



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 28, 2015 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2014-402

v.

Harrison Township Fire District (Gloucester)
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 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. Because OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is without authority to impose a statute of limitations where one does not exist, there is no statute of limitations barring the GRC’s adjudication of this complaint. See Mason v. City of Hoboken, 196 N.J. 51 (2008). See also N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240 (1950) Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated October 29, 2013).
2. The GRC must conduct an *in camera* review of the responsive May 16, and June 19, 2013, executive session minutes to determine the validity of the Custodian’s assertion that the records are exempt in their entirety under OPRA because they contain information regarding labor negotiations, ongoing litigation, and included attorney-client privileged material. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7).
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "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."

the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of July, 2015



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 29, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2015 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2014-402

v.

**Harrison Township Fire District (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all Harrison Township Fire District (“HTFD”) executive session minutes for meetings held between March 1, 2013, and August 31, 2013.

Custodian of Record: Brian Bartholomew
Request Received by Custodian: June 14, 2014
Response Made by Custodian: June 23, 2014
GRC Complaint Received: November 26, 2014

Background³

Request and Response:

On June 5, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 14, 2014, the Complainant e-mailed the Custodian noting that his initial request errantly included the dates “March 1, 2014 to August 31, 2014.” The Complainant thus clarified his initial request to reflect the appropriate dates of “March 1, 2013 to August 31, 2013.”

On June 23, 2014, the sixth (6th) business day after receipt of the clarified OPRA request, the Custodian responded in writing, stating that the responsive records are not in electronic format and that the Complainant must pay \$0.40 in applicable copy costs to provide same. Additionally, the Custodian denied access to the minutes from May 16, and June 19, 2013, claiming that those records are exempt in their entirety because they contain information pertaining to labor negotiations, ongoing litigation, and are subject to the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7); O’Shea v. West

¹ Represented by Anthony H. Ogozalek, Esq., of Beckman, Ogozalek, Paglione, Londar (Gibbsboro, NJ).

² Represented by Eric J. Riso, Esq., of Platt & Riso, P.C. (Stratford, 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.

Milford Bd. of Educ., 391 N.J. Super. 534, 540 (App. Div. 2007)(*certif. denied*, 192 N.J. 292)(2007)).

On September 1, 2014, the Complainant sent a check to the Custodian in the amount of \$0.40. However, the Complainant requested that the Custodian explain why he could not have faxed him the responsive records. The Complainant also requested that the Custodian disclose the May 16, and June 19, 2013 minutes with redactions. On September 10, 2014, the Custodian faxed nine (9) pages of records to the Complainant and deposited the Complainant's check into HTFD's bank account.

Denial of Access Complaint:

On November 26, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that the Custodian unlawfully denied access to the May 16, and June 19, 2013 minutes. The Complainant asserted that other minutes provided by the Custodian, which included start and stop times, contained at least some innocuous information that is not exempt under OPRA. The Complainant asserted that the Custodian should have disclosed the minutes with redactions because they are not inherently exempt from disclosure in their entirety. N.J.S.A. 47:1A-5(g).

Further, the Complainant asserted that he had no knowledge of the content of the minutes with the exception of the topics identified in the closed session resolutions that he received from the Custodian. The Complainant noted that the Custodian did not include in his response a document index, privilege log, or other explanation. The Complainant asserted that he was thus unable to evaluate and assess the reasonableness of the Custodian's denial. Burke v. Brandes, 429 N.J. Super. 169, 178 (App. Div. 2012).

The Complainant requested that the GRC: 1) determine that the Custodian violated OPRA by denying access to the May 16, and June 19, 2013, executive session minutes in their entirety; 2) order the Custodian to disclose the responsive records in redacted or unredacted form, but only to the extent necessary; and 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Statement of Information:

On December 18, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on June 14, 2015. The Custodian certified that he responded in writing on June 23, 2014, denying access to the HTFD's May 16, and June 19, 2013, minutes in their entirety.

The Custodian first argued that this complaint should be dismissed because same is time barred. Mason v. City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian contended that he last responded on September 10, 2014, by providing access to responsive records. Thus, the Complainant had until October 27, 2014, to file a Denial of Access Complaint and waited until November 26, 2014.

The Custodian next argued that the Complainant appeared to be misleading the GRC by failing to note that he submitted more than two (2) OPRA requests seeking the records at issue here. The Custodian also noted that the HTFD provided the Complainant with numerous records in response to both requests. Further, the Custodian argued that although the Complainant acknowledged receipt of records that he stated were not at issue in this complaint, such records are indeed at issue.

The Custodian stated that the HTFD acknowledges that OPRA's purpose is to maximize the public's knowledge of government but that the right to disclosure is not unlimited. Mason, 196 N.J. at 64; Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 588 (2011). The Custodian stated that OPRA provides for multiple exemptions, to include the attorney-client privilege and personnel exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; Burnett v. Cnty. of Bergen, 198 N.J. 408, 422 (2009). Moreover, the Custodian stated that OPRA also recognizes exemptions contained in the Open Public Meetings Act ("OPMA"). See O'Shea, 391 N.J. Super. at 540 (holding that OPRA "dovetails with OPMA" to exempt records under N.J.S.A. 10:4-12(b) in accordance with N.J.S.A. 47:1A-9). To this end, the Custodian contended that he lawfully denied access to the responsive minutes. N.J.S.A. 47:1A-6. The Custodian asserted that, to the extent that the minutes dealt solely with matters not subject to disclosure, he lawfully denied access to same in their entirety. Additionally, the Custodian noted that the minutes at issue here are different from the minutes he provided to the Complainant due to a change in HTFD secretaries: the new secretary began omitting the start and stop times from the minutes.⁴

Additional Submissions:

On January 8, 2015, the Complainant's Counsel e-mailed the GRC, requesting that the GRC disregard HTFD's accusation that the Complainant acted to mislead. Counsel noted that the Complainant chose not to include the prior OPRA request in this complaint because he repeated his request for the June 19, 2013, minutes in the OPRA request at issue herein.

