



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
Commissioner

FINAL DECISION

March 29, 2011 Government Records Council Meeting

Michael J. Mangeri
Complainant

Complaint No. 2010-70

v.

Monroe Township Board of Fire Commissioners
of District #1 (Middlesex)
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 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 Complainant has not responded to the Custodian within five (5) business days of receiving the estimate cost of duplicating the responsive records, the Custodian is not required to disclose the records. Furthermore, the Custodian has complied with the Interim Order’s requirement that certification of such compliance be provided to the Council with ten (10) business days. Accordingly, the Custodian has complied with the Council’s January 25, 2011 Interim Order.
2. In the instant case, the Custodian’s failure to provide a written response to the Complainant’s OPRA request resulted in a “deemed” denial 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). Furthermore, the Custodian’s denial of access to the requested records pursuant to her assertion that the requested recordings are considered advisory, consultative, and deliberative material and the Custodian’s failure to provide the Complainant the records in the medium requested were not supported by law and in violation of OPRA. However, the Custodian timely complied with the Council’s January 25, 2011 Interim Order by providing an estimate of the costs associated with duplicating the requested tape recordings and timely provided to the GRC certified confirmation of compliance. While the Custodian’s violations of OPRA are unlawful, the evidence of record does not indicate that the Custodian’s violations of OPRA have a positive element of conscious wrongdoing or were 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 29th Day of March, 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: April 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 29, 2011 Council Meeting**

Michael J. Mangeri¹
Complainant

GRC Complaint No. 2010-70

v.

**Monroe Township Board of
Fire Commissioners of District #1 (Middlesex)²**
Custodian of Records

Records Relevant to Complaint: Recorded tapes for the monthly meetings of December 2009, January 2010, and February 2010.³

Request Made: February 24, 2010⁴

Response Made: March 3, 2010⁵

Custodian: Joanne Hayes

GRC Complaint Filed: March 23, 2010⁶

Background

January 25, 2011

Government Records Council's ("Council") Interim Order. At its January 25, 2011 public meeting, the 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, found that:

1. Although the Custodian's response to the Complainant's OPRA request was timely, said response was verbal; the Custodian failed to provide a written response to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days of receiving the request. Accordingly, the Custodian's failure to provide a written

¹ No legal representation listed on record.

² Represented by Joseph Youssouf, Esq. (Manalapan, NJ).

³ The Complainant requested additional records which are not relevant to the adjudication of this Denial of Access Complaint.

⁴ Although the OPRA request is dated February 22, 2010, the evidence of record shows that the Complainant personally delivered said request to the Custodian on February 24, 2010.

⁵ The evidence of record indicates that the Custodian's response to the OPRA request was verbal.

⁶ The GRC received the Denial of Access Complaint on March 24, 2010.

response to the Complainant's OPRA request results in a "deemed" denial 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 requested tape recordings of the monthly Board meetings at issue herein are merely mechanical devices that provides an unbiased, purely factual account of the public meetings and do not reflect a personal opinion, and because a recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not involved in a decision-making process and the agency's use of such a recording is limited to the preparation of the draft meeting minutes, the requested tape recordings of the monthly Board meetings at issue herein are not exempt from disclosure under OPRA as ACD material. In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009). See Russell Miller v. Westwood Regional School District (Bergen), GRC Complaint No. 2009-49 (April 2010), Burlett v. Monmouth County Board of Freeholders, GRC Complaint No. 2004-75 (August 2004).
3. Because the Complainant's OPRA request sought copies of tape recordings of Board meetings made by the Custodian in her capacity as Board Secretary, and based on the GRC's definition of "medium" in New Jersey Libertarian Party v. New Jersey Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006), on-site inspection of the tape recordings responsive to the Complainant's OPRA request is not a reasonable substitute for actual copies of the requested tape recordings. The Custodian has therefore violated N.J.S.A. 47:1A-5.d. by not providing the records responsive in the medium requested by the Complainant and therefore unlawfully denied the Complainant access to the records responsive. N.J.S.A. 47:1A-6. See also Julian Leonard Grauer v. New Jersey Department of the Treasury, GRC Complaint No. 2007-03 (November 2007); Shirlee Manahan v. Salem County, GRC Complaint No. 2006-184 (December 2008).
4. The Custodian must obtain an estimate of the actual cost of duplicating the requested tape recordings and provide same to the Complainant prior to incurring the cost of duplication. N.J.S.A. 47:1A-5.b. See O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009).
5. **The Custodian shall comply with paragraph 4 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Complainant an estimate of the actual cost of duplicating the requested tape recordings. The Complainant's failure to take any action within the five (5) business days of receipt of the estimate shall be construed as a rejection of the required fee and the**

Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.⁷

6. 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.

