



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

April 30, 2008 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2006-160

v.

Township of Monroe (Middlesex)
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council (“Council”) considered the April 23, 2008 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. Even though the Custodian eventually provided the Rules of the Planning Board to the Complainant on November 9, 2007, the Custodian violated OPRA by denying the Complainant access to the requested records which were in fact available at the time of the request. Therefore, the Custodian unlawfully denied access to the requested Rules of the Planning Board and failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. In the prior GRC decision, Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), the Council held that because the Custodian certified that the records responsive did not exist, there was no unlawful denial of access. Therefore, in this complaint before the Council, the Custodian did not unlawfully deny access to the requested Rules of the Zoning Board because the Custodian has certified that such records do not exist.
3. On the Complainant’s original OPRA request, the Custodian annotated that no other records exist regarding rules for public records requests other than those listed on page two (2) of the OPRA request form. Additionally, the Custodian certifies within her Statement of Information that the Township does not have any additional rules applicable to this request apart from those rules stated on the OPRA request form. Therefore, the Custodian did not unlawfully deny access to the requested Rules of Public Records Requests. *See* Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).



4. Pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council's powers and duties, the GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain. *See Chaka Kwanzaa v. Dept of Corrections*, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); *Christine Gillespie v. Newark Public Schools*, GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); *Jay Katinsky v. River Vale Township*, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate); *Louis Toscano v. NJ Dept of Labor*, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian). Therefore, the GRC does not have the authority to regulate whether the Township should maintain the Rules of the Zoning Board.
5. Because OPRA provides that a requestor may submit OPRA requests anonymously, the Complainant is permitted to submit an anonymous OPRA request. N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-2.2.
6. Because the Custodian provided the requested Planning Board Rules to the Complainant as soon as she realized that her office mistakenly denied the Complainant's OPRA request for these records, it is concluded that 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. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 April, 2008

Robin Berg Tabakin , Chairman
Government Records Council

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

David Fleisher, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: May 12, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2008 Council Meeting**

**Anonymous (In care of John Paff)¹
Complainant**

GRC Complaint No. 2006-160

v.

**Township of Monroe²
Custodian of Records**

Records Relevant to Complaint:

1. Rules of the Planning Board
2. Rules of the Zoning Board
3. Rules of Public Records Requests

Request Made: July 13, 2006

Response Made: July 13, 2006

Custodian: Sharon Doerfler

GRC Complaint Filed: August 27, 2006

Background

July 13, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

July 13, 2006

Custodian's Response to the OPRA request. The Custodian responds to the Complainant's OPRA request on the same day of receipt of such request. The Custodian notes on the original OPRA request form for the Complainant to see Article III 1083.1-3.4 of the Monroe Code Land Development (40:55D Municipal Land Use and Law "MLUL") in reference to the requested Rules of the Planning Board and Rules of the Zoning Board. The Custodian also notes on the original OPRA request form that there are no other rules other than those set forth on page 2 of the OPRA request form in response to the requested Rules of Public Records Requests.³

¹ No legal representation listed on record.

² Represented by Peter J. Tober, Esq., of Shain, Schaffer & Rafanello, P.C. (Bernardsville, NJ).

³ The Custodian provides the Complainant with Chapter 108, Article III-Administrative Procedures for the Zoning and Planning Boards, but the Complainant states that those are not the records being sought.

August 27, 2006

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:⁴

- Complainant’s OPRA request dated July 13, 2006
- Custodian’s response noted on the original OPRA request form dated July 13, 2006

The Complainant asserts that on July 13, 2006 she re-read the Township’s OPRA request form and page two (2) did not include a requirement for showing identification.⁵ The Complainant also asserts that she asked for all of the rules for making an OPRA request and she was told by an employee that there are no other rules besides those printed on page two (2) of the OPRA request form. The Complainant further asserts that she was denied access to any rules that required her to provide identification when completing the OPRA request form.

The Complainant alleges that when she asked for the Zoning Board and the Planning Board meeting rules she was shown Article III 108:3.1-3.4, which is not helpful for a citizen seeking information on their own presentation before those boards or appearing as an objector during a hearing. The Complainant alleges that none of the rules provided concerned appearance, order of proceedings, participation of objectors, testimony, exhibits, etc. The Complainant further alleges that when she visited the Planning Department and requested the rules to follow when appearing before a Zoning Board or Planning Board meeting, a different employee showed the Complainant a very small paperback book.⁶

The Complainant asserts that she was shown the Municipal Land Use Law (“MLUL”) concerning the Zoning and Planning Boards but nothing therein was helpful to a pro-se citizen. The Complainant also asserts that she was therefore denied the rules for both the Zoning Board and Planning Board.

Additionally, the Complainant states that on July 13, 2006, while she was in the Clerk’s office, an employee took a photograph of her. The Complainant states that she was told that the employee was taking a photograph of the new security gate at the window near the Complainant. The Complainant further states that a professional would know to ask for a release or permission of anyone in their photograph. The Complainant notes that the photograph was taken by the Planning Director, Robert Tucker.

