



VINCENT P. MALTESE, Chairman  
ACTING COMMISSIONER CHALRES RICHMAN  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511  
Fax: 609-633-6337  
E-mail: [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us)  
Web Address:  
[www.nj.gov/grc](http://www.nj.gov/grc)

**FINAL DECISION**

**July 25, 2007 Government Records Council Meeting**

Donald J. Taylor  
Complainant

Complaint No. 2007-136

v.

Hudson County  
Custodian of Record

At the July 25, 2007 public meeting, the Government Records Council ("Council") considered the July 18, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to respond in writing to the Complainant's May 8, 2007 OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a deemed denial. Thus, the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and unlawfully denied access.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried his burden of proving a lawful denial of access to the record requested.
3. Because the Custodian promptly provided the requested resume to the Complainant after discovering that the May 8, 2007 OPRA request had been misfiled, 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 unlawful denial of access appears negligent and heedless since he 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., P.O. 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, P.O. Box 819, Trenton, NJ  
08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of July, 2007

Robin Berg Tabakin, Vice Chairman  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: August 2, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 25, 2007 Council Meeting**

**Donald J. Taylor<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2007-136**

**v.**

**Hudson County<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copy of the resume of Mr. James J. Kernan, who is employed by Hudson County Meadowview Psychiatric Hospital.

**Request Made:** May 8, 2007

**Response Made:** May 25, 2007

**Custodian:** Neil J. Carroll, Jr., Assistant Hudson County Counsel

**GRC Complaint Filed:** May 22, 2007

**Background**

**May 8, 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.

**May 10, 2007**

Custodian receives and date stamps Complainant's OPRA request.

**May 22, 2007**

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

- Complainant's OPRA request dated May 8, 2007.
- Certified letter receipt and tracking information.
- Letter from the Department of Health and Senior Services to the Complainant dated May 1, 2007.

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> The Custodian in this matter is representing Hudson County in his capacity as Hudson County Counsel (Jersey City, NJ).

The Complainant states that he filed an OPRA request for the requested record with the Custodian of Hudson County.<sup>3</sup> The Complainant states that he sent his OPRA request via certified mail on May 8, 2007. The Complainant further states that the request was received by the Custodian on May 10, 2007. The Complainant states that he did not receive a response.

**May 25, 2007**

Custodian's Response to the OPRA request.<sup>4</sup> The Custodian responds to the Complainant's OPRA request on the twelfth (12<sup>th</sup>) business day following receipt of such request and provides the record responsive to this request to the Complainant.

**June 14, 2007**

Offer of Mediation sent to both parties.

**June 18, 2007**

The Custodian agrees to mediate this complaint. The Complainant did not respond to the Offer of Mediation.

**June 25, 2007**

Request for the Statement of Information sent to the Custodian.

**July 2, 2007**

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

- Complainant's OPRA request dated May 8, 2007.
- Letter from the Custodian to the Complainant dated May 25, 2007 attaching the requested record.

The Custodian states that he received the Complainant's request on May 10, 2007. The Custodian asserts that at that time, the Complainant's request was accidentally misfiled. The Complainant asserts that this mistake was discovered on May 25, 2007 and the record responsive to this request was promptly mailed to the Complainant.

**Analysis**

**Whether the Custodian unlawfully denied access to a copy of the resume of Mr. James J. Kernan to the Complainant?**

OPRA provides that:

---

<sup>3</sup> The Complainant previously filed an OPRA request with the Custodian of Records for the Department of Health and Senior Services and was informed that the Department had no records responsive. The Department's Custodian directed the Complainant to the Hudson County Counsel to obtain the record at issue herein.

<sup>4</sup> The Custodian's response to the request came before the Custodian was notified of the Denial of Access Complaint.

“...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 therefore 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 therefore ...” 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.

OPRA requires that a custodian respond in writing to an OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business day time frame. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., see also Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007). Additionally, failure to respond to an OPRA request in writing within seven (7) business days results in a deemed denial of access. N.J.S.A. 47:1A-5.i.

In this complaint, the Complainant asserts that he did not receive a response in writing within the statutorily mandated seven (7) business days required by OPRA. The Custodian asserts that the request was misfiled and promptly fulfilled when the mistake was discovered.<sup>5</sup> The Custodian's failure to respond in writing to the Complainant's May 8, 2007 OPRA request within the statutorily mandated time frame results in a deemed denial pursuant to N.J.S.A. 47:1A-5.i. Thus, the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian has therefore failed to bear his burden that the denial of access was authorized by law. N.J.S.A. 47:1A-6.

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

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

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).

Because the Custodian promptly provided the requested resume to the Complainant after discovering that the May 8, 2007 OPRA request had been misfiled, the

---

<sup>5</sup> The Custodian's response to the request came before the Custodian was notified of the Denial of Access Complaint.

Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's May 8, 2007 OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a deemed denial. Thus, the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and unlawfully denied access.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried his burden of proving a lawful denial of access to the record requested.
3. Because the Custodian promptly provided the requested resume to the Complainant after discovering that the May 8, 2007 OPRA request had been misfiled, 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 unlawful denial of access appears negligent and heedless since he 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

July 18, 2007