February 4, 2011

Council's Interim Order distributed to the parties.

February 15, 2011

The Custodian's certification in response to the Council's Interim Order attaching:

- Copy of an estimate from AC Video Services/Home Video Studio of Nutley, New Jersey dated February 11, 2011.
- Custodian's letter to the Complainant dated February 11, 2011.

The Custodian certifies that she obtained an estimate of the actual cost of duplicating the requested tape recordings of the meetings of the requested Board of Fire Commissioners. The Custodian certifies that on February 11, 2011, she hand delivered to the Complainant's home a copy of the estimate and a letter advising the Complainant of the associated costs.

The Custodian certifies that as of February 15, 2011, she had not yet received a response from the Complainant.

February 24, 2011

The Custodian's supplemental certification in response to the Council's Interim Order. The Custodian certifies that as of February 24, 2011, nine (9) business days after providing the Complainant an estimate of the cost of reproducing the records, the Complainant has yet to contact the Custodian concerning the requested records.

⁷ "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."

Analysis

Whether the Custodian complied with the Council's January 25, 2011 Interim Order?

The evidence of record indicates that the Custodian provided an estimate of the costs associated with duplicating the requested tape recordings on February 11, 2011, five (5) business days from receipt of the Council's January 25, 2011 Interim Order. The evidence of record further indicates that the Custodian provided certified confirmation of compliance with said Interim Order to the GRC on February 15, 2011, seven (7) business days after receipt of said Interim Order, and further certified to the GRC on February 24, 2011, nine (9) business days after delivering the estimated cost of duplicating the records to the Complainant, that the Complainant had not yet contacted her regarding the duplication of the requested records.

The Council's Interim Order provides:

“The Complainant's failure to take any action within the five (5) business days of receipt of the estimate shall be construed as a rejection of the required fee and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Therefore, because the Complainant has not responded to the Custodian within five (5) business days of receiving the estimated cost of duplicating the responsive records, the Custodian is not required to disclose the records. Furthermore, the Custodian has complied with the Interim Order's requirement that certification of such compliance be provided to the Council with ten (10) business days. Accordingly, the Custodian has complied with the Council's January 25, 2011 Interim Order.

Whether the Custodian's unlawful denial of 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).

In the instant case, the Custodian’s failure to provide a written response to the Complainant’s OPRA request resulted in a “deemed” denial 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). Furthermore, the Custodian’s denial of access to the requested records pursuant to her assertion that the requested recordings are considered advisory, consultative, and deliberative material and the Custodian’s failure to provide the Complainant the records in the medium requested were not supported by law and in violation of OPRA. However, the Custodian timely complied with the Council’s January 25, 2011 Interim Order by providing an estimate of the costs associated with duplicating the requested tape recordings and timely provided to the GRC certified confirmation of compliance. While the Custodian’s violations of OPRA are unlawful, the evidence of record does not indicate that the Custodian’s violations of OPRA have a positive element of conscious wrongdoing or were 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. Because the Complainant has not responded to the Custodian within five (5) business days of receiving the estimate cost of duplicating the responsive records, the Custodian is not required to disclose the records. Furthermore, the Custodian has complied with the Interim Order’s requirement that certification of such compliance be provided to the Council with ten (10) business days. Accordingly, the Custodian has complied with the Council’s January 25, 2011 Interim Order.

2. In the instant case, the Custodian's failure to provide a written response to the Complainant's OPRA request resulted in a "deemed" denial 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). Furthermore, the Custodian's denial of access to the requested records pursuant to her assertion that the requested recordings are considered advisory, consultative, and deliberative material and the Custodian's failure to provide the Complainant the records in the medium requested were not supported by law and in violation of OPRA. However, the Custodian timely complied with the Council's January 25, 2011 Interim Order by providing an estimate of the costs associated with duplicating the requested tape recordings and timely provided to the GRC certified confirmation of compliance. While the Custodian's violations of OPRA are unlawful, the evidence of record does not indicate that the Custodian's violations of OPRA have a positive element of conscious wrongdoing or were 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: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 22, 2011



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
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Commissioner

INTERIM ORDER

January 25, 2011 Government Records Council Meeting

Michael J. Mangeri
Complainant

Complaint No. 2010-70

v.

