

FINAL DECISION

November 15, 2006 Government Records Council Meeting

James Vogel
Complainant

Complaint No. 2006-113

v.

Beach Haven Borough
Custodian of Record

At the November 15, 2006 public meeting, the Government Records Council (“Council”) considered the November 8, 2006 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 deny access to government records pursuant to N.J.S.A. 47:1A-1.1 because they were not made, maintained or kept on file at the time of the OPRA request.
2. The Custodian properly notified the Complainant that the requested minutes could not be provided since the records did not exist at the time of the request. Therefore, the Custodian has not violated N.J.S.A. 47:1A-5.i.
3. Pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council’s powers and duties, the GRC does not have the authority to regulate whether a Township properly notifies its residents of its meetings.
4. The Custodian has not violated N.J.S.A. 47:1A-5.g. in not providing the Complainant with a copy of the request at the time the request was made.

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 15th Day of November, 2006

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: November 21, 2006

**Findings and Recommendations of the Executive Director
November 15, 2006 Council Meeting**

**James Vogel¹
Complainant**

GRC Complaint No. 2006-113

v.

**Beach Haven Borough²
Custodian of Records**

Records Relevant to Complaint:

Minutes from the May 23, 2006 meeting of the Board of Commissioners.³

Request Made: May 24, 2006

Response Made: June 5, 2006

Custodian: Judith S. Howard

GRC Complaint Filed: June 5, 2006

Background

May 24, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the minutes of the Board of Commissioners May 23, 2006 meeting.

June 5, 2006

Custodian's faxed response to the OPRA request. The Custodian informs the Complainant, seven (7) business days after the request, that the requested documents are not yet prepared. The Custodian offers to fax the requested records to the Complainant once they are complete. The Custodian states that she expects that the records will be ready on June 7, 2006, and if they are not, she will forward him the unfinished document at that time.

June 5, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC"). The Complainant states that he made his request on May 24, 2006, and was informed verbally by the Custodian that the meeting was a long one and she was unaware when the minutes would be available. The Complainant states that he was informed on June 5, 2006 via facsimile, that the requested documents would be ready sometime during the following week because they had not yet been prepared.

¹ No legal representation indicated in the Denial of Access Complaint.

² Legal representation is Jerry Dasti, Esq. of Dasti, Murphy, McGuckin, Ulaky, Cheros, & Connors located in Forked River, NJ.

³ The OPRA request states "transcripts." However, the Custodian and Complainant use the terms "minutes" and "transcripts" interchangeably.

The Complainant states that, to his knowledge, the minutes should have been provided within seven (7) business days pursuant to OPRA. Additionally, the Complainant states that he does not believe any legal notices were sent to the newspapers announcing the meeting that is subject of this Complaint. The Complainant also indicates that he was not provided a copy of his request form by the Custodian at the time of his request.

June 7, 2006

Custodian's fax to the Complainant. The Custodian informs the Complainant that the draft version of the requested records will be available for pick-up at 10:00 am the following day.

June 13, 2006

Mediation Offer sent to both parties.

July 11, 2006

Request for Statement of Information sent to the Custodian.

July 10, 2006

Letter from the Custodian to the GRC. The Custodian states that the Complainant requested to review a draft copy of minutes of a meeting held by the Board of Commissioners on May 23, 2006, prior to their approval. The Custodian states that the requested documents have now been provided to the Complainant. The Custodian states that while the Borough questions the disclosability of meeting minutes prior to their approval, the Complainant has now received the requested document. The Custodian further requests mediation in the event that the Complainant does not withdraw this complaint.

July 12, 2006

Letter from the Complainant to the Custodian. The Complainant states that he is not willing to drop the Complaint based on the Custodian's assertion that the Complainant was not entitled to the requested meeting minutes because they were unapproved. The Complainant asserts that the requested minutes should have been provided within seven (7) business days of the meeting and cites "N.J.S.A. 47:1A" as the basis for this assertion.

July 24, 2006

Custodian's signed Agreement to Mediate. The Complainant did not submit a signed Agreement to Mediate.

August 15, 2006

Letter from the GRC to the Custodian. The letter states that the GRC provided the Custodian with a request for a Statement of Information on July 11, 2006, and has not received a response to date. It also states that if no submission is made within three (3) business days of receipt of this letter, this case may proceed to adjudication before the GRC with the documents already on file.

August 18, 2006

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

- June 5, 2006 Custodian's faxed response to the OPRA request,
- June 7, 2006 Custodian's faxed response to the OPRA request,
- Board of Commissioners meeting minutes from the May 23, 2006 meeting, marked "DRAFT",
- July 10, 2006 letter from the Custodian to the GRC, and
- July 12, 2006 letter from the Complainant to the Custodian.

