



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

WendySu Ivanicki
Complainant

Complaint No. 2018-35

v.

Borough of Wallington (Bergen)
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 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 current Custodian did not comply fully with the Council’s November 12, 2019 Interim Order. Specifically, the current Custodian certified that he provided the Complainant access to the responsive meeting minutes and that no recording existed. Further, he simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian failed to perform all actions required by the Order within the applicable time frame.
2. The Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the portion of the request seeking the December 4, 2017 executive session minutes. However, the Custodian lawfully denied access to the portion of the OPRA request seeking a recording of that meeting because none existed. Further, the current Custodian, although not complying fully with the Council’s November 12, 2019 Interim Order, certified that he provided the Complainant access to the responsive meeting minutes. Ultimately, 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, 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 2020

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: March 3, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**WendySu Ivanicki¹
Complainant**

GRC Complaint No. 2018-35

v.

**Borough of Wallington (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of audio file and minutes from the Borough of Wallington's ("Borough") December 4, 2017 executive and caucus sessions.

Custodian of Record: Witold T. Baginski³

Request Received by Custodian: February 2, 2018

Response Made by Custodian: February 13, 2018

GRC Complaint Received: March 2, 2018

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 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 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

¹ No legal representation listed on record. The GRC notes that the Complainant identified "Genova, Burns" as her legal representative in this complaint. The Complainant also included a hand-written note containing contact information for Borough Counsel in one of the attachments. However, the GRC never received a letter of representation from either alleged representative. See N.J.A.C. 5:105-1.3, 2.2.

² No legal representation listed on record.

³ The current custodian of record is Hector Olmo.

2. The Custodian may have unlawfully denied access to the responsive December 4, 2017 caucus/executive minutes and corresponding audio recording. N.J.S.A. 47:1A-6; Wolosky v. Vernon Twp. Bd. of Educ., GRC Complainant No. 2009-57 (December 2009); Campbell v. Twp. of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011). Regarding the minutes, the Custodian shall disclose them to the Complainant. It should be noted that if the minutes are posted to the Borough's website, a referral to the exact location of the minutes would be appropriate. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014). Regarding the recording, the Custodian must disclose said record, with redactions if applicable. If no recording existed at the time he received the Complainant's OPRA request, he must certify to this fact.
3. **The Custodian shall comply with conclusion No. 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, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 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.

Procedural History:

On November 14, 2019, the Council distributed its Interim Order to all parties. On November 27, 2019, the Government Records Council ("GRC") e-mailed the current Custodian recapitulating a telephone conversation wherein he advised that the Custodian was on extended administrative leave. The GRC also advised that it had not yet received a response to the Interim Order.

On December 3, 2019, the current Custodian responded to the Council's Interim Order. Therein, the current Custodian affirmed that "some months ago," he provided the Complainant the ability to review the December 4, 2017 executive session minutes.⁷ The current Custodian further certified that no recording existed because the Borough did not record meetings at that time.

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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.

⁷ The Complainant verbally corroborated to the GRC on or about December 2, 2019 that she was provided access.

Analysis

Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian to disclose the responsive December 4, 2017 executive session minutes to the Complainant. Regarding the meeting recording, the Council ordered the Custodian to disclose it to the Complainant or certify if no responsive record existed. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 14, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 21, 2019.

On December 3, 2019, the eleventh (11th) business day after receipt of the Council's Order, the current Custodian responded to the Council's Order. Therein, the current Custodian certified that he provided the Complainant access to the responsive minutes "some months ago."⁸ The current Custodian further certified that no recording of that meeting existed because the Borough did not record them at that time. Although the current Custodian was able to provide a complete response addressing the Order, he did so six (6) business days after the expiration of the compliance time frame. Thus, the current Custodian did not comply fully here.

Therefore, the current Custodian did not comply fully with the Council's November 12, 2019 Interim Order. Specifically, the current Custodian certified that he provided the Complainant access to the responsive meeting minutes and that no recording existed. Further, he simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian failed to perform all actions required by the Order within the applicable time frame.

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 ". . . [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 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,

⁸ Ibid.

