



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

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

FINAL DECISION

February 25, 2009 Government Records Council Meeting

John Paff
Complainant

Complaint No.2007-168

v.

Maurice River Township (Cumberland)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council ("Council") considered the February 18, 2009 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 the amended findings and recommendations. The Council, therefore, finds that this complaint should be dismissed because the Complainant withdrew his Complaint via letter to the GRC dated January 26, 2009.

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 25th Day of February, 2009

Robin Berg Tabakin, Chair
Government Records Council

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



David Fleisher, Secretary
Government Records Council

Decision Distribution Date: March 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

John Paff¹
Complainant

GRC Complaint No. 2007-168

v.

Maurice River Township (Cumberland)²
Custodian of Records

Records Relevant to Complaint:

1. The last three (3) resolutions passed by the Township Committee in 2006 that authorized the Committee to go into closed session.
2. The first two (2) resolutions passed by the Township Committee in 2007 that authorized the Committee to go into closed session (if Resolution 50-2007 authorizing the March 8, 2007 closed session is among the resolutions responsive to the request, do not produce said record).
3. Minutes of the Township Committee's closed session meetings authorized by each resolution within the scope of # 1-2 above.
4. Non-exempt portions of the Township Committee's March 8, 2007 closed session.

Request Made: June 23, 2007

Response Made: June 28, 2007

Custodian: J. Roy Oliver

GRC Complaint Filed: July 24, 2007

Background

March 26, 2008

Government Records Council's ("Council") Interim Order. At its March 26, 2008 public meeting, the Council considered the March 19, 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, found that:

1. Because the Custodian provided the Complainant with an unredacted copy of the Township Committee's executive session minutes dated November 13, 2006 and provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director as ordered by the Council's January 30, 2008 Interim Order, the Custodian has complied with said Order.

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Edward F. Duffy, Esq. (Vineland, NJ).

2. Although the Custodian violated OPRA by not providing the Complainant with all records responsive to his request within the statutorily mandated seven (7) business days and even though the Custodian unlawfully denied access to the redacted portions of the Township Committee's executive session minutes dated November 13, 2006, the Custodian has provided said minutes to the Complainant within the five (5) business days as ordered by the Council on January 30, 2008. Therefore, 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.
3. The action sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Thus, this complaint should be referred to the Office of Administrative Law for the determination of prevailing party attorney's fees.

March 27, 2008

Council's Interim Order distributed to the parties.

April 2, 2008

Complaint transmitted to the Office of Administrative Law.

November 6, 2008

Complaint returned to the Government Records Council ("GRC") for appropriate disposition because the Complainant failed to appear at the Office of Administrative Law's scheduled hearing. The Complainant must mail any excuse for failure to appeal to the GRC within thirteen (13) days of this notice.³

January 26, 2009

Letter from Complainant's Counsel to GRC. The Complainant withdraws his complaint because the parties have reached a settlement on their own.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant withdrew his Complaint via letter to the GRC dated January 26, 2009.

³The Complainant did not submit any such excuse to the GRC.
John Paff v. Maurice River Township, 2007-168 – Supplemental Findings and Recommendations of the Executive Director

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

INTERIM ORDER

March 26, 2008 Government Records Council Meeting

John Paff
Complainant
v.

Complaint No. 2007-168

Maurice River Township (Cumberland)
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council (“Council”) considered the March 19, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided the Complainant with an unredacted copy of the Township Committee’s executive session minutes dated November 13, 2006 and provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director as ordered by the Council’s January 30, 2008 Interim Order, the Custodian has complied with said Order.
2. Although the Custodian violated OPRA by not providing the Complainant with all records responsive to his request within the statutorily mandated seven (7) business days and even though the Custodian unlawfully denied access to the redacted portions of the Township Committee’s executive session minutes dated November 13, 2006, the Custodian has provided said minutes to the Complainant within the five (5) business days as ordered by the Council on January 30, 2008. Therefore, 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.
3. The action sought by the Complainant came about due to the Complainant’s filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Thus, this complaint should be referred to



the Office of Administrative law for the determination of prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 26th Day of March, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Janice Kovach
Government Records Council

Decision Distribution Date: March 27, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 26, 2008 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2007-168

v.

