



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 14, 2021 Government Records Council Meeting

Paul Brennan
Complainant

Complaint No. 2020-166

v.

Borough of Bay Head (Ocean)
Custodian of Record

At the December 14, 2021 public meeting, the Government Records Council (“Council”) considered the December 8, 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. The Complainant has failed to establish in his request for reconsideration of the Council’s September 28, 2021 Interim Order that either 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. The Complainant failed to establish that conclusion No. 2 of the Council’s Order should be reconsidered based on “new evidence,” extraordinary circumstances, fraud, or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the January 27, 2020 OPRA request sought the Proposal and there is no evidence supporting that it exists. Thus, the Complainant’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).
2. The Custodian complied with the Council’s September 28, 2021 Interim Order because she responded in the prescribed time frame certifying to the non-existence of the recordings requested in the August 21, 2020 OPRA request. The Custodian also included a certification from Mr. Erbe, as required by the Council if no records existed. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
3. The Custodian’s failure to timely respond to the January 27, and August 21, 2020 OPRA requests resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to each of the records at issue in the Complainant’s three (3) OPRA requests because responsive records either

did not exist or were exempt from disclosure. Further, the Custodian timely complied with the Council's September 28, 2021 Interim Order. Additionally, 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.

4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian lawfully denied access to the requested records because they either did not exist or were exempt from disclosure. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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 14th Day of December 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: December 16, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 14, 2021 Council Meeting**

**Paul Brennan¹
Complainant**

GRC Complaint No. 2020-166

v.

**Borough of Bay Head (Ocean)²
Custodial Agency**

Records Relevant to Complaint:

January 27, 2020 OPRA request: Copies of the 2005 Voorhees subdivision “wooded areas” proposal (“Proposal”).

August 7, 2020 OPRA request: Copies of the “Ordinance on the sidewalk change” (“Ordinance”) discussed at the August 3, 2020 Borough of Bay Head (“Borough”) Council meeting.

August 21, 2020 OPRA request: Copies of the recordings from the April and May 2005 Planning Board meetings.

Custodian of Record: Patricia Applegate

Request Received by Custodian: January 27, 2020; N/A

Response Made by Custodian: January 29, 2020

GRC Complaint Received: September 2, 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 did not bear her burden of proof that she timely responded to the Complainant’s January 27, 2020 and August 21, 2020 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a

¹ Represented by Michele Donato, Esq. (Lavallette, NJ).

² Represented by Robin La Bue, Esq., of Rothstein, Mandell, Strohm, Halm & Cipriani, P.A. (Lakewood, NJ).

“deemed” denial of the Complainant’s OPRA requests 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 has borne her burden of proof that she lawfully denied access to the January 27, 2020 OPRA request because she certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The requested Ordinance sought in the August 7, 2020 OPRA request constitutes “inter-agency or intra-agency advisory, consultative, or deliberative material” because it was in draft form and thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274 (2009); Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009). Therefore, the Custodian did not unlawfully deny access to the Complainant’s August 7, 2020 OPRA request. N.J.S.A. 47:1A-6.
4. The Custodian may have unlawfully denied access to August 21, 2020 OPRA request seeking April and May 2005 Planning Board recordings. N.J.S.A. 47:1A-6; Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004); Miller v. Westwood Reg’l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010). Thus, the Custodian must perform a search for the requested recordings and disclose same if they exist. If no recording existed at the time she received the Complainant’s OPRA request, the Custodian and those individuals performing the search must certify to this fact, inclusive of a search explanation.
5. **The Custodian shall comply with conclusion No. 4 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**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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.

Procedural History:

On September 29, 2021, the Council distributed its Interim Order to all parties.

Request for Reconsideration:

On October 5, 2021, the Complainant filed a request for reconsideration of the Council's September 28, 2021 Interim Order based on "new evidence," extraordinary circumstances, fraud, and illegality. The Complainant noted that upon receipt of the September 28, 2021 meeting notification, he was advised by the GRC that he could submit further submissions following the Council's decision.

