



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 8, 2010 Government Records Council Meeting

Cindy Merckx
(On behalf of The Sentinel of Gloucester County
Newspaper)
Complainant
Complaint No. 2009-47

v.
Township of Franklin Board of Education (Gloucester)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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 disclosed to the Complainant the closed session minutes dated January 16, 2008, March 26, 2008 and November 18, 2008 (Session I) with no redactions and provided certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of the Council’s Interim Order, the Custodian has complied with the Council’s January 26, 2010 Interim Order.
2. Although 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 her OPRA request that specifically granted access, denied access, sought clarification or requested an extension of time within the statutorily mandated seven (7) business days, and even though the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6, nothing in the record suggests that the Custodian’s violations of OPRA were intentional and deliberate or with knowledge of their wrongfulness. Rather, the evidence of record suggests that the Custodian mistakenly believed that the requested closed session minutes had to undergo a second approval by the Board of Education prior to their public release. 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 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

Cindy Merckx **GRC Complaint No. 2009-47**
(On behalf of The Sentinel of Gloucester County Newspaper)¹
Complainant

v.

Township of Franklin Board of Education (Gloucester)²
Custodian of Records

Records Relevant to Complaint: Closed session meeting minutes from January 1, 2008 to January 22, 2009.³

Request Made: January 22, 2009

Response Made: January 28, 2009

Custodian: Elizabeth DiPietro

GRC Complaint Filed: February 9, 2009⁴

Background

January 26, 2010

Government Records Council's ("Council") Interim Order. At its January 26, 2010 public meeting, the Council considered the January 19, 2010 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. The Custodian's failure to provide the Complainant with a written response to her OPRA request that specifically granted access, denied access, sought clarification or requested 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 all of the requested closed session minutes, with the exception of the minutes dated January 21, 2009, were approved by the Board of Education at

¹ No legal representation listed on record.

² Represented by B. Michael Borelli, Esq., of Law Office of B. Michael Borelli (Pitman, NJ).

³ The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

the time of the Complainant's OPRA request and no longer constituted advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6. A second approval by the governing body for public release of the requested minutes is not required because N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt from disclosure under OPRA. In fact, OPRA requires the disclosure of a record with redactions of only the information which is asserted to be exempt from disclosure. A denial of access to the entire record is therefore unlawful under OPRA.

3. The Custodian must disclose to the Complainant the remainder of the requested closed session minutes that were approved by the governing body at the time of the Complainant's OPRA request, with appropriate redactions, if any. Specifically, the Custodian must disclose the closed session minutes dated January 16, 2008; March 26, 2008 and November 19, 2008.
4. **The Custodian shall comply with item # 3 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 1:4-4⁵, to the Executive Director.**
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.

January 27, 2010

Council's Interim Order distributed to the parties.

February 2, 2010

Letter from Custodian to Complainant. The Custodian states that pursuant to the Council's Interim Order, she has enclosed the Board of Education's closed session minutes dated January 16, 2008, March 26, 2008 and November 18, 2008 (Session I).

February 2, 2010

Custodian's response to the Council's Interim Order. The Custodian certifies that she received the Council's Interim Order on January 27, 2010. The Custodian certifies that in compliance with paragraphs 3 and 4 of said Order, on February 2, 2010 the Custodian disclosed to the Complainant the Board of Education's closed session minutes

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
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dated January 16, 2008, March 26, 2008 and November 18, 2008 (Session I) with no redactions.⁶

Analysis

Whether the Custodian complied with the Council's January 26, 2010 Interim Order?

The Council's January 26, 2010 Interim Order directed the Custodian to disclose to the Complainant the remainder of the requested closed session minutes that were approved by the governing body at the time of the Complainant's OPRA request, with appropriate redactions, if any. Specifically, the Council ordered the Custodian to disclose the closed session minutes dated January 16, 2008, March 26, 2008 and November 19, 2008. The Council ordered the Custodian to disclose said records to the Complainant and provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of said Order, or by February 3, 2010.

On February 2, 2010 the Custodian provided the GRC's Executive Director with a legal certification wherein the Custodian certified that on February 2, 2010 she disclosed to the Complainant the following closed session minutes with no redactions: January 16, 2008, March 26, 2008 and November 18, 2008 (Session I).⁷

Therefore, because the Custodian disclosed to the Complainant the closed session minutes dated January 16, 2008, March 26, 2008 and November 18, 2008 (Session I) with no redactions and provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's Interim Order, the Custodian has complied with the Council's January 26, 2010 Interim Order.

