



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 28, 2007 Government Records Council Meeting

David Mann
Complainant

Complaint No. 2005-69

v.

Borough of Woodcliff Lake
Custodian of Record

At the February 28, 2007 public meeting, the Government Records Council (“Council”) considered the February 21, 2007 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 has not unlawfully denied access to the requested because the requested draft, unapproved closed session meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to Jane Cowley v. Township of Kingwood, GRC Complaint No. 2006-45, (November 2006) and O’Shea v. West Milford Board of Education, GRC Complaint 2004-93 (April, 2006).
2. The Custodian has gone beyond the mandates of OPRA by continuing to provide disclosure of the records responsive to this request as the closed session matters are resolved. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 28th Day of February, 2007

Vincent P. Maltese, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records
Council.

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: March 7, 2007

**Findings and Recommendations of the Executive Director
February 28, 2007 Council Meeting**

David Mann¹

GRC Complaint No. 2005-69

Complainant

v.

Borough of Woodcliff Lake²
Custodian of Records

Records Relevant to Complaint: Minutes from all of the Borough Council's closed (executive session) meetings occurring between and inclusive of January 1, 2001 and March 21, 2005 (redacted only as necessary, if at all).

Request Made: March 22, 2005

Response Made: March 23, 2005

Custodian: Lori Sciarra

GRC Complaint Filed: April 5, 2005

Background

March 22, 2005

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests minutes from all of the Borough Council's closed (executive session) meetings occurring between and inclusive of January 1, 2001 and March 21, 2005 (redacted only as necessary, if at all).

March 23, 2005

Custodian's response to the OPRA request. The Custodian informs the Complainant one (1) day after the OPRA request is made that the minutes requested are not releasable. The Custodian explains that the records responsive have not been authorized for release to the public by the governing body. The Custodian goes on to explain that the Mayor and Council are currently reviewing all of the closed session minutes requested and will make a determination as to when these records will be released. The Custodian states that the Complainant will be notified when the request will be fulfilled.

¹ No legal representation listed at this time.

² Represented by Mark Madaio, Esq. of *Madaio Law Offices* (Bergenfield, New Jersey).

March 28, 2005

Letter from Complainant to Custodian. The Complainant asserts that the previous correspondence from the Custodian violates OPRA because the letter neither granted nor denied him access to the records that the Complainant requested.

March 29, 2005

Letter from Custodian to Complainant. The Custodian explains that closed session meeting minutes are not public records and that is why the Complainant's request is denied.

April 5, 2005

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- March 22, 2005 Complainant's OPRA request,
- March 23, 2005 Custodian's Response to OPRA request,
- March 28, 2005 Complainant's letter to Custodian, and
- March 29, 2005 Custodian's letter to Complainant.

The Complainant asserts that he was denied access to minutes from all of the Borough Council's closed (executive session) meetings occurring between and inclusive of January 1, 2001 and March 21, 2005. The Complainant requests that the GRC establish a deadline by which the Custodian must provide the Complainant with all of the minutes requested. The Complainant also asks that the GRC find the Custodian in violation of OPRA and wishes for the GRC to decide if the Custodian's denial was knowing, willful and unreasonable, and if so, to impose monetary penalties on the Custodian pursuant to N.J.S.A. 47:1A-11.

April 5, 2005

Letter from Custodian to Complainant. The Custodian informs the Complainant that the minutes requested are now public and may be viewed immediately³. The Custodian informs the Complainant that these documents still continue to contain various redacted portions regarding closed session matters that are not yet resolved.

April 11, 2005

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

³ Actually, the Custodian only made some of the requested records available to the Complainant.

May 2, 2005

Request for Statement of Information sent to the Custodian

July 21, 2005

Custodian's Statement of Information ("SOI") submitted with the following attachments:

- Exhibit A – Preliminary Allegations Report created by Daniel E. Somers, Counsel for the Plaintiff for the Superior Court of New Jersey, Law Division/Bergen County, Docket No. BER-L-1164-05 dated February 11, 2005
- Exhibit B – OPRA request dated March 22, 2005,
- Exhibit C – Response from the Custodian to the OPRA request dated March 23, 2005,
- Exhibit D – Letter from Complainant to Custodian dated March 28, 2005,
- Exhibit E – Letter from Custodian to Complainant dated March 29, 2005 ,
- Exhibit F– Letter from Custodian to Complainant dated April 5, 2005, and
- Exhibit G – Complainant's faxed transmittal of the Denial of Access Complaint to the GRC dated April 5, 2005.

The Custodian asserts that the releasable records responsive to Complainant's March 21, 2005 OPRA request were made available on April 5, 2005, the same day that the Denial of Access Complaint was filed with the GRC⁴. The Custodian certifies that the Complainant and the Custodian were in contact regarding the records request from the time the request was made until the release of the records responsive to the request.

