



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

April 29, 2014 Government Records Council Meeting

Regina Shuster
Complainant

Complaint No.: 2013-6

v.

Township of Pittsgrove (Salem)
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council (“Council”) considered the April 22, 2014 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 the Custodian has failed to establish that the complaint should be reconsidered based on a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D’Atria, 242 N.J. Super.* at 401. The Custodian, through Counsel, states in his Request for Reconsideration that, as of the October 29, 2013 Interim Order, the requested documents had been posted to the Township’s website. The Custodian further states that because the Complainant had maintained that she would be satisfied upon the posting of the documents online, he assumed that there was no need to do anything to fulfill the Interim Order and mistakenly did not respond to said Order because he thought he had fully complied. The Custodian contends that it was not until he received the January 28, 2014 Interim Order that he understood a specific response and filing was required despite the posting of the records. On September 24, 2013, however, the Council adopted the Supplemental Findings and Recommendations of the Executive Director for Lenchitz v. Pittsgrove Township (Salem), GRC Complaint No. 2012-265, in which the same Custodian was found to be in contempt of the Council’s August 27, 2013 Interim Order because he did not disclose the requested documents, a document index, and certified confirmation of compliance to the Executive Director within five (5) business days. The Custodian’s claim, therefore, that he mistakenly did not provide any response to either the Complainant or the Council following his receipt of the October 29, 2013 Interim Order, and that it was not until his receipt of the January 29, 2014 Interim Order that he realized a response was required, strains credibility. At the time of the October 29, 2013 Interim Order, the Custodian had been found only one month earlier to be in contempt of an Interim Order due to his lack of a response. Thus, the Custodian’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A



Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 April, 2014

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: May 2, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
April 29, 2014 Council Meeting**

**Regina Shuster¹
Complainant**

GRC Complaint No. 2013-6

v.

**Township of Pittsgrove (Salem)²
Custodial Agency**

Records Relevant to Complaint:³ Electronic copies, via e-mail or through postings on the Township of Pittsgrove's website, of the following records:

1. Agenda and minutes of Pittsgrove Township Committee meetings held July 2012 through December 2012;
2. Agenda and minutes of Pittsgrove Township Planning Board meetings held July 2012 through December 2012;
3. Agenda and minutes of Pittsgrove Township Economic Development Committee meetings held July 2012 through December 2012;
4. Agenda and minutes of Pittsgrove Township Agricultural Committee meetings held July 2012 through December 2012;
5. Agenda and minutes of Pittsgrove Township Environmental Commission meetings held September 2012 through December 2012;
6. Agenda and minutes of Pittsgrove Township Recreation Advisory Committee meetings held October 2012 through December 2012.

Custodian of Record: Steven R. Wymbs
Request Received by Custodian: December 17, 2012
Response Made by Custodian: No response given.
GRC Complaint Received: January 11, 2013

Background

January 28, 2014 Council Meeting:

At its January 28, 2014 public meeting, the Council considered the January 21, 2014 Supplemental Findings and Recommendations of the Executive Director and all related

¹ No legal representation listed on record.

² The Custodian is represented by Adam I. Tesley, Esq. (Salem, N.J.).

³ The Complainant requested additional records that are not at issue in this complaint.

documentation submitted by the parties. The Council voted unanimously to adopt the entirety of the amended findings and recommendations. The Council, therefore, found that:

1. The Custodian failed to comply with the Council's October 29, 2013 Interim Order because he neither responded nor provided certified confirmation of compliance to the Executive Director within the prescribed time frame. The Council thus finds that the Custodian is hereby in contempt of Council's Order.
2. "The Council shall, pursuant to the New Jersey Rules governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's October 29, 2013 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law, for the limited purposes described below, the Council emphasizes that the issue of disclosure of records has already been determined by the Council, and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian unlawfully denied access to the responsive agendas and meeting minutes, and the Custodian failed to comply with the terms of the Council's October 29, 2013 Interim Order by not responding at all. Thus, the Custodian is in contempt of the Council's Order. It is possible that the Custodian's actions were intentional, deliberate, or performed with knowledge of their wrongfulness. As such, this complaint should be referred to OAL for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Procedural History:

On January 29, 2014, the Council distributed its Interim Order to all parties. On February 10, 2014, the Custodian filed a request for reconsideration of the Council's January 28, 2014 Interim Order based on a mistake.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian filed the request for reconsideration of the Council's Interim Order dated January 28, 2014 on February 10, 2014, 8 business days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: that 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384.