The Complainant requested that the Council reconsider conclusion No. 2 based on disclosures that occurred during the pendency of the complaint, which constitutes "new information." The Complainant noted that he originally sought the Proposal, but later amended his request to seek the "[e]ntire Voorhees Subdivision file." The Complainant argued that following previous Planning Board Secretary Claire S. Hense's departure, the Borough of Bay Head ("Borough") disclosed an incomplete copy of the 2004 Voorhees Subdivision Application on June 14, 2021. See Exhibit A. The Complainant argued that he was subsequently advised by Borough attorneys that the file was in the Borough Hall, which was constructed after Superstorm Sandy. The Complainant argued that this is notwithstanding multiple searches at the Department of Public Works and promises from Custodian's Counsel to conduct her own search. The Complainant thus disputed that responsive records were destroyed as originally posited by the Borough. The Complainant also contended that the size of the new Borough Hall (essentially one (1) medium-sized room) and file (110 pages and maps) renders the Borough's inability to locate responsive records unbelievable. The Complainant noted that following disclosure, he responded advising that he received certain records, but that the Proposal was still absent from the overall file.

The Complainant further contended that there is sufficient evidence to determine that the Custodian and Ms. Hense knowingly and willfully violated OPRA by failing to disclose subdivision records. The Complainant alleged that the Borough had significant interest in ensuring that the subdivision files and Proposal "remain[ed] missing." The Complainant noted that the wetland forest the Proposal was intended to protect has been replaced by a dwelling and nondisclosure ensured that the responsive records would not be presented at the Planning Board meeting where said construction was approved. The Complainant contended that Ms. Hense verbally advised him that she "buried" constituent letters, which he confirmed at a September 14, 2020 council meeting and after in writing to the Custodian. See Exhibits B-D. The Complainant also noted that Ms. Hense intentionally disclosed to him the wrong records on January 29, 2020 and expected to "hear[] back." The Complainant further contended that Ms. Hense's "willingness to lie about documents is chronic and well documented," noting her failure to acknowledge receipt of a letter from a constituent on a separate issue. See Exhibit E.

Compliance:

On October 5, 2021, the Custodian responded to the Council's Interim Order attaching a certification from current Planning Board Secretary Darren Erbe. Therein, the Custodian certified

that at the time the Complainant submitted his August 21, 2020, previous Planning Board Clerk Claire Hense searched for and was unable to locate responsive recordings. The Custodian certified that upon receiving the Council's Interim Order, she asked Mr. Erbe to perform another search. See also Erbe Cert. ¶ 2. The Custodian certified that Mr. Erbe performed this search and was unable to locate responsive recordings. See also Erbe Cert. ¶ 4-6. The Custodian thus certified that no recordings responsive to the August 21, 2020 OPRA request exist.

Request for Reconsideration (cont'd):

On October 12, 2021, the Complainant submitted an amended request for reconsideration. The Complainant argued that as further proof of his knowing and willful claim against the Borough, he received in response to an October 10, 2021 OPRA request copies of the December 15, 2004 meeting minutes that Ms. Hense claimed did not exist in response to prior OPRA requests. The Complainant presumed that these minutes were withheld because the content, whether the "subdivision was Major or Minor," was a critical element to the Planning Board application.

On October 26, 2021, Custodian's Counsel submitted objections to the Complainant's request for reconsideration. Therein, Counsel reiterated that Superstorm Sandy caused significant damage to the Borough Hall and that many records were lost. Counsel further stated that upon receipt of the Complainant's OPRA requests, Borough staff spent hours searching for the entire Voorhees subdivision file without success. Counsel confirmed that in June 2021, Mr. Erbe located an incomplete 2005 Voorhees subdivision file, which was misfiled. Counsel noted that Mr. Erbe disclosed all records located to the Complainant, but that the Proposal was not located amongst them.

Counsel argued that although the June 2021 discovery constituted "new information," the absence of the Proposal only reinforced the Borough's original response that same could not be located. Counsel thus argued that the Complainant failed to demonstrate that conclusion No. 2 should be reconsidered.