On January 12, 2015, the Custodian's Counsel e-mailed the GRC, objecting to Complainant Counsel's reply. Counsel further reiterated prior SOI arguments as to why the Custodian properly denied access to the May 16, and June 19, 2013, minutes. O'Boyle v. Borough of Longport, 218 N.J. 168, 185 (2014).

Analysis

Statute of Limitations

As a threshold issue, the Custodian asserted in the SOI that the Complainant did not timely file his Denial of Access Complaint because the Complainant waited to file his complaint until well after forty-five (45) days from the September 10, 2014, response. The Custodian argued that that the Supreme Court of New Jersey held that requestors who choose to file an

⁴ The Custodian argued that the Complainant abandoned his claim to the records under common law by failing to present any legal arguments herein. However, pursuant to N.J.S.A. 47:1A-7, the GRC only has the authority to adjudicate requests made pursuant to OPRA. See also Rowan v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).

action to challenge a Custodian's denial must do so within forty-five (45) days. Mason, 196 N.J. 51 (2008). For this reason, the Custodian argued that the complaint must be dismissed.

In Mason v. City of Hoboken, 196 N.J. 51 (2008), the Supreme Court determined that the appropriate statute of limitations for filing a denial of access complaint *in Superior Court* was 45 days from the date of the Custodian's denial of access. The Court noted that this statute of limitations was consistent with the limitations period in actions in lieu of prerogative writs. Id. The Court further noted that "the former Right to Know Law specifically directed that litigants headed to Superior Court should proceed via an action in lieu of prerogative writs. N.J.S.A. 47:1A-4 (repealed 2002). That language does not appear in OPRA. *See* N.J.S.A. 47:1A-6." Id.

The Court also stated that:

The Legislature plainly stated that requestors denied access to public records may file an action in Superior Court or a complaint before the GRC. N.J.S.A. 47:1A-6. Those matters "shall proceed in a summary or expedited manner." Beyond that, the Legislature specifically deferred to the Supreme Court to adopt court rules "necessary to effectuate the purposes of this act." N.J.S.A. 47:1A-12. The Legislature's action was consistent with our Constitution, which vests this Court with the authority to create procedural rules *for court practices*. *See* N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240, 255 (1950).

Id. at 68 (emphasis added).

The Court therefore held that "requestors who choose to file an action in Superior Court to challenge the decision of an OPRA custodian must do so within 45 days . . ." Id. at 70. Thus, the holding in Mason, 196 N.J. 51, is limited to complaints filed in the Superior Court of New Jersey.

The New Jersey Legislature is empowered to delegate to an administrative agency the authority to promulgate rules and regulations interpreting and implementing a statute. An appellate court will defer to an agency's interpretation of a statute unless it is plainly unreasonable. The presumption of validity, however, is not without limits. If an agency's statutory interpretation is contrary to the statutory language, or if the agency's interpretation undermines the Legislature's intent, no deference is required. An appellate court's deference does not go so far as to permit an administrative agency, under the guise of an administrative interpretation, to give a statute any greater effect than is permitted by the statutory language. *See*, Reilly v. AAA Mid-Atlantic Ins. Co. of NJ, 194 N.J. 474 (2008). OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC. Therefore, the GRC is without authority to impose a statute of limitations where one does not exist. *See also* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated October 29, 2013) at 4.

Accordingly, because OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is without authority to impose a statute of limitations where one does not exist, there is no statute of limitations barring the GRC's

adjudication of this complaint. See Mason, 196 N.J. 51. See also N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240; Carter, GRC 2012-288 *et seq.*

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁵ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Complainant disputed the Custodian’s denial of access to the May 16, and June 19, 2013, executive session minutes. The Complainant asserted that the Custodian could have provided the minutes with redactions, as some of the information contained therein likely did not

⁵ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

fall under any OPRA exemption. Conversely, the Custodian argued that the responsive minutes were exempt in their entirety under OPRA because they contained information regarding labor negotiations, ongoing litigation, and included attorney-client privileged material. N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7). However, the GRC must review same in order to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the responsive May 16, and June 19, 2013, executive session minutes to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA because they contain information regarding labor negotiations, ongoing litigation, and included attorney-client privileged material. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7).

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is without authority to impose a statute of limitations where one does not exist, there is no statute of limitations barring the GRC's adjudication of this complaint. *See Mason v. City of Hoboken*, 196 N.J. 51 (2008). *See also* N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240 (1950) Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288 *et seq.* (Interim Order dated October 29, 2013).
2. The GRC must conduct an *in camera* review of the responsive May 16, and June 19, 2013, executive session minutes to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA because they contain information regarding labor negotiations, ongoing litigation, and included attorney-client privileged material. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1, N.J.S.A. 10:4-12(b)(4) and (7).
3. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction**

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

July 21, 2015

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁸ "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."