Monroe Township Board of Fire Commissioners
Of District # 1 (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. Although the Custodian’s response to the Complainant’s OPRA request was timely, said response was verbal; the Custodian failed to provide a written response to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days of receiving the request. Accordingly, the Custodian’s failure to provide a written response to the Complainant’s OPRA request results in a “deemed” denial 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 requested tape recordings of the monthly Board meetings at issue herein are merely mechanical devices that provides an unbiased, purely factual account of the public meetings and do not reflect a personal opinion, and because a recording of an agency’s public meeting that is used to draft the agency’s official meeting minutes is not involved in a decision-making process and the agency’s use of such a recording is limited to the preparation of the draft meeting minutes, the requested tape recordings of the monthly Board meetings at issue herein are not exempt from disclosure under OPRA as ACD material. In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009). See Russell Miller v. Westwood Regional School District (Bergen), GRC Complaint No. 2009-49



(April 2010), Burlett v. Monmouth County Board of Freeholders, GRC Complaint No. 2004-75 (August 2004).

3. Because the Complainant's OPRA request sought copies of tape recordings of Board meetings made by the Custodian in her capacity as Board Secretary, and based on the GRC's definition of "medium" in New Jersey Libertarian Party v. New Jersey Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006), on-site inspection of the tape recordings responsive to the Complainant's OPRA request is not a reasonable substitute for actual copies of the requested tape recordings. The Custodian has therefore violated N.J.S.A. 47:1A-5.d. by not providing the records responsive in the medium requested by the Complainant and therefore unlawfully denied the Complainant access to the records responsive. N.J.S.A. 47:1A-6. See also Julian Leonard Grauer v. New Jersey Department of the Treasury, GRC Complaint No. 2007-03 (November 2007); Shirlee Manahan v. Salem County, GRC Complaint No. 2006-184 (December 2008).
4. The Custodian must obtain an estimate of the actual cost of duplicating the requested tape recordings and provide same to the Complainant prior to incurring the cost of duplication. N.J.S.A. 47:1A-5.b. See O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009).
5. **The Custodian shall comply with paragraph 4 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Complainant an estimate of the actual cost of duplicating the requested tape recordings. The Complainant's failure to take any action within the five (5) business days of receipt of the estimate shall be construed as a rejection of the required fee and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.¹**
6. 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 25th Day of January, 2011

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."

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 4, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Michael J. Mangeri¹
Complainant

GRC Complaint No. 2010-70

v.

**Monroe Township Board of
Fire Commissioners of District #1 (Middlesex)²**
Custodian of Records

Records Relevant to Complaint: Recorded tapes for the monthly meetings of December 2009, January 2010, and February 2010.³

Request Made: February 24, 2010⁴

Response Made: March 3, 2010⁵

Custodian: Joanne Hayes

GRC Complaint Filed: March 23, 2010⁶

Background

February 24, 2010

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.

March 3, 2010

Custodian's response to the OPRA request. The Custodian responds verbally to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian informs the Complainant that the requested tape recordings are not official records of the Monroe Township Board of Fire Commissioners of District #1 ("Board") and that the Custodian uses said tapes only as a device to aid her memory in preparing the official Board meeting minutes.

¹ No legal representation listed on record.

² Represented by Joseph Youssouf, Esq. (Manalapan, NJ).

³ The Complainant requested additional records which are not relevant to the adjudication of this Denial of Access Complaint.

⁴ Although the OPRA request is dated February 22, 2010, the evidence of record shows that the Complainant personally delivered said request to the Custodian on February 24, 2010.

⁵ The evidence of record indicates that the Custodian's response to the OPRA request was verbal.

⁶ The GRC received the Denial of Access Complaint on March 24, 2010.

March 23, 2010⁷

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching Complainant’s OPRA request dated February 22, 2010.

The Complainant asserts that he filed an OPRA request on February 24, 2010. The Complainant further asserts that he received a verbal response from the Custodian denying him access to the requested records on March 3, 2010 and that the Custodian's Counsel also verbally denied him access to the requested records on March 17, 2010.

