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

July 28, 2020 Government Records Council Meeting

Thomas S. Kirkland
Complainant
v.
Borough of Englishtown Fire District No. 1 (Monmouth)
Custodian of Record

Complaint No. 2020-75

At the July 28, 2020 public meeting, the Government Records Council ("Council") considered the July 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 the Council should dismiss the complaint because the Complainant voluntarily withdrew the complaint in writing via e-mail to the GRC on July 15, 2020, thereby negating the need for any further adjudication.

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 28th Day of July 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: July 30, 2020

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
July 28, 2020 Council Meeting

Thomas S. Kirkland[1] **GRC Complaint No. 2020-75**
Complainant

v.

Borough of Englishtown Fire Dist. No. 1 (Monmouth)[2]
Custodial Agency

Records Relevant to Complaint: Copies of the following records to be picked up:

1. The Board of Fire Commissioners meeting minutes for January 7, 2020 and February 6, 2020, including any and all attachments pertaining to nominating petitions of all candidates submitted.

2. Draft and final approved versions of the 2020 election ballots.

3. Meeting minutes of the closed executive session meeting on March 5, 2020.

4. Any and all correspondence between the Clerk of the Board and Board Attorney pertaining to the candidates to appear on the 2020 election ballot.

5. Any documents providing approval of draft election ballots for print and publishing.

Custodian of Record: Victoria Sarti
Requests Received by Custodian: March 13, 2020
Responses Made by Custodian: None
GRC Complaint Received: April 16, 2020

Background

June 30, 2020 Council Meeting:

At its June 30, 2020 public meeting, the Government Records Council ("Council") considered the June 23, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

[1] No legal representation listed on record.
[2] Represented by Jonathan F. Cohen, Esq., Plosia Cohen LLC (Chester, N.J.). Counsel entered his appearance on July 8, 2020.

1. The Custodian's failure to submit a completed SOI to the GRC, despite repeated] requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian's failure to respond obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b). See Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014). See also Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

2. The Custodian did not bear her burden of proof that she 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).

3. The Custodian failed to bear her burden of proving that the denial of access to the requested meeting minutes was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant copies of minutes for the Board's January 7, 2020 and February 6, 2020 meetings, together with any attachments pertaining to nominating petitions of all candidates submitted. The Custodian shall also disclose to the Complainant a copy of the March 5, 2020 closed session minutes. See N.D. v. Rumson Fair-Haven Bd. of Educ., GRC Complaint No. 2003-56 (December 2003); Merckx v. Twp. Of Franklin Bd. of Educ. (Gloucester), GRC Complaint No. 2009-47 (April 2010).

4. Although the draft of the 2020 election ballot is exempt from access as ACD material pursuant to N.J.S.A. 47:1A-1.1, the final version of the 2020 election ballot is subject to disclosure and the Custodian failed to bear her burden of proving that the denial of access to said record is authorized by law. N.J.S.A. 47:1A-6. As such, the Custodian must disclose the final version of the 2020 election ballot.

5. **The Custodian shall comply with paragraphs number 3 and 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 deliver certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**

6. The Complainant's OPRA request item number 4 seeking correspondence between the Clerk and the Board's attorney pertaining to candidates to appear on the election ballot is invalid because, by lacking a date or range of dates, it fails to seek identifiable government records. Further, the Complainant's request item number 5

seeking any documents providing approval of draft election ballots for print and publishing is overly broad because it fails to specifically identify a record and would require the Custodian to conduct research. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). See also Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011) and Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016). Thus, the Custodian did not unlawfully deny access to the Complainant's requests for said records. N.J.S.A. 47:1A-6.

7. 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 July 1, 2020, the Council distributed its June 30, 2020 Interim Order to all parties. On July 8, 2020, the Custodian's Counsel entered his appearance and acknowledged receipt of the Council's Order. Counsel further stated that the Custodian had no record of receiving the request and complaint in the instant matter prior to receipt of the Council's Order. Council stated that the Custodian is therefore seeking relief from the Interim Order. On July 9, 2020, the GRC e-mailed the Custodian's Counsel, informing him that on May 20, 2020, the GRC provided the Custodian with a copy of the complaint concurrently with the request for the Statement of Information. The GRC further informed Counsel that, because compliance with the Interim Order is due on July 9, 2020, the GRC would grant the Custodian a three (3) business day extension of time to either comply with the Council's Order or submit to the GRC a certification from the Custodian averring that prior to receipt of the Interim Order she had no knowledge that a request and complaint was filed in the instant matter.