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:

⁶ The Custodian disclosed to the Complainant the closed session minutes dated November 18, 2008 (Session II) on February 27, 2009.

⁷ The Custodian disclosed to the Complainant the closed session minutes dated November 18, 2008 (Session II) on February 27, 2009.

“... 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 the Council’s Interim Order dated January 26, 2010, the Council held that the Custodian’s failure to provide the Complainant with a written response to her OPRA request that specifically granted access, denied access, sought clarification or requested 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).

The Council also held that because all of the requested closed session minutes, with the exception of the minutes dated January 21, 2009, were approved by the Board of Education at the time of the Complainant’s OPRA request and no longer constituted advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6. The Council stated that a second approval by the governing body for public release of the requested minutes is not required because N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt from disclosure under OPRA. The Council further stated that OPRA requires the disclosure of a record with redactions of only the information which is asserted to be exempt from disclosure and that a denial of access to the entire record is therefore unlawful under OPRA.

Thus, the Council ordered the Custodian to disclose to the Complainant the closed session minutes dated January 16, 2008, March 26, 2008 and November 19, 2008. The Council also ordered the Custodian to provide certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of the Council’s Interim Order. As previously stated, the Custodian has complied with said Order.

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. by failing to provide the Complainant with a written response to her OPRA request that specifically granted access, denied access, sought clarification or requested an extension of time within the statutorily mandated seven (7) business days, and even though the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6, nothing in the record suggests that the Custodian's violations of OPRA were intentional and deliberate or with knowledge of their wrongfulness. Rather, the evidence of record suggests that the Custodian mistakenly believed that the requested closed session minutes had to undergo a second approval by the Board of Education prior to their public release. 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. Because the Custodian disclosed to the Complainant the closed session minutes dated January 16, 2008, March 26, 2008 and November 18, 2008 (Session I) with no redactions and provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's Interim Order, the Custodian has complied with the Council's January 26, 2010 Interim Order.
2. Although 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 her OPRA request that specifically granted access, denied access, sought clarification or requested an extension of time within the statutorily mandated seven (7) business days, and even though the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6, nothing in the record suggests that the Custodian's violations of OPRA were intentional and deliberate or with knowledge of their wrongfulness. Rather, the evidence of record suggests that the Custodian mistakenly believed that the requested closed session minutes had to undergo a second approval by the Board of Education prior to their public release. 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: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

INTERIM ORDER

January 26, 2010 Government Records Council Meeting

Cindy Merckx Complaint No. 2009-47
(on behalf of The Sentinel of Gloucester County Newspaper)
Complainant
v.
Township of Franklin Board of Education (Gloucester)
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 19, 2010 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 provide the Complainant with a written response to her OPRA request that specifically granted access, denied access, sought clarification or requested 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 all of the requested closed session minutes, with the exception of the minutes dated January 21, 2009, were approved by the Board of Education at the time of the Complainant’s OPRA request and no longer constituted advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6. A second approval by the governing body for public release of the requested minutes is not required because N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt from disclosure under OPRA. In fact, OPRA requires the disclosure of a record with redactions of only the information which is asserted to be exempt from disclosure. A denial of access to the entire record is therefore unlawful under OPRA.
3. The Custodian must disclose to the Complainant the remainder of the requested closed session minutes that were approved by the governing body at the time of the Complainant’s OPRA request, with appropriate redactions, if any. Specifically, the Custodian must disclose the closed session minutes dated January 16, 2008; March 26, 2008 and November 19, 2008.



4. **The Custodian shall comply with item # 3 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 1:4-4¹, to the Executive Director.**
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.

Interim Order Rendered by the
Government Records Council
On The 26th Day of January, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: January 27, 2010

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2010 Council Meeting**

Cindy Merckx **GRC Complaint No. 2009-47**
(On behalf of The Sentinel of Gloucester County Newspaper)¹
Complainant

v.

Township of Franklin Board of Education (Gloucester)²
Custodian of Records

Records Relevant to Complaint: Closed session meeting minutes from January 1, 2008 to January 22, 2009.³

Request Made: January 22, 2009

Response Made: January 28, 2009

Custodian: Elizabeth DiPietro

GRC Complaint Filed: February 9, 2009⁴

Background

January 22, 2009

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.

