



State of New Jersey
GOVERNMENT RECORDS COUNCIL

VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
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FINAL DECISION

December 19, 2007 Government Records Council Meeting

Vesselin Dittrich
Complainant

Complaint No. 2007-73

v.

City of Hoboken (Hudson)
Custodian of Record

At the December 19, 2007 public meeting, the Government Records Council (“Council”) considered the December 12, 2007 Supplemental 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 has complied with the Council’s October 31, 2007 Interim Order by releasing the requested records to the Complainant and providing a subsequent certification to the GRC within the five (5) business days ordered by the GRC. No further action is required.
2. Because the Custodian has complied with the Council’s October 31, 2007 Interim Order by releasing all requested records to the Complainant and providing a subsequent certification to the GRC within the five (5) business days ordered by the GRC, 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 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., 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 19th Day of December, 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: December 20, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 19, 2007 Council Meeting**

**Vesselin Dittrich¹
Complainant**

GRC Complaint No. 2007-73

v.

**City of Hoboken (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Copies of all documents containing the footnote “from Vesselin Bldg Dept. refused to show him files. DL,” mentioned in a letter from the Construction Official dated January 3, 2007.

Request Made: January 18, 2007

Response Made: January 23, 2007

Custodian: Michael Mastropasqua

GRC Complaint Filed: February 23, 2007

Background

October 31, 2007

Government Records Council’s (“Council”) Interim Order. At its October 31, 2007 public meeting, the Council considered the October 24, 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, found that:

1. 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. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (August 2007).
2. Although the Custodian made the requested records responsive to the Complainant’s January 18, 2007 OPRA request available for inspection to the Complainant, the Custodian denied access to copies of the requested records because the Complainant refused to sign a receipt for records provided in response to previous OPRA requests. This appears to be a policy of the City of Hoboken. However, OPRA does not permit a custodian to require a signed receipt in order to provide access to records which are not otherwise exempt

¹No representation listed on file.

² Represented by Jacquelin Gioioso, Esq. of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

from disclosure. Moreover, agency policy does not supersede access to government records required in OPRA.

3. The Custodian shall disclose all records responsive to the Complainant's January 18, 2007 OPRA request.
4. **The Custodian should comply with #3 above within five (5) business days from receipt of the Council's Order and simultaneously provide certified confirmation of compliance to the Executive Director.**
5. The Council defers analysis and determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

November 15, 2007

Council's Interim Order distributed to the parties.

November 21, 2007

Custodian's response to the Council's Interim Order. The Custodian certifies that the Council's October 31, 2007 Interim Order was received on November 15, 2007. The Custodian further certifies that he sent the requested records via regular mail, certified mail with receipt requested and facsimile to the Complainant on November 19, 2007.

Analysis

Whether the Custodian complied with the Council's October 31, 2007 Interim Order?

The Custodian certifies that he received the Council's Interim Order on November 15, 2007. The Custodian further certifies that all records responsive to the Complainant's request were mailed, sent certified mail and sent via facsimile on November 19, 2007 or three (3) days following receipt of the Council's Interim Order.

Pursuant to the Council's October 31, 2007 Interim Order, the Custodian had the duty to release the requested records to the Complainant and provide a legal certification to the GRC within five (5) business days following receipt of the Council's Interim Order. In this complaint, the Custodian has complied with the Council's October 31, 2007 Interim Order.

Whether the Custodian's denial of access to the requested records 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 has complied with the Council’s October 31, 2007 Interim Order by releasing all requested records to the Complainant and providing a subsequent certification to the GRC within the five (5) business days ordered by the GRC, 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 he 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. The Custodian has complied with the Council’s October 31, 2007 Interim Order by releasing the requested records to the Complainant and providing a subsequent certification to the GRC within the five (5) business days ordered by the GRC. No further action is required.
2. Because the Custodian has complied with the Council’s October 31, 2007 Interim Order by releasing all requested records to the Complainant and providing a subsequent certification to the GRC within the five (5) business days ordered by the GRC, 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 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

December 12, 2007



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

October 31, 2007 Government Records Council Meeting

Vesselin Dittrich
Complainant

Complaint No. 2007-73

v.

