



**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**

**March 25, 2009 Government Records Council Meeting**

Vesselin Dittrich  
Complainant

Complaint No. 2008-04

v.

City of Hoboken (Hudson)  
Custodian of Record

At the March 25, 2009 public meeting, the Government Records Council (“Council”) considered the March 18, 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. The Custodian’s failure to respond in writing to the 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).
2. Because the Custodian in this complaint certified that there are no records responsive to the Complainant’s request, the Custodian would have borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing in a timely manner.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by not providing the Complainant with a written response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.i. within seven (7) business days, the record requested did not exist. The evidence of record does not support a finding that the Custodian’s actions were knowing and willful. 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 “deemed”



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., 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 25<sup>th</sup> Day of March, 2009

Robin Berg Tabakin, Chair  
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: March 30, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 25, 2009 Council Meeting**

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

**GRC Complaint No. 2008-04**

**v.**

**City of Hoboken<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Review of transcript of city council meeting held on August 8, 2007.

**Request Made:** August 13, 2007

**Response Made:** August 14, 2007

**Custodian:** Michael Mastropasqua

**GRC Complaint Filed:** January 3, 2008<sup>3</sup>

**Background**

**August 13, 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.

**August 14, 2007**

Custodian's response to the OPRA request. The Custodian responds verbally via telephone to the Complainant's OPRA request on the first (1<sup>st</sup>) business day following receipt of such request. The Custodian states that access to the requested record is denied because no record responsive exists.

**August 29, 2007<sup>4</sup>**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests a copy of a DVD of a city council meeting held on August 8, 2007 on an official OPRA request form. The Complainant also executes an OPRA acknowledgement for the current OPRA request and the prior OPRA request dated August 13, 2007.

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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> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> This OPRA request is not the subject of this Denial of Access Complaint. The Complainant included this OPRA request for background information only.

**January 3, 2008**

Denial of Access Complaint filed with the Government Records Council. The Complainant asserts that on or about August 13, 2007 the Custodian offered to provide the Complainant with a copy of the DVD of the August 8, 2008 meeting. The Complainant certifies that he received the DVD but did not receive the requested transcript (subject of the August 13, 2007 request).

**February 4, 2008**

Offer of Mediation sent to both parties.

**February 6, 2008**

The Complainant agrees to mediate this complaint.

**February 8, 2008**

The Custodian agrees to mediate this complaint.

**February 19, 2008**

Complaint referred to mediation.

**June 19, 2008**

Complaint referred back from mediation.

**January 16, 2009**

Request for the Statement of Information sent to the Custodian.

**January 28, 2009**

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

- Complainant's OPRA request dated August 13, 2007
- OPRA acknowledgement for the OPRA request dated August 13, 2007
- OPRA Response form (undated)
- Complainant's OPRA request dated August 29, 2007
- OPRA acknowledgement for the OPRA request dated August 29, 2007

The Custodian certifies that he responded to the Complainant's OPRA request on August 14, 2007 and advised the Complainant that no responsive records exist because the City of Hoboken ("City") does not employ a court reporter and does not make transcripts of council meetings. The Custodian further certifies that he advised the Complainant that the council meetings were recorded on DVD and for a nominal charge the Custodian could provide the Complainant with a DVD of the August 8, 2007 meeting. The Custodian also certifies that he invited the Complainant to come in to the Clerk's office so that the Custodian could provide the Complaint with a written response containing this information and to execute an OPRA acknowledgement form.<sup>5</sup> The Custodian certifies that the Complainant came to the Clerk's Office on August 24, 2007, at which time the Complainant filed a new OPRA request for a DVD of the August 8, 2007 council meeting. The Custodian certifies that he responded to the Complainant on

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<sup>5</sup> When signed by a requestor, this form acknowledges receipt of records requested pursuant to OPRA. Vesselin Dittrich v. City of Hoboken, 2008-04 – Findings and Recommendations of the Executive Director

August 29, 2007 that the DVD was ready for pick up. The Custodian further certifies that the Complainant executed an acknowledgment form for both OPRA requests at that time. The Custodian requests that the GRC dismiss the Complainant's request because no record responsive to the Complainant's OPRA request exists and the Complainant was properly advised of such.

Citing N.J.S.A. 47:1A-1.1, the Custodian's Counsel argues that OPRA requires that a public agency provide only those records that it makes, maintains, or keeps on file. The Custodian's Counsel further argues that the City does not make transcripts of its public meetings. The Custodian's Counsel also argues that the City cannot provide what it does not have and that the City is under no obligation to create a record which does not otherwise exist. The Custodian's Counsel asserts that the Complainant was properly informed of these facts. The Custodian's Counsel argues the complaint is frivolous and should be dismissed.

### **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 ... 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 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. 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).

The Custodian responded to the Complainant's OPRA request via telephone on the first (1<sup>st</sup>) business day after receipt of the Complainant's OPRA request. Although the Custodian's response was within seven (7) business days, the Custodian's response was not in writing.

Therefore, the Custodian's failure to respond in writing to the 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).

Moreover, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the GRC held that there was no unlawful denial of access to the requested record because the Custodian certified that no records responsive existed.

In the instant matter, the Custodian certified that he responded to the Complainant's OPRA request and advised the Complainant that no responsive records exist because the City of Hoboken ("City") does not employ a court reporter and does not make transcripts of council meetings. Since there were no records responsive to the Complainant's OPRA request, the Custodian offered the Complainant a DVD recording of the city council meeting. The Complainant submitted a separate OPRA request and acknowledged his receipt of the DVD recording.

Because the Custodian in this complaint certified that there are no records responsive to the Complainant's request, the Custodian would have borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra, had the Custodian responded in writing in a timely manner.

**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, 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, 107 (App. Div. 1996).

The Complainant requested a transcript of the Hoboken City Council meeting of August 8, 2008. The Custodian informed the Complainant via telephone on the first (1<sup>st</sup>) business day after receipt of the OPRA request that the record requested did not exist but that a DVD of the meeting was available.

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by not providing the Complainant with a written response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.i. within seven (7) business days, the record requested did not exist. The evidence of record does not support a finding that the Custodian’s actions were knowing and willful. 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 “deemed” 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.

### **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 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).

2. Because the Custodian in this complaint certified that there are no records responsive to the Complainant’s request, the Custodian would have borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing in a timely manner.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by not providing the Complainant with a written response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.i. within seven (7) business days, the record requested did not exist. The evidence of record does not support a finding that the Custodian’s actions were knowing and willful. 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 “deemed” 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: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

March 18, 2009