

New Jersey Government Records Council Denial of Access Complaint

Please read these instructions before completing this form:

- This form is to be used only for claims of denial of access to public records that you want the Government Records Council (GRC) to decide. Your request must have been made on or after July 8, 2002 under "OPRA," the Open Public Records Act (N.J.S.A. 47:1A-1 et seq.).
- If you believe you have wrongfully been denied access to a public record under OPRA, you may ask the GRC staff for informal assistance in resolving the matter by calling 866-850-0511, by e-mail at grc@dca.state.nj.us, or by writing to the GRC at P.O. Box 819, Trenton, NJ 08625. If a resolution cannot be reached or if you do not wish to consult the GRC staff, you may EITHER file this Complaint with the GRC or seek relief from the Law Division of Superior Court, but not both.
- Please print or type your responses, and provide ALL information requested. Incomplete forms will delay processing. This form is available in downloadable format from the GRC web site at www.nj.gov/grc.
- Only one complaint is required for each OPRA request form, regardless of the number of documents sought in the request.
- The GRC recommends that you send the Custodian listed in Section 2 a copy of this complaint and that you keep a copy for your own files.

1. About the Requester of the Documents:

Full Name: John Paff

Mailing Address: PO Box 5424

City: Somerset State: NJ ZIP 08875-5424

Please provide a phone number at which GRC staff can contact you between 8 A.M.-5 P.M., Monday-Friday: 908-325-0129

Fax Number: 908-325-0129 E-Mail address (if used): paff@pobox.com

If you are represented by an attorney, please provide:

Name: n/a Telephone Number: _____ Fax Number: _____

Should we contact your attorney for further information on this Complaint? Yes No

2. About the Custodian of Records:

Name of the public agency from which records were sought: Township of Plainsboro

Name of custodian on whom records request was served: Patricia F. Hullfish, Township Clerk

Telephone Number: 609-799-0909 E-Mail address (if used): _____

Name of custodian who denied records request: Patricia F. Hullfish, Township Clerk

Telephone Number: same Other Telephone (if used): _____

Fax Number: 609-799-9204 E-Mail address (if used): _____

3. About the Record Request:

Date your records request was provided to the custodian: January 20, 2005

Did you receive a reply to your request? Yes No

If so, state the date your request was denied: February 3, 2005

Has there been any other complaint filed with the GRC concerning this record request or any document sought in it?
Yes No

If yes, state the date the Complaint was submitted to the GRC, the case number of the Complaint, and the final disposition of the Complaint, if known.

Date: _____ Case Number: _____

Disposition: _____

Have you ever before spoken with or written to the GRC or its staff about the record request or any document sought in it?

Yes Date: _____ No

Have you filed any action with the N.J. Superior Court concerning this record request or any document sought in it?

No Yes If Yes, Docket Number: _____

4. Documents to submit with this Form:

- Complete** the attached **Records Denied List** to describe the records to which you were denied access.
- Attach** a copy of the Records Request Form you filed with the public agency and any correspondence between you and the record custodian(s) or staff that concern the portion of your OPRA request that was denied. Be sure to include any e-mail, memoranda, phone messages, or any other documents such as affidavits, or certifications related to the request and the denial.
- Summarize** in writing the content, time and date of any conversations regarding this complaint, along with the names of the participants and any witnesses. Use the attached **Detail Summary** for this purpose.
- Provide** any written arguments or other information you would like the Council to consider in deciding your complaint.

5. Verification of Complaint:

By signing this complaint, I affirm that:

- I am the person who submitted the OPRA request for records which is the subject of this Complaint;
- The information I have provided is true to the best of my knowledge and belief;
- The documents submitted with this Complaint are true copies of material which I believe is relevant to my claim; and
- I am not seeking disclosure of any personal information pertaining to the victim of any crime committed by me which is an indictable offense under the laws of the State of New Jersey or any other State, or pertaining to the family of that victim.

Signature (required)

Date

MAIL THIS COMPLAINT AND ALL SUPPORTING DOCUMENTATION TO:

Government Records Council, PO Box 819, Trenton, New Jersey 08625

The GRC recommends that Requester send the Custodian listed in Section 2 a copy of this complaint.

**New Jersey Government Records Council
Denial of Access Complaint –Records Denied List**

For GRC use only

Name of Complainant: _____

This is Page ___ of ____.

Please fill out this form describing the record (or portion of it) to which access has been denied, the response to your request, including the reason given for denial of access. Submit additional pages if necessary.

Item #	Description of record (or portion)	Response to request
1	See attached sheets for full explanation and exhibits.	See attached sheets for full explanation and exhibits.

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Paff v. Plainsboro Township***

Statement of Facts and Introduction of Exhibits:

1. On January 20, 2005, Requestor mailed a government records request (Exhibit A) to Custodian.
2. With her letter dated February 3, 2005 (Exhibit B), Custodian furnished Requestor with documents responsive to all but two of the bulleted items set forth in the request. The two bulleted items for which records were not provided are:
 - *Minutes of the Township Committee's executive sessions of September 11, 2002, September 25, 2002 and October 27, 2004 redacted as little as necessary, if at all.*
 - *Minutes of the public Township Committee meeting held on January 12, 2005 redacted as little as necessary, if at all.*
3. Attached as Exhibits C, D and E are the Township Committee's resolutions that authorized its executive sessions of September 11, 2002, September 25, 2002 and October 27, 2004, respectively.
4. When Requestor visited Custodian's office on January 13, 2005, he was told by her Deputy Clerk that the Township Committee typically meets twice a month—a "regular" meeting on the 2nd Wednesday and a "special" meeting on the 4th Wednesday—and that the minutes from both the "regular" and "special" meetings are generally approved by the Committee at the next month's "regular" meeting. The Deputy also informed Requestor that it was the Township's policy to never disclose minutes of the Township Committee's public meetings until after those minutes are approved by the Committee at a subsequent meeting.