The Custodian declares that the Complainant's complaint is moot and that the Complainant has not noted any deficiency in the records that have been made available to him. The Custodian further asserts that this OPRA request for meeting minutes was made because of a pending court case between the Complainant and the Borough of Woodcliff Lake regarding Township ordinances with which the Complainant is not in agreement.

⁴ Actually, the Custodian only made some of the requested records available to the Complainant.

July 26, 2005

Letter from Complainant to GRC. The Complainant acknowledges that he did receive the records responsive to his request. However, the Complainant asserts that the records were too heavily redacted. The Complainant further asserts that he will be amending this complaint or filing a new one very soon⁵. The Complainant also declares that these records were not provided to the Complainant in the statutorily mandated seven (7) business days, and therefore the Complainant believes that the Custodian violated OPRA. The Complainant wants the Council to make a decision on whether there was a knowing and willful violation of OPRA.

August 22, 2005

Letter from GRC to Custodian. The GRC seeks a certification of the Custodian regarding the redactions that were made to the requested records. Specifically, the Custodian was asked to provide the GRC a certification of a document index that would provide the title and date of each document, a general nature description of the redactions, and the legal explanation of each redaction.

August 24, 2005

Custodian's response to GRC's letter. The Custodian provided a redaction index of all redactions made to the meeting minutes provided to the Complainant. The Custodian also explains the specific redactions and states that they were fully in compliance with applicable law.

October 4, 2005

Letter from GRC to Custodian. The GRC requests that the Custodian provides the status of which records responsive to the Complainant's March 22, 2005 OPRA request are "open" or "closed" subject matters as of the date of this correspondence.

October 7, 2005

Letter from Custodian to GRC with Certification enclosed. The Custodian submitted his certification to the GRC in response to the October 4, 2005 request for information. The Custodian identified which subject matters contained in the closed session minutes requested were "open" or "closed". The Custodian further explained that there may be records currently available now that were not available at the time of the Complainant's March 22, 2006 OPRA request. The Custodian asserts that those records will be released upon receipt of a new OPRA request.

⁵ The Complainant did not submit an amendment or an additional Denial of Access Complaint.

October 21, 2005

Letter from GRC to Custodian. The GRC requested that the Custodian submit a certification with the following information:

- List each of the documents that have been disclosed with redactions;
- Cite the specific provision of law, including subsections, that were relied upon when making the redactions;
- List each document that has not been disclosed; and
- Cite the specific provision of law, including subsections, which were relied upon for the denial of access.

October 27, 2005

Letter from Custodian to GRC with Certification enclosed. The Custodian again identified specific records that were redacted explained why the records responsive to the request were not released. The Custodian also attached the following correspondence that was previously submitted to the GRC:

- Exhibit A – Letter dated August 24, 2005 from Custodian to GRC,
- Exhibit B – Receipt of US Postal Service proving that the October 7, 2005 correspondence was copied to the Complainant, and
- Exhibit C – Civil Action Order of the Superior Court of New Jersey, Law Division: Bergen County.

December 13, 2005

Letter from Complainant to GRC. The Complainant requests that the GRC conduct an *in camera* review of the items that have not been disclosed to him.

February 3, 2006

Letter from Custodian to GRC. The Custodian reiterated the Borough's position that when the records responsive to the Complainant's March 22, 2006 OPRA request become available, the Custodian will be sure that the Complainant receives them. The Custodian further states in this letter that there are two additional sets of minutes now available for the Complainant.

March 7, 2006

Letter from Complainant to GRC with the following attachments:

- April 5, 2005 Letter from Custodian to Complainant
- March 7, 2006 OPRA Request

The Complainant asserts that the Borough of Woodcliff Lake continues to refuse to provide him with the redacted minutes that he requested. The Complainant submitted an additional OPRA request to review all closed session minutes, including those redacted, which were made available as of April 5, 2005.

March 7, 2006

Letter from Complainant to Custodian. The Complainant informs the Custodian that the Complainant's OPRA request dated March 7, 2006 was denied. The

Complainant expresses that he still wishes to review the closed session minutes, redacted as necessary, and requests that the Custodian advise him what to do next.

March 16, 2006

Letter from GRC to Custodian. The GRC requests an updated certification of which records responsive to the Complainant's March 22, 2005 OPRA request have not been disclosed. The GRC also requests that the Custodian submit an updated document index pursuant to his October 25, 2005 submission.

March 20, 2006

Letter from Custodian to GRC. The Custodian submits a letter and a document index showing which records are releasable and which records remained exempt from disclosure as of March 20, 2006.

The document index provides the date, topic of closed session discussion, general nature description, and a legal explanation for non-disclosure and/or redactions. The Custodian certifies that all records responsive to the request that are not exempt from disclosure have been released with appropriate redactions. The Custodian further certifies that various minutes at issue in this complaint have been made available and have been received by the Complainant.

The Custodian states that the Borough will continue to update the Complainant and the GRC when subject matters are closed by the governing body and become available for disclosure.

