



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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 26, 2013 Government Records Council Meeting

Raymond Klepar
Complainant

Complaint No. 2011-358

v.

Little Falls Township (Passaic)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 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. The Custodian, via the Township Administrator, did not timely comply with the Council’s January 29, 2013 Interim Order. Although the Administrator provided the requisite certification indicating that there are no additional records responsive to the Complainant’s OPRA request, the GRC received said certification on the tenth (10th) business day following the Custodian’s receipt of the Interim Order, not within the mandated five (5) business days.
2. Although the Custodian failed to meet his burden of proving that his initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6, and despite the Custodian’s failure to timely comply with the Council’s January 29, 2013 Interim Order, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

**Raymond Klepar¹
Complainant**

GRC Complaint No. 2011-358

v.

**Little Falls Township (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

1. Little Falls Township Fire Department (“LFFD”) Chief’s reports to Mayor from 2007-2011
2. LFFD Board of Fire Officers meeting minutes from 2007-2011
3. LFFD Fire Officers meeting minutes from 2007-2011
4. LFFD quarterly meeting minutes from 2007-2011

Request Made: October 4, 2011

Response Made: October 14, 2011³

GRC Complaint Filed: November 22, 2011⁴

Background

At its January 29, 2013 public meeting, the Council considered the January 22, 2013 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 initial response to the Complainant’s OPRA request that omitted certain responsive Annual Reports that were responsive to Item No. 1 of the Complainant’s request constitutes an unlawful denial of access. Accordingly, the Custodian has failed to meet his burden of proving that his initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6. However, the GRC will not order disclosure of the previously omitted records because the Custodian has certified that he has provided all of the responsive

¹ No legal representation listed on record.

² William E. Wilk, Custodian of Records. Represented by William W. Northgate, Esq., of McManimon, Scotland & Baumann, LLC (Roseland, NJ).

³ The GRC takes judicial notice that the municipal offices of Little Falls Township were closed on October 10, 2011 to observe the Columbus Day holiday.

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

records to the Complainant in responding to the GRC's request for a Statement of Information.

2. Because the Custodian failed to bear his burden of proving a lawful denial of access to the responsive records under N.J.S.A. 47:1A-6, the Custodian must provide the requested meeting minutes for the dates identified in the Complainant's OPRA request (Request Item Nos. 2, 3, and 4) to the Complainant. However, if minutes for a particular date do not exist or were not approved by the Township at the time of the Complainant's OPRA request, the Custodian must certify to this fact. *See Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006).
3. **The Custodian shall comply with paragraph #2 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 1:4-4,⁵ to the Executive Director.⁶**
4. 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.

The Council distributed its Interim Order to all parties on January 30, 2013. Said Order required the Custodian to submit compliance to the GRC by the close of business on February 6, 2013. On February 13, 2013, the GRC received a certification from the Township Administrator, on behalf of the Custodian, in response to the Council's Interim Order. The Township Administrator certifies that she met with the Fire Chief on February 11, 2013 regarding this complaint and the Fire Chief informed her that he has provided all records in the Department's files responsive to the Complainant's OPRA request. The Township Administrator also certifies that on February 13, 2013, the Fire Chief informed her that he completed a secondary review of the Department's files and confirmed that there are no additional records responsive to the Complainant's OPRA request.

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."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Analysis

Compliance

The Council's January 29, 2013 Interim Order required the Custodian, within five (5) business days from receipt of said Order, to provide the requested meeting minutes for the dates identified in the Complainant's OPRA request (Request Item Nos. 2, 3, and 4) to the Complainant. However, if minutes for a particular date do not exist or were not approved by the Township at the time of the Complainant's OPRA request, the Custodian must certify to this fact.

On February 13, 2013, the tenth (10th) business day following the Custodian's receipt of the Council's Interim Order, the Township Administrator submitted a certification on behalf of the Custodian. In said certification, the Administrator certified that no additional records responsive to the Complainant's OPRA request exist, per the Fire Chief's review of the Department's files.

Therefore, the Custodian, via the Township Administrator, did not timely comply with the Council's January 29, 2013 Interim Order. Although the Administrator provided the requisite certification indicating that there are no additional records responsive to the Complainant's OPRA request, the GRC received said certification on the tenth (10th) business day following the Custodian's receipt of the Interim Order, not within the mandated five (5) business days.