January 29, 2009⁵

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request.⁶ The Custodian states that she is in the process of reviewing the requested closed session minutes. The Custodian states that she wants to confirm that all matters discussed in closed session have been resolved before she places said minutes on the Board of Education's ("BOE") agenda for approval.

¹ No legal representation listed on record.

² Represented by B. Michael Borelli, Esq., of Law Office of B. Michael Borelli (Pitman, NJ).

³ The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Custodian's response is dated January 28, 2009; however, the Custodian hand-delivered said response to the Complainant on January 29, 2009.

⁶ The Custodian certifies in her Statement of Information dated March 27, 2009 that she received the Complainant's OPRA request on January 23, 2009.

January 30, 2009

Letter from Custodian to Custodian's Counsel. The Custodian asks Counsel to review the requested closed session minutes to determine if said minutes can be placed on the BOE's February 18, 2009 agenda to be made public.

February 9, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") with the Custodian's response to the Complainant's OPRA request dated January 28, 2009 attached. The Complainant states that she submitted her OPRA request on January 22, 2009 for the closed session minutes from January 1, 2008 through January 22, 2009. The Complainant states that the Custodian responded to said request on January 28, 2009 and denied access to said minutes on the basis that she was in the process of reviewing the minutes to place on the BOE's agenda for approval. Additionally, the Complainant agrees to mediate this complaint.

February 11, 2009

Letter from Custodian's Counsel to Custodian. The Custodian's Counsel states that the following closed session meeting minutes should not be made public because they contain discussions which are exempt from disclosure under the attorney-client privilege and the issues surrounding said discussions have not yet been resolved:

- January 16, 2008
- March 26, 2008
- November 19, 2008

Counsel states that the remainder of the requested closed session minutes can be made public at the BOE's February 18, 2009 meeting.

February 20, 2009

E-mail from Custodian to Complainant. The Custodian states that the BOE has voted to make the requested closed session minutes public.⁷ The Custodian states that if the Complainant would like to view the approved closed session minutes, the Complainant should contact Jean Perrotti who will return from vacation on February 23, 2009.

February 23, 2009

E-mail from Complainant to GRC. The Complainant forwards to the GRC the Custodian's e-mail to the Complainant dated February 20, 2009. The Complainant states that a month elapsed between the time she submitted her OPRA request and the time that the Custodian provided access to the requested closed session minutes. The Complainant asserts that said minutes should be made available to the public as soon as possible and that the BOE's delay in providing said records is against the law.

⁷ With the exception of the following closed session minutes: January 16, 2008, March 26, 2008 and November 19, 2008.
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March 3, 2009

Offer of Mediation sent to both parties.⁸

March 5, 2009

Custodian's signed Agreement to Mediate.

March 6, 2009

Complainant declines the Offer of Mediation.

March 16, 2009

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

March 19, 2009

E-mail from GRC to Custodian's Counsel. The GRC grants a five (5) business day extension of time for Counsel to submit the Custodian's completed SOI.⁹

March 27, 2009¹⁰

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 22, 2009
- Custodian's response to the Complainant's OPRA request dated January 28, 2009
- Letter from Custodian to Custodian's Counsel dated January 30, 2009
- Letter from Custodian's Counsel to Custodian dated February 11, 2009
- Meeting minutes dated February 18, 2009
- E-mail from Custodian to Complainant dated February 20, 2009
- Closed session minutes responsive to the Complainant's OPRA request¹¹

The Custodian certifies that she received the Complainant's OPRA request on January 23, 2009. The Custodian certifies that she provided the Complainant with a written response to said request on January 29, 2009 (the response is dated January 28, 2009) when the Complainant came into the Business Office to view records which are not the subject of this complaint. The Custodian certifies that her written response indicated that she was in the process of reviewing the requested closed session minutes to be placed on the BOE's agenda for approval.

The Custodian also certifies that on January 30, 2009, she contacted her attorney and asked him to review the closed session minutes to determine which minutes could be placed on the next agenda for approval because the Custodian does not have the authority to release minutes without BOE approval. The Custodian certifies that the attorney provided a written response to her on February 11, 2009 identifying which minutes could

⁸ Although the Complainant agreed to participate in mediation on her Denial of Access Complaint, the Complainant failed to sign the Agreement to Mediate form.

⁹ In response to Counsel's verbal request via telephone on March 19, 2009.