Analysis

Whether the Custodian unlawfully denied access to the executive session meeting minutes?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or

in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... [t]he terms *shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA further provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, *a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request,* provided that the record is currently available and not in storage or archived..." (Emphasis added) N.J.S.A.47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

The Complainant asserts that the Custodian did not provide the records responsive to his OPRA request within the statutorily mandated seven (7) business days. The Complainant acknowledges that the Custodian did provide a response in writing to the request one (1) day after the OPRA request was received. The Complainant further asserts that the Custodian's initial response failed to outline specific information regarding when the Complainant would receive the records responsive. The Complainant asks that the GRC find the Custodian in violation of OPRA and wishes for the GRC to decide if the Custodian's denial was knowing, willful, and unreasonable, and if so, to impose monetary penalties on the Custodian pursuant to N.J.S.A. 47:1A-11.

The Custodian asserts that the releasable records responsive to Complainant's March 21, 2005 OPRA request were made available on April 5, 2005, the same day that the Complainant's Denial of Access Complaint was filed with the GRC. The Custodian certifies that the Complainant and the Custodian were in contact regarding the records request from the time the request was made until the release of the records responsive to the request. The Custodian declares that at the time of the request, the draft meeting minutes were not approved and therefore not public records. The Custodian also asserts that the Borough took great efforts to have four (4) years of minutes approved and released to the Complainant as soon as possible. Additionally, in a certification dated March 20, 2006, the Custodian certifies that the Borough will continue to release the un-redacted records responsive as they become available.

In Cowley v. Township of Kingwood, GRC Complaint No. 2006-45 (September, 2006), the Council held that the unapproved draft meeting minutes of the Township Committee meetings constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, as well as O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April, 2006). Accordingly, the Custodian in the complaint now before the GRC has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6, as the Custodian certifies that at the time of the Complainant's OPRA request the minutes were not yet approved by the governing body. Thus, these draft, unapproved meeting minutes were exempt from disclosure at the time of the Complainant's OPRA request as advisory, consultative or deliberative material. However, the Custodian has gone above and beyond the requirements of OPRA by providing the requested records to the Complainant as they are approved by the governing body, thus making them disclosable under OPRA.

Based upon the Custodian's certification and actions, the Custodian has acted in good faith to provide access to the requested minutes. The Custodian presumably operated under the erroneous belief that she had an obligation to notify the Complainant when the requested draft minutes were approved by the governing body after the date of the Complainant's request. In Robert Blau v. Union County, GRC Complaint No. 2003-75 (January 2005), the Council ruled that "[t]he request for copies 'on a continuing basis' is not valid under OPRA and that the requestor must submit a new OPRA request to the custodian for each new batch of documents sought." While the facts of this complaint are not exactly the same as those in Blau, a similar ruling applies. At the time of the Complainant's request, the requested meeting minutes were exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian is not obligated any further than to either grant or deny access at the time of the request. If the Complainant wants to receive a copy of the requested meeting minutes once they are approved by the governing body, he must submit a new

OPRA request pursuant to Robert Blau v. Union County, GRC Complaint No. 2003-75 (January 2005).

Whether the Custodian's delay in access to the requested executive session minutes rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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.

The Custodian certifies that a response was made to the Complainant's March 21, 2005 OPRA request on March 23, 2005, at which time the Complainant was notified that the records responsive were not available because they were not yet approved for release by the governing body. On March 29, 2005, the Custodian notified the Complainant in writing that the records responsive to the request would be presented to the governing body for approval within the week. A majority of the releasable portions of executive session minutes from January 2001 through March 21, 2005 were made available to the Complainant, with redactions made pursuant to OPRA, on April 5, 2005. The Custodian continues to release the records responsive as the issues contained within become resolved.

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 at 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 (Berg); 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 (App. Div. 1996) at 107).

The Complainant received two correspondences from the Custodian pertaining to his OPRA request within the statutorily mandated seven (7) business day time period. The Custodian responded to the Complainant's OPRA request one (1) day after it was received explaining that the records had not yet been approved by the governing body and were thus exempt from disclosure as advisory, consultative or deliberative material, as the Council has previously ruled in Cowley.

In the Custodian's second response to the Complainant, the Custodian explained that the records responsive would be presented to the governing body for approval within the week and upon approval the minutes would be provided to the Complainant, redacted as necessary pursuant to OPRA. The Custodian has also gone beyond the mandates of OPRA by continuing to provide disclosure of the records responsive to this request as certain closed session matters are resolved. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

3. The Custodian has not unlawfully denied access to the requested because the requested draft, unapproved closed session meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to Jane Cowley v. Township of Kingwood, GRC Complaint No. 2006-45, (November 2006) and O'Shea v. West Milford Board of Education, GRC Complaint 2004-93 (April, 2006).
4. The Custodian has gone beyond the mandates of OPRA by continuing to provide disclosure of the records responsive to this request as the closed session matters are resolved. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By:

Rebecca Steese
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

Date: February 21, 2007