**Maurice River Township (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

1. The last three (3) resolutions passed by the Township Committee in 2006 that authorized the Committee to go into closed session.
2. The first two (2) resolutions passed by the Township Committee in 2007 that authorized the Committee to go into closed session (if Resolution 50-2007 authorizing the March 8, 2007 closed session is among the resolutions responsive to the request, do not produce said record).
3. Minutes of the Township Committee's closed session meetings authorized by each resolution within the scope of # 1-2 above.
4. Non-exempt portions of the Township Committee's March 8, 2007 closed session.

Request Made: June 23, 2007

Response Made: June 28, 2007

Custodian: J. Roy Oliver

GRC Complaint Filed: July 24, 2007

Background

January 30, 2008

Government Records Council's ("Council") Interim Order. At its January 30, 2008 public meeting, the Council considered the January 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, found that:

1. Although seeking legal advice on how to appropriately respond to an OPRA request is reasonable pursuant to John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006) and although the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., John Paff v. Bergen County Prosecutor's Office, GRC Complaint

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Edward F. Duffy, Esq. (Vineland, NJ).

No. 2005-115 (March 2006), and Sandra Louise Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (December 2007), said request for an extension is unreasonable because the Complainant's request was not voluminous, did not require an extraordinary expenditure of time and effort and was not in storage or archived. *See* Thomas Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2007-161 (October 2007). Thus, the Custodian unlawfully denied access to the records responsive to item #3 of the Complainant's request.

2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried his burden of proving a lawful denial of access to the redacted portions of the executive session minutes dated November 13, 2006. As such, the Custodian should release unredacted copies of said minutes to the Complainant.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order, with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. Because the Custodian stated in the Statement of Information that all of the requested records were provided to the Complainant, and because the Custodian was required, as part of the Statement of Information, to certify that the statements contained therein are true, the Custodian has provided the meeting minutes requested by the Complainant to the Complainant.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

February 4, 2008

Council's Interim Order distributed to the parties.

February 5, 2008

Letter from Custodian to Complainant. The Custodian states that pursuant to the Council's Interim Order, he has enclosed a signed, unredacted copy of the Township Committee's executive session minutes dated November 13, 2006.

February 5, 2008

Custodian's response to the Council's Interim Order. The Custodian certifies receiving the Council's Interim Order on February 4, 2008. The Custodian certifies that he forwarded the Complainant an unredacted copy of the Township Committee's

executive session minutes dated November 13, 2006 via regular mail and facsimile on February 5, 2008.

February 6, 2008

Letter from Complainant's Counsel to GRC. Counsel states that the unredacted minutes indicate that the information originally redacted by the Custodian, the name of a town that approached Maurice River about a shared services arrangement, was unlawfully redacted. Counsel asks that the GRC proceed with a determination of whether the Complainant is a prevailing party in this matter.

Analysis

Whether the Custodian complied with the Council's January 30, 2008 Interim Order?

Via letter to the GRC dated February 5, 2008, the Custodian certified that he provided the Complainant with an unredacted copy of the Township Committee's executive session minutes dated November 13, 2006 via regular mail and facsimile on February 5, 2008

Therefore, because the Custodian provided the Complainant with an unredacted copy of the Township Committee's executive session minutes dated November 13, 2006 and provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director as ordered by the Council's January 30, 2008 Interim Order, the Custodian has complied with said Order.

Whether the Custodian's delay in access to the requested meeting minutes rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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.