City of Hoboken (Hudson)
Custodian of Record

At the October 31, 2007 public meeting, the Government Records Council (“Council”) considered the October 24, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council adopted the entirety of said findings and recommendations by a majority vote. The Council, therefore, finds that:

1. 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. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (August 2007).
2. Although the Custodian made the requested records responsive to the Complainant’s January 18, 2007 OPRA request available for inspection to the Complainant, the Custodian denied access to copies of the requested records because the Complainant refused to sign a receipt for records provided in response to previous OPRA requests. This appears to be a policy of the City of Hoboken. However, OPRA does not permit a custodian to require a signed receipt in order to provide access to records which are not otherwise exempt from disclosure. Moreover, agency policy does not supersede access to government records required in OPRA.
3. The Custodian shall disclose all records responsive to the Complainant’s January 18, 2007 OPRA request.
4. **The Custodian should comply with #3 above within five (5) business days from receipt of the Council’s Order and simultaneously provide certified confirmation of compliance to the Executive Director.**



5. The Council defers analysis and determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

Interim Order Rendered by the
Government Records Council
On The 31st Day of October, 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: November 15, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 31, 2007 Council Meeting**

**Vesselin Dittrich¹
Complainant**

GRC Complaint No. 2007-73

v.

**City of Hoboken (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Copies of all documents containing the footnote “from Vesselin Bldg Dept. refused to show him files. DL,” mentioned in a letter from the Construction Official dated January 3, 2007.

Request Made: January 18, 2007

Response Made: January 23, 2007

Custodian: Michael Mastropasqua

GRC Complaint Filed: February 23, 2007

Background

January 18, 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.

January 23, 2007

The Complainant telephones the Custodian to inquire about the status of his January 18, 2007 OPRA request.

January 23, 2007

Custodian’s response to the OPRA request. The Custodian responds via telephone to the Complainant’s OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that the requested records were ready for the Complainant to pick them up.

February 23, 2007

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

¹ No representation listed on record.

² Represented by Jacqueline Gioioso, Esq. of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).
Vesselin Dittrich v. City of Hoboken (Hudson), 2007-73 – Findings and Recommendations of the Executive Director

- Complainant's OPRA records request dated January 18, 2007 (with handwritten notes).
- Letter from the Construction Official to the Complainant dated January 3, 2007.

The Complainant states that he submitted an OPRA request (logged by the Custodian as request No. 07-078 to the City of Hoboken) on January 18, 2007. The Complainant states that he viewed the records responsive to this request on January 29, 2007. The Complainant asserts that the Custodian offered to release copies of the records responsive to this request only if the Complainant signed a receipt for copies of records from three previous OPRA requests.³ The Complainant refused to sign for the additional records. The Complainant asserts that the Custodian then denied access to copies of the records responsive to the Complainant's OPRA request which is the subject of this complaint and recorded that the Complainant would not sign for the records as the reason for the Custodian's denial on the Complainant's OPRA request form.

March 13, 2007

Offer of Mediation sent to both parties.

March 14, 2007

The Custodian agrees to participate in mediation. The Complainant did not respond to the Offer of Mediation.

March 21, 2007

Request for the Statement of Information sent to the Custodian.

March 27, 2007

Letter from the Custodian to the GRC. The Custodian requests an extension of the deadline to submit the Statement of Information.

March 27, 2007

Letter from the GRC to the Custodian. The GRC grants the Custodian an extension until April 2, 2007 to file the Statement of Information.

April 2, 2007

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

- Complainant's OPRA records request dated January 18, 2007 (with handwritten notes from the Custodian).
- Letter from the Construction Official to the Complainant dated January 3, 2007.
- Complainant's three (3) previous OPRA records requests date stamped December 29, 2006 with attached records.

³ These three requests were the subject of Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007), which involved three separate requests for records relating to three properties in Hoboken, New Jersey. The Complainant returned to the Clerk's office with these requests on December 29, 2006, apparently seeking a written explanation for the denial of access in that case. The Complainant contends that he was not resubmitting to the Custodian these three OPRA requests. However, the Custodian re-logged the three previous OPRA requests as new requests.

The Custodian states that he received the Complainant's OPRA request which is the subject of this complaint on January 18, 2007. The Custodian states that he telephoned the Complainant on January 23, 2007 and advised the Complainant that all records responsive to this request were available for inspection. The Custodian states that the Complainant arrived to view the records on January 29, 2007.