Here, the Custodian has failed to establish that the complaint should be reconsidered based on a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. The Custodian, through Counsel, states in his Request for Reconsideration that, as of the October 29, 2013 Interim Order, the requested documents had been posted to the Township's website. The Custodian further states that because the Complainant had maintained that she would be satisfied upon the posting of the documents online, he assumed that there was no need to do anything to fulfill the Interim Order and mistakenly did not respond to said Order because he thought he had fully complied. The Custodian contends that it was not until he received the January 28, 2014 Interim Order that he understood a specific response and filing was required despite the posting of the records.

On September 24, 2013, however, the Council adopted the Supplemental Findings and Recommendations of the Executive Director for Lenchitz v. Pittsgrove Township (Salem), GRC Complaint No. 2012-265, in which the same Custodian was found to be in contempt of the Council's August 27, 2013 Interim Order because he did not disclose the requested documents, a document index, and certified confirmation of compliance to the Executive Director within five (5) business days. The Custodian's claim, therefore, that he mistakenly did not provide any response to either the Complainant or the Council following his receipt of the October 29, 2013

Interim Order, and that it was not until his receipt of the January 29, 2014 Interim Order that he realized a response was required, strains credibility. At the time of the October 29, 2013 Interim Order, the Custodian had been found only one month earlier to be in contempt of an Interim Order due to his lack of a response. Thus, the Custodian's request for reconsideration should be denied. *See Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has failed to establish that the complaint should be reconsidered based on a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. The Custodian, through Counsel, states in his Request for Reconsideration that, as of the October 29, 2013 Interim Order, the requested documents had been posted to the Township's website. The Custodian further states that because the Complainant had maintained that she would be satisfied upon the posting of the documents online, he assumed that there was no need to do anything to fulfill the Interim Order and mistakenly did not respond to said Order because he thought he had fully complied. The Custodian contends that it was not until he received the January 28, 2014 Interim Order that he understood a specific response and filing was required despite the posting of the records. On September 24, 2013, however, the Council adopted the Supplemental Findings and Recommendations of the Executive Director for *Lenchitz v. Pittsgrove Township (Salem)*, GRC Complaint No. 2012-265, in which the same Custodian was found to be in contempt of the Council's August 27, 2013 Interim Order because he did not disclose the requested documents, a document index, and certified confirmation of compliance to the Executive Director within five (5) business days. The Custodian's claim, therefore, that he mistakenly did not provide any response to either the Complainant or the Council following his receipt of the October 29, 2013 Interim Order, and that it was not until his receipt of the January 29, 2014 Interim Order that he realized a response was required, strains credibility. At the time of the October 29, 2013 Interim Order, the Custodian had been found only one month earlier to be in contempt of an Interim Order due to his lack of a response. Thus, the Custodian's request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J.*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

April 22, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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CHRIS CHRISTIE
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 28, 2014 Government Records Council Meeting

Regina Shuster
Complainant

Complaint No. 2013-6

v.

Township of Pittsgrove (Salem)
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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 failed to comply with the Council’s October 29, 2013 Interim Order because he neither responded nor provided certified confirmation of compliance to the Executive Director within the prescribed time frame. The Council thus finds that the Custodian is hereby in contempt of Council’s Order.
2. “The Council shall, pursuant to the New Jersey Rules governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s October 29, 2013 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law, for the limited purposes described below, the Council emphasizes that the issue of disclosure of records has already been determined by the Council, and thus is not an outstanding issue before the Office of Administrative Law.
3. The Custodian unlawfully denied access to the responsive agendas and meeting minutes, and the Custodian failed to comply with the terms of the Council’s October 29, 2013 Interim Order by not responding at all. Thus, the Custodian is in contempt of the Council’s Order. It is possible that the Custodian’s actions were intentional, deliberate, performed with knowledge of their wrongfulness. As such, this complaint should be referred to OAL for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.