In this complaint, the Custodian provided the Complainant with a written response to the Complainant's request three (3) business days following receipt of said request in which the Custodian granted access to some records and indicated that he forwarded the remaining records responsive to the Custodian's Counsel for review. At the Council's January 30, 2008 public meeting, the Council held that:

“[a]lthough seeking legal advice on how to appropriately respond to an OPRA request is reasonable pursuant to John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006) and although the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), and Sandra Louise Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (December 2007), said request for an extension is unreasonable because the Complainant's request was not voluminous, did not require an extraordinary expenditure of time and effort and was not in storage or archived. See Thomas Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2007-161 (October 2007). Thus, the Custodian unlawfully denied access to the records responsive to item #3 of the Complainant's request.”

However, the Custodian provided the Complainant with the remaining records responsive on July 27, 2007, twenty-three (23) business days following receipt of the Complainant's request. The Custodian redacted portions of the Township Committee's executive session minutes dated November 13, 2006 based on a request for confidentiality from another municipality. The Council held at its January 30, 2008 public meeting that “[p]ursuant to N.J.S.A. 47:1A-6, the Custodian has not carried his burden of proving a lawful denial of access to the redacted portions of the executive session minutes dated November 13, 2006. As such, the Custodian should release unredacted copies of said minutes to the Complainant.”

By letter to the GRC dated February 5, 2008, the Custodian certified that he provided the Complainant with an unredacted copy of the Township Committee's executive session minutes dated November 13, 2006 via regular mail and facsimile on February 5, 2008.

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).

Therefore, although the Custodian violated OPRA by not providing the Complainant with all records responsive to his request within the statutorily mandated seven (7) business days and even though the Custodian unlawfully denied access to the redacted portions of the Township Committee's executive session minutes dated November 13, 2006, the Custodian has provided said minutes to the Complainant within the five (5) business days as ordered by the Council on January 30, 2008. Therefore, 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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J. Stat. Ann. § 47:1A-6 and N.J. Stat. Ann. § 47:1A-7(f), against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in

question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

In the complaint currently before the Council, by filing a Denial of Access Complaint, the Complainant requested that the Council declare that the Custodian violated OPRA, order the Custodian to provide the minutes of the Township's closed sessions held on March 13, 2006, May 15, 2006 and November 13, 2006, award attorneys fees as provided under N.J.S.A. 47:1A-6 and find that the Custodian knowingly and willfully denied access to the requested records. Prior to this complaint being adjudicated by the Council, the Custodian provided the Complainant with additional records responsive to the Complainant's request. As stated above, the Council held at its January 30, 2008 public meeting that the Custodian unlawfully denied access to the records responsive to item #3 of the Complainant's request and has not carried his burden of proving a lawful denial of access to the redacted portions of the executive session minutes dated November 13, 2006 pursuant to N.J.S.A. 47:1A-6. Additionally, the Council ordered the Custodian to release the executive session minutes dated November 13, 2006 to the Complainant.

Therefore, the action sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters, *supra*. Thus, this complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the Complainant with an unredacted copy of the Township Committee's executive session minutes dated November 13, 2006 and provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director as ordered by the Council's January 30, 2008 Interim Order, the Custodian has complied with said Order.
2. Although the Custodian violated OPRA by not providing the Complainant with all records responsive to his request within the statutorily mandated seven (7) business days and even though the Custodian unlawfully denied access to the redacted portions of the Township Committee's executive session minutes dated November 13, 2006, the Custodian has provided said minutes to the Complainant within the five (5) business days as ordered by the Council on January 30, 2008. Therefore, 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.

3. The action sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Thus, this complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney's fees.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

March 19, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

INTERIM ORDER

January 30, 2008 Government Records Council Meeting

Thomas O. Johnston, Esq.
Complainant

Complaint No. 2006-202

v.