Legal Argument:

Point 1: Custodian violated OPRA by not providing Requestor with the "specific basis" for denying access to the Township Committee's September 11, 2002, September 25, 2002 and October 27, 2004 executive session minutes.

Custodian's February 3, 2005 letter (Exhibit B) does not mention the fact that the requested executive session minutes were not among the documents included with that letter. Instead, Custodian's letter merely states that she had provided Requestor with "all of the documents that are currently available for public release." Since the minutes from the three executive sessions were not among the documents provided, Requestor is led to

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believe¹ that Custodian is denying access to those minutes.

Simply stating, however, that records are not “currently available for public release” does not satisfy OPRA’s requirement that custodians inform requestors of the “specific basis” for a record’s denial. N.J.S.A. 47:1A-5(g). In Gober v. City of Burlington, GRC Complaint No. 2003-139, the Executive Director’s Findings and Recommendation state in part:

N.J.S.A. 47:1A-1 et seq. provide that government records shall be subject to public access, subject to certain clearly enumerated exemptions. Here, the Custodian’s assertion that certain of the information requested by the Complainant is “privileged” is so vague that the existence of an applicable exemption cannot be ascertained. Because the Open Public Records Act presumes that a government record is subject to public access unless an exemption exists, it is appropriate to order that access be granted unless an appropriate exemption is clearly identified by the Custodian.

If referring to documents as “privileged” is too vague to satisfy OPRA’s specificity mandate, it follows that referring to them as not “currently available for public release” is also unlawful.

Point 2: Custodian violated OPRA by not providing Requestor with at least redacted copies of the Township Committee’s September 11, 2002, September 25, 2002 and October 27, 2004 executive session minutes.

Each of the three executive sessions at issue were purportedly convened to discuss “personnel” matters.² (See Exhibits C, D and E.) The purpose of the Open Public Meetings Act’s personnel exemption

*is to facilitate the process by which the public body makes personnel-type decisions, permitting the debate and deliberation to be conducted without public scrutiny or participation. But the exemption is designed to enable the public body to determine the appropriate action to be taken, **not to withhold from the public either the public body’s determination or the reasons on which its determination was based.***

¹ It is possible, however, that Custodian thought that she had included the executive session minutes among the documents sent to Requestor when she in fact had not. If such is the case, Requestor asks that those records be sent to him immediately.

² “Litigation” is also listed as one of the purposes for the October 27, 2004 executive session.

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South Jersey Publishing Co. v. New Jersey Expressway Authority, 124 N.J. 478, 493-94 (1991) (emphasis supplied.)

Executive session minutes are “government records” under OPRA. Davis v. Rumson Fair-Haven Board of Education, GRC Case No. 2003-56. Just because a public body discusses a matter in executive session does not automatically exempt the minutes of those sessions from disclosure. Rather, the New Jersey Supreme Court has held that a public body must promptly disclose its executive session minutes even if the purpose for holding the executive session was legitimate. See Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556-57 (1997).

The only exception is “when full disclosure would subvert the purpose of the particular [Open Public Meetings Act] exception.” Ibid. Even then, total suppression is justified only in “unusual case[s]” where the public interest in the suppressed information is slight and where even minimal disclosure would cause great public harm. Ibid. The Court went on to state that

[i]n the vast majority of cases in which full disclosure would have an adverse impact on the purpose of the particular exception, other methods of maintaining confidentiality can be achieved, such as redacting the specific information that would undermine the exception. We stress, however, that, given the Legislature's strongly stated intent to effectuate broad public participation in the affairs of governmental bodies, few cases will require even partial nondisclosure.

Ibid.

When some of the material within a nonexempt record may lawfully be suppressed, OPRA requires custodians to “delete or excise from a copy of the record that portion which the custodian asserts is exempt from access” and to “promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5(g). OPRA also requires the custodian or her public agency to prove “that the denial of access is authorized by law.” N.J.S.A. 47:1A-6.

Nothing in the current record supports an assertion that suppression of even redacted versions of the three sets of executive session minutes would harm the public interest or undermine any of the exceptions contained in N.J.S.A. 10:4-12(b). Accordingly, Custodian has failed, at least so far, to satisfy her burden of proving that the three sets of executive session minutes requested are legally exempt from disclosure.

Point 3: Custodian violated OPRA by denying access to the Township Committee's January 12, 2005 public meeting minutes.

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The only justification Custodian offers for not furnishing Requestor with the January 12, 2005 public meeting minutes is that they had not, as of the date of Custodian's response, been approved by the Township Committee.

A governmental entity's public meeting minutes are public records. One would be hard pressed to identify any other government record that is more fundamentally and universally open to the public. Whether or not a governmental entity has "approved" its public meeting minutes does not alter the minutes' public nature.

