



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

**JON S. CORZINE**  
*Governor*

**JOSEPH V. DORIA, JR.**  
*Commissioner*

**FINAL DECISION**

**April 29, 2009 Government Records Council Meeting**

Vesselin Dittrich  
Complainant

Complaint No. 2007-193

v.

City of Hoboken (Hudson)  
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council (“Council”) considered the April 22, 2009 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. Pursuant to N.J.S.A. 47:1A-1.1., Michelson v. Wyatt and the City of Plainfield, 379 N.J.Super. 611, 619 (App. Div.), and Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005- 127 (December 2005), the license application is not a government record as defined in OPRA and therefore is not disclosable under OPRA. Mr. Bahun did not make, maintain or keep on file the license application in the ordinary course of his duties as a plumber inspector. Therefore, the license application does not meet the definition of a government record as set forth in N.J.S.A. 47:1A-1.1.
2. Because the Complainant has received the actual record requested and the license application is not a government record, neither Mr. Bahun nor the Custodian has unlawfully denied the Complainant access to the requested record.

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 29<sup>th</sup> Day of April, 2009

Robin Berg Tabakin, Chairwoman  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: May 4, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 29, 2009 Council Meeting**

**Vesselin Dittrich<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-193**

v.

**City of Hoboken (Hudson)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Register book, ledger or log in which inspectors enter information about each inspection.

**Request Made:** July 24, 2007

**Response Made:** July 31, 2007

**Custodian:** Michael Mastropasqua<sup>3</sup>

**GRC Complaint Filed:** September 4, 2007<sup>4</sup>

**Background**

**July 24, 2007**

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

**July 31, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request. The Custodian states that access to review the record requested is granted.

**September 4, 2007**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated July 24, 2007. The Complainant asserts that he submitted an OPRA request to the Hoboken City Clerk on July 24, 2007. The Complainant further asserts that on August 15, 2007, he went to the Construction Office to review the Plumbing Inspections Book for 2007. The Complainant states that he reviewed the record in question and requested copies of all the pages. The Complainant further states that while the Plumbing Inspections Book was being copied at his request, the plumbing inspector, Joe Bahun, interfered and removed two (2) pages from the Plumbing Inspection Book. The Complainant alleges that Mr. Bahun stated to

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

<sup>2</sup> Represented by Steven Kleinman, Esq. (Hoboken, NJ).

<sup>3</sup> While Mr. Mastropasqua is the Municipal Clerk, the record requested was in the possession of Joe Bahun.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

him that the Complainant would not get copies of the two (2) loose pages in the back folder of the Plumbing Inspection Book. The Complainant states that he replied that all pages of the Plumbing Inspection Book are public records and that the two (2) loose pages were included in his copy request for all the pages in the Plumbing Inspection Book. The Complainant indicates that Mr. Bahun responded that the Complainant would never get copies of the two (2) pages. The Complainant states that Mr. Bahun then destroyed the two (2) loose pages by tearing them into little pieces in front of the Complainant. The Complainant states that he received a copy of all the bound pages of the Plumbing Inspections Book.

**September 5, 2007**

Offer of Mediation sent to both parties.

**September 10, 2007**

The Complainant agrees to mediate the complaint.

**September 18, 2007<sup>5</sup>**

The Custodian agrees to mediate this complaint.

**April 2, 2008**

Complaint referred back from mediation.

**July 15, 2008**

Request for the Statement of Information sent to the Custodian.

**July 25, 2008**

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

- Complainant's OPRA request dated July 24, 2007
- Blank copy of City of Hoboken's Public Records Request Response form
- Blank copy of City of Hoboken's Acknowledgment form
- Instruction sheet for OPRA request
- Redacted copy of a License Application

Mr. Bahun certifies that the Complainant sought to review the log book which is used to record plumbing inspections that Mr. Bahun regularly carries out in the course of his official duties. Mr. Bahun certifies that on August 15, 2007, arrangements were made with the Complainant to review the log book in Mr. Bahun's office. Mr. Bahun certifies that the Complainant requested a copy of the logbook after reviewing it. Mr. Bahun certifies that the request to copy was granted immediately. Mr. Bahun certifies that he provided the Complainant with an unredacted copy of the logbook.

Mr. Bahun further certifies that while another employee copied the log book, the Complainant yelled "also the pages in the back," referring to a double-sided record contained in the back pocket of the log book. Mr. Bahun certifies that the pages to which the Complainant referred were a personal record belonging to Mr. Bahun specifically; it

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<sup>5</sup> It is unclear from the record when this matter was sent to mediation.  
Vesselin Dittrich v. City of Hoboken 2007-193 – Findings and Recommendations of the Executive Director

was an application that Mr. Bahun was making to the Department of Community Affairs for a construction license. Mr. Bahun certifies that this license application contained his personal information, such as home address, phone number, and e-mail address. Mr. Bahun argues that this license application was in no way responsive to the Complainant's OPRA request. Mr. Bahun notes that this log book was purchased by him from his personal funds and as such he has the right to store personal records in the back pocket.