Township of Hillside (Union)
Custodian of Record

At the January 30, 2008 public meeting, the Government Records Council (“Council”) considered the January 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. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to his OPRA requests dated June 9, 2006 and June 20, 2006 until August 31, 2006, approximately two (2) months following the date of the Complainant’s requests, which far exceeds the statutorily mandated seven (7) business days, thus resulting in a “deemed” denial of the Complainant’s OPRA requests. *See Tucker Kelley v. Township of Rockaway*, GRC Complaint No. 2007-11 (October 2007) and *John Paff v. Bergen County Prosecutor’s Office*, GRC Complaint No. 2005-115 (March 2006).
2. Because the Complainant resubmitted his June 9, 2006 OPRA request on June 20, 2006, after the closed session minutes were approved by the governing body on June 13, 2006, the closed session minutes dated May 17, 2006 are government records pursuant to N.J.S.A. 47:1A-1.1 and are subject to public access with appropriate redactions. The fact that the Township Attorney has not yet authorized the closed session minutes for release is not a lawful basis for a denial of access and as such, the Custodian has not borne her burden of proving a lawful denial of access to the closed session minutes dated May 17, 2006 pursuant to N.J.S.A. 47:1A-6.
3. **The Custodian shall release the Township’s closed session minutes dated May 17, 2006 to the Complainant with appropriate redactions, if any,**



including a detailed document index explaining the lawful basis for each redaction.

4. **The Custodian shall comply with # 3 above within five (5) business days from receipt of the Council's Order and simultaneously provide certified confirmation of compliance, as well as a redaction index detailing each redaction asserted and the lawful basis for the denial, to the Executive Director pursuant to N.J. Court Rule 1:4-4.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: January 31, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Thomas O. Johnston, Esq.
(on behalf of the Hillside Board of Education)¹
Complainant

GRC Complaint No. 2006-202

v.

Township of Hillside²
Custodian of Records

Records Relevant to Complaint: All documents in the custody, possession or control of the Township or its elected officials and agents regarding the Hillside School District base tax levy budget review in the 2006-2007 school year conducted by the Township and their agents, including but not limited to any memorandums and/or correspondence from the consultants and/or auditors retained by the Township.

Request Made: June 9, 2006 and June 20, 2006

Response Made: August 31, 2006

Custodian: Janet Vlasisavljevic

GRC Complaint Filed: November 8, 2006

Background

June 9, 2006

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.

June 20, 2006

Complainant resubmits his OPRA request dated June 9, 2006 to the Custodian's Counsel with a letter stating that he has not received a response to his June 9, 2006 OPRA request from the Custodian.

August 30, 2006

Letter from Complainant to Custodian's Counsel. The Complainant states that he is writing in regards to his OPRA request dated June 9, 2006. The Complainant states that he sent Counsel correspondence dated June 20, 2006 indicating that the Custodian had not yet complied with his OPRA request. The Complainant states that to date, he still has not received any records responsive to his OPRA request. Further, the Complainant

¹ The Complainant submitted his OPRA request and filed this complaint on behalf of the Hillside Board of Education (Morristown, NJ).

² No legal representation listed on record.

asserts that the Township has blatantly disregarded its obligations under OPRA and requests that the Township immediately comply with the Complainant's request.

August 31, 2006

Custodian Counsel's response to the Complainant's OPRA request. Counsel responds to the Complainant's OPRA request approximately two (2) months following receipt of such request. Counsel releases the Township Council's meeting minutes dated May 17, 2006 (includes Resolution R-06-119 and a Certificate and Report of School Taxes).

September 13, 2006

Letter from Complainant to Custodian's Counsel. The Complainant states that he is in receipt of the Township's meeting minutes dated May 17, 2006. The Complainant claims that the meeting minutes are not responsive to his request for all records in the possession of the Township Council, its members and agents and thus does not comply with the mandates of OPRA. The Complainant states that documents in connection with the consulting services the Council received by Warren Korecky, C.P.A., regarding the budget review have not been released. The Complainant requests that if said records are no longer in the Township Council's possession, the Custodian should notify the Complainant of the date on which said records were destroyed and by whom.