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 Complainant filed the request for reconsideration of the Council's Order September 28, 2021 on October 5, 2021, four (4) business days from the issuance of the Council's Order. Thereafter, the Complainant amended his request for reconsideration on October 12, 2021, ten (10) 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).]

Here, the Complainant alleges that “new evidence” requires the Council to reconsider conclusion No. 2 of its September 28, 2021 Interim Order. The Complainant contended that while his original January 27, 2020 OPRA request sought the Proposal, he later amended it to seek the entire subdivision file. The Complainant argued that said file was found and disclosed on June 14, 2021, but that the Proposal was still not part of the file. Custodian’s Counsel submitted objections noting that although the discovery of the incomplete subdivision file may constitute “new information,” it provided additional support to the fact that the Proposal did not exist. Counsel thus argued that the Complainant failed to meet the threshold for reconsideration of conclusion No. 2.

In reviewing the reconsideration request and objections, the GRC is persuaded that the Complainant did not establish that Interim Order conclusion No. 2 requires reconsideration. Initially, the location and disclosure of the file in June 2021 does not necessarily constitute “new evidence” as defined by the GRC (which is evidence that “*could not* have been provided prior to the Council’s decision because the evidence did not exist at the time.”). Further, it appears the Complainant has shifted the parameters of his January 27, 2020 OPRA request from the Proposal to the total subdivision file. However, all evidence and arguments submitted prior to the reconsideration request point to the OPRA request seeking only the Proposal. That the Complainant and Ms. Hense conversed on inspection of additional Planning Board files in furtherance of attempting to locate the Proposal does not constitute an amendment, as the Complainant now asserts. Instead, it has become clearer that the Proposal cannot be located and that the Council arrived at the correct conclusion that no unlawful denial of access occurred.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 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. The Complainant failed to establish that conclusion No. 2 of the Council’s Order should be reconsidered based on “new evidence,”

extraordinary circumstances, fraud, or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the January 27, 2020 OPRA request sought the Proposal and there is no evidence supporting that it exists. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Compliance

At its September 28, 2021 meeting, the Council ordered the Custodian to perform a search for recordings responsive to the Complainant's August 21, 2020 OPRA request and either disclose them or certify if none existed. The Council noted that should no records exist, any individuals performing the search were also required to submit a legal certification regarding their search. The Council further 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 29, 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 6, 2021.

On October 5, 2021, the fourth (4th) business day after receipt of the Council's Order, the Custodian responded in writing providing certifications from herself and Mr. Erbe affirming that no records existed. Mr. Erbe also certified to the search he conducted, as required by the Order. Thus, the Custodian satisfied the Council's Order by responding in a timely manner and meeting the requirements of conclusion Nos. 4 and 5 thereof.

Therefore, the Custodian complied with the Council's September 28, 2021 Interim Order because she responded in the prescribed time frame certifying to the non-existence of the recordings requested in the August 21, 2020 OPRA request. The Custodian also included a certification from Mr. Erbe, as required by the Council if no records existed. Finally, the Custodian simultaneously provided 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's failure to timely respond to the January 27, and August 21, 2020 OPRA requests resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to each of the records at issue in the Complainant's three (3) OPRA requests because responsive records either did not exist or were exempt from disclosure. Further, the Custodian timely complied with the Council's September 28, 2021 Interim Order. Additionally, 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.

Prevailing Party Attorney's Fees

The GRC notes that the Complainant has been represented by Counsel since the outset of this complaint. Thus, although not previously deferred by the Council, the prevailing party fee issue is a mandatory one for represented parties and will be addressed at this time. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-114, *et seq.* (Interim Order dated July 31, 2012).