On July 9, 2020, the Custodian's Counsel e-mailed the GRC to clarify some of the statements made to the GRC in his July 8, 2020 e-mail. Counsel stated that there was confusion surrounding the instant matter (the underlying request of which was filed anonymously) and a lawsuit filed in Superior Court regarding the validity of an election. Counsel stated that the Custodian did not respond to the anonymous request, but did send all of the requested records, except executive session minutes, to the Complainant. Counsel stated that with respect to the Complainant's communication with Mr. Cooke, there may have been confusion about whether the Complainant was referring to the OPRA request or the Superior Court action. Counsel asked the GRC for some leeway in attempting to comply with the Council's Interim Order. On July 9, 2020, the GRC replied to Counsel's e-mail, informing him that the Custodian would have to comply with the Council's Interim Order; however, the GRC would grant the Custodian a five (5) business day extension of time to do so.

On July 9, 2020, the Complainant sent an e-mail to the Custodian's Counsel and the GRC. The Complainant stated that he was replying to some of the statements made in the July 9, 2020 e-mail from the Custodian's Counsel to the GRC. The Complainant stated that Counsel's allegation that he made an anonymous OPRA request is inaccurate. The Complainant stated that the request was made on his personal letterhead which contained his e-mail address. The Complainant further stated that, to date, he had not received any records from the Custodian. The Complainant also stated that there should have been no confusion regarding his question to Mr. Cooke because when he asked Mr. Cooke for the status of his OPRA request, Mr. Cooke said, "Vickie gave the OPRA to Joe."

On July 13, 2020, the Custodian's Counsel informed the GRC via e-mail that the Custodian provided the Complainant with all of the records ordered by the Council. Counsel stated that he would contact the GRC once the complaint was resolved. On July 13, 2020, the GRC e-mailed the Custodian's Counsel, informing him that the extended time for compliance ends on July 17, 2020, and that the Custodian must therefore comply no later than that date.

On July 15, 2020, the Complainant e-mailed the GRC, voluntarily withdrawing his complaint.

Analysis

Compliance

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should dismiss the complaint because the Complainant voluntarily withdrew the complaint in writing via e-mail to the GRC on July 15, 2020, thereby negating the need for any further adjudication.

Prepared By: John E. Stewart
Staff Attorney

July 21, 2020

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

June 30, 2020 Government Records Council Meeting

Thomas Kirkland
Complainant
v.
Borough of Englishtown Fire Dist. No.1 (Monmouth)
Custodian of Record

Complaint No. 2020-75

At the June 30, 2020 public meeting, the Government Records Council ("Council") considered the June 23, 2020 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. requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian's failure to respond obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b). See Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014). See also Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

2. The Custodian did not bear her burden of proof that she 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).

3. The Custodian failed to bear her burden of proving that the denial of access to the requested meeting minutes was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant copies of minutes for the Board's January 7, 2020 and February 6, 2020 meetings, together with any attachments pertaining to nominating petitions of all candidates submitted. The Custodian shall also disclose to the Complainant a copy of the March 5, 2020 closed session minutes. See N.D. v. Rumson Fair-Haven Bd. of Educ., GRC Complaint No. 2003-56 (December 2003); Merckx v. Twp. Of Franklin Bd. of Educ. (Gloucester), GRC Complaint No. 2009-47 (April 2010).

4. Although the draft of the 2020 election ballot is exempt from access as ACD material pursuant to N.J.S.A. 47:1A-1.1, the final version of the 2020 election ballot is subject to disclosure and the Custodian failed to bear her burden of proving that the denial of access to said record is authorized by law. N.J.S.A. 47:1A-6. As such, the Custodian must disclose the final version of the 2020 election ballot.

5. **The Custodian shall comply with paragraphs number 3 and 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 deliver[1] certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,[2] to the Executive Director.[3]**

6. The Complainant's OPRA request item number 4 seeking correspondence between the Clerk and the Board's attorney pertaining to candidates to appear on the election ballot is invalid because, by lacking a date or range of dates, it fails to seek identifiable government records. Further, the Complainant's request item number 5 seeking any documents providing approval of draft election ballots for print and publishing is overly broad because it fails to specifically identify a record and would require the Custodian to conduct research. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). See also Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011) and Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016). Thus, the Custodian did not unlawfully deny access to the Complainant's requests for said records. N.J.S.A. 47:1A-6.