OPRA burdens custodians and their public entities with proving "that the denial of access is authorized by law." N.J.S.A. 47:1A-6. Custodian has failed, at least so far, to satisfy her burden of proving that the requested public meeting minutes are legally exempt from disclosure.

In her February 3, 2005 letter, however, Custodian informs Requestor that she will readily grant access to the January 12, 2005 public meeting minutes after their approval on by the Committee on February 9, 2005. This is consistent with Custodian's policy as it was declared to Requestor on January 13, 2005 by Custodian's deputy.³

Even if Custodian subsequently furnishes Requestor with the January 12, 2005 public meeting minutes, Requestor respectfully requests that the Council not consider this issue moot. Plainsboro's policy operates to deprive citizens from accessing the minutes of its Township Committee's "regular" or "special" public meetings until after the Committee's subsequent "regular" meeting. There is no reason to doubt that any citizen's request for the minutes of the February 9, 2005 "regular" meeting will be rebuffed until at least March 9, 2005—the date of the next "regular" meeting. In sum, Plainsboro has institutionalized a permanent, one-month waiting period for its "regular" meeting minutes—a significant impediment to OPRA's stated policy of making government records "readily accessible for inspection, copying, or examination." N.J.S.A. 47:1A-1.

While New Jersey courts are generally reluctant to decide issues that have become academic during the pendency of a case, they sometimes make an exception when an issue presented is one of public interest, capable of repetition, yet susceptible to continuously evading judicial review. See, e.g. New Jersey Div. of Youth & Family Services v. J.B., 120 N.J. 112, 118-19 (1990).

Requestor asserts that the Council has the discretion, similar to that of the courts, to decide this issue, even if it is mooted by Custodian's tardy disclosure of the January 12, 2005

³ See Statement of Facts and Introduction of Exhibits: ¶ 4.

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minutes. Requestor further urges that the issue before the Council—ready public access to public meeting minutes—is at least as compelling and publicly important as the issue of press access to civil hearings that was before the court in New Jersey Div. of Youth & Family Services v. J.B.

Requested Relief:

1. In accordance with Legal Argument, Point 1, Requestor seeks the Council's ruling that Custodian violated OPRA by failing or refusing to provide Requestor with the "specific basis" for denying him access to the Township Committee's September 11, 2002, September 25, 2002 and October 27, 2004 executive session minutes.
2. In accordance with Legal Argument, Point 2, Requestor seeks an Order of the Council directing Custodian to provide either unredacted minutes of the Township Council's September 11, 2002, September 25, 2002 and October 27, 2004 executive sessions, or versions of those minutes redacted only to the extent permitted under Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997) and other relevant case law.
3. In accordance with Legal Argument, Point 3, Requestor seeks the Council's ruling that Custodian violated OPRA by denying him access to the Township Committee's January 12, 2005 public meeting minutes. Requestor requests this determination even if Custodian subsequently furnishes Requestor with the January 12, 2005 public meeting minutes.

Certification of Service:

On February 10, 2005, I served a copy of this Denial of Access Complaint, together with all the exhibits and attachments by mail to: Patricia F. Hullfish, Clerk, Township of Plainsboro, 641 Plainsboro Road, Plainsboro, NJ 08536.

Dated: February 10, 2005

John Paff

John Paff

P.O. Box 5424

Somerset, NJ 08875-5424

E-MAIL - CJSC@POBOX.COM

JANUARY 20, 2005

TELEPHONE - 908-325-0129

FAX - 908-325-0129

Records Custodian
Township of Plainsboro
641 Plainsboro Rd
Plainsboro, NJ 08536-0278

Dear Sir or Madam:

Please accept this as my request for government records pursuant to the Open Public Records Act and the common law. Please inform me of the price for having paper copies of the following records mailed to me:

- Resolutions, passed in public as required by N.J.S.A. 10:4-13, authorizing the Township Committee's executive sessions of September 11, 2002, September 25, 2002 and October 27, 2004.
- Minutes of the Township Committee's executive sessions of September 11, 2002, September 25, 2002 and October 27, 2004 redacted as little as necessary, if at all.
- R-04-266 and R-04-255.
- Minutes of the public Township Committee meeting held on January 12, 2005 redacted as little as necessary, if at all.
- The affidavits of publication and the full text of the notice that was placed in the Township's designated newspaper following the adoption of R-04-266 and R-04-255. (If there is more than one official newspaper, just send me the affidavits and notice text that appeared in one of them.)
- The "certifications of availability of funds" attached to R-04-266 and R-04-255.

Thank you for your attention to this matter.

Sincerely,

John Paff

Exhibit A

Township of Plainsboro
641 Plainsboro Road
Plainsboro, New Jersey 08536
(609) 799-0909

February 3, 2005

Mr. John Paff
P.O. Box 5424
Somerset, NJ 08875-5424

Dear Mr. Paff:

With reference to your recent request, I have enclosed all of the documents that are currently available for public release. The minutes from the January 12, 2005 meeting of the Plainsboro Township Committee will be approved on February 9, 2005. If you want them, I'll send them to you after that date.

Sincerely,

/s/ Patricia F. Hullfish
Township Clerk

PFH/kk
Enclosure

Township of Plainsboro
County of Middlesex

RESOLUTION FOR EXECUTIVE SESSION

WHEREAS, Section 7:b-7 of the Open Public Meeting Act, Chapter 231, P.L. 1975 permits the options of this body to go into Executive Session for the purpose of discussion of personnel.

NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of Plainsboro, County of Middlesex, that the general nature of the subject to be discussed would best serve the community by excluding discussion in public at this time, and when a decision has been reached it will be released at an open public meeting. This Resolution shall take effect immediately for a closed session at the end of the Township Committee Meeting of September 11, 2002.

I certify the above to be a true copy of a Resolution adopted by the Township Committee of the Township of Plainsboro at a meeting held on September 11, 2002.

Patricia F. Hullfish, Township Clerk

Township of Plainsboro
County of Middlesex

RESOLUTION FOR EXECUTIVE SESSION

WHEREAS, Section 7:b-7 of the Open Public Meeting Act, Chapter 231, P.L. 1975 permits the options of this body to go into Executive Session for the purpose of discussion of personnel.

NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of Plainsboro, County of Middlesex, that the general nature of the subject to be discussed would best serve the community by excluding discussion in public at this time, and when a decision has been reached it will be released at an open public meeting. This Resolution shall take effect immediately for a closed session at the end of the Township Committee Meeting of September 25, 2002.

I certify the above to be a true copy of a Resolution adopted by the Township Committee of the Township of Plainsboro at a meeting held on September 25, 2002.

Patricia F. Hullfish, Township Clerk

Township of Plainsboro
County of Middlesex

RESOLUTION FOR EXECUTIVE SESSION

WHEREAS, Section 7:b-7 of the Open Public Meeting Act, Chapter 231, P.L. 1975 permits the options of this body to go into Executive Session for the purpose of discussion of personnel and litigation.

NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of Plainsboro, County of Middlesex, that the general nature of the subject to be discussed would best serve the community by excluding discussion in public at this time, and when a decision has been reached it will be released at an open public meeting. This Resolution shall take effect immediately for a closed session at the end of the Township Committee Meeting of October 27, 2004.

I certify the above to be a true copy of a Resolution adopted by the Township Committee of the Township of Plainsboro at a meeting held on October 27, 2004.

Patricia F. Hullfish, Township Clerk

State of New Jersey
Government Records Council
101 South Broad Street
PO Box 819
Trenton, NJ 08625-0819 (via email message)

Re: Complaint Number 2005-29:

Dear Mr. John Paff:

The Government Records Council (GRC) acknowledges receipt of your Complaint, regarding John Paff vs. Township of Plainsboro, alleging that a Records Custodian has improperly denied you access to some or all of a government record sought under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq. The GRC has assigned your Complaint the Identification Number listed above. Please refer to this ID Number in all future correspondence to the GRC concerning this Complaint. Please be advised that Ms. Colleen McGann has been assigned as your Case Manager, please contact her directly at 609-984-2105 or via email colleen.mcgann@dca.state.nj.us

Pursuant to OPRA, the GRC has established a mediation program to facilitate resolution of disputes concerning access to public records. Please read the attached brochure describing the professional mediation services offered by the New Jersey Office of Dispute Settlement (ODS). While the law does not require you to mediate your case, mediation can resolve disputes quickly and, in this case, at no cost to you. Statements made during mediation are held confidential. An attorney or representative may accompany you, but is not at all required. If settlement is not reached, your complaint will be returned to the GRC for processing.

Please use the attached form to tell us if you choose to participate in mediation. Please sign the form and either mail it to the GRC, P.O. Box 819, Trenton, N.J., 08625 or fax it to us at 609-633-6337. The GRC will contact you or your representative to advise whether the Records Custodian consents to mediation. If so, the ODS mediator will contact you to schedule a mediation session at a time and place convenient for all parties.

If you do not mail or fax a signed copy of the consent form to the GRC within 5 business days after you receive this letter, the GRC will assume that you do not wish to participate in mediation and will proceed with formal investigation of your complaint. If you are unable to read the attachments, please respond via e-mail and we will provide them through other means.

Please do not hesitate to contact us if you have any questions about this action.

John Paff

P.O. BOX 5424
SOMERSET, NEW JERSEY 08875-5424
E-MAIL - CJSC@POBOX.COM
FEBRUARY 15, 2005

TELEPHONE - 732-873-1251

FAX - 908-325-0129

Colleen McGann, Case Manager
Government Records Council
101 South Broad Street
PO Box 819
Trenton, NJ 08625-0819 (via Fax only to 609-633-6337)

RE: Paff v. Plainsboro Township
GRC Complaint No. 2005-29

Dear Ms. McGann:

Please be advised that I decline your offer of mediation in this case and ask that you please being with a formal investigation of my complaint.

Thank you for your attention to this matter.

Sincerely,

/s/ John Paff

Township of Plainsboro
641 Plainsboro Road
Plainsboro, New Jersey 08536
(609) 799-0909

Patricia F. Hullfish
Township Clerk
email: PHullfish@plainsboronj.com

June W. Merritt
Deputy Township Clerk
email: JMerritt@plainsboronj.com

February 28, 2005

Ms. Colleen C. Mc Gann
Government Records Council
101 South Broad Street
P.O. Box 819
Trenton, NJ 08625-0819

Re: GRC Case 2005-29

Dear Ms. Mc Gann:

Enclosed are the completed forms concerning the above referenced case.