¹⁰ Additional correspondence was submitted by the parties; however, said correspondence either restates the facts/legal arguments already submitted to the Council or is not relevant to the adjudication of this Denial of Access Complaint.

¹¹ The Custodian attached additional records which are not relevant to the adjudication of this Denial of Access Complaint.

be placed on the agenda for approval. Additionally, the Custodian certifies that the BOE approved twenty-six (26) sets of closed session meeting minutes at its February 18, 2009 meeting. The Custodian certifies that she e-mailed the Complainant on February 20, 2009 advising the Complainant that she could make an appointment to view the closed session minutes which were approved at the BOE's meeting on February 18, 2009. The Custodian states that the Complainant viewed said minutes on February 27, 2009.

Additionally, the Custodian certifies that the following closed session meeting minutes are responsive to the Complainant's OPRA request:

1. January 16, 2008 (1 page) – not provided to Complainant
2. February 13, 2008 (1 page) – provided to Complainant with no redactions on February 27, 2009
3. February 20, 2008 (1 page) – provided to Complainant with no redactions on February 27, 2009
4. March 26, 2008 (1 page) – not provided to Complainant
5. April 23, 2008 (1 page) – provided to Complainant with no redactions on February 27, 2009
6. April 28, 2008 (1 page) – provided to Complainant with no redactions on February 27, 2009
7. May 21, 2008 (1 page) – provided to Complainant with no redactions on February 27, 2009
8. June 18, 2008 (Session I) (1 page) – provided to Complainant with no redactions on February 27, 2009
9. June 18, 2008 (Session I) (1 page) – provided to Complainant with no redactions on February 27, 2009
10. July 24, 2008 (1 page) – provided to Complainant with no redactions on February 27, 2009
11. August 20, 2008 (1 page) – provided to Complainant with no redactions on February 27, 2009
12. September 17, 2008 (1 page) – provided to Complainant with no redactions on February 27, 2009
13. October 15, 2008 (1 page) – provided to Complainant with no redactions on February 27, 2009
14. November 19, 2008 (Session I) (1 page) – not provided to Complainant
15. November 19, 2008 (Session II) (1 page) – provided to Complainant with no redactions on February 27, 2009
16. December 17, 2008 (1 page) – provided to Complainant with no redactions on February 27, 2009

Regarding the closed session minutes which were not provided to the Complainant, the Custodian contends that N.J.S.A. 10:4-12-14 allow public bodies to exclude the public from matters involving personnel, attorney-client privilege and anticipated litigation. The Custodian certifies that the legal matters contained in said minutes have not yet been concluded.

The Custodian also certifies that no physical search was required to locate the requested meeting minutes since all minutes are located in the Business Office. The

Custodian certifies that closed session minutes are required to be maintained permanently and thus no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).¹²

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 therefor 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. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A- 5.g.

OPRA further provides 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...*(Emphasis added.) N.J.S.A. 47:1A-5.i.

¹² The Custodian provided other facts/arguments which are not relevant to the adjudication of this Denial of Access Complaint.
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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.¹³ 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 instant complaint, the Custodian certified that she received the Complainant’s OPRA request on January 23, 2009. The Custodian also certified that she provided a written response to the Complainant’s request on January 29, 2009, the fourth (4th) business day following receipt of said request. In her written response, the Custodian informed the Complainant that she was in the process of reviewing the requested minutes to confirm that all matters discussed in closed session had been resolved before the Custodian placed said minutes on the BOE’s agenda for approval. The Custodian’s written response does not specifically grant access, deny access, seek clarification or request an extension of time to comply with the Complainant’s OPRA request. Further, the Custodian did not provide the Complainant with a subsequent response to her OPRA request within the statutorily mandated seven (7) business days.

Therefore, the Custodian’s failure to provide the Complainant with a written response to her OPRA request that specifically granted access, denied access, sought clarification or requested 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, supra.

¹³ 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.

