



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

January 25, 2011 Government Records Council Meeting

Lois A. Lebbing
Complainant

Complaint No. 2009-251

v.

Borough of Highland Park (Middlesex)
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 2011 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 search for the requested Planning Board meeting minutes responsive to the Complainant’s August 8, 2008 OPRA request was insufficient because the records were eventually located in the same office previously searched by the Custodian. Moreover, the Custodian unlawfully denied access to the requested records in response to the Complainant’s August 8, 2008 OPRA request and failed to bear the burden of proving her due diligence in searching for the records requested pursuant to N.J.S.A. 47:1A-6.
2. Because Ms. Reh certified that no minutes prior to October 1953 could be located, and because the Complainant has not provided any competent, credible evidence to refute Ms. Reh’s certification in this regard, the Custodian has not unlawfully denied access to the requested Planning Board meeting minutes from 1950 to October 1953 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian in this complaint performed an insufficient search to locate the requested Planning Board meeting minutes; thus, she failed to bear the burden of proving her due diligence in searching for the records responsive to the Complainant’s August 8, 2008 OPRA request pursuant to N.J.S.A. 47:1A-6. However, the Complainant was provided with the requested Planning Board meeting minutes from October 1953 to 1960 in response to her August 4, 2009 OPRA request and Ms. Reh certified that no Planning Board meeting minutes from 1950 to October 1953 exist. Thus, the evidence of record does not indicate that the Custodian’s



violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

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 January, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: February 7, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2011 Council Meeting**

**Lois A. Lebbing¹
Complainant**

GRC Complaint No. 2009-251

v.

**Borough of Highland Park (Middlesex)²
Custodian of Records**

Records Relevant to Complaint: Inspection of Planning Board meeting minutes from 1950 through 1960.

Request Made: August 8, 2008 and August 4, 2009

Response Made: August 15, 2008 and August 13, 2009

Custodian: Joan Hullings

GRC Complaint Filed: September 2, 2009³

Background

August 8, 2008

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

August 15, 2008

Custodian's response to the first (1st) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states both Mr. Scott Luthman ("Mr. Luthman"), Director of Code Enforcement, and the Custodian conducted a search of the Borough archives and located no records responsive to the Complainant's OPRA request.⁴

August 4, 2009

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by Victoria Britton, Esq., of Mason, Griffin & Pierson, PC (Princeton, NJ).

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

⁴ The Custodian noted her response on the Complainant's OPRA request form.

August 7, 2009

E-mail from Ms. Janet Molina (“Ms. Molina”), Deputy Clerk, to Ms. Diane Reh (“Ms. Reh”), Master Code Enforcement Officer. Ms. Molina asks if Ms. Reh is going to retrieve the requested minutes prior to 1953.

August 11, 2009

E-mail from Ms. Reh to Ms. Molina. Ms. Reh states that she understands that the Complainant is seeking Planning Board meeting minutes prior to 1953. Ms. Reh states that she checked the archives and found no meeting minutes responsive.

August 13, 2009

Ms. Molina’s response to the second (2nd) OPRA request. Ms. Molina responds on behalf of the Custodian in writing to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request. Ms. Molina states that access to the requested Planning Board meeting minutes from October 1953 to 1960 is granted. Ms. Molina encloses an e-mail from Ms. Reh stating that no minutes prior to 1953 were located.⁵

September 2, 2009

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

- Complainant’s first (1st) OPRA request dated August 8, 2008 with Custodian’s notes thereon.
- Complainant’s second (2nd) OPRA request dated August 4, 2009 with Ms. Molina’s notes thereon.
- E-mail from Ms. Molina to Ms. Reh dated August 7, 2009.
- E-mail from Ms. Reh to Ms. Molina dated August 11, 2009.

The Complainant states that she submitted an OPRA request to the Borough of Highland Park (“Borough”) on August 8, 2008. The Complainant states that when she went to the Borough on August 15, 2008 to review the requested minutes, the Custodian read to her a note from Mr. Luthman stating that no Planning Board minutes could be located. The Complainant states that the Custodian left the office to conduct a second check of the Borough’s records. The Complainant states that the Custodian returned and noted on the OPRA request form that she had checked the archives and could not locate the requested Planning Board minutes.