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Appellate Division held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney’s fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

Here, the Complainant filed the instant complaint contending that the Custodian unlawfully denied him access to the Proposal, the Ordinance, and meeting recordings from April and May 2005. While the Council found that a “deemed” denial of access occurred for two (2) of the OPRA requests, it has been determined that no unlawful denial of access occurred. Specifically, the Proposal sought in the January 27, 2020 OPRA request does not exist. Further, the Ordinance sought in the August 7, 2020 OPRA request was a draft document exempt from disclosure. N.J.S.A. 47:1A-1.1. Finally, the recordings sought in the August 21, 2020 OPRA request did not exist. Thus, the relief sought here was not achieved and the Complainant is not a prevailing party entitled to an award of attorney’s fees.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian lawfully denied access to the requested records because they either did not exist or were exempt from disclosure. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant has failed to establish in his request for reconsideration of the Council’s September 28, 2021 Interim Order that either 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. The Complainant failed to establish that conclusion No. 2 of the Council’s Order should be reconsidered based on “new evidence,” extraordinary circumstances, fraud, or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the January 27, 2020 OPRA request sought the Proposal and there is no evidence supporting that it exists. Thus, the Complainant’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).
2. The Custodian complied with the Council’s September 28, 2021 Interim Order because she responded in the prescribed time frame certifying to the non-existence of the recordings requested in the August 21, 2020 OPRA request. The Custodian also included a certification from Mr. Erbe, as required by the Council if no records existed. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

3. The Custodian's failure to timely respond to the January 27, and August 21, 2020 OPRA requests resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to each of the records at issue in the Complainant's three (3) OPRA requests because responsive records either did not exist or were exempt from disclosure. Further, the Custodian timely complied with the Council's September 28, 2021 Interim Order. Additionally, 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.

4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian lawfully denied access to the requested records because they either did not exist or were exempt from disclosure. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Executive Director

December 8, 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

Paul Brennan
Complainant

Complaint No. 2020-166

v.

Borough of Bay Head (Ocean)
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 did not bear her burden of proof that she timely responded to the Complainant’s January 27, 2020 and August 21, 2020 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests 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 requests 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 has borne her burden of proof that she lawfully denied access to the January 27, 2020 OPRA request because she certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The requested Ordinance sought in the August 7, 2020 OPRA request constitutes “inter-agency or intra-agency advisory, consultative, or deliberative material” because it was in draft form and thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274 (2009); Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009). Therefore, the Custodian did not unlawfully deny access to the Complainant’s August 7, 2020 OPRA request. N.J.S.A. 47:1A-6.
4. The Custodian may have unlawfully denied access to August 21, 2020 OPRA request seeking April and May 2005 Planning Board recordings. N.J.S.A. 47:1A-6; Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004); Miller v. Westwood Reg’l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010). Thus, the Custodian must perform a search for the requested recordings and

disclose same if they exist. If no recording existed at the time she received the Complainant's OPRA request, the Custodian and those individuals performing the search must certify to this fact, inclusive of a search explanation.

5. **The Custodian shall comply with conclusion No. 4 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**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 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

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
September 28, 2021 Council Meeting**

**Paul Brennan¹
Complainant**

GRC Complaint No. 2020-166

v.

**Borough of Bay Head (Ocean)²
Custodial Agency**

Records Relevant to Complaint:

January 27, 2020 OPRA request: Copies of the 2005 Voorhees subdivision “wooded areas” proposal (“Proposal”).

August 7, 2020 OPRA request: Copies of the “Ordinance on the sidewalk change” (“Ordinance”) discussed at the August 3, 2020 Borough of Bay Head (“Borough”) Council meeting.

August 21, 2020 OPRA request: Copies of the recordings from the April and May 2005 Planning Board meetings.

Custodian of Record: Patricia Applegate

Request Received by Custodian: January 27, 2020; N/A

Response Made by Custodian: January 29, 2020

GRC Complaint Received: September 2, 2020

Background³

Request and Response:

On January 27, 2020, the Complainant submitted the first (1st) Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 29, 2020, Planning Board Clerk Claire S. Hense responded in writing stating that the Complainant received a record the day prior that he alleged was not responsive to the subject OPRA request. Ms. Hense asked the Complainant to identify specific records from the 2004 or 2005 Planning Board file. The Complainant responded asking to inspect the entire file. On January 30, 2020, Ms. Hense responded stating that both files were in storage and would need to be retrieved.