The Custodian asserts that the Complainant's May 24, 2006 request for the minutes of the three (3) hour long May 23, 2006 meeting was for documents that had not yet been prepared. The Custodian states that the Complainant was informed on June 5, 2006, that the requested minutes were in the process of being prepared and that he would be notified when they are available for pick up. The Custodian asserts that despite the concerns of the Borough Attorney regarding the disclosability of meeting minutes prior to their approval by the governing body, the Custodian released the requested minutes in draft form on June 8, 2006.

November 1, 2006

Letter from the GRC to the Custodian. The GRC requests a definitive statement as to whether or not the requested documents were in existence at the time of the request.

November 1, 2006

Custodian's certification. The Custodian certifies that the records requested did not exist at the time of the Complainant's OPRA request.

Analysis

Whether the Custodian unlawfully denied access to the requested May 23, 2006 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 ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also states 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 states that he made his request on May 24, 2006, and was informed verbally by the Custodian that the meeting was a long one and she was unaware when the minutes would be available. The Complainant states that he was informed on June 5, 2006, via facsimile, that the requested documents would be ready sometime during the following week because they had not yet been prepared.

Based on the certification of the Custodian the requested minutes had not been prepared and so did not exist at the time of request. OPRA states that a government record consists of records which are made, maintained, kept on file, or received by a public agency in the course of its official business. 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. Thus, there was no unlawful denial of access to the May 23, 2006 meeting minutes because the minutes from the May 23, 2006 meeting of the Board of Commissioners were not made, maintained or kept on file at the time of the Complainant’s May 24, 2006 OPRA request.

The Complainant asserts that the minutes should have been provided within seven (7) business days pursuant to OPRA. OPRA provides that a Custodian must grant or deny a request for access to a government record as soon as possible, but not later than seven (7) business days. The Custodian in this case did inform the Complainant, within the seven (7) day time period, that there were no records responsive to the request at the time it was made. Therefore, the Custodian has not violated N.J.S.A. 47:1A-5.i., because the records could not be provided since the records did not exist at the time of the request and the Custodian properly notified the Complainant of this.

The Custodian did not deny access to government records pursuant to N.J.S.A. 47:1A-1.1 because they were not made, maintained, or kept on file at the time of the OPRA request. The Custodian has not violated N.J.S.A. 47:1A-5.i. because the Custodian properly notified the Complainant that the requested minutes could not be provided since the records did not exist at the time of the request.

Whether the Borough failed to provide written notice of the May 23, 2006 meeting?

Pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council's powers and duties, the Council shall:

“receive, hear, review and adjudicate a complaint filed by any person concerning a *denial of access to a government record* by a records custodian ...; issue advisory opinions ...; prepare guidelines and an informational pamphlet ...; prepare lists for use by records custodians ...; make training opportunities available for records custodians ..., and operate an informational website and a toll-free helpline ...” (Emphasis added.) N.J.S.A. 47:1A-7.b.

The Complainant states that he does not believe any legal notices were sent to the newspapers announcing the May 23, 2006 meeting. The GRC only has authority determine those matters concerning a denial of access to government records. The agency's responsibilities regarding public notice of meetings are not matters addressed in OPRA and are not under the authority of the GRC as delineated in N.J.S.A. 47:1A-7.b.

Pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council's powers and duties, the GRC does not have the authority to regulate whether a Township properly notifies its residents of its meetings.

Whether the Custodian violated OPRA in not providing the Complainant with a copy of his May 23, 2006 OPRA request?

“If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof.” N.J.S.A. 47:1A-5.g.

The Complainant indicates that he was not provided a copy of his request form by the Custodian at the time of his request.

N.J.S.A. 47:1A-5.g. states that in the event a Custodian is unable to comply with a request for access, the reasons for denial should be noted on the request form and returned to the requestor. However, OPRA does not require the Custodian to provide a copy of the OPRA request at the time that the request is made.

Therefore, the Custodian has not violated N.J.S.A. 47:1A-5.g. in not providing the Complainant with a copy of the request at the time the request was made.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

5. The Custodian did not deny access to government records pursuant to N.J.S.A. 47:1A-1.1 because they were not made, maintained or kept on file at the time of the OPRA request.
6. The Custodian properly notified the Complainant that the requested minutes could not be provided since the records did not exist at the time of the request. Therefore, the Custodian has not violated N.J.S.A. 47:1A-5.i.
7. Pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council's powers and duties, the GRC does not have the authority to regulate whether a Township properly notifies its residents of its meetings.
8. The Custodian has not violated N.J.S.A. 47:1A-5.g. in not providing the Complainant with a copy of the request at the time the request was made.

Prepared By:

Colleen C. McGann
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

November 8, 2006