The Complainant states that she submitted a second (2nd) OPRA request for the same Planning Board meeting minutes to the Borough nearly a year later, on August 4, 2009. The Complainant states that Ms. Molina responded providing access to Planning Board minutes from October 1953 through 1961. The Complainant states that Ms. Molina included in her response an e-mail from Ms. Reh advising that no minutes prior to 1953 could be located. The Complainant also attached three (3) pages of minutes from

⁵ The Custodian noted her response on the Complainant’s OPRA request form.
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various Council meetings in 1952 to support her assertion that the Planning Board was in existence prior to October 1953.⁶

The Complainant questions whether the Custodian conducted a more in depth search of the archives to locate those records which apparently did not exist a year earlier. The Complainant further questions whether Mr. Luthman's files were searched.

September 15, 2009

Offer of Mediation sent to both parties.

September 16, 2009

The Custodian agrees to mediate this complaint.

September 22, 2009

The Complainant does not agree to mediate this complaint.

September 22, 2009

Request for the Statement of Information ("SOI") sent to the Custodian.

September 30, 2009⁷

Custodian's SOI attaching the Complainant's first (1st) OPRA request dated August 8, 2008 with Custodian's notes therein.

The Custodian certifies that her search for the requested records involved checking the file drawers of the Planning Board filing cabinet in the Code Enforcement Office Filing Room. The Custodian certifies that she also checked the Borough archives room located in the lower level of the municipal building.

The Custodian also certifies that the minutes responsive were not willfully destroyed. Moreover, the Custodian certifies that no request was submitted to destroy said minutes in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") because minutes are permanent records.

The Custodian certifies that she received the Complainant's August 8, 2008 OPRA request on the same date. The Custodian certifies that she forwarded the request to Code Enforcement, where Mr. Luthman (who is also the Clerk for the Planning Board) works as a Housing Inspector. The Custodian certifies that Mr. Luthman returned the request to the Custodian noting only "No Planning." The Custodian certifies that she subsequently went to the Code Enforcement Office and Borough archives room and searched for the records with assistance from Mr. Luthman.

⁶ The GRC notes that these minutes are not Planning Board meeting minutes, but minutes of the Borough Council.

⁷ The Custodian contacted the GRC via e-mail earlier in the day stating that the requested SOI was prepared to be sent to the GRC on the due date of September 29, 2009; however, the Custodian was away from the office and unable to sign the form. The GRC therefore granted a one (1) day extension of time to file same. Lois A. Lebbing v. Borough of Highland Park (Middlesex), 2009-251 – Findings and Recommendations of the Executive Director 3

The Custodian certifies that this search yielded no records responsive. The Custodian certifies that she responded to the Complainant's OPRA request in writing on August 15, 2008 advising the Complainant that no records responsive could be located.⁸

November 4, 2010

E-mail from the GRC to the Custodian. The GRC states that it has reviewed the evidence of record and is in need of additional information. The GRC states that the Custodian certified in the SOI that no Planning Board minutes responsive to the Complainant's August 8, 2008 OPRA request existed; however, the Complainant requested the same records on August 4, 2009 and was provided with minutes from October 1953 through 1961 by Ms. Molina and Ms. Reh. The GRC requests that both Ms. Molina and Ms. Reh legally certify to the following:

1. Where were the Planning Board meeting minutes provided to the Complainant in response to her August 4, 2009 OPRA request located?
2. Whether any minutes prior to October 1953 exist in the Borough's records?

The GRC requests that both Ms. Molina and Ms. Reh provide the requested legal certifications by close of business on November 8, 2010.

November 8, 2010

Ms. Molina's and Ms. Reh's legal certifications.

Ms. Molina certifies that she was employed as Deputy Clerk for the Borough from January 1, 2008 to December 31, 2009. Ms. Molina certifies that her duties included logging OPRA requests and disseminating same to various departments within the Borough. Ms. Molina certifies that she also advised requestors when the requested records were available.