The Complainant states that the Custodian verbally informed him that the requested tape recordings were only used by the Board’s Secretary as an aid in preparing the minutes for each meeting and that said tapes are not public. The Complainant states that when he asked the Custodian if he could have this denial of access in writing, the Custodian told him that she had to contact the Board’s attorney. The Complainant asserts that a few days later, when he again asked to have the denial of access in writing, the Complainant was verbally informed that he would have to contact the Custodian’s attorney about this matter.

The Complainant asserts that at the Board’s monthly meeting on March 17, 2010, the Board’s attorney verbally informed the Complainant that the requested tape recordings are used only as an aid by the Board Secretary in preparing the meeting minutes and that the tape recordings are not public records.

The Complainant does not agree to mediate this complaint.

May 11, 2010

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

May 17, 2010

Custodian Counsel’s Response to the OPRA request. The Custodian’s Counsel verbally denies the Complainant access to the requested tape recordings at the monthly Board meeting.

May 19, 2010

Custodian’s SOI attaching the Complainant’s OPRA request dated February 22, 2010.

The Custodian certifies that the Complainant is a former Board employee. The Custodian further certifies that the Complainant sought tape recordings of the December 2009, January 2010 and February 2010 Board meetings. The Custodian certifies that she denied the Complainant access to the requested tape recordings because said recordings are not official records of the Board.

The Custodian contends that there is no statutory provision or administrative regulation which requires Boards of Fire Commissioners to make and/or keep audio tape recordings of their meetings. The Custodian further contends that in her capacity as Board Secretary, she attends every Board meeting, takes shorthand stenographic notes at the meetings and supplements those notes by referring to the tape recordings when necessary. The Custodian

⁷ The Complainant attached additional materials which are not relevant to the adjudication of this complaint. Michael J. Mangeri v. Monroe Township Board of Fire Commissioners of District #1 (Middlesex), 2010-70 – Findings and Recommendations of the Executive Director

asserts that the requested tape recordings are made merely to assist her in the preparation of the official minutes of the meetings.

The Custodian further asserts that in Atlantic City Convention Center v. South Jersey Publishing Co., Inc., 135 N.J. 53, 63-64 (1994), the Supreme Court considered the use of audio tapes by public agencies and observed:

“[W]hen the tapes serve (as they do in certain court proceedings) as the official record, those tape recordings would be the records "required by law to be made, maintained or kept." N.J.S.A. 47:1A-2. However, in this case, the Authority used the audiotapes merely as a convenience for its own purposes in preparing the official minutes that it recognizes it must disclose under the Right to Know law. The situation is as though a secretary had taken shorthand notes of the meeting. The secretary's transcribed notes, approved by the body, not the notes themselves, would constitute the official record of the meeting. Simply because a public agency uses an electronic note pad in place of a steno pad as a method to prepare 'reasonably comprehensible minutes' does not establish that that electronic record constitutes a Right to Know record... Because the audio tapes of these proceedings served only as a convenient means to enable preparation of the official minutes and were not records required to be 'made, maintained or kept,' N.J.S.A. 47:1A-2, the audio tapes do not constitute Right to Know records.” *Id.*

The Custodian contends that she does not have the capacity to produce copies of the requested tapes of the meetings. However, the Custodian states that the Complainant may make an appointment with her to review the requested tape recordings during regular business hours at the Board offices.

November 22, 2010

Letter from Custodian to the GRC, attaching the Custodian's legal certification. The Custodian certifies that she is the Secretary to the Board and is the Custodian of Records for the Board. The Custodian further certifies that she works part-time for the Board and that there are no full time administrative personnel employed by the Board.

The Custodian certifies that the Board meets once per month and that the Board meetings are held on the third Wednesday of each month commencing at 7 p.m. The Custodian further certifies that she takes handwritten notes at the meetings and produces minutes that are reviewed and approved at the next succeeding monthly meeting of the Board. The Custodian certifies that she uses a small handheld mini tape recorder at the meetings to supplement her handwritten notes. The Custodian further certifies that these tape recordings are only used as a memory aid to help her produce accurate minutes.

The Custodian certifies that she received the Complainant's OPRA request dated February 22, 2010 on February 24, 2010 when the Complainant, whom she knows personally, handed same to her while she was at the firehouse. The Custodian certifies that all communications with the Complainant were verbal.

The Custodian further certifies that she verbally informed the Complainant that the requested tape recordings were not official Board records and that the Custodian uses said tapes as a device to aid her memory in preparing the minutes of the Board meetings. The Custodian also certifies that she informed the Complainant that the Board attorney advised her that the Complainant should have his attorney contact the Board attorney if the Complainant wished to discuss the status of the requested tapes any further.