7. 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.

[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.

Interim Order Rendered by the
Government Records Council
On The 30th Day of June 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: July 1, 2020

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting

Thomas S. Kirkland[1] **GRC Complaint No. 2020-75**
Complainant

v.

Borough of Englishtown Fire Dist. No. 1 (Monmouth)[2]
Custodial Agency

Records Relevant to Complaint: Copies of the following records to be picked up:

1. The Board of Fire Commissioners meeting minutes for January 7, 2020 and February 6, 2020, including any and all attachments pertaining to nominating petitions of all candidates submitted.

2. Draft and final approved versions of the 2020 election ballots.

3. Meeting minutes of the closed executive session meeting on March 5, 2020.

4. Any and all correspondence between the Clerk of the Board and Board Attorney pertaining to the candidates to appear on the 2020 election ballot.

5. Any documents providing approval of draft election ballots for print and publishing.

Custodian of Record: Victoria Sarti
Requests Received by Custodian: March 13, 2020
Responses Made by Custodian: None
GRC Complaint Received: April 16, 2020

Background[3]

Request and Response:

On March 13, 2020, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. The Custodian did not respond to the request.

[1] No legal representation listed on record.
[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.

Denial of Access Complaint:

On April 16, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he submitted an OPRA request to the Custodian on March 11, 2020 via certified mail and received the return receipt indicating delivery on March 13, 2020. The Complainant stated that the Custodian did not respond to his request, and on April 2, 2020, he sent a text message to the Board of Fire Commissioners ("Board") Chairman Peter Cooke inquiring about the status of his request. The Complainant stated that Mr. Cooke replied informing the Complainant that he would check with the Custodian to determine the status of the request. The Complainant further stated that later that same day Mr. Cooke notified him that the request was forwarded to the Board's attorney. The Complainant asserted that he received no further communications regarding his OPRA request from the Custodian or the Board's attorney.

The Complainant stated that his understanding of OPRA was that the Custodian had to either respond to the request within seven (7) business days or request an extension of time to respond. The Complainant stated that the seventh (7^{th}) business day was March 23, 2020; however, the Complainant stated that he understood that Executive Order 107 (Gov. Murphy, 2020) relaxed the statutory compliance deadlines. The Complainant stated that it is his belief that if the Custodian was indeed relying upon Executive Order 107 as the reason for noncompliance, the Custodian should have explained the circumstances causing such delay. The Complainant also stated that he believes the Custodian should have made a "reasonable effort" to respond to the request.

Statement of Information:

On May 20, 2020, the GRC sent the Custodian a request for the Statement of Information ("SOI"). The Custodian failed to return the completed SOI to the GRC.

On May 29, 2020, the GRC sent the Custodian a letter advising her that if the GRC did not receive the SOI within three (3) business days, the complaint would proceed to adjudication based only upon the information contained within the complaint. The Custodian failed to return the completed SOI to the GRC.

Analysis

Failure to Submit SOI

OPRA provides that "Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]" N.J.A.C. 5:105-2.4(a).

OPRA also provides that:

> Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date

> of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.
>
> [N.J.A.C. 5:105-2.4(f).]

Furthermore, OPRA provides that "[a] custodian's failure to submit a completed and signed SOI . . . may result in the Council issuing a decision in favor of the complainant." N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian's failure to adhere to N.J.A.C. 5:105-2.4(a). See also Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

Here, the GRC sent the Custodian, a request for the SOI on May 20, 2020; however, the Custodian failed to comply with the GRC's initial request for the SOI. Following the expiration of the five (5) business day deadline,[4] the GRC again attempted to obtain a completed SOI from the Custodian by sending a "No Defense" letter and requesting a completed SOI within three (3) business days of receipt; however, the Custodian still did not submit a completed SOI.

Accordingly, the Custodian's failure to submit a completed SOI to the GRC, despite repeated requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian's failure to respond obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b). Alterman, Esq., GRC 2013-353. See also Kovacs, GRC 2014-196; Howell, GRC 2015-249.

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).[5] 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).

[4] Because some agencies were operating with reduced staff and/or hours due to the COVID-19 pandemic, the GRC allowed six (6) business days for the Custodian to submit the completed SOI or otherwise contact the GRC.

[5] 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.

Here, the Complainant proved that the agency received the OPRA request on March 13, 2020. When he did not receive a response by the fourteenth (14th) business day, he made an inquiry with the Board Chairman, who confirmed that the Custodian did receive the request. Thereafter, the Complainant waited nine (9) additional business days for a response from the Custodian before filing the complaint alleging he was denied access.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 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.

