of the record is exempt from public access, the custodian must delete from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record under N.J.S.A. 47:1A-5.g. Therefore, the Custodian's failure to release at least redacted copies of the requested minutes to the Complainant resulted in a violation of N.J.S.A. 47:1A-5.g.

In prior GRC decision, Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005), the Council found that the Custodian should redact the exempt information contained in the requested executive session minutes, providing a detailed and lawful basis for each redacted part thereof and provide access to those redacted minutes that have not already been released.

Therefore, in this case, the Custodian shall redact the exempt information contained within the requested executive session minutes, including a detailed and lawful basis for each redaction, and provide the redacted minutes to the Complainant if the requested minutes were approved by the governing body prior to the date of this OPRA request. The Custodian shall not disclose the requested

executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

9. Since the Custodian did not completely and properly bear her burden of proving that the denial of access is authorized by law at the time of the denial as is required under N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.i., the Custodian has unlawfully denied access to the requested records by not properly denying access within the statutorily mandated seven (7) business day time frame.
10. OPRA provides that when the custodian of a government record asserts that part of the record is exempt from public access, the custodian must delete from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record under N.J.S.A. 47:1A-5.g. Therefore, the Custodian's failure to release at least redacted copies of the requested minutes to the Complainant resulted in a violation of N.J.S.A. 47:1A-5.g.
11. **The Custodian shall disclose the requested executive session minutes with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director if the requested closed session minutes were approved by the governing body prior to the date of this OPRA request.**
12. **The Custodian shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of this OPRA request because such meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian shall provide certified confirmation to the Executive Director that the minutes were not approved by the governing body prior to the date of this OPRA request within five (5) business days from receipt of this Interim Order.**

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

December 7, 2006