November 8, 2006

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

- Complainant's OPRA request dated June 9, 2006
- Complainant's resubmitted OPRA request dated June 20, 2006
- Letter from Complainant to Custodian's Counsel dated August 30, 2006
- Letter from Custodian's Counsel to Complainant dated August 31, 2006
- Letter from Complainant to Custodian's Counsel dated September 13, 2006

The Complainant states that he submitted his OPRA request on June 9, 2006 and the Custodian failed to respond to said request. The Complainant states that on June 20, 2006 he resent his OPRA request to the Custodian's Counsel and did not receive a response from the Custodian or the Custodian's Counsel. The Complainant also states that on August 30, 2006 he sent a letter to the Custodian's Counsel requesting that Counsel comply with the Complainant's records request. In response to said letter, the Complainant states that Counsel released meeting minutes dated May 17, 2006, which the Complainant claims is not responsive to his OPRA request. Additionally, the Complainant states that on September 13, 2006 he sent another letter to the Custodian's Counsel indicating that he is requesting documents in connection with consulting services the Township Council received from Warren Korecky, C.P.A., regarding the budget review. The Complainant states that he did not receive any response to said letter. Further, the Complainant requests the recovery of all attorney's fees incurred in connection with this OPRA request and GRC complaint.

November 21, 2006

Offer of Mediation sent to both parties.

November 21, 2006

Custodian's signed Agreement to Mediate. The Complainant did not agree to mediate this complaint.

December 7, 2006

Request for the Statement of Information sent to the Custodian.

January 2, 2007

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on December 7, 2006 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

January 3, 2007

Letter of Representation from Custodian's Counsel with the following attachments:

- Complainant's Denial of Access Complaint dated November 8, 2006 (and all attachments)
- Memorandum from Custodian to Custodian's Counsel dated November 9, 2006
- NJ Department of Education, Division of Finance Certificate and Report of School Taxes for Hillside Township for the 2006-2007 school year

Custodian's Counsel states that he has advised the Complainant several times that following a detailed search and inquiry, it has been determined there are no other records responsive to the Complainant's request. Counsel states that he has enclosed all of the documents which exist concerning the Complainant's OPRA request.

January 4, 2007

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

- Hillside Township Council's meeting minutes dated May 17, 2006
- Resolution R-06-119 dated May 17, 2006
- Letter from Custodian's Counsel to Complainant dated August 31, 2006

The Custodian certifies that she received the Complainant's request on June 9, 2006. The Custodian certifies that the records responsive to the Complainant's request are the Hillside Township Council's meeting minutes dated May 17, 2006 and Resolution R-06-119 dated May 17, 2006, which the Custodian certifies were released to the Complainant in their entirety.

March 7, 2007

Letter from GRC to Custodian. GRC requests a document index from the Custodian itemizing the records responsive to the Complainant's June 9, 2006 OPRA request and which of those records were or were not provided to the Complainant because the GRC notes an inconsistency between the Custodian's and the Custodian Counsel's submissions to the GRC. The GRC states that in the Custodian's SOI, the Custodian lists two (2) records responsive to the Complainant's June 9, 2006 OPRA request; however, the Custodian's Counsel included one (1) additional responsive record in his letter to the GRC dated January 3, 2007.

March 13, 2007

Letter from Custodian to GRC. The Custodian states that on August 31, 2006 the Township Attorney released the meeting minutes dated May 17, 2006 and the Certificate and Report of School Taxes, which the Custodian asserts are the only records that are on file in her office. The Custodian states that the closed session minutes dated May 17, 2006 are not included because the Township Attorney has not authorized the release of said minutes. The Custodian states that she maintains the records that the Board of Education ("BOE") submitted to the Township Council to review regarding the defeated budget, however, the Custodian states she did not submit said records to the Township Council. Additionally, the Custodian states that she never had any memorandum and/or correspondence from the consultants and/or auditors on file with the exception of the resolution that was received and included in the minutes.

April 24, 2007

E-mail from Custodian's Counsel to GRC. Counsel states that his firm no longer represents the Township of Hillside.

April 26, 2007

Letter from GRC to Custodian. The GRC requests a letter of representation from the Township's new legal counsel, if any.

April 27, 2007

Letter from Custodian to GRC. The Custodian states that the Township currently does not have legal representation.