414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 matter before the Council, the Custodian's failure to timely respond to the Complainant's OPRA request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the portion of the request seeking the December 4, 2017 executive session minutes. However, the Custodian lawfully denied access to the portion of the OPRA request seeking a recording of that meeting because none existed. Further, the current Custodian, although not complying fully with the Council's November 12, 2019 Interim Order, certified that he provided the Complainant access to the responsive meeting minutes. Ultimately, 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, 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 current Custodian did not comply fully with the Council's November 12, 2019 Interim Order. Specifically, the current Custodian certified that he provided the Complainant access to the responsive meeting minutes and that no recording existed. Further, he simultaneously provided certified confirmation of compliance to the Executive Director. However, the Custodian failed to perform all actions required by the Order within the applicable time frame.
2. The Custodian's failure to timely respond to the Complainant's OPRA request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the portion of the request seeking the December 4, 2017 executive session minutes. However, the Custodian lawfully denied access to the portion of the OPRA request seeking a recording of that meeting because none existed. Further, the current Custodian, although not complying fully with the Council's November 12, 2019 Interim Order, certified that he provided the Complainant access to the responsive meeting minutes. Ultimately, 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

January 21, 2020⁹

⁹ This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.



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PO BOX 819
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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 12, 2019 Government Records Council Meeting

WendySu Ivanicki
Complainant

Complaint No. 2018-35

v.

Borough of Wallington (Bergen)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council ("Council") considered the October 30, 2019 Findings and Recommendations of the Council Staff 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian may have unlawfully denied access to the responsive December 4, 2017 caucus/executive minutes and corresponding audio recording. N.J.S.A. 47:1A-6; Wolosky v. Vernon Twp. Bd. of Educ., GRC Complainant No. 2009-57 (December 2009); Campbell v. Twp. of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011). Regarding the minutes, the Custodian shall disclose them to the Complainant. It should be noted that if the minutes are posted to the Borough's website, a referral to the exact location of the minutes would be appropriate. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014). Regarding the recording, the Custodian must disclose said record, with redactions if applicable. If no recording existed at the time he received the Complainant's OPRA request, he must certify to this fact.
3. **The Custodian shall comply with conclusion No. 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, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

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 12th Day of November 2019

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: November 14, 2019

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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
November 12, 2019 Council Meeting**

**WendySu Ivanicki¹
Complainant**

GRC Complaint No. 2018-35

v.

**Borough of Wallington (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of audio file and minutes from the Borough of Wallington's ("Borough") December 4, 2017 executive and caucus sessions.

Custodian of Record: Witold T. Baginski

Request Received by Custodian: February 2, 2018

Response Made by Custodian: February 13, 2018

GRC Complaint Received: March 2, 2018

Background³

Request and Response:

On February 2, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On February 13, 2018, the Complainant e-mailed the Custodian seeking a status update. On the same day, the Custodian responded stating that "[t]here is a procedure for the information" requested. The Custodian further stated that he was "following the procedure with the Borough attorney."

Denial of Access Complaint:

On March 2, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that she was unlawfully denied access to the requested records. The Complainant noted that the Borough Council, newly-installed as of January 1, 2018 and including herself, has experienced "constant barriers" in obtaining "any

¹ No legal representation listed on record. The GRC notes that the Complainant identified "Genova, Burns" as her legal representative in this complaint. The Complainant also included a hand-written note containing contact information for Borough Counsel in one of the attachments. However, the GRC never received a letter of representation from either alleged representative. See N.J.A.C. 5:105-1.3, 2.2.

² No legal representation listed on record.

³ 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.

documents that should be available” to them. The Complainant noted that the instant complaint represents such an example: the Borough made her file the subject OPRA request.

Statement of Information:

On May 3, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on February 2, 2018. The Custodian certified that he responded in writing on February 13, 2018. The Custodian also averred that the issue was “discussed at the January 25, February 6 and 22, as well as the March 6 and 22, 2018 meetings. The Custodian certified that he did not provide any records responsive to the subject OPRA request. The Custodian asserted that said records were denied under N.J.S.A. 10:4-12 of the Open Public Meetings Act (“OPMA”).

The Custodian additionally asserted that he was not prepared to respond to the instant complaint because of a legal representation issue. The Custodian contended that there existed a conflict of interest because the Complainant identified attorneys contracted by the Borough as her representatives. The Custodian further asserted that because the New Jersey Local Public Contracts Law contained a statutory process for “specialty services,” he was awaiting the Borough attorney’s advice prior to proceeding in this complaint.

Analysis

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).⁴ 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, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant complaint, the Complainant submitted her OPRA request on February 2, 2018. On February 13, 2018, the seventh (7th) business day after receipt after receipt of the subject OPRA request, the Complainant sought a status update. The Custodian simply replied that he was following procedure and had contacted the Borough attorney. However, the Custodian’s response was not appropriate within the framework set forth in OPRA and Kelley, GRC 2007-11. For this reason, the Complainant’s OPRA request was “deemed” denied.

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

⁴ 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.

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 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.