Knowing & Willful

The Custodian's initial response to the Complainant's OPRA request which omitted certain responsive Annual Reports responsive to Item No. 1 of the Complainant's request constituted an unlawful denial of access. Accordingly, the Custodian failed to meet his burden of proving that his initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6. Because the Custodian failed to bear his burden of proving a lawful denial of access to the responsive records under N.J.S.A. 47:1A-6, the Council ordered the Custodian to provide the requested meeting minutes for the dates identified in the Complainant's OPRA request (Request Item Nos. 2, 3, and 4) to the Complainant or certify that no records responsive exist, within five (5) business days from receipt of the Council's Interim Order. As stated above, the Custodian, via the Township Administrator, did not timely comply with the Council's January 29, 2013 Interim 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 (Felder 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 failed to meet his burden of proving that his initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6, and despite the Custodian's failure to timely comply with the Council's January 29, 2013 Interim Order, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian, via the Township Administrator, did not timely comply with the Council's January 29, 2013 Interim Order. Although the Administrator provided the requisite certification indicating that there are no additional records responsive to the Complainant's OPRA request, the GRC received said certification on the tenth (10th) business day following the Custodian's receipt of the Interim Order, not within the mandated five (5) business days.
2. Although the Custodian failed to meet his burden of proving that his initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6, and despite the Custodian's failure to timely comply with the Council's January 29, 2013 Interim Order, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Dara L. Barry
Communications Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

February 19, 2013



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

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 29, 2013 Government Records Council Meeting

Raymond Klepar
Complainant

Complaint No. 2011-358

v.

Little Falls Township (Passaic)
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council ("Council") considered the January 22, 2013 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 initial response to the Complainant's OPRA request that omitted certain responsive Annual Reports that were responsive to Item No. 1 of the Complainant's request constitutes an unlawful denial of access. Accordingly, the Custodian has failed to meet his burden of proving that his initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6. However, the GRC will not order disclosure of the previously omitted records because the Custodian has certified that he has provided all of the responsive records to the Complainant in responding to the GRC's request for a Statement of Information.
2. Because the Custodian failed to bear his burden of proving a lawful denial of access to the responsive records under N.J.S.A. 47:1A-6, the Custodian must provide the requested meeting minutes for the dates identified in the Complainant's OPRA request (Request Item Nos. 2, 3, and 4) to the Complainant. However, if minutes for a particular date do not exist or were not approved by the Township at the time of the Complainant's OPRA request, the Custodian must certify to this fact. See Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).
3. **The Custodian shall comply with paragraph #2 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 1:4-4,¹ to the Executive Director.²

4. 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 29th Day of January, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 30, 2013

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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting**

**Raymond Klepar¹
Complainant**

GRC Complaint No. 2011-358

v.

**Little Falls Township (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

1. Little Falls Township Fire Department (“LFFD”) Chief’s reports to Mayor from 2007-2011
2. LFFD Board of Fire Officers meeting minutes from 2007-2011
3. LFFD Fire Officers meeting minutes from 2007-2011
4. LFFD quarterly meeting minutes from 2007-2011

Request Made: October 4, 2011

Response Made: October 14, 2011³

Custodian: William E. Wilk

GRC Complaint Filed: November 22, 2011⁴

Background

November 22, 2011

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

- Complainant’s OPRA request dated October 4, 2011
- Letter from Township Fire Chief Jack Sweezy to the Township Attorney dated October 5, 2011
- Letter from the Custodian to the Complainant dated October 14, 2011
- Letter from the Complainant to the Custodian dated November 18, 2011

The attached October 14, 2011 letter from the Custodian in response to the Complainant’s request states that the Custodian will need an extension of time until November 10, 2011 in order to fulfill the Complainant’s request.

¹ No legal representation listed on record.

² Represented by Jeffrey J. Trapanese, Esq. of Trapanese & Trapanese, Esqs. (Little Falls, NJ).

³ The GRC takes judicial notice that the municipal offices of Little Falls Township were closed on October 10, 2011 to observe the Columbus Day holiday.

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

In the Complainant's November 18, 2011 letter to the Custodian, the Complainant states that he has picked up the records that were to fulfill his request but the officer meeting minutes were only from 2011, the department minutes were difficult to decipher, and that he did not receive any Board of Fire Officer's meeting minutes or annual reports.

In the Denial of Access Complainant, the Complainant states that all of the meeting minutes should be neatly organized by the respective category. The Complainant states that after agreeing to the Custodian's request for an extension, he was dissatisfied with the incomplete response that he received. In addition, he states that on November 10, 2011, he received a letter⁵ asking for an extension until the following week. The Complainant asserts that he went to town hall to retrieve the records on November 18, 2011 and was given 84 pages in response to his request. The Complainant states that upon a review of the records, he found that the Complainant's response was deficient.

The Complainant states that the October 5, 2011 letter from the Township's Fire Chief to the Township Attorney demonstrates that there are additional minutes that were being prepared for disclosure that were not forwarded to him, as the Fire Chief's letter states that the Complainant's request would consist of 50 Officers meeting minutes, 12 to 16 Board of Fire Officers meetings, sixty quarterly reports, and sixty LFFD meeting minutes.

The Complainant agrees to mediate this complaint.

December 12, 2011

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

- Complainant's OPRA request dated October 4, 2011
- Letter from Township Fire Chief Jack Sweezy to the Township Attorney dated October 5, 2011
- Letter from the Custodian to the Complainant dated October 14, 2011
- Letter from the Complainant to the Custodian dated November 18, 2011
- Copies of the Fire Chief's 2006-2011 annual reports to the Mayor

The Custodian certifies his search for responsive records yielded 84 pages of minutes and 116 pages of annual reports to the Mayor from the Fire Chief. The Custodian further certifies that no responsive records have been destroyed. The Custodian certifies that none of the requested minutes have been redacted nor withheld, however the included "Annual Reports to the Mayor" responsive to Item No. 1 of the Complainant's request were inadvertently omitted in the Township's November 18, 2011 response and the copies of said records are thereby included with this SOI and have been provided to the Complainant.