May 8, 2007

Letter from GRC to Custodian. The GRC requests a certification in response to the following:

1. Whether or not the Township Council's closed session minutes dated May 17, 2006 are responsive to the Complainant's June 9, 2006 OPRA request?
2. Whether or not the Township Council's closed session minutes dated May 17, 2006 were approved by the governing body at the time of the Complainant's June 9, 2006 OPRA request?
3. Whether or not the "mandated documents that were submitted by the Board of Education in order for the Council to review for the purposes of the defeated budget" are responsive to the Complainant's June 9, 2006 OPRA request? If said records are responsive to the Complainant's request, provide a legal explanation and statutory citation for the denial of said records.

4. Whether or not any memorandum and/or correspondence from the consultants and/or auditors exist on file?

May 10, 2007

Custodian's certification in response to GRC's request. The Custodian certifies that the Township's closed session minutes dated May 17, 2006 were not approved by the governing body at the time of the Complainant's June 6, 2006 OPRA request. The Custodian certifies that the governing body approved the closed session minutes on June 13, 2006, but these minutes have not yet been authorized for release by the Township Attorney. The Custodian also certifies that based on the Complainant's OPRA request and follow up correspondence, it was her understanding that the records that were supplied by the BOE would not be responsive to the Complainant's June 9, 2006 OPRA request. Additionally, the Custodian certifies that she has never had any memorandum and/or correspondence from the auditors on file except the resolution that was included in the Township Council's meeting minutes dated May 17, 2006.

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 ... The terms *shall not include* inter-agency or intra-agency *advisory, consultative, or deliberative material.*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

"...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g

Additionally, OPRA 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 Open Public Meetings Act (“OPMA”) provides that:

“[e]ach public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with section 7 of this act.” N.J.S.A. 10:4-14.

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.

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. As also prescribed under 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. Further, the Custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. A custodian’s failure to respond in writing to a complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, if the Custodian required additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant’s request, the Custodian should have obtained a written agreement from the Complainant in order to do so. In John Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Custodian knew he needed additional time in order to respond to the

Complainant's request, but failed to obtain a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA to respond. The Council held that the Custodian's failure to obtain a written agreement extending the seven (7) business day time period resulted in a "deemed" denial of the request.

Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to his OPRA requests dated June 9, 2006 and June 20, 2006 until August 31, 2006, approximately two (2) months following the date of the Complainant's requests, which far exceeds the statutorily mandated seven (7) business days, thus resulting in a "deemed" denial of the Complainant's OPRA requests. *See* Kelley, supra, and Paff, supra.

The Custodian certifies that the records responsive to the Complainant's OPRA request are the Hillside Township Council's meeting minutes dated May 17, 2006 and Resolution R-06-119 dated May 17, 2006 (including the Certificate of School Taxes), which were released to the Complainant in their entirety (by Custodian's Counsel on August 31, 2006 approximately two (2) months following the date of the Complainant's OPRA request(s)).

The Custodian also certifies that the Township's closed session minutes dated May 17, 2006 were not approved by the governing body at the time of the Complainant's June 6, 2006 OPRA request, as said minutes were approved on June 13, 2006; however, the Custodian also certifies that the Township Attorney has not yet authorized the release of said minutes.

The question of whether such draft minutes are exempt from disclosure requires consideration of the general question of the status of draft documents under OPRA. As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a "government record" as information either "made, maintained or kept on file in the course of [an agency's] official business," or "received" by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. *Id.* *See* Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that "inter-agency or intra-agency advisory, consultative, or deliberative material" is not included within the definition of a government record. N.J.S.A. 47: 1A-1.1.

