



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 25, 2009 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2008-106

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 18, 2009 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’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that the Executive Session minutes were not yet approved by the Borough Council at the time of the Complainant’s OPRA request, these minutes are exempt from disclosure under OPRA as advisory, consultative or deliberative material pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) and N.J.S.A. 47:1A-1.1. However, the Custodian has not borne his 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. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failed to bear his burden of proving a lawful denial of access by not responding within the statutorily mandated seven (7) business day time frame, the requested Executive Session meeting minutes are not subject to disclosure because the minutes were not approved by the governing body at the time of the request. 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. However, the Custodian's "deemed" denial of access appears negligent and heedless since he 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 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 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-106

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: All executive session meeting minutes from February 2007.

Request Made: June 17, 2007

Response Made: None

Custodian: Donald E. Kazar

GRC Complaint Filed: May 21, 2008³

Background

June 17, 2007

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

May 21, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated June 17, 2007.

The Complainant states that he submitted an OPRA request to the Complainant via e-mail on June 17, 2007 and to date has not received a response.

The Complainant did not agree to mediate this complaint.

July 1, 2008

Request for the Statement of Information sent to the Custodian.

July 7, 2008

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until July 11, 2008 to submit the Statement of Information because he was not in the office the prior week.

¹ No legal representation listed on record.

² Represented by William Cooper, Esq. (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

July 7, 2008

E-mail from the GRC to the Custodian. The GRC grants the Custodian's request for an extension of time until July 11, 2008 to submit the Statement of Information.

July 11, 2008

Custodian's Statement of Information ("SOI") attaching the Complainant's OPRA request dated June 17, 2007.

The Custodian certifies that he researched the meeting minutes file to locate the appropriate executive session minutes.

The Custodian states that he received the Complainant's June 17, 2007 OPRA request on June 20, 2007. The Custodian asserts that he verbally informed the Complainant that the requested records could not be provided because the minutes were not yet completed due to continuing legal issues.

The Custodian contends that, contrary to the Complainant's assertion that the Custodian did not respond to the June 17, 2007 OPRA request, the Custodian remembers advising the Complainant that the requested records were not available due to pending legal issues. The Custodian asserts that the Complainant asked the Custodian to inform him when the records would be made available and never followed up after this exchange.⁴

The Custodian finally asserts that the requested minutes would have become available after the Complainant entered into a settlement agreement regarding his legal claims with the Borough.

August 6, 2008

The Complainant's response to the Custodian's SOI. The Complainant asserts that regardless of the Custodian's assertions, no response was received by the Complainant regarding the OPRA request that is subject to this complaint. The Complainant contends that the Custodian's written response proves that he not only received the request, but knowingly, willfully and deliberately refused to provide the records.

October 28, 2008

E-mail from the GRC to the Custodian. The GRC requests that the Custodian certify to the following: whether the requested executive session minutes were approved by the Borough of South Bound Brook Council at the time of the Complainant's June 17, 2007 OPRA request. The GRC requests that the Custodian provide a response by October 31, 2008.

⁴ The OPRA request provided as part of the SOI shows the Custodian's signature, thereon dated June 20, 2007, noting that the requested records were not available for release. It appears from the evidence of record that the Custodian did not return the OPRA request signed and dated by him to the Complainant. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-106 – Findings and Recommendations of the Executive Director

October 30, 2008

Certification from the Custodian to the GRC. The Custodian certifies that the requested executive session minutes were approved by Council on March 13, 2008.

Analysis

Whether the Custodian unlawfully denied access to the requested executive session meeting minutes?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

In this complaint, the Complainant asserts that he submitted an OPRA request to the Custodian on July 17, 2007 and received no response. Conversely, the Custodian asserts that he received the Complainant’s request on July 20, 2007, found that the records requested could not be provided due to pending litigation and then verbally advised the Complainant that the records could not be provided until after the legal matters had been resolved. Although it appears that the Custodian signed and dated the OPRA request form with the reason for the denial of access, it also appears that the Custodian did not return the signed and dated request to the Complainant.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Nevertheless, in Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the GRC held that meeting minutes not approved at the time an OPRA request is made are exempt from disclosure as intra-agency advisory, consultative and deliberative (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1.

In this complaint, the Custodian certified on October 30, 2008 that the requested executive session meeting minutes were not approved until March 13, 2008.

Therefore, because Custodian certified that the Executive Session minutes were not yet approved by Council at the time of the Complainant’s OPRA request, these minutes are exempt from disclosure under OPRA as ACD material pursuant to Parave-Fogg and N.J.S.A. 47:1A-1.1. However, the Custodian has not borne his 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.

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, 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, 107 (App. Div. 1996).

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failed to bear his burden of proving a lawful denial of access by not responding within the statutorily mandated seven (7) business day time frame, the requested Executive Session meeting minutes are not subject to disclosure because the minutes were not approved by the governing body at the time of the request. 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. However, the Custodian's deemed denial of access appears negligent and heedless since he 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. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that the Executive Session minutes were not yet approved by the Borough Council at the time of the Complainant's OPRA request, these minutes are exempt from disclosure under OPRA as advisory, consultative or deliberative material pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) and N.J.S.A. 47:1A-1.1. However, the Custodian has not borne his 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. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failed to bear his burden of proving a lawful denial of access by not responding within the statutorily mandated seven (7) business day time frame, the requested Executive Session meeting minutes are not subject to disclosure because the minutes were not approved by the governing body at the time of the request. 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. However, the Custodian's "deemed" denial of access appears negligent and heedless since he 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

February 18, 2009