



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

June 25, 2008 Government Records Council Meeting

Rita A. Bernstein
Complainant

Complaint No. 2007-278

v.

Township of Knowlton (Warren)
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council (“Council”) considered the June 18, 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. Because the Custodian did not address the records relevant to this complaint until October 4, 2007, nine (9) business days following receipt of the Complainant’s September 21, 2007 OPRA request, the Custodian’s failure to respond in writing to the 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. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The unapproved, draft executive and public session meeting minutes of the Township Council dated September 10, 2007 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, GRC Complaint No. 2006-51 (August 2006). However, the Custodian has not borne her burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because the Custodian’s failure to respond in writing within the statutorily mandated time frame resulted in a deemed denial.
3. The GRC need not reconcile the Custodian’s conflicting assertions of dates on which the public session meeting minutes were approved because the



Custodian did ultimately certify in her May 8, 2008 submission to the GRC that the Complainant was provided with unapproved draft public meeting minutes on September 28, 2007 which the Custodian was not required to provide 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).

4. The Custodian's response to Item No. 2 of the Complainant's September 21, 2007 OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2006) because she failed to specifically state that the minutes were not yet approved and were thus exempt from disclosure as ACD material. Therefore, the Custodian failed to bear her burden of proving that the denial of access was lawful pursuant to N.J.S.A. 47:1A-6.
5. Handwritten notes of the Custodian are not subject to investigation because they are not considered to be public records pursuant to O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007).
6. Although the Custodian's response resulted in a deemed denial of access to the records relevant to this complaint, because the requested unapproved public and executive session meeting minutes were exempt from disclosure 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), and because the Custodian certifies that the minutes were delivered to the Complainant upon approval even though the Custodian was not required to do so 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), 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 actions appear to be 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 25th Day of June, 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, Secretary
Government Records Council

Decision Distribution Date: July 2, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2008 Council Meeting**

**Rita A. Bernstein¹
Complainant**

GRC Complaint No. 2007-278

v.

**Township of Knowlton (Warren)²
Custodian of Records**

Records Relevant to Complaint:

1. Minutes of public session meeting held on September 10, 2007.
2. Minutes of executive session meeting held on September 10, 2007.³

Request Made: September 21, 2007

Response Made: September 26, 2007

Custodian: Lisa Patton

GRC Complaint Filed: November 13, 2007

Background

September 21, 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.

September 26, 2007

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request, providing one record not at issue in this complaint.⁴

October 4, 2007

Letter from the Custodian to the Complainant. The Custodian states that copies of public session meeting minutes will be provided when they are approved by the Township Committee and that executive session meeting minutes are available to the public when they are released by the Municipal Attorney.⁵

November 13, 2007

¹ No legal representation listed on record.

² Represented by Richard Cushing, Esq., of Gehhardt & Kiefer (Clinton, NJ).

³ The Complainant also requested other records but those records are not at issue in this complaint.

⁴ The Custodian did not address the records relevant to this complaint in this letter to the Complainant.

⁵ The Custodian requests that the Complainant submit \$12.50 in copying costs. The copying costs are not at issue in this complaint. The Custodian also provided additional records which are not at issue in this complaint.

Letter from the Complainant to the Custodian. The Complainant states that she has not received either the public or the executive session minutes as requested in the Complainant's September 21, 2007 OPRA request. The Complainant asserts that two (2) months and five (5) meetings have occurred since September 10, 2007 and she cannot believe that the Board has not yet approved the requested minutes. The Complainant asserts that she believes that the Custodian is denying access to the requested minutes because unapproved minutes can still be made available to the public when requested. The Complainant finally asserts that she will be filing a complaint with the GRC.

November 13, 2007

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

- Complainant's OPRA request dated September 21, 2007.
- Letter from the Custodian to the Complainant dated October 4, 2007.
- Letter from the Complainant to the Custodian dated November 13, 2007.

The Complainant states that she submitted an OPRA request to the Custodian on September 21, 2007. The Complainant states that a confidential package was left on her desk on September 27, 2007 containing records not at issue in this complaint. The Complainant states that on October 4, 2007, two (2) weeks after her OPRA request, the Complainant received additional records not at issue in this complaint via certified mail. The Complainant states that as of the filing of this complaint, the Complainant has yet to receive either the September 10, 2007 public or executive session minutes. The Complainant states that, according to the Custodian's letter dated October 4, 2007, the minutes have not been approved by the Township Committee, even though there have been four (4) meetings since September 10, 2007. The Complainant contends that the Custodian is unlawfully denying access to the requested records.