However, the Custodian provided the Complainant with a subsequent response to her OPRA request via e-mail dated February 20, 2009 in which the Custodian stated that the BOE voted to make the requested closed session minutes public and that if the Complainant would like to view the approved closed session minutes, the Complainant should contact Jean Perrotti who would return from vacation on February 23, 2009. The Custodian stated that the Complainant viewed the requested meeting minutes on February 27, 2008 with the exception of the following minutes because said minutes were not approved for public release:

- January 16, 2008
- March 26, 2008
- November 19, 2008

The crux of the Custodian's argument in this complaint is that the requested closed session minutes were not approved by the governing body for public release at the time of the Complainant's OPRA request. However, upon the GRC's review of the BOE's website¹⁴, all of the requested closed session minutes had been approved by the governing body for content at the time of the Complainant's OPRA request, with the exception of closed session minutes dated January 21, 2009, which the Custodian did not identify as a record responsive to the Complainant's OPRA request in the Custodian's SOI. The closed session minutes dated January 21, 2009 were approved by the governing body at its February 18, 2009 meeting and thus were in draft form at the time of the Complainant's 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).

¹⁴ http://www.franklintwpschools.org/newsite/?page_id=64.

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004), 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:

“[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.

As previously stated, the Custodian’s argument in this complaint is that the requested closed session minutes were not approved by the governing body for public release at the time of the Complainant’s OPRA request. However, the GRC’s review of the BOE’s website reveals that said minutes were approved by the governing body for content.

Pursuant to N.J.A.C. 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant’s record of convictions, because judicial notice could have been taken of the records of any court in

New Jersey, and appellant's record of convictions were exclusively in New Jersey. See Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95 (App.Div. 1974).

Therefore, the Council takes judicial notice of the following dates on which the requested closed session minutes were approved by the governing body for accuracy of content. Said information was taken directly from the BOE's website.

- Closed session minutes dated January 16, 2008 – approved on February 20, 2008
- Closed session minutes dated February 13, 2008 – approved on March 26, 2008
- Closed session minutes dated February 20, 2008 – approved on March 26, 2008
- Closed session minutes dated March 26, 2008 – approved on April 23, 2008
- Closed session minutes dated April 23, 2008 – approved on May 21, 2008
- Closed session minutes dated April 28, 2008 – approved on May 21, 2008
- Closed session minutes dated May 21, 2008 – approved on June 18, 2008
- Closed session minutes dated June 18, 2008 (Session I) – approved on August 20, 2008
- Closed session minutes dated June 18, 2008 (Session II) – approved on August 20, 2008
- Closed session minutes dated July 24, 2008 – approved on August 20, 2008
- Closed session minutes dated August 20, 2008 – approved on September 17, 2008
- Closed session minutes dated September 17, 2008 – approved on October 15, 2008
- Closed session minutes dated October 15, 2008 – approved on November 19, 2008
- Closed session minutes dated November 19, 2008 (Session I) – approved on December 17, 2008
- Closed session minutes dated November 19, 2008 (Session II) – approved on December 17, 2008
- Closed session minutes dated December 17, 2008 – approved on January 21, 2009
- Closed session minutes dated January 21, 2009 – approved on February 18, 2009

Therefore, because all of the requested closed session minutes, with the exception of the minutes dated January 21, 2009, were approved by the BOE at the time of the Complainant's OPRA request and therefore no longer constituted ACD material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6. A second approval by the governing body for public release of the requested minutes is not required because N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt from disclosure under OPRA. In fact, OPRA requires the disclosure of a record with redactions of only the information which is asserted to be exempt from disclosure. A denial of access to the entire record is therefore unlawful under OPRA.

As such, the Custodian must disclose to the Complainant the remainder of the requested closed session minutes that were approved by the governing body at the time of the Complainant's OPRA request, with appropriate redactions, if any. Specifically, the Custodian must disclose the closed session minutes dated January 16, 2008, March 26, 2008 and November 19, 2008.

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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to provide the Complainant with a written response to her OPRA request that specifically granted access, denied access, sought clarification or requested 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 all of the requested closed session minutes, with the exception of the minutes dated January 21, 2009, were approved by the Board of Education at the time of the Complainant's OPRA request and no longer constituted advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6. A second approval by the governing body for public release of the requested minutes is not required because N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt from disclosure under OPRA. In fact, OPRA requires the disclosure of a record with redactions of only the information which is asserted to be exempt from disclosure. A denial of access to the entire record is therefore unlawful under OPRA.
3. The Custodian must disclose to the Complainant the remainder of the requested closed session minutes that were approved by the governing body at the time of the Complainant's OPRA request, with appropriate redactions, if any. Specifically, the Custodian must disclose the closed session minutes dated January 16, 2008; March 26, 2008 and November 19, 2008.
4. **The Custodian shall comply with item # 3 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 1:4-4¹⁵, to the Executive Director.**

¹⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
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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.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 19, 2010