Although my written response to Mr. Paff' request for government records did not refer directly to the fact that the executive session minutes were not included, Mr. Paff was aware that the minutes had not been released by the Plainsboro Township Committee. Mr. Paff had come to my office on January 13, 2005. He filled out a request for access to government records form, asking to review minute books. When Mr. Paff asked about executive session minutes, he was told by the Deputy Township Clerk that the minutes had not been released.

If you need any further information concerning this matter, please do not hesitate to contact me.

Sincerely,

/s/ Patricia F. Hullfish
Township Clerk

PH/jwm


Enclosures
cc. Mr. John Paff

PART 1 – Identifying Information

1. GRC Complaint # to which you are responding: **2005-29**
2. Name of Complainant: **John Paff**
3. Custodian's name: **Patricia Hullfish**
Title: **Township Clerk**
4. Public Agency the Custodian is employed by: **Plainsboro Township**
Address: **641 Plainsboro Road**
City: **Plainsboro, NJ 08536**
5. Custodian's Office Phone Number: **609-799-0909**
Fax Number: **609-799-9204**
E-mail (if applicable): **phullfish@plainsboronj.com**
6. Name of Custodian's legal counsel: **Joseph L. Stonaker**
Address: **41 Leigh Avenue**
Princeton, NJ 08542
Phone: **609-921-2155**
Fax: **609-921-6790**
E-mail:

PART 2: ABOUT THE OPRA COMPLAINT

7. Attach a copy of the OPRA records request on which this Complaint is based and any subsequent amendments, extensions of time, clarifications or changes to it submitted by the requester to the Custodian. Please mark these attachments: "Item 7."

(Copy of John Paff's January 20, 2005 Request Attached) 

8. On what date did the Custodian receive the request described in the Complaint and, if applicable, each subsequent amendment, clarification or change to it?

January 26, 2005

9. List the government records or parts thereof that the requester seeks in the Complaint that the Custodian claims were provided or made available to the requester and the date each record was provided or made available.

Minutes of January 12, 2005 meeting of the Plainsboro Township Committee were approved on February 9, 2005 and sent to Mr. Paff on February 15, 2005.

10. List each record or part thereof that the requester seeks in the Complaint that was not provided or made available, and explain why. Attach all materials you want the Council to consider in deciding this case. You may include witness affidavits, certifications or legal arguments. Note: Do not provide any record or information you claim is privileged or not accessible under OPRA. If necessary you may provide a general description of the record.

Minutes of the executive session meetings of the Plainsboro Township Committee held on September 11, 2002, September 25, 2002, and October 27, 2004. These minutes were not given to Mr. Paff because they had not been approved for release by the Plainsboro Township Committee. When Mr. Paff visited my office on January 13, 2005, he was told by the Deputy Township Clerk that these minutes were not available because they had not been released. On that date, Mr. Paff only requested in writing to review the minute books.

11. If you have not already done so, indicate here whether the Council should dismiss the Complaint without further investigation for one or more of the following reasons:

I feel that this claim is frivolous because Mr. Paff was aware on January 30, 2005, when he made his request, that some of the items he asked for were not available for release to the public.

By signing this Statement, I affirm:

- That I am the Custodian of Records for the Public Agency holding the records sought in the OPRA Complaint described above, or am authorized to respond on behalf of the Custodian of records;
- That the documents attached hereto are true copies of all documents sent or received by the records Custodian or staff~
- A copy of this Statement will be sent to the Complainant upon mailing of this Statement to the GRC; and
- That the foregoing is true to the best of my knowledge and belief and that I am subject to penalty for any deliberate misstatement of fact in this document.

Signed: **Patricia F. Hullfish**
Position: **Township Clerk**
Date: **February 28, 2005**

John Paff

P.O. Box 5424

Somerset, NJ 08875-5424

E-MAIL - *CJSC@POBOX.COM*

MARCH 21, 2005

TELEPHONE - 732-873-1251

FAX - 908-325-0129

Colleen McGann, Case Manager
Government Records Council
101 South Broad Street
PO Box 819
Trenton, NJ 08625-0819 (via Fax only to 609-633-6337)

RE: Paff v. Plainsboro Township
GRC Complaint No. 2005-29

Dear Ms. McGann:

I wish to briefly reply to Custodian's February 28, 2005 response to the Complaint.

Custodian is correct in her answer to response form ¶ 9 that she sent me the minutes of the Township Committee's January 12, 2005 public meeting after their approval on February 9, 2005. As stated in Point 3 of the Complaint, however, I still wish for the Council to rule on the legality of Custodian's tardy release of these minutes because this is an "issue . . . of public interest, capable of repetition, yet susceptible to continuously evading judicial review."

Thank you for your attention to this matter.

Sincerely,

/s/ John Paff

cc. Patricia F. Hullfish, via PDF email attachment
Joseph L. Stonaker, Esq., via fax only 609-921-6790

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 14, 2005 Council Meeting**

John Paff
Complainant



GRC Complaint No. 2005-29

v.