November 16, 2007

Memo from the Custodian to the Complainant attaching the September 10, 2007 public session meeting minutes.⁶ The Custodian asserts that the Complainant's November 13, 2007 letter contains some inaccurate information. The Custodian states that the Complainant's OPRA request was received on September 24, 2007 and responded to on September 26, 2007. The Custodian further states that the September 10, 2007 public session meeting minutes were approved on September 27, 2007 and placed in the Complainant's work mailbox on September 28, 2007. The Custodian finally avers that the September 10, 2007 executive session minutes are being prepared by the Municipal Attorney and will be provided to the Complainant once they are released by the attorney.

November 26, 2007

Offer of Mediation sent to both parties.

⁶ The Custodian also includes other records responsive to the Complainant's September 21, 2007 OPRA request that are not at issue in this complaint.

November 28, 2007

The Custodian agrees to mediate this complaint.

November 29, 2007

Letter from the Complainant to the GRC. The Complainant declines mediation. The Complainant contends that it is hard to believe that the requested meeting minutes have not yet been approved.

December 4, 2007

Letter from the Complainant to the Custodian. The Complainant asserts that the September 10, 2007 public meeting minutes were never placed in the Complainant's work mailbox. The Complainant asserts that if the minutes were placed in the Complainant's mailbox on September 28, 2007 as the Custodian contends, then the minutes would have remained there until the Complainant returned to the office on October 2, 2007.

The Complainant contends that it is quite strange that the Custodian would provide records in a confidential envelope and then by certified mail a week later, but would then place the requested minutes in the Complainant's mailbox. The Complainant asserts that she believes that the minutes were never placed in the mailbox as asserted by the Custodian and requests that the Custodian forward a copy of the minutes via U.S. mail.

December 6, 2007

Request for the Statement of Information sent to the Custodian.

December 11, 2007

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

- Complainant's OPRA request dated September 21, 2007.
- Memo from the Custodian to the Complainant dated September 26, 2007.⁷
- Letter from the Custodian to the Complainant dated October 4, 2007.

The Custodian states that she received the Complainant's September 21, 2007 OPRA request on September 24, 2007. The Custodian states that she delivered to the Complainant a memo attaching a record not at issue in this complaint and informed the Complainant that the remainder of the request would be mailed. The Complainant avers she delivered the September 10, 2007 public session meeting minutes to the Complainant's work mailbox on September 28, 2007 because the minutes were approved by the Board on September 27, 2007. The Custodian further asserts that a second copy of the minutes was provided to the Complainant again on November 13, 2007.

The Custodian states that she provided the rest of the records which are not at issue in this complaint, but was still unable to produce the September 10, 2007 executive session minutes because they had not yet been approved. The Custodian avers that the

⁷ The Custodian attaches records not at issue in this complaint.

September 10, 2007 executive session minutes were approved on December 10, 2007 and sent to the Complainant via certified mail on December 11, 2007.

December 18, 2007

The Complainant's response to the Custodian's SOI. The Complainant avers that the executive session minutes provided to the GRC are insufficient.

February 5, 2008

Letter from the Complainant to the GRC. The Complainant avers that the September 10, 2007 executive session meeting minutes are inaccurate and untruthful. The Complainant requests that the GRC investigate the Custodian's notes from the executive session meeting because the minutes obviously do not reflect the exact contents of the meeting.

May 7, 2008

E-mail from the GRC to the Custodian. The GRC requests that the Custodian respond to the following inquiries:

1. Which dates were the September 10, 2007 public session meeting minutes approved by the Board and disclosed to the Complainant?
2. Which dates were the September 10, 2007 executive session meeting minutes approved by the Board and disclosed to the Complainant?

May 8, 2008

Certification from the Custodian to the GRC. The Custodian certifies that the September 10, 2007 public session meeting minutes were stamped "Draft" and placed in the Complainant's work mailbox on September 28, 2007. The Custodian further certifies that an approved copy of the public session minutes, which were approved on October 25, 2007, were mailed to the Complainant on October 26, 2007. The Custodian further certifies that the September 10, 2007 executive session meeting minutes were approved on December 10, 2007 and mailed to the Complainant on December 11, 2007. The Custodian finally certifies that the public session meeting minutes provided to the Complainant on September 28, 2007 were actually not yet approved and that the Custodian had merely made a mistake.

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 also provides that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian...If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived....” 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.