This exemption is equivalent to the deliberative process privilege, which protects from disclosure pre-decisional records that reflect an agency's deliberations. *In re Readoption of N.J.A.C. 10A:23*, 367 N.J. Super. 61, 73-74 (App. Div. 2004), cert. den. 182 N.J. 149 (2004); *see also* *In re Liq. Of Integrity Ins. Co.*, 165 N.J. 75 (2000). As a result, OPRA "shields from disclosure documents 'deliberative in nature, containing opinions, recommendations, or advice about agency policies,' and 'generated before the adoption of an agency's policy or decision.'" *Bent v. Stafford Police Department*, 381 N.J. Super. 30, 37 (App. Div. 2005), quoting *Gannet New Jersey Partners LP v. County of Middlesex*, 379 N.J. Super. 205, 219 (App. Div. 2005).

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. *See* U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); *Pies v.*

U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n, v. Dinkins, 807 F.Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption, *supra*, the court reviewed an OPRA request to the Department of Corrections (DOC) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

The trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. *Id.* (Emphasis added.)

The court similarly held that memos containing draft procedures and protocols were entirely protected from disclosure. *Id.* at 19. *See also* Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 2004) (noting that in general, drafts are deliberative materials).

Although draft minutes always fall under OPRA’s exemption for deliberative material, the Appellate Division has suggested that the confidentiality accorded to deliberative records may be overcome if the requestor asserts and is able to demonstrate an overriding need for the record in question. *See In re Readoption*, *supra*, 367 N.J.Super. at 73. Resolution of such a claim, if raised by the requestor, will depend upon the particular circumstances of the case in question.

Thus, in accordance with the foregoing case law, all draft documents, including the draft minutes of a meeting held by a public body, are entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the public body’s decision making concerning the specific language and information that should be contained in the minutes to be adopted by that public body, pursuant to its obligation, under the Open Public Meetings Act, to “keep reasonably comprehensible minutes.” N.J.S.A. 10:4-14.

In Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council found 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.”

In this complaint, the Custodian certifies that the closed session minutes dated May 17, 2006 were not approved at the time of the Complainant’s June 9, 2006 OPRA request because said minutes were approved by the governing body on June 13, 2006. However, the Complainant resubmitted his OPRA request on June 20, 2006 after the closed session minutes were approved by the governing body.

Therefore, the closed session minutes dated May 17, 2006 are government records pursuant to N.J.S.A. 47:1A-1.1 and are subject to public access with appropriate redactions. The fact that the Township Attorney has not yet authorized the closed session minutes for release is not a lawful basis for a denial of access and as such, the Custodian has not borne her burden of proving a lawful denial of access to the closed session minutes dated May 17, 2006 pursuant to N.J.S.A. 47:1A-6. The Custodian shall release the Township’s closed session minutes dated May 17, 2006 to the Complainant with appropriate redactions, if any, and a legal justification for any redacted part thereof.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees when the Complainant is an attorney representing himself before the Council?

The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to his OPRA requests dated June 9, 2006 and June 20, 2006 until August 31, 2006, approximately two (2) months following the date of the Complainant’s requests, which far exceeds the statutorily mandated seven (7) business days, thus resulting in a “deemed” denial of the Complainant’s OPRA requests. *See Tucker Kelley v. Township of Rockaway*, GRC Complaint No. 2007-11 (October 2007) and

John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006).

2. Because the Complainant resubmitted his June 9, 2006 OPRA request on June 20, 2006, after the closed session minutes were approved by the governing body on June 13, 2006, the closed session minutes dated May 17, 2006 are government records pursuant to N.J.S.A. 47:1A-1.1 and are subject to public access with appropriate redactions. The fact that the Township Attorney has not yet authorized the closed session minutes for release is not a lawful basis for a denial of access and as such, the Custodian has not borne her burden of proving a lawful denial of access to the closed session minutes dated May 17, 2006 pursuant to N.J.S.A. 47:1A-6.
3. **The Custodian shall release the Township's closed session minutes dated May 17, 2006 to the Complainant with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction.**
4. **The Custodian shall comply with # 3 above within five (5) business days from receipt of the Council's Order and simultaneously provide certified confirmation of compliance, as well as a redaction index detailing each redaction asserted and the lawful basis for the denial, to the Executive Director pursuant to N.J. Court Rule 1:4-4.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

January 23, 2008