Township of Plainsboro
Custodian of Records

Records Requested:

1. “Resolutions passed in public as required by N.J.S.A. 10:4-13, authorizing the Township Committee’s executive sessions of September 11, 2002 and October 27, 2004.
2. Minutes of the Township Committee’s executive sessions of September 11, 2002, September 25, 2002 and October 27, 2004 redacted as little as necessary, if at all.
3. R-04-266 and R-04-255.
4. Minutes of the public Township Committee meeting held on January 12, 2005 redacted as little as necessary, if at all.
5. The affidavits of publication and the full text of the notice that was placed in the Township’s designated newspaper following the adoption of R-04-266 and R-04-255. (If there is more than one official newspaper, just send me the affidavit and notice text that appeared in one of the.)
6. The “certifications of availability of funds” attached to R-04-266 and R-04-255.

Request Made: January 20, 2005

Response Made: February 3, 2005

Custodian: Patricia Hullfish

GRC Complaint filed: February 10, 2005

Background

January 20, 2005

Complainant’s written Open Public Records Act (OPRA) Request. The Complainant sought a copy of resolutions, public and executive session minutes, “affidavits of publication” and “certifications of availability of funds.”

February 3, 2005

Letter from Custodian to Complainant. The Custodian states that all documents “currently available for public release” were released as enclosures to this letter. Additionally, the minutes from the January 12, 2005 meeting would not be released until their approval at the February 9, 2005 Township Committee meeting. The Custodian stated that if the Complainant still wanted them the minutes would be released to him after that date.

February 10, 2005

Complainant's Denial of Access Complaint with the following attachments:

- January 20, 2005 Complainant's written OPRA Request
- February 3, 2005 letter from Custodian to Complainant
- Resolutions for Executive Sessions "for the purpose of discussion of personnel" dated September 11, 2002, September 25, 2002, and October 27, 2004

The Complainant stated the Custodian released all documents with the exception of, "Minutes of the Township Committee's executive sessions of September 11, 2002, September 25, 2002 and October 27, 2004 redacted as little as necessary, if at all" and, "Minutes of the public Township Committee meeting held on January 12, 2005 redacted as little as necessary, if at all."

The Complainant alleged the Custodian denied access to the above-mentioned records and did not provide a specific basis for the denial pursuant to N.J.S.A. 47:1A-5(g). The Complainant cited Government Records Council (GRC) Case 2003-139, Gober v. City of Burlington stating that referring to a document as "not currently available for release" is too vague to satisfy the requirement of a specific basis for denial set forth in OPRA. Additionally, it was stated that, "executive session minutes are 'government records' under OPRA" citing GRC Case 2003-56, Davis v. Rumson-Fair Haven Board of Education.

The resolutions for the executive sessions stated the sessions were being held to discuss personnel matters. He states that with the exception of redacting some information that may cause the public great harm, "the New Jersey Supreme Court has held that a public body must promptly disclose its executive session minutes even if the purpose for holding the executive session was legitimate. See Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556-57 (1997)."

Additionally, the Complainant asserts that if the Custodian released the January 12, 2005 minutes there would be an issue of timeliness. The Plainsboro policy of waiting for the approval of minutes prior to their release essentially institutes a month waiting period for the release of meeting minutes contrary to OPRA's policy of making government records "readily accessible for inspection, copying, or examination." An individual requesting meeting minutes would have to wait until the approval of said minutes at the next "regular" meeting. The Complainant asserted, "the Council has the discretion... to decide this issue, even if it is mooted by Custodian's tardy disclosure of the January 12, 2005 meeting minutes" because the issue "is one of public interest, capable of repetition, yet susceptible to continuously evading judicial review. See, e.g. New Jersey Division of Family Services v. J.B., 120 N.J. 112, 118-19 (1990)."

It is the Complainant's assertion that these records should be disclosed with appropriate redactions and that the Custodian has failed to meet their burden of proving the request for these minutes was lawfully denied.

February 15, 2005

Complainant's faxed declination of mediation.

February 16, 2005

Offer of Mediation sent to both parties.

February 17, 2005

Custodian's signed Agreement to Mediate.

February 28, 2005

Custodian's Statement of Information with the following attachments:

- February 10, 2005, Complainant's written OPRA Request

The Custodian asserted that the OPRA request was received and date stamped on January 26, 2005. The Custodian stated, while the written response to the request did not specifically state that the Executive Session minutes had not been released, the Complainant was verbally made aware by the Deputy Township Clerk that the minutes had not been released by the Township Committee when he requested to view the minute books on January 13, 2005. The minutes of the January 12, 2005 meeting were approved February 9, 2005 and sent to the Complainant February 15, 2005. The Executive Session minutes requested were not given to the Complainant "because they had not been approved for release by the Plainsboro Township Committee." The Custodian alleges this complaint is frivolous because the Complainant was aware when he made his request that some of the items were not available to the public.

March 21, 2005

Letter from the Complainant to the GRC staff. The Complainant stated that he was in receipt of the January 12, 2005 meeting minutes. The Complainant "still wishes for the Council to rule on the legality of the custodian's tardy release of these minutes because this is an 'issue... of public interest, capable of repetition, yet susceptible to continuously evading judicial review.'"

Analysis

WHETHER access was unlawfully denied minutes of the Township Committee's executive session of September 11, 2002, September 25, 2002, October 27, 2004 and minutes of the public Township Committee meeting held on January 12, 2005 prior to their formal approval?

The OPRA provides that:

"Government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions..."
N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"Government record' or 'record' means 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 in the course of his or its official business..." N.J.S.A. 47:1A-1.1.