Ms. Molina certifies that when the Complainant submitted her two (2) OPRA requests to the Borough, Ms. Molina forwarded the requests to Ms. Reh and later notified the Complainant of the results of Ms. Reh's search.

Ms. Reh certifies that she is the Planning Board Secretary and her duties include serving as Custodian of Record for the Planning Board. Ms. Reh certifies that when the Borough Custodian receives an OPRA request for Planning Board records, the request is forwarded to Ms. Reh and a search is conducted for those records requested.

Ms. Reh certifies that when the Complainant submitted her August 8, 2008 OPRA request, all planning and zoning files were stored in filing cabinets and boxes in an area in the back of the Code Enforcement Office⁹ that also contained archived construction, fire prevention, housing, zoning and planning files. Ms. Reh certifies that this area was subsequently organized over the ensuing year and the books containing Planning Board

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

⁹ Ms. Reh actually refers to the Code Enforcement Office as the Construction Office. On November 16, 2010, the GRC received verbal confirmation from the Custodian that both offices are one and the same.

meeting minutes were retrieved, labeled and placed in their current location in bookcases in a closet behind the Zoning Office within Code Enforcement. Ms. Reh certifies that based on the foregoing, the minutes were easily located and provided in response to the Complainant's August 4, 2009 OPRA request.

Ms. Reh further certifies that no Planning Board minutes prior to October 1953 have been located.

Analysis

Whether the Custodian unlawfully denied access to the requested Planning Board 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 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.

In the matter now before the Council, the Complainant submitted two (2) OPRA requests for the same records a year apart. In response to the Complainant's August 8, 2008 OPRA request, the Custodian responded in writing on August 15, 2008 stating that after a search conducted by both Mr. Luthman and the Custodian, no records responsive could be located. However, in response to the Complainant's August 4, 2009 OPRA request, Ms. Molina responded in writing on behalf of the Custodian on August 13, 2009 providing Planning Board minutes from October 1953 to 1960, as well as an e-mail from

Ms. Reh advising that no Planning Board minutes prior to 1953 were located. The Complainant filed a Denial of Access Complaint questioning the Custodian's search in response to the first (1st) OPRA request and asking why records previously deemed to be nonexistent were provided a year later.

The GRC first addresses the issue of whether the Custodian's initial search for the requested Planning Board minutes in response to the Complainant's August 8, 2008 OPRA request was sufficient and whether the Custodian unlawfully denied access to said records.

The Custodian certified in the SOI that she forwarded the Complainant's August 8, 2008 OPRA request to Mr. Luthman, who returned the request form to the Custodian with a note indicating "No Planning." The Custodian certified that she also conducted a search of the Code Enforcement Office and Building Archives and located no records responsive to the request.

The Complainant included evidence in the Denial of Access Complaint indicating that Ms. Molina and Ms. Reh were responsible for providing Planning Board minutes to the Complainant in response to her August 4, 2009 OPRA request. Based on the foregoing, the GRC requested that Ms. Molina and Ms. Reh legally certify to where the minutes provided to the Complainant in response to the second (2nd) OPRA request were located. The GRC also requested that Ms. Molina and Ms. Reh legally certify as to whether any records prior to October 1953 existed.

Ms. Molina subsequently certified that she logged the Complainant's OPRA requests and forwarded same to Ms. Reh. Ms. Molina certified that she then notified the Complainant of the results of Ms. Reh's search. Ms. Reh certified that when the Complainant submitted her August 8, 2008 OPRA request, all planning and zoning files were stored in filing cabinets and boxes in an area in the back of the Code Enforcement Office that also contained archived construction, fire prevention, housing, zoning and planning files. Further, Ms. Reh certified that this area was subsequently organized over the ensuing year and the books containing Planning Board meeting minutes were retrieved, labeled and placed in their current location in bookcases in a closet behind the Zoning Office within the Code Enforcement Office; thus, the minutes were easily located after the Complainant submitted her August 4, 2009 OPRA request. Ms. Reh also certified that no Planning Board meeting minutes prior to October 1953 were located.