Here, the Custodian failed to provide a legal explanation and statutory citation for denying access, whether in whole or in part, to any of the requested records. As such, the GRC is adjudicating this complaint based only upon the information contained within the complaint.

Request item number 1 - Board meeting minutes for January 7, 2020 and February 6, 2020.

Request item number 3 - Meeting minutes of the closed session meeting on March 5, 2020.

The Council has long held that approved meeting minutes of a government agency are subject to disclosure. See N.D. v. Rumson Fair-Haven Bd. of Educ., GRC Complaint No. 2003-56 (December 2003), wherein the Council determined that "[t]aped or written minutes of meetings held by public agencies are made in the course of official business and are 'government records' pursuant to N.J.S.A. 47:1A-1.1. OPRA provides that government records are subject to public access unless exempt from access by statute. N.J.S.A. 47:1A-1[.]"[6] See also Merckx v. Twp. Of Franklin Bd. of Educ. (Gloucester), GRC Complaint No. 2009-47 (April 2010); Hemmann v. Borough of South Toms River (Ocean), GRC Complaint No. 2013-224 (Interim Order September 24, 2013).

In the instant complaint, the Complainant specifically identified the records he sought in OPRA request item numbers 1 and 3. The Custodian failed to submit a completed SOI, therefore

[6] For unapproved meeting minutes See Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018), holding that draft meeting minutes are exempt from disclosure). See also Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006), holding that unapproved meeting minutes are exempt from disclosure as advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

there is nothing in the evidence of record to indicate that any of the records are, or may be, exempt from access.

Thus, the Custodian failed to bear her burden of proving that the denial of access to the requested meeting minutes was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant copies of minutes for the Board's January 7, 2020 and February 6, 2020 meetings, together with any attachments pertaining to nominating petitions of all candidates submitted. The Custodian shall also disclose to the Complainant a copy of the March 5, 2020 closed session minutes. See N.D. v. Rumson Fair-Haven Bd. of Educ., GRC Complaint No. 2003-56 (December 2003); Merckx v. Twp. Of Franklin Bd. of Educ. (Gloucester), GRC Complaint No. 2009-47 (April 2010).

Request item number 2 - Draft and final approved versions of the 2020 election ballots.

OPRA provides that the definition of a government record "shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege." See O'Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006). 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. N.J. 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. at 297.

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. Id. at 286 (internal citations and quotations omitted). 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 of a public agency 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 record was a draft document and that draft documents in their entirety are advisory, consultative, or deliberative ("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 a draft that 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) (draft meeting minutes exempt from disclosure); Ciesla v. N.J. Dep't of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011), aff'd Ciesla v. N.J. Dep't of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012) (draft staff report).

Here, the Complainant in OPRA request item number 2 sought both a "draft" and a "final approved" version of the 2020 election ballot. The Custodian did not unlawfully deny access to the draft of the 2020 election ballot because draft documents in their entirety are exempt from access as ACD material pursuant to N.J.S.A. 47:1A-1.1. See also Libertarians, 453 N.J. Super. 83; Ciesla ,429 N.J. Super. 127; Dalesky, GRC 2008-61; Shea, GRC 2010-79. However, the Complainant also sought access to the final version of the 2020 election ballot, and there is nothing in the evidence of record to indicate that this record is exempt from access.

Therefore, although the draft of the 2020 election ballot is exempt from access as ACD material pursuant to N.J.S.A. 47:1A-1.1, the final version of the 2020 election ballot is subject to disclosure and the Custodian failed to bear her burden of proving that denial of access to said record is authorized by law. N.J.S.A. 47:1A-6. As such, the Custodian must disclose the final version of the 2020 election ballot.

Request item number 4 - Any and all correspondence between the Clerk of the Board and Board Attorney pertaining to the candidates to appear on the 2020 election ballot.

Request item number 5 - Any documents providing approval of draft election ballots for print and publishing.

The New Jersey Appellate Division has held that:

> While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination." N.J.S.A. 47:1A-1.*
>
> [MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

> Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case*

> *prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.
>
> [Id. at 549 (emphasis added).]