The Complainant questions whether all Zoning Board and Planning Board meetings in Monroe Township should be postponed until these rules are created and produced. The Complainant also questions if the lack of these required rules is a major violation of the MLUL.

⁴ The Complainant attached other documents that are not relevant to the adjudication of this complaint.

⁵ The Complainant contends that on July 7, 2006 she submitted an OPRA request “anonymously” seeking Zoning Board minutes of 1981 and was asked to show identification.

⁶ It is unclear from the submissions what information this book actually contained. The Complainant did not indicate whether she believed the book to be responsive to her OPRA request.

October 6, 2006

Offer of Mediation sent to both parties. The Complainant agrees to mediation.

October 12, 2006

The Custodian agrees to mediation. The complaint was referred to mediation.

October 7, 2007

Complaint referred back from mediation for adjudication.

October 18, 2007

Request for the Statement of Information sent to the Custodian.

October 31, 2007

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

- Complainant's OPRA request dated July 13, 2006
- Chapter 108, Article III-Administrative Procedures for the Zoning and Planning Boards
- Letter from the Custodian's Counsel to the Complainant dated November 9, 2007
- Rules of the Planning Board⁷

The Custodian certifies that on July 13, 2006, the Complainant requested the three (3) records listed in the records relevant to this complaint as an "anonymous" requestor. The Custodian also certifies that, regarding the requested rules for public records requests, the Complainant was immediately provided with a copy of the OPRA request form, which details the procedures for records requests on page two (2). The Custodian also certifies that the Complainant was advised that the Township does not have any additional rules applicable to requests for public records other than what she was already provided, *i.e.*, those rules listed on page two (2) of the OPRA request form. The Custodian further certifies that she even accessed the GRC's website and printed off additional material concerning procedures for accessing public records, but the Complainant was unimpressed and stated that she did not receive what was being sought.

The Custodian asserts that, in reference to the requested rules of the Planning Board and the Zoning Board, the Custodian initially believed that the rules were outlined in Chapter 108, Article III-Administrative Procedures for the Zoning and Planning Boards and such copies were instantly provided to the Complainant for review. The Custodian also asserts that after the Complainant viewed the documents she again stated that the records provided were not the records she was seeking; however, the Clerk asserts that neither she nor her staff was aware of any other rules and regulations. The Custodian states that she suggested that the Complainant inquire with the Planning Office because perhaps their staff would be aware of the existence of such rules and regulations.

The Custodian contends that at the time of the Complainant's visit to the Planning Office, the Planning Board secretary was not in the office and no other staff member was

⁷ The Custodian also included correspondence that took place during the mediation process which is not considered for the adjudication of this complaint before the GRC.
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familiar with or involved with Planning Board meetings. The Custodian also contends that the Complainant was advised that no rules and regulations existed for the Zoning Board or Planning Board. The Custodian further contends that this advice was only half-correct, because Zoning Board rules did not exist, but Planning Board rules did exist.

The Custodian contends that the Complainant's OPRA requests were processed immediately upon receipt and there was absolutely no denial of access to a public record that was known to exist. The Custodian also contends that the Complainant is improperly using the OPRA process to compel a government agency to create a record that does not exist. The Custodian further contends that the Complainant was provided with all records responsive to the request but denied that those were the records being sought because she was looking for a roadmap on how to file and present an application to the Zoning or Planning Board.

November 9, 2007

Letter from the Custodian's Counsel to the Complainant. The Custodian's Counsel asserts that no rules of the Zoning Board exist; therefore, the Township is unable to provide any documents. The Custodian's Counsel also asserts that a copy of the rules of the Planning Board is attached and that the individual in the Zoning Board Office was not aware of the existence of such records. The Custodian's Counsel asserts that all requests should be made to the Clerk in order to ensure accuracy.

November 11, 2007

Letter from the Complainant to the GRC. The Complainant asserts that the Township's board rules must exist and be available to members of the public. The Complainant also asserts that the Township's OPRA form does not require that a requestor show identification and that is why the Complainant requested more information on the Township's rules regarding public records requests under OPRA.

The Complainant contends that N.J.S.A. 40:55D, the Municipal Land Use Law, requires that the Planning Board and Board of Adjustment shall make rules governing the conduct of hearings before such bodies, which rules shall not be inconsistent with the provisions of N.J.S.A. 40:55D-1 et. seq. The Complainant contends that, however, the Township's rules have been nonexistent and unavailable to the public.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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 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.

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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

Rules of the Planning Board

The Complainant requested Rules of the Planning Board on July 13, 2006 and was provided with access to Article III 1083.1-3.4. of the Monroe Code Land Development 40:55D Municipal Land Use and Law (“MLUL”). The Custodian certified in her Statement of Information that she initially believed that the rules as outlined in Chapter 108, Article III-Administrative Procedures for the Zoning and Planning Boards were responsive, but after the Complainant viewed the documents, the Complainant stated that the records provided were not those being sought. The Custodian also certified that the Complainant was advised that no separate rules exist for the Planning Board. The Custodian then later certified that this information given to the Complainant was incorrect because in fact, specific rules of the Planning Board did exist at the time of the OPRA request.

