



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 27, 2008 Government Records Council Meeting

Laurel Kornfeld
Complainant

Complaint No. 2007-109

v.

Borough of Highland Park (Middlesex)
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council (“Council”) considered the February 20, 2008 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. In considering the meaning of a public agency as explained by the court in the Lafayette Yard case and all the document submissions of the Custodian of the municipality, HPTV is not a public agency pursuant to N.J.S.A. 47:1A-1.1. Therefore, HPTV is not subject to the provisions of OPRA and is not required to respond to OPRA requests for records.
2. Because HPTV is not a public agency and is therefore not subject to the provisions of OPRA, the Custodian of the municipality did not unlawfully deny access to the requested record because the meeting tape was in the possession of HPTV. The Custodian of the municipality has, therefore, borne her burden of proof that the denial of access was authorized by law pursuant to OPRA. However, the Custodian of the municipality has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. for failing to respond in writing granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days.
3. In this complaint, although the Custodian of the municipality violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there no unlawful denial of access because HPTV is not a public agency subject to OPRA and the Complainant was also granted access to the requested record on May 31, 2007. Based on the evidence of record, therefore, it is concluded that 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. However, the Custodian's actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 27th Day of February, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Kathryn Forsyth
Government Records Council

Decision Distribution Date: February 29, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 27, 2008 Council Meeting**

**Laurel Kornfeld¹
Complainant**

GRC Complaint No. 2007-109

v.

**Borough of Highland Park (Middlesex)²
Custodian of Records**

Records Relevant to Complaint: A videotape copy of a March 6, 2007 Borough Council meeting.

Request Made: March 30, 2007

Response Made: None

Custodian: Joan Hullings

GRC Complaint Filed: May 3, 2007

Background

March 30, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

April 2, 2007

E-mail from the Custodian to Chairperson Gary Leslie, Cable Television Citizens Advisory Committee.³ The Custodian advises Mr. Leslie that the Complainant's March 30, 2007 OPRA request has been received and that the Custodian must provide a respond within seven (7) business days.

April 4, 2007

E-mail from Mr. Leslie to the Custodian. Mr. Leslie states that the Highland Park Television ("HPTV"), as a policy, does not make copies of council meeting broadcasts because the HPTV has too few resources. Mr. Leslie further states that anyone wanting a copy of a meeting can schedule an appointment with him to come down to the HPTV room and view the tape there.

¹ No representation listed on file.

² Represented by Diane Dabulas, Esq. of Rogut, MacCarthy & Troy (Cranford, NJ).

³ Highland Park TV, the station on which the record responsive to this request was aired, is a local public access station that the Cable Television Citizens Advisory Committee monitors for quality service.

April 30, 2007

E-mail from the Custodian's Counsel to Mr. Leslie. The Custodian's Counsel states that the Borough is under an obligation to comply with OPRA requests and that if Mr. Leslie can provide a legally authorized response as to why the record requested should not be provided, then he should advise the Custodian's Counsel of that reason.

May 3, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated March 30, 2007.

The Complainant states that she submitted an OPRA request to the Borough Clerk's Office on March 30, 2007 for the record responsive to this request. The Complainant states that after more than seven (7) business days had passed, the Complainant inquired about the status of her request. The Complainant states that the Custodian asserted that the Borough had never previously received any OPRA request for a videotape, so there was confusion as to how to handle the OPRA request. The Complainant asserts that she has since inquired several times about the status of her OPRA request and never received a definitive response to whether access to the record has been granted or denied.

The Complainant asserts that she believes the Custodian is not at fault, but that the Mayor is pressuring the Custodian into stalling access to the record based on its content.

May 8, 2007

Offer of Mediation sent to both parties.

May 10, 2007

The Custodian agrees to mediate this complaint.

May 10, 2007

E-mail from the Custodian to Mr. Leslie. The Custodian states that the record requested is needed because the Complainant has filed a complaint with the GRC.

May 10, 2007

E-mail from Mr. Leslie to the Custodian's Counsel. Mr. Leslie states that he will provide a copy of the original videotape to the Custodian's mailbox, if he can locate it, by day's end. Mr. Leslie asserts that he does not believe that the requested record is a government record accessible under OPRA.

Mr. Leslie contends, that based on the definition of a government record pursuant to N.J.S.A. 47:1A-1.1, the videotapes produced by HPTV are not a government record. Mr. Leslie contends that, contrary to the Custodian's audio recordings of each meeting, he tapes meetings as a volunteer and not as a member of the Cable Television Citizens Advisory Committee. Mr. Leslie further asserts that there is no ordinance or legal requirement to produce or store videotapes. Mr. Leslie finally asserts that the Complainant is free to come in and view the requested record.