The Complainant requested access to executive and public session meeting minutes of the Township Committee. The Custodian asserted to the Government Records Council that they could not release the minutes to these meetings, as the Township Committee had not yet approved the requested documents. The Complainant was informed that the public session meeting minutes from the January 12, 2005 Township Committee could not be released until their approval at the February Township Committee meeting. The Complainant was provided with a copy of the January 12, 2005 meeting minutes on February 15, 2005. The Complainant states that this practice institutes a one-month waiting period for meeting minutes and does not allow for documents to be “readily accessible” pursuant to OPRA. The executive minutes were not released nor was than explanation of the denial of access provided to the Complainant.

The Complainant cites GRC Case 2003-56, Davis v Rumson-Fair Haven Board of Education, which asserts that “the minutes of meetings made, maintained, kept or received by public agencies are ‘government records’ pursuant to OPRA, they are accessible unless confidential by statute.” According to the Complainant, the Custodian in this case does not assert that these records are confidential under statute therefore; the draft minutes withheld from the Complainant are considered government records as they are made, maintained, and kept on file by the agency and are therefore.

In GRC Case 2003-38 Seerey v. Upper Pittsgrove Township the Council found that “characterization of the maps as interim, incomplete, or inaccurate is not relevant to the definition of a government record under OPRA. Many records maintained, kept or received by government officials are eventually superseded or amended. For example, draft-meeting minutes are considered government records even though they are subject to change. Such records can be specifically identified for requestors as being subject to amendment or repeal.” The Council’s decision in GRC Case 2003-119, Calogero v. Borough of Emerson, was consistent with that of Seerey.

Therefore the draft public meeting and executive session minutes requested fall under the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian should have released the requested draft minutes that had not already been released to the Complainant with appropriate redactions pursuant to OPRA and provided a detailed explanation for any redacted part thereof Thus, access to these records was unlawfully denied.

WHETHER the Custodian provided a specific basis for the denial of access pursuant to N.J.S.A. 47:1A-5(g)?

If a Custodian is unable to comply with a request for records it is required that the Complainant be given a reason for the denial or delay in access. OPRA states:

“If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g).

OPRA places the responsibility for proving a claimed exemption on the Custodian. N.J.S.A. 47:1A-6 states in relevant part:

“. . . The public agency shall have the burden of proving that the denial of access is authorized by law. . .”

The Custodian wrote to the Complainant on February 3, 2005 attaching those documents that were “currently available for public release.” The Custodian did not address which documents were not being provided to the Complainant nor was an explanation offered for not releasing all of the documents responsive to the request; specifically the Township Committee’s executive session minutes of September 11, 2002, September 25, 2002, October 27, 2004. The Custodian did state that the minutes from the January 12, 2005 public meeting would not be released until their approval at the February 9, 2005 Township Committee meeting. However, the Custodian did not provide a legal basis for this delay in access. The Custodian asserts in the Statement of Information that, while the written response did not refer directly to the fact that the executive session minutes were not included the Complainant was verbally made aware when requesting minutes on January 13, 2005 that the executive session minutes had not been released.

OPRA allows the Custodian to deny access to records under those circumstances in which the records requested are exempt from access, under OPRA or any other law. If a Custodian asserts a privilege under the law the Custodian is required to notify the Complainant in writing of the specific legal basis for the denial. The Complainant cites GRC Case 2003-139, Gober v. City of Burlington, in which the Council found that “the Custodian’s assertion that certain of the information requested by the Complainant is “privileged” is so vague that the existence of an applicable exemption cannot be ascertained. Because the OPRA presumes that a government record is subject to public access unless an exemption exists, it is appropriate to order that access be granted unless an appropriate exemption is clearly identified by the Custodian.” The onus rests on the Custodian to prove that “the denial of access is authorized by law.”

In the case at hand, the Custodian violated N.J.S.A. 47:1A-5(g) by not providing a written response to the portion of the request that indicated the specific lawful basis for the denial of access to the requested executive session minutes.

WHETHER the Custodian provided the Complainant with the minutes of the public Township Committee meeting held on January 12, 2005 within the statutory time period pursuant to OPRA?

OPRA provides that:

“Unless 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.” N.J.S.A. 47:1A-5(i).

The Custodian informed the Complainant in writing that the minutes of the public Township Committee meeting held on January 12, 2005 could not be released until their approval at the February 9, 2005 Township Committee meeting. This requested document was

provided to the Complainant on February 15, 2005 and the Complainant confirms the receipt of same.

While the Custodian neglected to include a reason for the denial of access to the requested executive session minutes the Custodian did provide the Complainant with a timely response to the OPRA request and therefore did not violate N.J.S.A. 47:1A-5(i).

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find:

1. The Custodian should redact the exempt information contained in the requested executive session minutes, providing a detailed and lawful basis for each redacted part thereof and provide access to those redacted minutes that have not already been released.
2. The Custodian violated N.J.S.A. 47:1A-5(g) by not providing a written reason for the denial of access to the requested executive session minutes.
3. The Custodian provided a timely response to the OPRA request, however the response was not sufficient concerning the response to the request for executive session minutes.
4. The Custodian shall comply with "I" directly above within ten (10) business days from receipt of the Council's decision and provide confirmation to the Executive Director.

