



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

November 9, 2021 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2020-136

v.

Borough of Haledon (Passaic)
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 2021 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. Through Ms. Van Hook, the Custodian complied with the Council’s September 28, 2021 Interim Order. Specifically, Ms. Van Hook responded in the prescribed time frame disclosing the outstanding minutes located, providing a certification as to any remaining existing records, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian conducted an insufficient search and unlawfully denied access to multiple responsive records. N.J.S.A. 47:1A-6. Notwithstanding, the Custodian did initially disclose several records and subsequently complied with the Council’s Order through Ms. Van Hook. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 9th Day of November 2021

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 15, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2020-136

v.

**Borough of Haledon (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of minutes of all Mayor and Council meetings for 2006.

Custodian of Record: Allan Susen
Request Received by Custodian: January 3, 2020
Response Made by Custodian: January 29, 2020
GRC Complaint Received: July 22, 2020

Background

September 28, 2021 Council Meeting:

At its September 28, 2021 public meeting, the Council considered the September 21, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to locate and disclose responsive minutes and attachments until after he conducted a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. Thus, the Custodian unlawfully denied access to multiple minutes and attachments responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013) (citing Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008)).
2. The Custodian may have unlawfully denied access to additional 2006 minutes. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff's Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). Thus, the Custodian shall initiate a new search for the responsive minutes and, should he locate them, disclose same to the Complainant. Should the Custodian's, or any other Borough employee, search fail to

¹ No legal representation listed on record.

² Represented by Andrew Oddo, Esq., of Oddo Law Firm (Oradell, NJ).

yield responsive records, the Custodian and those employees shall submit a certification specifically stating as such and inclusive of a detailed search explanation.

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 deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 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:

On September 29, 2021, the Council distributed its Interim Order to all parties. On October 1, 2021, Municipal Deputy Clerk Joanne Van Hook responded to the Council's Interim Order due to the Custodian's absence. Therein, Ms. Van Hook certified that upon conducting another search, the minutes identified in the Council's Order were located and are being disclosed to the Complainant. Ms. Van Hook certified that she did not locate any additional minutes, including the missing March 2006 minutes. Ms. Van Hook argued that there was never an intent to knowingly and willfully withhold access to the outstanding minutes.

Analysis

Compliance

At its September 28, 2021 meeting, the Council ordered the Custodian to conduct a search for and disclose any outstanding minutes or to certify if additional records existed. Further, 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 September 28, 2021, 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 October 5, 2021.

On October 1, 2021, the third (3rd) business day after receipt of the Council's Order, Ms. Van Hook responded to the Council's Order on behalf of the Custodian due to his absence. Therein,

³ 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.

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.

Ms. Van Hook certified that she conducted another search and was able to locate additional responsive special session minutes. Ms. Van Hook affirmed that she disclosed those records to the Complainant and no other minutes, inclusive of the missing March 2006 minutes, existed.

Therefore, through Ms. Van Hook, the Custodian complied with the Council's September 28, 2021 Interim Order. Specifically, Ms. Van Hook responded in the prescribed time frame disclosing the outstanding minutes located, providing a certification as to any remaining existing records, and simultaneously providing certified confirmation of compliance to 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 “. . . [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, 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 conducted an insufficient search and unlawfully denied access to multiple responsive records. N.J.S.A. 47:1A-6. Notwithstanding, the Custodian did initially disclose several records and subsequently complied with the Council's Order through Ms. Van Hook. Additionally, the evidence of record does not indicate that the Custodian's violations 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. Through Ms. Van Hook, the Custodian complied with the Council's September 28, 2021 Interim Order. Specifically, Ms. Van Hook responded in the prescribed time frame disclosing the outstanding minutes located, providing a certification as to any remaining existing records, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian conducted an insufficient search and unlawfully denied access to multiple responsive records. N.J.S.A. 47:1A-6. Notwithstanding, the Custodian did initially disclose several records and subsequently complied with the Council's Order through Ms. Van Hook. Additionally, the evidence of record does not indicate that the Custodian's violations 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

October 26, 2021



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

INTERIM ORDER

September 28, 2021 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2020-136

v.

Borough of Haledon (Passaic)
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to locate and disclose responsive minutes and attachments until after he conducted a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. Thus, the Custodian unlawfully denied access to multiple minutes and attachments responsive to Complainant’s OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013) (citing Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008)).
2. The Custodian may have unlawfully denied access to additional 2006 minutes. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff’s Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). Thus, the Custodian shall initiate a new search for the responsive minutes and, should he locate them, disclose same to the Complainant. Should the Custodian’s, or any other Borough employee, search fail to yield responsive records, the Custodian and those employees shall submit a certification specifically stating as such and inclusive of a detailed search explanation.
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**

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.

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 28th Day of September 2021

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: September 29, 2021

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
September 28, 2020 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2020-136

v.

**Borough of Haledon (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of minutes of all Mayor and Council meetings for 2006.

Custodian of Record: Allan Susen
Request Received by Custodian: January 3, 2020
Response Made by Custodian: January 29, 2020
GRC Complaint Received: July 22, 2020

Background³

Request and Response:

On January 3, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 29, 2020, the Custodian responded in writing stating that an extension of time to respond through February 5, 2020 was necessary to convert responsive records to searchable .pdf documents. On January 30, 2020, the Custodian responded disclosing multiple records. On February 9, 2020, the Complainant e-mailed the Custodian asking when he would receive minutes from the work session meetings.

Denial of Access Complaint:

On July 22, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that following an extension of time, the Custodian’s January 30, 2020 disclosure was incomplete. The Complainant argued that the Custodian failed to provide minutes from both the work session and executive session meetings (and any attachments). The Complainant further contended that the first two (2) pages of the July 26, 2006 open session minutes were not provided. The Complainant contended that the Custodian

¹ No legal representation listed on record.