May 14, 2007

The Complainant declines mediation.

May 14, 2007

Request for the Statement of Information sent to the Custodian.

May 22, 2007

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on May 14, 2007 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely of the information provided by the Complainant.

May 29, 2007

E-mail from Custodian to the GRC. The Custodian states that the Statement of Information was mailed via Federal Express on May 25, 2007.

June 4, 2007

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

- Complainant's OPRA request dated March 30, 2007.
- E-mail from the Custodian to Mr. Leslie dated April 2, 2007.
- E-mail from Mr. Leslie to the Custodian dated April 4, 2007.
- E-mail from the Custodian to Mr. Leslie dated April 30, 2007.
- E-mail from the Custodian to Mr. Leslie dated May 10, 2007.
- E-mail from Mr. Leslie to the Custodian dated May 10, 2007.

The Custodian states that she received the Complainant's OPRA request on March 30, 2007. The Custodian further states that she contacted Mr. Leslie via e-mail on April, 2, 2007 advising him that an OPRA request had been received and that the Custodian had to provide a response within seven (7) business days.

The Custodian states that Mr. Leslie informed her that HPTV has a policy of not copying videotapes. The Custodian states that she explained to Mr. Leslie that the Custodian had an obligation to provide the requested record to the Complainant. The Custodian states that Mr. Leslie did not provide the requested record until after the Complainant had filed a complaint with the GRC. The Custodian finally asserts that the record is currently being duplicated to be provided to the Complainant.

June 8, 2007

Letter from the GRC to the Custodian. The GRC requests additional information on the Cable Television Citizens Advisory Committee in order to decide whether or not the committee is a public agency.

June 15, 2007

Response from the Custodian to the GRC's request attaching a copy of the Borough Ordinance §2-36, which created the Cable Television Citizens Advisory Committee and outlines their powers and duties.

November 30, 2007

E-mail from the GRC to the Custodian. The GRC requests that Mr. Leslie submit a legal certification in response to the following inquiries:

1. Whether HPTV was created by ordinance or resolution?
2. Whether the Cable Television Citizens Advisory Committee controls HPTV or is merely monitoring for quality assurance?
3. Where members of HPTV are elected by the Mayor, Council or are volunteers?
4. Whether HPTV is funded by the Mayor, Council or Cable Television Citizens Advisory Committee?

December 10, 2007

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension to submit Mr. Leslie's legal certification until December 14, 2007.

December 10, 2007

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension to submit Mr. Leslie's legal certification until December 14, 2007.

December 14, 2007

Legal Certification from Mr. Leslie to the GRC. Mr. Leslie certifies that he is both the Chairperson for the Highland Park Cable Television Citizens Advisory Committee and a volunteer with HPTV. Mr. Leslie certifies that the Cable Television Citizens Advisory Committee was created by Borough Ordinance §2-36 to assist the Mayor and Council in making their determination in the awarding of a cable television franchise for the Borough.

Mr. Leslie further certifies that HPTV was created by Cablevision and that the Cable Television Citizens Advisory Committee monitors quality of service, and to some degree, content for HPTV. Mr. Leslie certifies that HPTV has no members, only volunteers responsible for producing, programming and managing content. Mr. Leslie certifies that HPTV is designated to carry only Borough broadcasts.

Mr. Leslie also certifies that HPTV is funded through grants and other outside appropriations as well as a minimal budget received by the Borough for necessities. Mr. Leslie certifies that all of the equipment used to prepare and program broadcasts was purchased by the Borough through funding received by grants from Cablevision. Mr. Leslie certifies that he has also provided funds for peripheral materials, such as DVD's, videotapes, and wires, that have been used to support broadcasting of the Borough's public meetings.

January 2, 2008

E-mail from the GRC to the Custodian. The GRC requests that the Custodian inform the GRC whether or not the Custodian provided the Complainant with the requested record.

January 2, 2008

E-mail from the Complainant to the GRC. The Complainant states that she received the requested record two months after submission of the March 30, 2007 OPRA request.

January 9, 2008

E-mail from the Custodian to the GRC. The Custodian states that the requested record was duplicated by Lagno Video Services for a cost of \$14.95. The Custodian states that the requested record was received from Lagno Video Services on May 31, 2007 and the Complainant was notified that the record was available for disclosure.

January 29, 2008

E-mail from the GRC to the Custodian. The GRC requests that Mr. Leslie submit a legal certification clarifying whether the minimal budget afforded by the Borough for HPTV necessities was identified specifically within the Borough budget and the specific meaning of “necessities” as used in Mr. Leslie’s December 14, 2007 legal certification. The GRC requests that the Custodian provide this certification by close of business on February 4, 2008.