Draft meeting minutes are exempt from disclosure under OPRA. See Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018) (certif. denied, 233 N.J. 484 (2018)). In Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006), the Council held that ". . . the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency or intra-agency advisory, deliberative or consultative ["ACD"] material and are exempt from disclosure. . . ." citing N.J.S.A. 47:1A-1.1. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009); Wolosky v. Stillwater Twp. (Sussex), GRC Complaint No. 2009-30 (January 2010).

However, the Council has required disclosure once minutes are approved for accuracy and content. For instance, in Wolosky v. Vernon Twp. Bd. of Educ., GRC Complainant No. 2009-57 (December 2009), the custodian denied the complainant access to executive session minutes on the basis that the requested minutes were not approved for release to the public. The custodian argued in the SOI that the sole issue was the complainant's misconception that the BOE's approval as to accuracy and content signified that the minutes were for release to the general public. The Council disagreed, ultimately holding that because the BOE had already approved the requested executive session minutes as to accuracy and content, said minutes no longer constituted draft material exempt from disclosure under N.J.S.A. 47:1A-1.1. The Council thus ordered disclosure of said minutes.

Finally, the Council has ordered disclosure of meeting audio recordings regardless of the approval status of the corresponding minutes. In Campbell v. Twp. of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011), the complainant sought access to among other records, an audio recording of an executive session meeting. The custodian denied access to said recording because the minutes were not approved at that time. Following the Denial of Access Complaint, the custodian argued in the SOI that the responsive recording was exempt from access under N.J.S.A. 47:1A-9(a) and N.J.S.A. 10:4-12. The Council looked to its prior decisions in Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004) and Miller v. Westwood Reg'l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010) for direction. In those complaints, the Council had held that audio recordings of public session meetings were disclosable because they represented a verbatim account of the meeting.

This was, as noted above, regardless of whether minutes had been approved for accuracy and content. However, the Council found both distinguishable to the facts of Campbell:

[S]pecifically, the record requested herein is an audio recording of an executive session, rather than a public meeting. The GRC acknowledges that although an audio record is a verbatim account of a meeting, OPMA provides that “[a] public body may exclude the public only from that portion of a meeting” in which the body discusses certain subjects such as those identified by the original Custodian to be personnel matters, attorney-client privileged matters and collective bargaining agreement matters. See N.J.S.A. 10:4-12.

[Id. at 17.]

The Council thus held that the recording was disclosable but noted that the custodian may redact the recording to the extent that same was exempt under OPRA, if necessary.

In the matter before the Council, the Complainant sought access to minutes and the audio recording from the Borough Council’s “caucus and executive session” meeting on December 4, 2017. The Custodian’s initial response provided no indication as to the existence or disclosability of either. The Custodian also did not provide any arguments in the SOI beyond asserting a conflict of counsel issue. Thereafter, the Custodian nor either the Borough’s attorney or another contracted legal representative contacted the GRC presenting arguments against disclosure. Thus, the GRC must proceed with the evidence contained in the record as presented. N.J.A.C. 5:105-2.4(f).

In looking to both Wolosky, GRC 2009-57 and Campbell, GRC 2009-219, the GRC is satisfied that an unlawful denial of access may have occurred here. Specifically, there is no evidence in the record to support that the requested minutes were not approved at the time of the subject OPRA request. Thus, the Custodian was required to disclose them to the Complainant. However, it is unclear whether the Custodian was maintaining an audio recording of said meeting and whether same could have lawfully been redacted.

Accordingly, the Custodian may have unlawfully denied access to the responsive December 4, 2017 caucus/executive minutes and corresponding audio recording. N.J.S.A. 47:1A-6; Wolosky, GRC 2009-57; Campbell, GRC 2009-219. Regarding the minutes, the Custodian shall disclose them to the Complainant. It should be noted that if the minutes are posted to the Borough’s website, a referral to the exact location of the minutes would be appropriate. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014). Regarding the recording, the Custodian must disclose said record, with redactions if applicable. If no recording existed at the time he received the Complainant’s OPRA request, he must certify to this fact.

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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian may have unlawfully denied access to the responsive December 4, 2017 caucus/executive minutes and corresponding audio recording. N.J.S.A. 47:1A-6; Wolosky v. Vernon Twp. Bd. of Educ., GRC Complainant No. 2009-57 (December 2009); Campbell v. Twp. of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011). Regarding the minutes, the Custodian shall disclose them to the Complainant. It should be noted that if the minutes are posted to the Borough's website, a referral to the exact location of the minutes would be appropriate. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014). Regarding the recording, the Custodian must disclose said record, with redactions if applicable. If no recording existed at the time he received the Complainant's OPRA request, he must certify to this fact.
3. **The Custodian shall comply with conclusion No. 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, if applicable. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
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.

Prepared By: Frank F. Caruso
Executive Director

October 30, 2019

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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."

⁷ 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.