¹ Represented by Michele Donato, Esq. (Lavallette, NJ).

² Represented by Robin La Bue, Esq., of Rothstein, Mandell, Strohm, Halm & Cipriani, P.A. (Lakewood, 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.

On February 11, 2020, the Complainant e-mailed Ms. Hense asking if he could inspect the files on February 13, 2020. On the same day, Ms. Hense responded advising that she could not locate the 2004 file, but that the Director of Public Works could retrieve the 2005 file for inspection. The Complainant responded agreeing to a review of the 2005 file because “the files may be” therein, noting that the final resolution on the subdivision was May 17, 2005. On February 15, 2020, the Complainant sought an update on his pending inspection. On February 18, 2020, Ms. Hense responded stating that, upon return from the holiday weekend, she saw that Public Works located and retrieved the 2005 file. Ms. Hense stated that she would review it and let the Complainant know if the Proposal was therein. Later that day, Ms. Hense responded stating that she was unable to locate any documents regarding the Voorhees project within the 2005 file box.

On July 23, 2020, the Complainant e-mailed Custodian’s Counsel noting that documents responsive to his first (1st) OPRA request were submitted “in relation to the conditional approval of the subdivision in 2006.” Custodian’s Counsel obtained some additional information from the Complainant and stated that she would ask Ms. Hense if she searched the 2006 Planning Board file.

On August 7, 2020, the Complainant submitted the second (2nd) OPRA request to the Custodian seeking the above-mentioned records. On the same day, Custodian’s Counsel responded stating that the Ordinance was not disclosable because it was in draft form. The Complainant responded disputing the denial, noting that the Mayor “approved the current form” per a recording of the August 3, 2020 executive session. Custodian’s Counsel responded stating that the Ordinance was never introduced and remained in draft form.

On August 17, 2020, the Complainant sought an update on his first (1st) OPRA request. On August 20, 2020, the Complainant again sought an update on his first (1st) OPRA request, noting that Custodian’s Counsel failed to update him. The Complainant noted that he understood Superstorm Sandy damaged some records, but that they were subsequently preserved by a third-party contractor.

On August 21, 2020, the Complainant submitted the third (3rd) OPRA request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On September 2, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that regarding the January 27, 2020 OPRA request, he was attempting to locate the Proposal to ascertain what occurred on protected “wetlands and transition areas” within the subdivision. The Complainant noted that he recognizes that the Borough town hall flooded during Superstorm Sandy, but that documents were later recovered by American Freeze Dry Operations, Inc.

The Complainant argued that regarding the August 7, 2020 OPRA request, he disputed the Custodian’s assertion that the Ordinance was still in draft form. The Complainant noted that the Ordinance, which would have removed a variance from a current application for the subdivision in question, was approved by the Mayor on first reading. The Complainant argued that statements

made at the Borough's August 3, 2020 public meeting regarding the Mayor's approval prove that the Ordinance was no longer in draft form.

The Complainant contended that his interactions with the Borough and Planning Board suggest their "intent to deceive" him on this project. The Complainant alleged that the troubling interactions included disclosing information to him that was not responsive to his OPRA requests. The Complainant further argued that Ms. Hence disclosed to the subdivision applicant all OPRA requests related to the subdivision in response to an OPRA request about another property.

The Complaint finally argued that the Custodian failed to respond to his August 21, 2020 OPRA request

Statement of Information:

On September 15, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's first (1st) OPRA request on January 30, 2020. The Custodian certified that her search included having Ms. Hence search off-site Planning Board files for 2004 and 2005 at the Borough Department of Public Works ("DPW"). The Custodian further certified that the Director of DPW and other employees conducted separate searches for responsive records. The Custodian certified that the Borough responded in writing on multiple dates, culminating in a February 18, 2020 denial because no records could be located.