Mr. Bahun certifies that the agency has had numerous harassing contacts with the Complainant. In light of the Complainant's past harassing conduct, Mr. Bahun did not want to provide the Complainant with a copy of the license application. Mr. Bahun certifies that the Complainant grew loud, agitated and adversarial when he was denied a copy of the license application. Mr. Bahun certifies that he became upset and in frustration, destroyed the license application by tearing it into small pieces. Mr. Bahun certifies that he recognizes that his behavior was less than professional and regrets losing his temper.

The Custodian reiterates Mr. Bahun's argument that the license application is not responsive to the Complainant's OPRA request. The Custodian argues that the license application in question does not meet the definition of a government record because it only relates to Mr. Bahun's career advancement. The Custodian also argues that OPRA exempts the personal information contained in the license application from disclosure. The Custodian argues that Mr. Bahun's lost of temper should not warrant an unfavorable finding against Mr. Bahun or the City of Hoboken. Lastly, the Custodian argues that the Complainant did not suffer a denial of access because the license application was not the record sought by the Complainant.

### **Analysis**

#### **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 in the course of his or its official business...*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

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:

“a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.” N.J.S.A. 47:1A-1.

Additionally, OPRA provides that:

“If the custodian of a government record asserts that part of a particular record is exempt from public access ... the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt ... ” N.J.S.A. 47:1A-5.g.

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

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, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the matter currently under review, the Complainant made an OPRA request to view the ledger in which the City of Hoboken’s plumbing inspector enters information about each inspection. When the Complainant reviewed the responsive record there were two (2) pages in the back folder of the Plumbing Inspection Book which comprised a license application made by Mr. Bahun to the New Jersey Department of Community Affairs. The Complainant requested copies of all pages in the record, including the license application in the back folder. The Complainant was given copies of all pages except for the license application. Mr. Bahun alleged that the additional pages were personal documents that were inadvertently included in the binder containing the record responsive to the request. Mr. Bahun declined to provide the Complainant with copies of the license application and subsequently destroyed the application.

The Custodian and Mr. Bahun have argued that the Complainant was not unlawfully denied access to the license application because: 1) the license application does not meet the definition of a government record; 2) OPRA exempts the personal information contained in the license application from disclosure; and 3) the license application was not responsive to the Complainant's OPRA request.

OPRA defines a government record as "any paper, written or printed book, document ... *made, maintained or kept on file in the course of his or its official business.*" (Emphasis added.) N.J.S.A. 47:1A-1.1. "In other words, if the public agency or public entity has not made, maintained, kept or received a document in the course of his or its official business, a document is not a government record subject to production." Michelson v. Wyatt and the City of Plainsfield, 379 N.J.Super. 611, 619 (App. Div. 2005)(holding that information regarding an individual's health history is not a government record subject to public access).

In Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005- 127 (December 2005), the complainant requested e-mails located on the Mayor's home computer made to various individuals regarding Borough business. The custodian alleged that due to the location of the records, they were not government records. The GRC found that the definition of a government record is not restricted by the physical location of the record. The GRC further found that the records requested should be released in accordance with OPRA, to the extent that the records fell within the definition of a government record as provided in OPRA.

The location of a record is immaterial to that document's status as a government record. Meyers, *supra*. The license application's presence in the back of the binder containing the record responsive to the Complainant's OPRA request is not dispositive of its disclosability pursuant to Michelson, *supra*.

Pursuant to N.J.S.A. 47:1A-1.1., Michelson, *supra*, and Meyers, *supra*, the license application is not a government record as defined in OPRA and therefore is not disclosable under OPRA. Mr. Bahun did not make, maintain or keep on file the license application in the ordinary course of his duties as a plumber inspector. Therefore, the license application does not meet the definition of a government record as set forth in N.J.S.A. 47:1A-1.1.

Because the Complainant has received the actual record requested and the license application is not a government record, neither Mr. Bahun nor the Custodian has unlawfully denied the Complainant access to the requested record.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-1.1., Michelson v. Wyatt and the City of Plainfield, 379 N.J.Super. 611, 619 (App. Div.), and Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005- 127 (December 2005), the

license application is not a government record as defined in OPRA and therefore is not disclosable under OPRA. Mr. Bahun did not make, maintain or keep on file the license application in the ordinary course of his duties as a plumber inspector. Therefore, the license application does not meet the definition of a government record as set forth in N.J.S.A. 47:1A-1.1.

2. Because the Complainant has received the actual record requested and the license application is not a government record, neither Mr. Bahun nor the Custodian has unlawfully denied the Complainant access to the requested record.

Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 22, 2009