December 13, 2011

The Complainant's response to the Custodian's SOI. The Complainant asserts that the Custodian's response to his request remains incomplete per a review of the Fire

⁵ Not attached.

Chief's October 5, 2011 letter to the Township Attorney. The Complainant contends that he only received four (4) out of 50 Officers meeting minutes, none of the 12 to 16 Board of Fire Officers meeting minutes, none of the requested quarterly reports, and 26 LFFD quarterly meeting minutes. The Complainant states that he did receive six (6) annual reports to the Township Mayor.

Analysis

Whether the Custodian failed to conduct a sufficient search before responding to the Complainant's OPRA request?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA 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 ..." N.J.S.A. 47:1A-5.g.

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.

In the instant matter, the Custodian certified in the Statement of Information that he accidentally omitted Annual Reports to the Mayor that were responsive to Item No. 1 of the Complainant's request. However, the Custodian did certify that he provided the Complainant with the responsive Annual Reports as part of his response to the request for an SOI.

Therefore, the Custodian's initial response to the Complainant's OPRA request that omitted certain responsive Annual Reports that were responsive to Request Item No.

1 of the Complainant's request constitutes an unlawful denial of access. Accordingly, the Custodian has failed to meet his burden of proving that his initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6. However, the GRC will not order disclosure of the previously omitted records because the Custodian has certified that he has provided all of the responsive Annual Reports to the Complainant in responding to the GRC's request for an SOI.

Whether the Custodian unlawfully denied access to the requested minutes?

The Complainant also requested meeting minutes from the Custodian (Request Item Nos. 2, 3, and 4). In response to the Complainant's request for minutes, the Complainant's Denial of Access Complaint and the Custodian's SOI confirm that the Complainant was provided with 84 pages of responsive minutes. However the Complainant argues that there are more responsive minutes⁶ because a comparison between the October 5, 2011 letter from Township Fire Chief Jack Sweezy to the Township Attorney and the records the Complainant has received reveals that there are at least an additional 88 sets of meeting minutes that have not been disclosed.

Accordingly, the GRC recognizes the possibility that there are records responsive to the Complainant's request that have not been disclosed to the Complainant. OPRA requires disclosure of non-exempt government records. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.i. The Custodian herein never asserted that the minutes mentioned in the October 5, 2011 letter from the Township Fire Chief to the Township Attorney were exempt from disclosure under OPRA because no meeting was held on a particular dates provided for in the OPRA request or because said minutes were not approved by the Little Falls Township Board at the time of receipt of the Complainant's OPRA request. See Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) (holding that unapproved, draft executive session meeting minutes constitute "inter-agency or intra-agency advisory, consultative, or deliberative material" and thus are not government records subject to disclosure pursuant to N.J.S.A. 47:1A-1.1). Accordingly, the Custodian has failed to adequately bear the statutory duty of proving that there has not been an unlawful denial of access.

Therefore, because the Custodian failed to bear his burden of proving a lawful denial of access to the responsive records under N.J.S.A. 47:1A-6, the Custodian must provide the requested meeting minutes for the dates identified in the Complainant's OPRA request (Request Item Nos. 2, 3, and 4) to the Complainant. However, if minutes for a particular date do not exist or were not approved by the Township at the time of the Complainant's OPRA request, the Custodian must certify to this fact. See Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).

⁶ The Complainant also argues that the minutes were hard to read and were out of order. However, the GRC has no authority to determine which records a public agency must maintain or whether those records provided are legible. See Van Pelt v. Twp of Edison BOE, GRC Complaint No. 2007-179 (January 2008); Paff v. Willingboro BOE, GRC Complaint No. 2007-272 (May 2008).

Whether the Custodian's actions rise 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 initial response to the Complainant's OPRA request that omitted certain responsive Annual Reports that were responsive to Item No. 1 of the Complainant's request constitutes an unlawful denial of access. Accordingly, the Custodian has failed to meet his burden of proving that his initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6. However, the GRC will not order disclosure of the previously omitted records because the Custodian has certified that he has provided all of the responsive records to the Complainant in responding to the GRC's request for a Statement of Information.
2. Because the Custodian failed to bear his burden of proving a lawful denial of access to the responsive records under N.J.S.A. 47:1A-6, the Custodian must provide the requested meeting minutes for the dates identified in the Complainant's OPRA request (Request Item Nos. 2, 3, and 4) to the Complainant. However, if minutes for a particular date do not exist or were not approved by the Township at the time of the Complainant's OPRA request, the Custodian must certify to this fact. *See Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006).
3. **The Custodian shall comply with paragraph #2 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 1:4-4,⁷ to the Executive Director.⁸**
4. 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.

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."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013