The Custodian certified that as Superstorm Sandy had a significant impact on the Borough in 2012. The Custodian certified that the Borough Hall was inundated with floodwaters and sustained heavy damage to both the building and contents. The Custodian affirmed that many records were either lost or destroyed; notwithstanding the Borough's attempts to salvage as much as it could by contracting with American Freeze Dry Operations, Inc. The Custodian noted that the Borough could not determine what was lost because there was not a before and after list encompassing all potentially existent records. The Custodian averred that multiple attempts to locate responsive records in January, February, July, and August 2020 failed to yield responsive records. The Custodian thus contended that because no records existed, no unlawful denial of access occurred here.

The Custodian asserted that all other "documentation, e-mails, and accusations are extraneous and not relevant to the consideration" of the Borough's handling of the January 27, 2020 OPRA request. Thus, the Custodian did not address OPRA request Nos. 2 and 3 as part of her SOI.

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).

Relating to the August 21, 2020 OPRA request, the Complainant contended in the Denial of Access Complaint that he did not receive a response. Thereafter, the Custodian did not address the OPRA request in the SOI and there is no evidence in the record refuting her failure to respond. Thus, a "deemed" denial of access occurred here.

Relating to the January 27, 2020 OPRA request, the Custodian initially disclosed records two (2) business days after receipt of the OPRA request. On that same day, the Complainant clarified that he wished to inspect Planning Board files for 2004 and 2005. On January 30, 2020, still within the seven (7) business day time frame, Ms. Hense responded on behalf of the Custodian advising that the files were in storage and would need to be retrieved. However, the original seven (7) business day response time frame expired prior to Ms. Hense's February 11, 2020 response. Additionally, considering a restart of the time frame due to the Complainant's "clarification," Ms. Hense's response still fell beyond seven (7) business days.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's January 27, 2020 and August 21, 2020 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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 requests 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.

January 27, 2020 OPRA request:

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). In the matter before the Council, after multiple searches, the Custodian responded on multiple occasions stating that no records existed. In the Denial of Access Complaint, the Complainant disputed the Custodian's response. However, the Complainant included in the complaint an unrelated OPRA request from another individual seeking the same

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.

records to which the Custodian similarly responded that no records existed. The Custodian subsequently certified to this fact in the SOI. The Custodian also certified to the potential that the records sought were destroyed during Superstorm Sandy and were not recovered. In reviewing the Custodian's response, Complainant's Denial of Access Complaint, and SOI certification, the facts support that no responsive record exist. Thus, no unlawful denial of access occurred here.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the January 27, 2020 OPRA request because she certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

August 7, 2020 OPRA request:

OPRA provides that the definition of a government record "shall not include . . . "inter-agency or intra-agency advisory, consultative, or deliberative [{"ACD"}]" material." When the exception is invoked, a governmental entity may "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274, 285 (2009) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. See Educ. Law Ctr., 198 N.J. at 286. The key factor in this determination is whether the contents of the document reflect "formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated." Id. at 295 (adopting the federal standard for determining whether material is "deliberative" and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

The Council has also repeatedly held that draft records fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian's denial as lawful, determined that the requested study of the local police department was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified that a requested letter was in draft form and had not yet been reviewed by the municipal engineer. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018) (holding that draft minutes were exempt from disclosure as ACD material); Ciesla v. N.J. Dep't of Health and Senior Serv., GRC Complaint No. 2010-38

(May 2011) (aff'd Ciesla, 429 N.J. Super. 127 (holding that a draft staff report was exempt from disclosure as ACD material)).

In the matter before the Council, the Complainant sought access to the Ordinance and the Borough denied access under the ACD exemption. In the Denial of Access Complaint, the Complainant argued that the Ordinance was “approved by the Mayor” in its current form and directed the GRC to review the August 3, 2020 meeting for supporting proof. The Custodian did not address this OPRA request in the SOI; however, evidence submitted by the Complainant and the Borough’s August 3, 2020 regular meeting minutes support her denial of access.