Interim Order Rendered by the
Government Records Council
On The 28th Day of January, 2014

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 29, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**Regina Shuster¹
Complainant**

GRC Complaint No. 2013-6

v.

**Township of Pittsgrove (Salem)²
Custodial Agency**

Records Relevant to Complaint:³ Electronic copies, via e-mail or through postings on the Township of Pittsgrove's website, of the following records:

1. Agenda and minutes of Pittsgrove Township Committee meetings held July 2012 through December 2012;
2. Agenda and minutes of Pittsgrove Township Planning Board meetings held July 2012 through December 2012;
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5. Agenda and minutes of Pittsgrove Township Environmental Commission meetings held September 2012 through December 2012;
6. Agenda and minutes of Pittsgrove Township Recreation Advisory Committee meetings held October 2012 through December 2012.

Custodian of Record: Steven R. Wymbs

Request Received by Custodian: December 17, 2012

Response Made by Custodian: No response given.

GRC Complaint Received: January 11, 2013

Background

October 29, 2013 Council Meeting:

At its October 29, 2013 public meeting, the Council considered the October 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 No legal representation listed on record.

² The Custodian is represented by George G. Rosenburger, Jr., Esq. (Woodstown, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

Regina Shuster v. Township of Pittsgrove (Salem), 2013-6 – Supplemental Findings and Recommendations of the Executive Director

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian failed to provide either a clear certification that the non-posted records do not exist or a lawful basis for denying the Complainant's OPRA request. Thus, the Custodian has failed to bear his burden of proving that the denial of access to portions of the requested meeting minutes and agendas was authorized by law. N.J.S.A. 47:1A-6; *see also* Pusterhofer v. N.J. Dept. of Educ., GRC Complaint No. 2005-49 (July 2005). Therefore, the Custodian shall disclose to the Complainant copies of all requested minutes and agendas adopted as of December 17, 2012, on a case by case basis, either by hard-copy or referral to the website, unless a lawful exemption applies. *See* Moore v. Twp. of Washington (Bergen), GRC Complaint No. 2002-72 (January 2003); Kumka (N. Valley Suburbanite) v. City of Englewood (Bergen), GRC Complaint No. 2007-07 (January 2010); Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 2007); Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). The Custodian must identify any documents that are either redacted or not provided, and state the basis for redacting or not providing such documents.
3. **The Custodian shall comply with item #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 1:4-4,⁴ to the Executive Director.⁵**
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.

Procedural History and Non-Compliance:

On October 30, 2013, the Council ordered the Custodian to produce copies of all requested minutes and agendas adopted as of December 17, 2012, on a case by case basis, either by hard-copy or referral to the website, unless a lawful exemption applies, with appropriate

⁴ "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."

⁵ 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.

Regina Shuster v. Township of Pittsgrove (Salem), 2013-6 – Supplemental Findings and Recommendations of the Executive Director

redactions, if any, including a detailed document index, explaining the lawful basis for each redaction and to simultaneously provide a certification of compliance, in accordance with N.J. Court Rule 1:4-4⁶ to the Executive Director. The Counsel ordered compliance within five (5) business days of receipt of its Interim order. On October 30, 2013, the Council distributed its Interim Order to all parties. The Custodian failed to respond to, and therefore comply with, the Council's October 29, 2013 Order.

Analysis

Compliance

At its October 29, 2013 meeting, the Council ordered the Custodian to: (1) disclose to the Complainant copies of all requested minutes and agendas adopted as of December 17, 2012, on a case by case basis, either by hard-copy or referral to the website, unless a lawful exemption applies; and (2) to identify any documents that are either redacted or not provided, and state the basis for redacting or not providing such documents "within five (5) business days from receipt of the Council's Interim Order . . . and simultaneously provide certified confirmation of compliance . . . to the Executive Director." On October 30, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order.