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 ...” ... [t]he 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 states that:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record.” N.J.S.A. 47:1A-5.b.

OPRA also states that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.” N.J.S.A. 47:1A-5.d.

Moreover, OPRA states 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 therefore.” (Emphasis added.) N.J.S.A. 47:1A- 5.g.

Further, OPRA 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* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA 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.⁸ 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).

Here, although the Custodian’s response to the Complainant’s OPRA request was timely, said response was verbal; the Custodian failed to provide a written response to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days of receiving the request. Accordingly, the Custodian’s failure to provide a written response to the Complainant’s OPRA request results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*.

Moreover, in her response to the OPRA request, the Custodian denied access to the requested tape recordings, stating that the requested tape recordings are not government records because they are made by her in her capacity as Board Secretary in order to assist her in preparing the official minutes of the Board meetings.

In Russell Miller v. Westwood Regional School District (Bergen), GRC Complaint No. 2009-49 (April 2010), the Council addressed the disclosability of a copy of an audio tape recording of the January 29, 2009 meeting of the Board of Education. As in the matter before

⁸ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA. Michael J. Mangeri v. Monroe Township Board of Fire Commissioners of District #1 (Middlesex), 2010-70 – Findings and Recommendations of the Executive Director

the Council, the custodian in Miller denied access stating that the requested audio tape recording was an administrative aid used to prepare the meeting minutes.

The GRC noted that the crux of the custodian's argument was that because the requested audio tape recording was used as an aid to create the agency's official meeting minutes, said recording is exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative material ("ACD"). In determining that the custodian failed to bear his burden of proving that he lawfully denied the Complainant access to the requested audio tape recording, the GRC observed that:

“[A] recording of an agency's public meeting which is used to prepare the agency's official meeting minutes does not fall within the class of records protected by the deliberative process privilege and the ACD exemption in OPRA. The information contained on a recording of a public meeting does not inaccurately reflect or prematurely disclose the views of the agency because any agency views expressed at a public meeting are made in the context of a public forum: the meeting itself. A recording is merely a mechanical device that provides an unbiased, purely factual account of the public meeting; such recording does not reflect a personal opinion. A record that contains purely factual components may be exempt from disclosure under the ACD exemption in OPRA if the record is used in a decision-making process and its disclosure would reveal the deliberations that occurred during that process. Education Law Center, supra.

A recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not involved in a decision-making process. The agency's use of such a recording is limited to the preparation of the draft meeting minutes; it is the meeting minutes which reflect the agency's decision-making process. Therefore, a recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not exempt from disclosure under OPRA as ACD material.”

In Kate Burlett v. Monmouth County Board of Freeholders, GRC Complaint No. 2004-75 (August 2004), the complainant sought access to an audio tape recording of the Board of Freeholders' May 27, 2004 meeting. The custodian denied the complainant access to the requested record on the basis that the recording was an aid used by the custodian to draft the official meeting minutes and therefore was exempt from disclosure as ACD material. The Council found that because the audio tape recording of the May 27, 2004 Freeholders' meeting was made, maintained, kept on file by and did not fall within any of the exemptions recognized by OPRA, said recording was subject to disclosure pursuant to the provisions of OPRA. Because a recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not deliberative in nature, such recording is not exempt from disclosure under OPRA as ACD material pursuant to In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009).

As in Miller, supra, and Burlett, supra, the Custodian herein denied access to the requested tape recordings of Board meetings, stating that the tape recordings were not official Board records and were used only as a memory aid to assist the Custodian in preparing the

official Board meeting minutes. However, because a recording is merely a mechanical device that provides an unbiased, purely factual account of the public meeting and does not reflect a personal opinion, and because a recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not involved in a decision-making process and the agency's use of such a recording is limited to the preparation of the draft meeting minutes, a recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not exempt from disclosure under OPRA as ACD material.

Therefore, because the requested tape recordings of the monthly Board meetings at issue herein are merely mechanical devices that provides an unbiased, purely factual account of the public meetings and do not reflect a personal opinion, and because a recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not involved in a decision-making process and the agency's use of such a recording is limited to the preparation of the draft meeting minutes, the requested tape recordings of the monthly Board meetings at issue herein are not exempt from disclosure under OPRA as ACD material. In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009). See Miller, supra, Burlett, supra.