Specifically, the Complainant refuted the denial in an e-mail to the Custodian’s Counsel on August 7, 2020. Therein, the Complainant alleged that “it is in the interest of government transparency that the text of the *proposed* ordinance . . . be released.” (Emphasis added). The inclusion of “proposed” within the context of the Complainant’s e-mail strongly indicates that he understood the Ordinance was in draft form at the time of his OPRA request. Additionally, a review of the Borough Council’s August 3, 2020 regular meeting minutes provides evidentiary support of the Ordinance’s draft nature. Therein, the Mayor stated that he “requested [the Borough attorney] to prepare an amendment to the sidewalk ordinance but it wasn’t received in time to get on the agenda.” Borough Regular Minutes. 8, August 3, 2020.⁵ The Borough attorney stated that the ordinance “could be approved for introduction by title only.” After engaging in a discussion with the Complainant, the Borough attorney “. . . advise[d] to have the introduction at the next meeting in August” and agreed to “submit copies to the Council for [] review.” Id. at 9. These facts considered together support that when the Complainant submitted his OPRA request four (4) days after the meeting, the Ordinance was in draft form and thus exempt from disclosure based on precedential case law. Educ. Law Ctr., 198 N.J. 274; Dalesky, GRC 2008-61.

Accordingly, the requested Ordinance sought in the August 7, 2020 OPRA request constitutes ACD material because it was in draft form and thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. 198 N.J. 274; Dalesky, GRC 2008-61. Therefore, the Custodian did not unlawfully deny access to the Complainant’s August 7, 2020 OPRA request. N.J.S.A. 47:1A-6.

August 21, 2020 OPRA request:

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), the Council had held that audio recordings of public session meetings were disclosable because they represented a verbatim account of the meeting. This is regardless of whether minutes had been approved for accuracy and content.

In the matter before the Council, the Complainant sought access to the audio recordings from the April and May 2005 Planning Board meetings. The Custodian did not respond to the subject OPRA request. Further, the Custodian did not present any SOI arguments regarding this OPRA request. Thus, it is unclear whether the records exist or were disclosed to the Complainant

⁵<http://www.bayheadnj.org/bhnj/Government/Agendas%2C%20Minutes%20%26%20Recordings/Archives/2020%20Minutes/8-3-2020%20Regular%20Minutes.pdf?1631210254> (accessed September 9, 2021).

at some point during the pendency of this complaint. However, in looking to both Burlett, GRC 2004-75 and Miller, GRC 2009-49, the GRC is satisfied that an unlawful denial of access may have occurred here.

Accordingly, the Custodian may have unlawfully denied access to August 21, 2020 OPRA request seeking April and May 2005 Planning Board recordings. N.J.S.A. 47:1A-6; Burlett, GRC 2004-75; Miller, GRC 2009-49. Thus, the Custodian must perform a search for the requested recordings and disclose same if they exist. If no recording existed at the time she received the Complainant's OPRA request, the Custodian and those individuals performing the search must certify to this fact, inclusive of a 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 did not bear her burden of proof that she timely responded to the Complainant's January 27, 2020 and August 21, 2020 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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 requests 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 has borne her burden of proof that she lawfully denied access to the January 27, 2020 OPRA request because she certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The requested Ordinance sought in the August 7, 2020 OPRA request constitutes "inter-agency or intra-agency advisory, consultative, or deliberative material" because it was in draft form and thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274 (2009); Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009). Therefore, the Custodian did not unlawfully deny access to the Complainant's August 7, 2020 OPRA request. N.J.S.A. 47:1A-6.
4. The Custodian may have unlawfully denied access to August 21, 2020 OPRA request seeking April and May 2005 Planning Board recordings. N.J.S.A. 47:1A-6; Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004);

Miller v. Westwood Reg'l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010). Thus, the Custodian must perform a search for the requested recordings and disclose same if they exist. If no recording existed at the time she received the Complainant's OPRA request, the Custodian and those individuals performing the search must certify to this fact, inclusive of a search explanation.

5. **The Custodian shall comply with conclusion No. 4 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 deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

September 21, 2021

⁶ 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.

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.