Here, the Custodian did not provide the requested records, or redacted copies of such records, within five (5) business days of his receipt of the Interim Order. The Custodian did not respond at all to the Interim Order.

Therefore, the Custodian failed to comply with the Council's October 29, 2013 Interim Order because he neither responded nor provided certified confirmation of compliance to the Executive Director within the prescribed time frame. The Council thus finds that the Custodian is hereby in contempt of Council's Order.

Council's October 29, 2013 Interim Order is Enforceable

"The Council shall, pursuant to the New Jersey Rules governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's October 29, 2013 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law ("OAL"), for the limited purposes described below, the Council emphasizes that the issue of disclosure of records has already been determined by the Council, and thus is not an outstanding issue before the OAL.

⁶ "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."
Regina Shuster v. Township of Pittsgrove (Salem), 2013-6 – Supplemental Findings and Recommendations of the Executive Director

Knowing & Willful

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 that “[i]f 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 the Council to determine that a custodian “knowingly and willfully” violated OPRA: the custodian’s actions must have been much more than negligent conduct; the custodian must have had some knowledge that his actions were wrongful; the custodian’s actions must have had a positive element of conscious wrongdoing; the custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden; and the custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. *See Alston v. City of Camden*, 168 N.J. 170, 185 (2001); *Fielder v. Stonack*, 141 N.J. 101, 124 (1995); *Berg v. Reaction Motors Div.*, 37 N.J. 396, 414 (1962); *ECES v. Salmon*, 295 N.J. Super. 86, 107 (App. Div. 1996).

The Custodian unlawfully denied access to the responsive agendas and meeting minutes, and the Custodian failed to comply with the terms of the Council’s October 29, 2013 Interim Order by not responding at all. Thus, the Custodian is in contempt of the Council’s Order. It is possible that the Custodian’s actions were intentional, deliberate, performed with knowledge of their wrongfulness. As such, this complaint should be referred to OAL for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply with the Council’s October 29, 2013 Interim Order because he neither responded nor provided certified confirmation of compliance to the Executive Director within the prescribed time frame. The Council thus finds that the Custodian is hereby in contempt of Council’s Order.
2. “The Council shall, pursuant to the New Jersey Rules governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s October 29, 2013 Interim Order to disclose the relevant records is enforceable in the Superior Court if the

Complainant decides to exercise that option. R. 4:67-6. As this complaint should be referred to the Office of Administrative Law, for the limited purposes described below, the Council emphasizes that the issue of disclosure of records has already been determined by the Council, and thus is not an outstanding issue before the Office of Administrative Law.

3. The Custodian unlawfully denied access to the responsive agendas and meeting minutes, and the Custodian failed to comply with the terms of the Council's October 29, 2013 Interim Order by not responding at all. Thus, the Custodian is in contempt of the Council's Order. It is possible that the Custodian's actions were intentional, deliberate, performed with knowledge of their wrongfulness. As such, this complaint should be referred to OAL for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

January 21, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

October 29, 2013 Government Records Council Meeting

Regina Shuster
Complainant

Complaint No. 2013-06

v.

Township of Pittsgrove (Salem)
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian failed to provide either a clear certification that the non-posted records do not exist or a lawful basis for denying the Complainant’s OPRA request. Thus, the Custodian has failed to bear his burden of proving that the denial of access to portions of the requested meeting minutes and agendas was authorized by law. N.J.S.A. 47:1A-6; *see also* Pusterhofer v. N.J. Dept. of Educ., GRC Complaint No. 2005-49 (July 2005). Therefore, the Custodian shall disclose to the Complainant copies of all requested minutes and agendas adopted as of December 17, 2012, on a case by case basis, either by hard-copy or referral to the website, unless a lawful exemption applies. *See* Moore v. Twp. of Washington (Bergen), GRC Complaint No. 2002-72 (January 2003); Kumka (N. Valley Suburbanite) v. City of Englewood (Bergen), GRC Complaint No. 2007-07 (January 2010); Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 2007); Dina Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). The Custodian must identify any documents that are either redacted or not provided, and state the basis for redacting or not providing such documents.