The Custodian asserts that he offered to give the Complainant copies of all records responsive to this request at no cost if the Complainant signed for the records being provided in response to this request and the three previous requests. The Custodian asserts that the Complainant refused to sign the acknowledgement of receipt of the records and left. The Custodian asserts that the Complainant claimed that a note from Diane Lanzer⁴ on the bottom of the OPRA request form stated the reason for denial of access to the three previous requests. The Custodian states that he added two notes to the request relevant to this complaint to clarify that Diane Lanzer's notes are what the Complainant actually asserted to Diane Lanzer on December 29, 2006, based upon Diane Lanzer's representation to the Custodian.

April 19, 2007

Letter from the Complainant to the GRC attaching a letter from the Construction Official to the Complainant dated January 3, 2007.

The Complainant asserts that the Construction Official's letter insinuated that the Complainant wrote the footnote "from Vesselin Bldg Dept. refused to show him files. DL," at the bottom of the OPRA request mentioned in the Construction Official's letter. The Complainant further asserts that the Custodian never advised him whether such records exist or how many may exist. The Complainant contends that the Construction Official's letter was an attempt to intimidate the Complainant into not filing any more OPRA requests. The Complainant finally contends that the records provided by the Custodian were not responsive to the Complainant's January 18, 2007 OPRA request because they did not contain footnotes written by the Complainant, therefore, the Complainant refused to sign for the records.

Analysis

Whether the Custodian unlawfully denied access to the request records?

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:

⁴ Diane Lanzer is a clerk in the City of Hoboken Municipal Office. Her initials appear in a note on the bottom of the OPRA request that is the subject of this complaint. Diane Lanzer's footnotes at the bottom of the requested records are also the subject of the Construction Official's letter.

“... 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.

The Custodian responded to the Complainant via telephone on January 23, 2007, four (4) business days following receipt of the Complainant’s request, to inform the Complainant that the records responsive to his request were ready for inspection. However, 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. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (August 2007).

Although the Custodian made the requested records responsive to the Complainant's January 18, 2007 OPRA request available for inspection to the Complainant, the Custodian denied access to copies of the requested records because the Complainant refused to sign a receipt for records provided in response to previous OPRA requests. This appears to be a policy of the City of Hoboken. However, OPRA does not permit a custodian to require a signed receipt in order to provide access to records which are not otherwise exempt from disclosure. Moreover, agency policy does not supersede access to government records required in OPRA.

In Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004), the Complainant made an OPRA request for certain records and was told that the Township was developing a protocol for the release of records. Four months after the Complainant's OPRA request, the Custodian sent the Complainant a request form for the records and a release of liability form to be completed. The GRC found that the Township erred in handling the request, and determined that the Township did not provide any basis in law or fact that the special request form and release of liability were permitted under OPRA.

Similarly in this complaint, the Custodian denied access to copies of the requested records because the Complainant refused to sign a receipt for these records. There is nothing in OPRA which allows a Custodian's internal agency practice to inhibit a requestor's access to government records. The Custodian unlawfully denied access to records under OPRA when he required the Complainant to sign a receipt for records responsive to the Complainant's January 18, 2007 OPRA request. See Joseph Renna v. County of Union, GRC Complaint 2004-136 (August 2005) and Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007). The Custodian, therefore, has failed to carry the burden of proof that his denial of access was lawful pursuant to N.J.S.A. 47:1A-6.

Therefore, the Custodian shall disclose all records responsive to the Complainant's January 18, 2007 OPRA request.

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

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

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 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. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (August 2007).

2. Although the Custodian made the requested records responsive to the Complainant’s January 18, 2007 OPRA request available for inspection to the Complainant, the Custodian denied access to copies of the requested records because the Complainant refused to sign a receipt for records provided in response to previous OPRA requests. This appears to be a policy of the City of Hoboken. However, OPRA does not permit a custodian to require a signed receipt in order to provide access to records which are not otherwise exempt from disclosure. Moreover, agency policy does not supersede access to government records required in OPRA.
3. The Custodian shall disclose all records responsive to the Complainant’s January 18, 2007 OPRA request.
4. **The Custodian should comply with #3 above within five (5) business days from receipt of the Council’s Order and simultaneously provide certified confirmation of compliance to the Executive Director.**
5. The Council defers analysis and determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the circumstances pending the Custodian’s compliance with the Council’s Interim Order in this matter.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

October 24, 2007