January 31, 2008

E-mail from the Custodian’s Counsel to the GRC. The Custodian’s Counsel requests an extension of time until February 6, 2008 to submit Mr. Leslie’s legal certification.

February 4, 2008

E-mail from the GRC to the Custodian’s Counsel. The GRC grants the Custodian Counsel’s request for an extension of time until February 6, 2008 to submit Mr. Leslie’s legal certification.

February 6, 2008

Legal Certification from Mr. Leslie to the GRC. Mr. Leslie certifies that the Borough dedicates approximately \$1,250 for maintenance of HPTV’s equipment. Mr. Leslie further certifies that HPTV has never used any of the monies dedicated by the Borough for maintenance of equipment or necessities. Mr. Leslie certifies that the monies used by HPTV for maintenance of HPTV’s equipment come from grants or his personal funds.

Mr. Leslie certifies that the purchase of necessities for operation of HPTV is made with grant monies or, in case of emergency (i.e., no tapes available to tape board meetings), Mr. Leslie has personally paid his own funds for these uses without reimbursement from either HPTV or the Borough.

Analysis

Whether Highland Park Television or the Cable Television Citizens Advisory Committee is a public agency?

OPRA defines a public agency as:

“...[a]ny of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.” N.J.S.A. 47:1A-1.1.

Most definitions of "public agency" under New Jersey statutes and the Administrative Code resemble that contained in OPRA. However, the Open Public Meetings Act ("OPMA") defines "public body" as a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, *and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds.* N.J.S.A. 10:4-8a. (Emphasis added.)

OPMA's definition of public body requires that an entity, "... (1) consist of 'two or more persons' and (2) be 'collectively empowered as a voting body' (3) 'to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits or other legal relations of any person or collectively authorized to spend public funds.' N.J.S.A. 10:4-8a..." The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (App.Div. 2004). Lafayette Yard undertook the task of deciding whether or not an entity was a public agency under both OPRA and OPMA because the plaintiff requested access to both meetings and copies of meeting minutes of the Community Development Corporation.

In that case, the court held that:

- (1) a private, non-profit corporation created for the express purpose of redeveloping property donated to it by the city of Trenton,
- (2) having a Board of Trustees appointed by the Mayor and City Council,

(3) with the mandated reversion of the donated property after the completion of the project and repayment of the debt,

(4) having corporate bylaws requiring the distribution of all assets to the city upon the dissolution or liquidation of the corporation,

(5) having a Disposition Agreement with the city that designates the city as the "agency" and the corporation as the "redeveloper" pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -49, and

(6) having the authority to issue tax-exempt bonds for the financing of the project

qualified the corporation as a "public body" under OPMA. The court further held that the corporation was "an 'instrumentality' created by the City and a 'public agency' under the OPRA for essentially the same reasons that it is a 'public body' under the OPMA." *Id.* at 442, 670.

The decision of the Superior Court that Lafayette Yard Community Development Corp. qualifies as a "public body" was affirmed by the New Jersey Supreme Court (Lafayette Yard, 183 N.J. 519 (2005)). See also Snyder v. American Association of Blood Banks, 144 N.J. 269 (1996) (finding that the legislature did not create or authorize the AABB to perform a specific governmental purpose); Williams v. National Car Rental System, Inc., 225 N.J. Super. 164 (Law Div. 1988) (finding that the broad powers conferred upon the Port Authority leave no doubt that it is a public authority or public agency); Blazer Corporation v. NJ Sports and Exposition Authority, 195 N.J. Super. 542 (Law Div. 1984) (citing Wade v. N.J. Turnpike Authority, 132 N.J. Super. 92 (Law Div. 1975), "The Court noted the official comment to N.J.S.A. 59:1-3: 'The definition of 'Public Entity' provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to all entities exercising governmental functions.'").

Additionally, two rules in the Administrative Code define "public agency" more precisely than other rules and statutes by adding the following language to the usual definition, "... agencies exercising sovereign powers of government." This language is very illustrative of the meaning of public agencies, as explained by the court in the Lafayette Yard case cited above. While other state statutes and rules do not include this language, it appears that the New Jersey Supreme Court confirms that "exercising sovereign powers of government" or performing a specific governmental function is required for an entity to be deemed a public body or agency under OPRA.

In this complaint, the GRC must first decide whether the Highland Park Cable Television Citizens Advisory Committee is a public agency. Due to the close association between the Cable Television Citizens Advisory Committee and HPTV, both must be defined clearly in order to ultimately decide whether HPTV is considered a public agency.

The Highland Park Cable Television Citizens Advisory Committee, consisting of nine (9) members, was created to assist the Mayor and Council “in making their determination in the award of a cable television franchise.” Further, the ordinance states that eight (8) of the nine (9) members are to be appointed by the Mayor and Council, with the ninth (9th) being appointed by the Board of Education and Library Board of Trustees.