3. **The Custodian shall comply with item #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 October, 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: October 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
October 29, 2013 Council Meeting**

**Regina Shuster¹
Complainant**

GRC Complaint No. 2013-6

v.

**Township of Pittsgrove (Salem)²
Custodial Agency**

Records Relevant to Complaint:³ Electronic copies, via e-mail or through postings on the Township of Pittsgrove's website, of the following records:

1. Agenda and minutes of Pittsgrove Township Committee meetings held July 2012 through December 2012;
2. Agenda and minutes of Pittsgrove Township Planning Board meetings held July 2012 through December 2012;
3. Agenda and minutes of Pittsgrove Township Economic Development Committee meetings held July 2012 through December 2012;
4. Agenda and minutes of Pittsgrove Township Agricultural Committee meetings held July 2012 through December 2012;
5. Agenda and minutes of Pittsgrove Township Environmental Commission meetings held September 2012 through December 2012;
6. Agenda and minutes of Pittsgrove Township Recreation Advisory Committee meetings held October 2012 through December 2012.

Custodian of Record: Steven R. Wymbs

Request Received by Custodian: December 17, 2012

Response Made by Custodian: No response given.

GRC Complaint Received: January 11, 2013

Background⁴

Request and Response:

On December 17, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian for the above-referenced records. On December 28, 2012,

¹ No legal representation listed on record.

² Represented by George G. Rosenburger, Jr., Esq. (Woodstown, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.
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eight (8) business days later, the Complainant emailed the Custodian regarding the expiration of OPRA's seven (7) business day response period. *See* N.J.S.A. 47:1A-5(i).

Denial of Access Complaint:

On January 11, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that the Custodian did not respond to her December 17, 2012 request for records.

Statement of Information:

On April 19, 2013, the Custodian filed a Statement of Information ("SOI") with the GRC. The Custodian certifies he received the Complainant's OPRA request on December 17, 2012. The Custodian also certifies that he has no record prior to January 25, 2013, after he agreed to mediate the complaint, of any response made to the Complainant. The Custodian further certifies that, after January 25, 2013, he had no communication with the Complainant until she requested additional records on February 4, 2013.

The Custodian certifies that the documents requested by the Complainant on December 17, 2012 are available as follows:

1. Pittsgrove Township Committee agendas and minutes for July 2012 through December 2012 are posted on the town's website;
2. Pittsgrove Township Planning Board agendas and minutes for June 2012 through December 2012 are posted on the town's website, with the exception of the meetings on June 12, 2012 and August 14, 2012 as no minutes are available;
3. Pittsgrove Township Economic Development Committee minutes are not available for July 2012 through December 2012;
4. Pittsgrove Township Agricultural Committee minutes are not available for the meeting on September 12, 2012;
5. Pittsgrove Township Environmental Commission agendas and minutes are all posted;
6. Pittsgrove Township Recreation Advisory Committee agendas and minutes are all posted.

The Custodian contends that some of the requested records may have been posted to Pittsgrove Township's website prior to January 25, 2013. The Custodian initially certifies that, as of April 19, 2013, all available requested information has been posted. The Custodian, however, later certifies that only a majority of the requested documents are online as some do not exist or cannot be located.

The Custodian certifies that documents of the types requested are posted on Pittsgrove Township's website once they have been accepted or adopted by the appropriate Committee, Commission, or Board. In addition, the Custodian certifies that some of the requested records have not been given to the Complainant because some meetings did not take place, notes of the meetings were not taken, or the secretary previously responsible for keeping such notes did not provide them to the Custodian and is no longer employed by Pittsgrove Township.

On September 6, 2013, the GRC requested via email that the Custodian clarify responses contained in his SOI. The GRC received no reply.

Analysis⁵

Timeliness

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). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ 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. Twp. of Rockaway (Morris), GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant submitted her OPRA request on December 17, 2012. On December 28, 2012, eight (8) business days later, she e-mailed the Custodian regarding the status of her request. On January 11, 2013, the Complainant filed a Denial of Access Complaint with the GRC as she had still not received any response from the Custodian. The Custodian certified that he received the request on December 17, 2013, but that he has no record of responding to the Complainant before January 25, 2013.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC Complaint No. 2007-11.