Furthermore, OPRA requires a custodian to permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium, or provide a copy in some other meaningful medium. N.J.S.A. 47:1A-5.d. In the matter before the Council, the Complainant requested a copy of tape recordings of Board meetings made by the Custodian in her capacity as Board Secretary. The Board therefore maintains the requested record in the medium requested by the Complainant. The Custodian has asserted that she is unable to produce a copy of the requested records and offered the Complainant the opportunity to review the requested tape recordings in lieu of providing copies of same.

In Julian Leonard Grauer v. New Jersey Department of the Treasury, 2007-03 (November 2007), the Complainant originally sought inspection of certain records, but requested copies of portions of the requested records during said inspection. The Custodian denied access to copies of the records, stating that federal copyright law prohibited copying the requested records. The Custodian asserted that the Custodian met the requirement of N.J.S.A. 47:1A-5.d. by providing "inspection" instead of copies as a meaningful medium of access.

The Council examined the Legislative intent of the word "medium" and determined that on-site inspection of the records responsive to the Complainant's November 3, 2006 OPRA request was not a reasonable substitute for copies of the requested records. In doing so, the Council reviewed its decision in New Jersey Libertarian Party v. New Jersey Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006), wherein the Council held that:

"[c]onsidering the plain meaning of the word 'medium,' we consulted a dictionary and encyclopedia. The American Heritage Dictionary of the English Language, Fourth Edition (Copyright 2000 by Houghton Mifflin Company) defines medium as 'an intervening substance through which something else is transmitted or carried on.' And, its plural abstraction 'media' is defined in the same dictionary as 'an object or device, such as a disk, on which data is stored.'

Further, the Wikipedia (free encyclopedia) (Copyright 2001-2005) describes a 'recording medium' as 'a physical material that holds information expressed in any of the existing recording formats.' It lists recording formats as follows:

'Examples since the 19th century include:

- Photographic film
- Wax for recording cylinders
- "shellac" compound and later vinyl for analog disk records
- Plastic sheet for Dictaphone recorders
- Steel wire for magnetic wire recorders
- Magnetic tape
- Rigid magnetic disks and cylinders
- Floppy magnetic disks
- Pressed optical media for CDs and DVDs
- Write-once, read-many optical media for writable CDs and DVDs
- Read-write optical media for rewritable CDs and DVDs
- Flash memory media' *Id.*

Given this description of a 'medium' and the use of the word 'medium' in N.J.S.A. 47:1A-5.d., inspection does not fall under the term of medium because inspection is not an 'object' or 'device' for which copies can be substituted.⁹ Although there may be instances when a custodian may substitute inspection of a record for a requested medium in order to safeguard the safety and integrity of certain records, the 'other meaningful medium' which the Custodian substitutes must be 'meaningful' to the requestor, because 'any limitations on the right of access accorded by [OPRA] ...shall be construed in favor of the public's right of access [.]' N.J.S.A. 47:1A-1.

In this complaint, the Complainant did not agree that inspection was 'some other meaningful medium' to replace copies of portions of the record. Since OPRA 'shall be construed in favor of the public's right of access,' the Custodian failed to prove that on-site inspection was a 'meaningful medium' substitute for copies of the portions of the requested record."

Moreover, in Shirlee Manahan v. Salem County, GRC Complaint No. 2006-184 (December 2008), the Complainant requested that various electronic records be sent to her electronically. The Custodian responded by granting access to these records in printed form, a different medium than requested. The Custodian alleged that the requested records are not

⁹ It should be noted that NJ Libertarian Party involved a request for a record which was maintained in the format requested, although use of certain proprietary software was required in order to read the requested record. The complainant did not wish to pay the cost of licensing the necessary software. The GRC found that the custodian was under no obligation to convert the requested record to another medium which did not require the use of the proprietary software, because the record was, in fact, maintained in the medium which the complainant requested. Michael J. Mangeri v. Monroe Township Board of Fire Commissioners of District #1 (Middlesex), 2010-70 – Findings and Recommendations of the Executive Director

maintained in the medium requested and therefore they were supplied in paper format which is the method by which they are maintained. At the time of the response, the Custodian did not provide an explanation why the records could not be converted into an e-mail or the cost of conversion for providing the records in the requested medium as is required under OPRA. The Council determined that the Custodian violated N.J.S.A. 47:1A-5.d. by not providing the records responsive in the medium requested by the Complainant and therefore unlawfully denied the Complainant access to the records responsive.