The Cable Television Citizens Advisory Committee had the duty to:

- (1) Research and review all relevant information and advise the Mayor and Borough Council on the Cable TV refranchising process.
- (2) Design and implement a survey of the community (in four areas concerning the job of the cable operator).
- (3) Research the benefits of a public access channel and make a recommendation thereof to the Mayor and Council.
- (4) Assist in the publicity for a public hearing on the cable operator’s application for municipal consent.
- (5) Submit a report to the Mayor and Council containing its findings and recommendations as to paragraphs [1, 2 and 3] above on or before November 15, 1991, providing that nothing contained herein shall be deemed to preclude such other or further reports as the Committee deems appropriate.
- (6) Monitor on an ongoing basis the quality of service and maintenance by the holder of the Borough’s cable television franchise. Borough Ordinance §2-36.

While the Highland Park Cable Television Citizens Advisory Committee was set up by ordinance with eight (8) members elected by Mayor and Council to serve on the Board, the committee was created as an advisor to the Mayor and Council concerning the creation and maintaining of a public access television station. The ordinance creating the Highland Park Cable Television Citizens Advisory Committee does not provide that members are required to vote on Board actions. Moreover, the Cable Television Citizens Advisory Committee does not possess a governmental function affecting public rights and has no collective authority to spend public funds. Therefore, the Highland Park Cable Television Citizens Advisory Committee is not a public agency pursuant to N.J.S.A. 47:1A-1.1 and The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (App.Div. 2004) because the Committee does not exercise sovereign powers of government.

Additionally, HPTV is run by volunteers spending personal time to tape council meetings. Mr. Leslie certifies that he is a volunteer of HPTV that has spent time and money on the station, which was created by Cablevision. Mr. Leslie also certifies that HPTV receives outside funding through grants available from Cablevision and receives minimal money from the Borough of Highland Park. Mr. Leslie further certifies that although the Borough dedicates money to HPTV, the money has never been used by HPTV. Mr. Leslie certifies that all funding comes from grants or, in case of emergency needs, out of his personal funds without reimbursement.

Therefore, HPTV is also not a public agency pursuant to N.J.S.A. 47:1A-1.1 and The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J.Super. 425 (App.Div. 2004) because the Committee does not exercise sovereign powers of government. Thus, in considering the meaning of a public agency as explained by the court in the Lafayette Yard case and all the document submissions of the Custodian, HPTV is not a public agency pursuant to N.J.S.A. 47:1A-1.1. Therefore, HPTV is not subject to the provisions of OPRA and is not required to respond to OPRA requests for records.

Whether the Custodian unlawfully denied access to the requested record?

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 provides that:

“[i]f 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.

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 ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (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.

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. 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

In this complaint, although the Custodian conversed with the Complainant verbally on several occasions, she failed to respond in writing to the Complainant’s March 30, 2007 OPRA request granting access to the record requested until forty-two (42) business days after receipt of the request. OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, the Custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the Complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Because HPTV is not a public agency and is therefore not subject to the provisions of OPRA, the Custodian did not unlawfully deny access to the requested record because the meeting tape was in the possession of HPTV. The Custodian has, therefore, borne her burden of proof that the denial of access was authorized by law pursuant to OPRA. However, the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. for failing to respond in writing granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days.

Whether the Custodian’s actions rise 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.

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).

In this complaint, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there no unlawful denial of access because HPTV is not a public agency subject to OPRA and the Complainant was also granted access to the requested record on May 31, 2007. Based on the evidence of record, therefore, it is concluded that 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. However, the Custodian’s actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. In considering the meaning of a public agency as explained by the court in the Lafayette Yard case and all the document submissions of the Custodian of the municipality, HPTV is not a public agency pursuant to N.J.S.A. 47:1A-1.1. Therefore, HPTV is not subject to the provisions of OPRA and is not required to respond to OPRA requests for records.
2. Because HPTV is not a public agency and is therefore not subject to the provisions of OPRA, the Custodian of the municipality did not unlawfully deny access to the requested record because the meeting tape was in the possession of HPTV. The Custodian of the municipality has, therefore, borne her burden of proof that the denial of access was authorized by law pursuant to OPRA. However, the Custodian of the municipality has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. for failing to respond in writing granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days.

3. In this complaint, although the Custodian of the municipality violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there no unlawful denial of access because HPTV is not a public agency subject to OPRA and the Complainant was also granted access to the requested record on May 31, 2007. Based on the evidence of record, therefore, it is concluded that 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. However, the Custodian's actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

February 20, 2008