Unlawful Denial of Access

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.

The GRC has repeatedly held that meeting minutes ". . . are government records subject to public access." See Moore v. Twp. of Washington (Bergen), GRC Complaint No. 2002-72

⁵ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

⁶ 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.

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(January 2003); Kumka (N. Valley Suburbanite) v. City of Englewood (Bergen), GRC Complaint No. 2007-07 (January 2010) (holding that custodian failed to prove lawful denial of access when she did not respond to OPRA request for meeting minutes). However, meeting minutes that are not approved as of the date of an OPRA request are not subject to disclosure. See Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 2007) (finding that unapproved, draft meeting minutes of borough council meetings constitute inter-agency or intra-agency advisory, consultative, or deliberative material, and are therefore not government records under N.J.S.A. 47:1A-1.1); see also Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006).

The GRC has further determined that when a custodian certifies that no records responsive to a request exist, and no evidence exists in the record to refute that certification, there is no unlawful denial of access to the requested records. See Pusterhofer v. N.J. Dept. of Educ., GRC Complaint No. 2005-49 (July 2005) (finding no unlawful denial of access of request for telephone billing records when custodian certified in SOI that no responsive records existed and complainant submitted no evidence to refute custodian's certification).

Here, in contrast to Pusterhofer, GRC 2005-49, the Custodian asserted in his SOI that "some of the requested documents do not exist." (Emphasis added). The Custodian attempts to delineate which of the requested minutes and agendas are available online, but he fails to specify which documents "do not exist" and which simply have not been posted to the website. The Custodian has certified to general reasons why some documents may not be available, but he has not submitted any evidence to support these contentions. Moreover, when the GRC contacted the Custodian through the Custodian's Counsel, the GRC received no response.

The Custodian, however, also certified that a "majority of the requested documents have been posted on the township website." The Complainant's request stated that posting on Pittsgrove Township's website was an acceptable form of delivery for the minutes and agendas.

Accordingly, because the Custodian failed to provide either a clear certification as to which records do not exist or a lawful basis for denying the Complainant's OPRA request, the Custodian has failed to bear his burden of proving that the denial of access to portions of the requested meeting minutes and agendas was authorized by law. N.J.S.A. 47:1A-6; see also Pusterhofer, GRC 2005-49. Thus, the Custodian shall disclose to the Complainant copies of all requested minutes and agendas adopted as of December 17, 2012, on a case by case basis, either by hard-copy or referral to the website, unless a lawful exemption applies. See Moore, GRC 2002-72; Kumka, GRC 2007-07; Donato GRC 2005-125; Dina Parave-Fogg, GRC 2006-51. The Custodian must identify any documents that are either redacted or not provided, and state the basis for redacting or not providing such documents.

Knowing & Willful

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 did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian failed to provide either a clear certification that the non-posted records do not exist or a lawful basis for denying the Complainant's OPRA request. Thus, the Custodian has failed to bear his burden of proving that the denial of access to portions of the requested meeting minutes and agendas was authorized by law. N.J.S.A. 47:1A-6; *see also* Pusterhofer v. N.J. Dept. of Educ., GRC Complaint No. 2005-49 (July 2005). Therefore, the Custodian shall disclose to the Complainant copies of all requested minutes and agendas adopted as of December 17, 2012, on a case by case basis, either by hard-copy or referral to the website, unless a lawful exemption applies. *See* Moore v. Twp. of Washington (Bergen), GRC Complaint No. 2002-72 (January 2003); Kumka (N. Valley Suburbanite) v. City of Englewood (Bergen), GRC Complaint No. 2007-07 (January 2010); Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 2007); Dina Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). The Custodian must identify any documents that are either redacted or not provided, and state the basis for redacting or not providing such documents.
3. **The Custodian shall comply with item #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.

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Prepared By: Robert T. Sharkey
Staff Attorney

Approved By: Brandon D. Minde
Executive Director

October 22, 2013