The court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. at 549 (emphasis added). Such open-ended searches would typically be required by requests that are overly broad and/or require a custodian to conduct research. See Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);[7] N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007), the Council more fully addressed the search versus research issue. In Donato the complainant requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The custodian sought clarification of the request on the basis that it was not specific enough. The Council stated that:

> Pursuant to [MAG], the Custodian is obligated to search her files to find the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word search is defined as "to go or look through carefully in order to find something missing or lost." The word research, on the other hand, means "a close and careful study to find new facts or information." (Footnotes omitted.)
>
> [Id.]

Further, with respect to requests for e-mails and correspondence, the GRC established specific criteria deemed necessary under OPRA to request such records in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain (1) the content and/or subject of the email, (2) the specific date or range of dates during which the email(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. Id.; see also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). The Council has also applied

[7] Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Further, the Council has previously determined that a request failing to contain all appropriate criteria set forth in Elcavage, GRC 2009-07, was invalid. See *e.g.* Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016) (invalid request omitting "date or range of dates").

Here, the Complainant's request item number 4 sought correspondence between the Clerk of the Board and the Board's attorney pertaining to candidates to appear on the 2020 election ballot. The Complainant's request included a subject and the sender/recipient; however, the request did not include a date or range of dates. As such, the request failed to satisfy the elements of a valid request for communications under Elcavage, GRC 2009-07, Armenti, GRC 2009-154, and Inzelbuch, GRC 2015-68.

The Complainant's request item number 5, seeking any documents providing approval of draft election ballots for print and publishing, is overly broad because it fails to specifically identify a record. Moreover, this request would require the Custodian to conduct research to determine which records contained the requested "approval." MAG, 375 N.J. Super. 534; Bent, 381 N.J. Super. 30.

Therefore, the Complainant's OPRA request item number 4 seeking correspondence between the Clerk and the Board's attorney pertaining to candidates to appear on the election ballot is invalid because, by lacking a date or range of dates, it fails to seek identifiable government records. Further, the Complainant's request item number 5 seeking any documents providing approval of draft election ballots for print and publishing is overly broad because it fails to specifically identify a record and would require the Custodian to conduct research. MAG, 375 N.J. Super. 534, 546; Bent, 381 N.J. Super. 30, 37; N.J. Builders Ass'n, 390 N.J. Super. 166. See also Donato, GRC No. 2005-182; Elcavage, GRC 2009-07; Armenti, GRC 2009-154 and Inzelbuch, GRC 2015-68. Thus, the Custodian did not unlawfully deny access to the Complainant's requests for said records. N.J.S.A. 47:1A-6.

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 submit a completed SOI to the GRC, despite repeated requests, results in a violation of N.J.A.C. 5:105-2.4(a). Additionally, the Custodian's failure to respond obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b). See Alterman,

Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014). See also Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

2. The Custodian did not bear her burden of proof that she 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).

3. The Custodian failed to bear her burden of proving that the denial of access to the requested meeting minutes was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant copies of minutes for the Board's January 7, 2020 and February 6, 2020 meetings, together with any attachments pertaining to nominating petitions of all candidates submitted. The Custodian shall also disclose to the Complainant a copy of the March 5, 2020 closed session minutes. See N.D. v. Rumson Fair-Haven Bd. of Educ., GRC Complaint No. 2003-56 (December 2003); Merckx v. Twp. Of Franklin Bd. of Educ. (Gloucester), GRC Complaint No. 2009-47 (April 2010).

4. Although the draft of the 2020 election ballot is exempt from access as ACD material pursuant to N.J.S.A. 47:1A-1.1, the final version of the 2020 election ballot is subject to disclosure and the Custodian failed to bear her burden of proving that the denial of access to said record is authorized by law. N.J.S.A. 47:1A-6. As such, the Custodian must disclose the final version of the 2020 election ballot.

5. **The Custodian shall comply with paragraphs number 3 and 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 deliver[8] certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,[9] to the Executive Director.[10]**

[8] 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.

[9] "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."

[10] 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.

6. The Complainant's OPRA request item number 4 seeking correspondence between the Clerk and the Board's attorney pertaining to candidates to appear on the election ballot is invalid because, by lacking a date or range of dates, it fails to seek identifiable government records. Further, the Complainant's request item number 5 seeking any documents providing approval of draft election ballots for print and publishing is overly broad because it fails to specifically identify a record and would require the Custodian to conduct research. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). See also Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011) and Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016). Thus, the Custodian did not unlawfully deny access to the Complainant's requests for said records. N.J.S.A. 47:1A-6.

7. 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: John E. Stewart
Staff Attorney

June 23, 2020