In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The Complainant in Donato, *supra*, requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

“[p]ursuant to MAG, the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA

request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as ‘to go or look through carefully in order to find something missing or lost.’¹⁰ The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’¹¹”

Additionally, the court in MAG, *supra*, held that:

“[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, *OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’ N.J.S.A. 47:1A-1.*” (Emphasis added).

In May v. Township of Edison (Middlesex), GRC Complaint No. 2007-165 (October 2007), the complainant sought access to schematic floor plans of Edison High School. The custodian initially denied access to the requested floor plans by stating that the complainant must submit his request to the Board of Education. After the complainant filed his Denial of Access Complaint, the custodian made the requested records available to the complainant and indicated that she misunderstood the complainant’s request to be for Board of Education records. The Council held that:

“[e]ven though the Custodian eventually made the requested floor plans available to the Complainant after she realized that the initial denial was a mistake, the Custodian has violated OPRA by denying the Complainant access to the requested records. Therefore, the Custodian unlawfully denied access to the requested floor plans and has failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.”

Additionally, in Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the complainant’s OPRA request stating that no records responsive existed. The complainant, however, submitted as part of the Denial of Access Complaint e-mails which were responsive to her request. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and this time located records responsive to this request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied access to the requested records.

¹⁰ “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

¹¹ “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Lois A. Lebbing v. Borough of Highland Park (Middlesex), 2009-251 – Findings and Recommendations of the Executive Director

Conversely, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009), the Council analyzed how the facts of that complaint compared to both May, supra, and Schneble, supra. In that complaint, the custodian certified on July 8, 2009 that the executive session meeting minutes requested were provided for inspection to the complainant on April 23, 2009. The complainant subsequently identified dates of several executive session meetings for which no minutes were provided. The GRC in turn requested a second (2nd) certification regarding whether the custodian had a legal authority for denying access to said executive session meeting minutes for the dates identified in the complainant's July 17, 2009 e-mail to the GRC. The custodian certified on July 28, 2009 that the additional executive session meeting minutes were never inputted into the computer or filed appropriately. The custodian further certified that the minutes had since been properly inputted, filed and are available for disclosure.

All three (3) of the complaints above are distinguishable from the facts of the instant complaint. Specifically, the custodian in May, supra, admitted to not having performed any search whereas the Custodian here certified in the SOI that both Mr. Luthman and herself conducted a search of the Code Enforcement Office and/or Borough archives and were unable to locate the requested records. The custodian in Schneble, supra, admitted to performing an inadequate search based on a misinterpretation of the records sought by the complainant whereas the Complainant's August 8, 2008 OPRA request clearly indicated that the records at issue were meeting minutes from 1950 to 1960.

Conversely, the custodian in Verry, supra, certified that the missing minutes were misfiled and had not been inputted in the computer; thus, the minutes were not found during the initial search whereas the Custodian in the matter before the Council simply could not locate the requested Planning Board minutes due to the disorganization of the Borough's files.¹² This conclusion is supported by Ms. Reh's certification that the requested Planning Board minutes were located in the Code Enforcement Office, which was searched by the Custodian in August 2008, and subsequently organized in a way that they were easily located and produced in response to the Complainant's August 4, 2009 OPRA request.

Based on all of the foregoing, although the Custodian here conducted a more thorough search than the custodians in May, supra, and Schneble, supra, the evidence of record indicates that the requested Planning Board minutes were not merely misplaced in a location separate from where said records should be located, as was the case in Verry, supra. The minutes may have been among the Borough's disorganized files, but the Custodian was obligated to search her files to find the requested records pursuant to the definition of "search" pursuant to Donato, supra.