Additionally, the Custodian further certified that the Rules of the Planning Board were provided to the Complainant on November 9, 2007 and subsequently provided within the Statement of Information.

Even though the Custodian eventually provided the Rules of the Planning Board to the Complainant on November 9, 2007, the Custodian violated OPRA by denying the Complainant access to the requested records which were in fact available at the time of the request. Therefore, the Custodian unlawfully denied access to the requested Rules of the Planning Board and failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

Rules of the Zoning Board

The Complainant requested Rules of the Zoning Board on July 13, 2006 and was provided with access to Article III 1083.1-3.4. of the Monroe Code Land Development 40:55D Municipal Land Use and Law (“MLUL”). The Custodian certified in her Statement of Information that she initially believed that the rules outlined in Chapter 108, Article III-Administrative Procedures for the Zoning and Planning Boards were responsive, but after the Complainant viewed the documents, the Complainant stated that the records provided were not those being sought. The Custodian also certified that no separate rules exist for the Zoning Board.

In the prior GRC decision, Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), the Council held that because the Custodian certified that the records responsive did not exist, there was no unlawful denial of access. Therefore, in this complaint before the Council, the Custodian did not unlawfully deny access to the requested Rules of the Zoning Board because the Custodian has certified that such records do not exist.

Rules for Public Records Requests

On the Complainant’s original OPRA request form, the Custodian annotated that no records exist regarding rules for public records requests other than those listed on page two (2) of the OPRA request form. Additionally, the Custodian certifies in her Statement of Information that the Township does not have any rules applicable to this request apart from those rules stated on the OPRA request form. Therefore, the Custodian did not unlawfully deny access to the requested Rules of Public Records Requests. See Pusterhofer, supra.

Whether the Township should maintain Rules of the Zoning Board?

In the complaint before the Council, the Complainant asserts that the requested Rules of the Zoning Board should exist and be available to members of the public. The Complainant also contends that N.J.S.A. 40:55D, the Municipal Land Use Law, requires that the Planning Board and Board of Adjustment shall make rules governing the conduct of hearing before such bodies, which rules shall not be inconsistent with the provisions of N.J.S.A. 40:55D-1 et. seq. The Custodian has certified that Rules of the Zoning Board do not exist.

Pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council’s powers and duties, the GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain. See Chaka Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Christine Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); Jay Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC’s authority to adjudicate); Louis Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the

condition of records provided by a Custodian). Therefore, the GRC does not have the authority to regulate whether the Township should maintain Rules of the Zoning Board.

Whether the Complainant may submit an anonymous OPRA request?

The Custodian certifies that on July 13, 2006, the Complainant requested records as an anonymous requestor. The Complainant asserts that while she was reading through some of the requested records the Planning Director, Robert Tucker, took a photograph of her.

OPRA permits a requestor to submit anonymous requests pursuant to N.J.S.A. 47:1A-5.i. This provision states that if the requestor has elected not to provide a name, address, or telephone number, or other means of contacting the requestor, the custodian shall not be required to respond until the requestor reappears before the custodian seeking a response to the original request. The only limitation on anonymous requestors is contained in N.J.S.A. 47:1A-2.2. which provides that a Custodian shall not comply with an anonymous request for a government record containing personal information pertaining to the person's victim or victim's family.

Therefore, because OPRA provides that a requestor may submit OPRA requests anonymously, the Complainant is permitted to submit an anonymous OPRA request.

Whether the delay in access to the requested records rises to the level of a knowing and willful violation of OPRA?

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 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 at 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 (App. Div. 1996) at 107).

Because the Custodian provided the requested Planning Board Rules to the Complainant as soon as she realized that her office mistakenly denied the Complainant's OPRA request for these records, it is concluded that 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. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Even though the Custodian eventually provided the Rules of the Planning Board to the Complainant on November 9, 2007, the Custodian violated OPRA by denying the Complainant access to the requested records which were in fact available at the time of the request. Therefore, the Custodian unlawfully denied access to the requested Rules of the Planning Board and failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. In the prior GRC decision, Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), the Council held that because the Custodian certified that the records responsive did not exist, there was no unlawful denial of access. Therefore, in this complaint before the Council, the Custodian did not unlawfully deny access to the requested Rules of the Zoning Board because the Custodian has certified that such records do not exist.
3. On the Complainant's original OPRA request, the Custodian annotated that no other records exist regarding rules for public records requests other than those listed on page two (2) of the OPRA request form. Additionally, the Custodian certifies within her Statement of Information that the Township does not have any additional rules applicable to this request apart from those rules stated on the OPRA request form. Therefore, the Custodian did not unlawfully deny access to the requested Rules of Public Records Requests. *See* Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council's powers and duties, the GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain. *See* Chaka Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record);

Christine Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); Jay Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate); Louis Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian). Therefore, the GRC does not have the authority to regulate whether the Township should maintain the Rules of the Zoning Board.

5. Because OPRA provides that a requestor may submit OPRA requests anonymously, the Complainant is permitted to submit an anonymous OPRA request. N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-2.2.
6. Because the Custodian provided the requested Planning Board Rules to the Complainant as soon as she realized that her office mistakenly denied the Complainant's OPRA request for these records, it is concluded that 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. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008