² Represented by Andrew Oddo, Esq., of Oddo Law Firm (Oradell, NJ).

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.

also failed to disclose attachments for open session minutes dated February 15, April 19, May 31, and July 26, 2006. The Complainant also argued that the Custodian did not disclose the August 16, 2006 open session minutes. The Complainant noted that he e-mailed the Custodian on February 9, 2020 regarding the missing records but received no response.

Statement of Information:

On September 9, 2020, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that he received the Complainant’s OPRA request on January 3, 2020. The Custodian certified that because he believed the subject OPRA request only sought open session minutes, his search included locating the minutes book and copying the relevant minutes. The Custodian certified that he responded in writing on January 30, 2020 disclosing all minutes located.

The Custodian reasserted that upon receipt of the subject OPRA request, he “understood [it] to” seek only open session minutes. The Custodian argued that he was not aware of the Complainant’s February 9, 2020 e-mail or that certain records were not included in the disclosure until he received the instant complaint. The Custodian certified that all missing executive and work session minutes, as well as those missing pages identified in the Denial of Access Complaint, are being disclosed through attachment to the SOI. The Custodian affirmed that the only exception to the forgoing is the March 1, 2006 work session minutes, which he could not locate after a thorough search of both the Borough of Haledon’s paper and electronic files.

Analysis

Insufficient Search

It is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant’s OPRA request existed. The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found records responsive to the complainant’s request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Moreover, in Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013), the custodian initially responded to the complainant’s request, producing four (4) responsive records and stating that no other records existed. However, after receiving the denial of access complaint, the custodian performed another search and discovered several other records. Id. In accordance with Schneble, the Council held that the custodian failed to perform an adequate initial search and unlawfully denied access to those additional records. Id.

Here, the Custodian received the subject OPRA request and responded disclosing multiple open session minutes to the Complainant. This complaint followed; wherein the Complainant

contended that the Custodian failed to disclose executive and work session minutes, attachments for multiple open session minutes, the first two (2) pages of the July 26, 2006 open sessions minutes, and minutes from the August 16, 2006 open session meeting. In the SOI, the Custodian certified that he interpreted the Complainant's OPRA request to only seek open session minutes. The Custodian also noted that he was disclosing all outstanding records and attachments except for minutes for the March 1, 2006 work session, which could not be located.

The GRC notes that although the Custodian indicated that he interpreted the subject OPRA request to seek only open session minutes, the language of said request supports the Complainant's argument that he sought "all" minutes which includes open, executive, work, and special sessions that the Mayor and Council conducted in 2006. Based on the forgoing, the facts here are on point with those in Weiner, 2013-52 and it follows that an insufficient search occurred in the instant complaint.

Accordingly, the Custodian's failure to locate and disclose responsive minutes and attachments until after he conducted a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. Thus, the Custodian unlawfully denied access to multiple minutes and attachments responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Weiner, 2013-52 (citing Schneble, GRC 2007-220).

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.

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015). However, in Macek v. Bergen Cnty. Sheriff's Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019), the Council held that evidence contained in the record suggested that additional responsive records may exist. Based on this, the Council ordered the Custodian to perform another search and submit a certification regarding the results of that search.

Here, the Complainant argued that the Custodian failed to perform a diligent search to locate all minutes responsive to the subject OPRA request. In the SOI, the Custodian certified that he disclosed multiple outstanding work session and executive session minutes, as well as other missing records, to the Complainant. The Custodian noted that he initially interpreted the OPRA request to seek only public session minutes, which lead to the non-disclosure of those minutes. The Custodian also certified that he could not locate work session minutes for March 1, 2006.

The GRC has reviewed the arguments of the parties and copies of the minutes disclosed to the Complainant and attached to the SOI. While the Custodian has disclosed several sets of minutes and attachments previously determined by the Complainant to remain outstanding, copies of those minutes reveals that additional responsive records may exist. For example, both the July 26, 2006 and August 16, 2006 open session minutes contain a list of minute approvals for prior meetings including those from special meetings held on January 4, 2006; May 17, 2006; and July 26, 2006. Notwithstanding that it has been established that the Complainant sought all to “all minutes” for 2006, the GRC was unable to locate those minutes in the disclosed material attached to the SOI. This evidence is sufficient to support that the Custodian may have failed to disclose additional 2006 minutes to the Complainant. Thus, determining that another search in this matter is appropriate and consistent with Macek.

Accordingly, the Custodian may have unlawfully denied access to additional 2006 minutes. N.J.S.A. 47:1A-6; Macek, GRC 2017-156. Thus, the Custodian shall initiate a new search for the responsive minutes and, should he locate them, disclose same to the Complainant. Should the Custodian’s, or any other Borough employee, search fail to yield responsive records, the Custodian and those employees shall submit a certification specifically stating as such and inclusive of a detailed search explanation.

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’s failure to locate and disclose responsive minutes and attachments until after he conducted a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. Thus, the Custodian unlawfully denied access to multiple minutes and attachments responsive to Complainant’s OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013) (citing Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008)).
2. The Custodian may have unlawfully denied access to additional 2006 minutes. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff’s Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). Thus, the Custodian shall initiate a new search for the responsive minutes and, should he locate them, disclose same to the Complainant. Should the Custodian’s, or any other Borough employee, search fail to yield responsive records, the Custodian and those employees shall submit a certification specifically stating as such and inclusive of a detailed search explanation.

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.

Prepared By: Frank F. Caruso
Executive Director

September 21, 2021

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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.