Therefore, the Custodian's search for the requested Planning Board meeting minutes responsive to the Complainant's August 8, 2008 OPRA request was insufficient

¹² The GRC notes that pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council's powers and duties, the GRC does not have the authority to regulate the manner in which the Township maintains its files. See Van Pelt v. Edison Township Board of Education, GRC Complaint No. 2007-179 (January 2008).
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because the records were eventually located in the same office previously searched by the Custodian. Moreover, the Custodian unlawfully denied access to the requested records in response to the Complainant's August 8, 2008 OPRA request and failed to bear the burden of proving her due diligence in searching for the records requested pursuant to N.J.S.A. 47:1A-6.

The GRC next addresses the issue of whether the Custodian unlawfully denied access to the Planning Board meeting minutes in response to the Complainant's August 4, 2009 OPRA request.

The Complainant submitted a second (2nd) request for Planning Board meeting minutes from 1950 to 1960. Ms. Molina responded in writing on behalf of the Custodian on the seventh (7th) business day after receipt of the Complainant's OPRA request providing access to Planning Board minutes from October 1953 to 1960 and an e-mail from Ms. Reh advising that no minutes prior to 1953 exist.

The GRC subsequently requested that Ms. Molina and Ms. Reh certify to whether any meeting minutes prior to October 1953 exist. On November 8, 2010, Ms. Reh certified that no minutes prior to October 1953 could be located. The Complainant attached as part of the Denial of Access Complaint Borough Council meeting minutes dated prior to 1953 to illustrate that the Planning Board was in existence. However, the existence of Council meeting minutes from the period sought is not competent, credible evidence which establishes by a preponderance of the evidence that the Borough still maintains Planning Board minutes from the same period .

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed, and the Complainant submitted no evidence to refute the Custodian's certification. The GRC determined the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed and there was no evidence in the record to refute the Custodian's certification.

Therefore, because Ms. Reh certified that no Planning Board meeting minutes prior to October 1953 could be located, and because the Complainant has not provided any competent, credible evidence to refute Ms. Reh's certification in this regard, the Custodian has not unlawfully denied access to the requested Planning Board meeting minutes from 1950 to October 1953 pursuant to Pusterhofer, supra.

The GRC notes that it declines to order disclosure of the requested Planning Board meeting minutes in response to the Complainant's August 8, 2008 OPRA request because said minutes from October 1953 to 1960 were provided in response to the Complainant's August 4, 2009 OPRA request and because Ms. Reh certified that no minutes from 1950 to October 1953 exist.

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).

The Custodian in this complaint performed an insufficient search to locate the requested Planning Board meeting minutes; thus, she failed to bear the burden of proving her due diligence in searching for the records responsive to the Complainant’s August 8, 2008 OPRA request pursuant to N.J.S.A. 47:1A-6. However, the Complainant was provided with the requested Planning Board meeting minutes from October 1953 to 1960 in response to her August 4, 2009 OPRA request and Ms. Reh certified that no Planning Board meeting minutes from 1950 to October 1953 exist. Thus, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's search for the requested Planning Board meeting minutes responsive to the Complainant's August 8, 2008 OPRA request was insufficient because the records were eventually located in the same office previously searched by the Custodian. Moreover, the Custodian unlawfully denied access to the requested records in response to the Complainant's August 8, 2008 OPRA request and failed to bear the burden of proving her due diligence in searching for the records requested pursuant to N.J.S.A. 47:1A-6.
2. Because Ms. Reh certified that no minutes prior to October 1953 could be located, and because the Complainant has not provided any competent, credible evidence to refute Ms. Reh's certification in this regard, the Custodian has not unlawfully denied access to the requested Planning Board meeting minutes from 1950 to October 1953 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian in this complaint performed an insufficient search to locate the requested Planning Board meeting minutes; thus, she failed to bear the burden of proving her due diligence in searching for the records responsive to the Complainant's August 8, 2008 OPRA request pursuant to N.J.S.A. 47:1A-6. However, the Complainant was provided with the requested Planning Board meeting minutes from October 1953 to 1960 in response to her August 4, 2009 OPRA request and Ms. Reh certified that no Planning Board meeting minutes from 1950 to October 1953 exist. Thus, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 18, 2011