OPRA further states that:

“[t]he Government Records Council shall ... receive, hear, review and adjudicate a complaint filed by any person concerning *a denial of access to a government record* by a records custodian...” (Emphasis added.) N.J.S.A. 47:1A-7.b.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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.⁸

In the complaint now before the GRC, the Custodian did not respond to the Complainant's OPRA request for the items relevant to this complaint until October 4, 2007, nine (9) business days following receipt of the Complainant's September 21, 2007 OPRA request. Therefore, the Custodian's failure to respond in writing to the 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. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Further, the Custodian asserts that the requested public and executive session meeting minutes were not approved at the time of the Complainant's September 21, 2007 OPRA request.

As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a "government record" as records 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. Ibid. 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.

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:

⁸ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

“[t]he 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. *Ibid.* (Emphasis added.)”

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held 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.”

Thus, in accordance with the foregoing case law and the prior GRC decision in Parave-Fogg, supra, all 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.

Therefore, the unapproved, draft executive and public session meeting minutes of the Township Council dated September 10, 2007 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, supra. However, the Custodian has not borne her burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because the Custodian’s failure to respond in writing within the statutorily mandated time frame resulted in a deemed denial.

Additionally, the GRC need not reconcile the Custodian’s conflicting assertions of dates on which the public session meeting minutes were approved because the Custodian did ultimately certify in her May 8, 2008 submission to the GRC that the Complainant was provided with unapproved draft public meeting minutes on September 28, 2007 which the Custodian was not required to provide pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, supra.

In this complaint, the Custodian stated in her initial October 4, 2007 response to the Complainant that the executive session meeting minutes would be made available once the Municipal Attorney had released the minutes. In a prior GRC decision, Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007), the Custodian granted

access to executive session minutes but stated that the Complainant would receive the requested records once the City Attorney had decided that the records no longer presented any danger to the public interest. The GRC held that this response was insufficient and that the Custodian had therefore failed to bear her burden of proving that the denial of access was lawful pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-6.

The Custodian's response to Item No. 2 of the Complainant's September 21, 2007 OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Paff v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) because she failed to specifically state that the minutes were not yet approved and were thus exempt from disclosure as ACD material. Therefore, the Custodian failed to bear her burden of proving that the denial of access was lawful pursuant to N.J.S.A. 47:1A-6.

Further, although the Complainant requested that the GRC investigate the Custodian's meeting notes to determine the accuracy and contents of the September 10, 2007 Executive Session meeting minutes, in O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007), the Complainant appealed a GRC final decision denying access to copies of handwritten notes taken by the Board of Education ("BOE") secretary during executive session. The Court upheld the GRC's decision and further ruled that "it is clear that ... the preparation of formal minutes is the Secretary's "official business" and that the formal minutes themselves, not the Secretary's handwritten notes, are the public record." Therefore, the handwritten notes of the Custodian are not subject to investigation because they are not considered to be public record pursuant to O'Shea, supra.

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?

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.

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).

Although the Custodian's response resulted in a deemed denial of access to the records relevant to this complaint, because the requested unapproved public and executive session meeting minutes were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg, *supra*, and because the Custodian certifies that the minutes were delivered to the Complainant upon approval even though the Custodian was not required to do so pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg, *supra*, 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 actions appear to be 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. Because the Custodian did not address the records relevant to this complaint until October 4, 2007, nine (9) business days following receipt of the Complainant's September 21, 2007 OPRA request, the Custodian's failure to respond in writing to the 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. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The unapproved, draft executive and public session meeting minutes of the Township Council dated September 10, 2007 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, GRC Complaint No. 2006-51 (August 2006). However, the Custodian has not borne her burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because the Custodian's failure to respond in writing within the statutorily mandated time frame resulted in a deemed denial.
3. The GRC need not reconcile the Custodian's conflicting assertions of dates on which the public session meeting minutes were approved because the Custodian did ultimately certify in her May 8, 2008 submission to the GRC

that the Complainant was provided with unapproved draft public meeting minutes on September 28, 2007 which the Custodian was not required to provide 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).

4. The Custodian's response to Item No. 2 of the Complainant's September 21, 2007 OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2006) because she failed to specifically state that the minutes were not yet approved and were thus exempt from disclosure as ACD material. Therefore, the Custodian failed to bear her burden of proving that the denial of access was lawful pursuant to N.J.S.A. 47:1A-6.
5. Handwritten notes of the Custodian are not subject to investigation because they are not considered to be public records pursuant to O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007).
6. Although the Custodian's response resulted in a deemed denial of access to the records relevant to this complaint, because the requested unapproved public and executive session meeting minutes were exempt from disclosure 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), and because the Custodian certifies that the minutes were delivered to the Complainant upon approval even though the Custodian was not required to do so 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), 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 actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

June 18, 2008