Prepared By:

/s/ Colleen C. McGann
Case Manager

Approved by

/s/ Paul F. Dice
Executive Director
Government Records Council

July 8, 2005

John Paff

P.O. Box 5424

Somerset, New Jersey 08875-5424

E-mail – CJSC@pobox.com

August 23, 2005

Telephone – 732-873-1251

Fax – 908-325-0129

Colleen McGann, Case Manager
Government Records Council
101 S Broad St
Trenton, New Jersey

(via Email PDF file)

RE: Paff v. Township of Plainsboro
GRC Case No. 2005-29

Dear Ms. McGann:

I am in receipt of Ms. Hullfish's July 28, 2005 letter and the accompanying minutes from the Township Committee's September 11, 2002, September 25, 2002 closed sessions as well as the three closed sessions held on October 27, 2004.

All of the minutes were unredacted save for those from the October 27, 2004, 8:22 p.m. closed session. Copies of the redacted minutes from that session and Ms. Hullfish's July 28, 2005 letter are attached as Exhibits A and B, respectively.

It is impossible to determine anything regarding the nature, context or even the general subject of the discussion redacted from Exhibit A, because:

- ?? The redacted paragraph in Exhibit A vaguely states that "The Township Administrator reported that [remainder redacted]."
- ?? Ms. Hullfish's July 28, 2005 letter, which states that the redactions were made because "the matter under discussion is in litigation," contradicts the first paragraph of Exhibit A which states that the purpose of the closed session was "personnel."

The Council's July 14, 2005 Interim Order states:

The Custodian should redact the exempt information contained in the requested executive session minutes, providing a detailed and lawful basis for each redacted part thereof and provide access to those redacted minutes that have not already been released.

Yet, no "detailed or lawful basis" has been provided.

Further, the Open Public Meetings Act requires prompt disclosure of a public body's closed session minutes except "when full disclosure would subvert the purpose

of the particular [Open Public Meetings Act] exception." Even then, total suppression is justified only in "unusual case[s]" where the public interest in the suppressed information is slight and where even minimal disclosure would cause great public harm.

Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556-57.

In the vast majority of cases in which full disclosure would have an adverse impact on the purpose of the particular exception, other methods of maintaining confidentiality can be achieved, such as redacting the specific information that would undermine the exception. We stress, however, that, given the Legislature's strongly stated intent to effectuate broad public participation in the affairs of governmental bodies, few cases will require even partial nondisclosure.

Ibid. (Emphasis supplied)

Hence, it is difficult to understand why Defendant needed to redact everything of substance from the paragraph. Is it Plainsboro's position that not even identify of the litigation, or the nature of the personnel matter, could be disclosed without jeopardizing a vital governmental interest?

Finally, since Plainsboro's closed session minutes are "government records" under the Open Public Records Act (OPRA), it "shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6. The Council's "Records Note" entitled "Redacting Government Records" states that "[w]ords, sentences, paragraphs, or whole pages may be subject to redaction." Accordingly, Plainsboro cannot legally redact an entire paragraph from a non-exempt record when only a single sentence within that paragraph, if disclosed, would undermine a governmental interest more than disclosure would benefit the public's interest in keeping a watchful eye on its government.

I ask that the Council rule that the level of redaction Plainsboro performed on its minutes does not meet either the terms of the Council's Interim Order or the

requirements of the Open Public Meetings Act. Further, I ask that the Council either require Plainsboro to give better and more detailed reasons for its redactions or to conduct an *in camera* review of the minutes at issue as recommended by the Appellate Division in Paff v. New Jersey Department of Labor, Board of Review, ___ N.J. Super. ___, Docket No. A-4540-03T5, (App. Div. 2005).

Thank you for your attention to this matter.

Sincerely,

/s/ John Paff

cc. Patricia Hullfish, with enclosures, via PDF email attachment

CONFIDENTIAL

October 27, 2004 — Executive Session
Plainsboro Township Committee

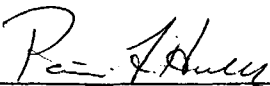
Executive session for discussion of personnel was called to order by Mayor Peter Cantu at 8:22 p.m.

Present: Mayor Peter Cantu, Deputy Mayor Neil Lewis and Committeepersons Ginger Schnitzer and Michael Weaver. Committeeperson Edmund Yates was absent. Also present were: Township Administrator Robert Sheehan, Township Attorney Joseph Stonaker, Township Clerk Patricia Hullfish and Public Safety Director Clifford Maurer.

The Township Administrator reported

[REDACTED]

There being no further business, the meeting was adjourned at 8:30 p.m.



Patricia F. Hullfish, Township Clerk



PLAINSBORO

Office of the Township Clerk

Patricia F. Hullfish

Township Clerk

email: PHullfish@plainsboronj.com

June W. Merritt

Deputy Township Clerk

email: JMerritt@plainsboronj.com

July 28, 2005

Mr. John Paff
P.O. Box 5424
Somerset, NJ 08875

Dear Mr. Paff:

Re: GRC Complaint No. 2005-29

As per the recommendation of the Government Records Council, enclosed are the executive session minutes of the Plainsboro Township Committee for September 11, 2002, September 25, 2002, and October 27, 2004.

The minutes of October 27, 2004 have been redacted because the matter under discussion is in litigation.

Sincerely,

Patricia F. Hullfish
Township Clerk

PH/jwm

Cc: Paul F. Dice, Executive Director, Government Records Council