Thus, because the Complainant's OPRA request sought copies of tape recordings of Board meetings made by the Custodian in her capacity as Board Secretary, and based on the GRC's definition of "medium" in New Jersey Libertarian Party, *supra*, on-site inspection of the tape recordings responsive to the Complainant's OPRA request is not a reasonable substitute for actual copies of the requested tape recordings. The Custodian has therefore violated N.J.S.A. 47:1A-5.d. by not providing the records responsive in the medium requested by the Complainant and therefore unlawfully denied the Complainant access to the records responsive. N.J.S.A. 47:1A-6. See also Grauer, *supra*, Manahan, *supra*.

OPRA provides that copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. N.J.S.A. 47:1A-5.b.

In O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009), the complainant requested a copy of an audio recording and the Custodian charged the Complainant \$10.00 for the duplication. The complainant objected to the fee asserting that it was excessive. However, the custodian certified that the Board of Education did not possess the capability to complete the duplication in-house and provided the GRC with a cost estimate from outside vendors which charged \$2.49 for the audiotape and \$7.99 for the duplication. The Council held that:

“[b]ecause the Custodian has certified that the Pine Hill Board of Education lacks the equipment necessary to fulfill the OPRA request, and because the vendor invoice submitted by the Custodian is reasonable and based on the cost to be incurred by the agency, and because the Complainant has failed to submit any credible evidence that the vendor invoice submitted by the agency is unreasonable, the proposed estimate of \$10.48 for duplication is reasonable and consistent with N.J.S.A. 47:1A-5.c.”

Therefore, the Custodian must obtain an estimate of the actual cost of duplicating the requested tape recordings and provide same to the Complainant prior to incurring the cost of duplication. N.J.S.A. 47:1A-5.b. See O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009).

Whether the Custodian's unlawful denial of 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. Although the Custodian's response to the Complainant's OPRA request was timely, said response was verbal; the Custodian failed to provide a written response to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days of receiving the request. Accordingly, the Custodian's failure to provide a written response to the Complainant's OPRA request results in a "deemed" denial 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 requested tape recordings of the monthly Board meetings at issue herein are merely mechanical devices that provides an unbiased, purely factual account of the public meetings and do not reflect a personal opinion, and because a recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not involved in a decision-making process and the agency's use of such a recording is limited to the preparation of the draft meeting minutes, the requested tape recordings of the monthly Board meetings at issue herein are not exempt from disclosure under OPRA as ACD material. In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009). See Russell Miller v. Westwood Regional School District (Bergen), GRC Complaint No. 2009-49 (April 2010), Burlett v. Monmouth County Board of Freeholders, GRC Complaint No. 2004-75 (August 2004).
3. Because the Complainant's OPRA request sought copies of tape recordings of Board meetings made by the Custodian in her capacity as Board Secretary, and based on the GRC's definition of "medium" in New Jersey Libertarian Party v. New Jersey Department of Human Services, Division of Youth and Family Services, GRC Complaint No. 2004-114 (April 2006), on-site inspection of the tape recordings responsive to the Complainant's OPRA request is not a reasonable substitute for actual copies of the requested tape recordings. The Custodian has therefore violated N.J.S.A. 47:1A-5.d. by not providing the records responsive in the medium requested by the Complainant and therefore unlawfully denied the Complainant access to the records responsive. N.J.S.A. 47:1A-6. See also Julian Leonard Grauer v. New Jersey Department of the

Treasury, GRC Complaint No. 2007-03 (November 2007); Shirlee Manahan v. Salem County, GRC Complaint No. 2006-184 (December 2008).

4. The Custodian must obtain an estimate of the actual cost of duplicating the requested tape recordings and provide same to the Complainant prior to incurring the cost of duplication. N.J.S.A. 47:1A-5.b. See O'Shea v. Pine Hill Board of Education (Camden), GRC Complaint No. 2007-192 (February 2009).
5. **The Custodian shall comply with paragraph 4 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Complainant an estimate of the actual cost of duplicating the requested tape recordings. The Complainant's failure to take any action within the five (5) business days of receipt of the estimate shall be construed as a rejection of the required fee and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.¹⁰**
6. 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: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 18, 2011

¹⁰ "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."