



**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**

**June 11, 2009 Government Records Council Meeting**

Lucious Riley  
Complainant

Complaint No. 2008-27

v.

City of East Orange (Essex)  
Custodian of Record

At the June 11, 2009 public meeting, the Government Records Council (“Council”) considered the May 20, 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-5.g. and John A. Bart, Esq. v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), the Custodian’s response to the Complainant’s OPRA request is insufficient because she failed to grant access to the record specifically requested by the Complainant.
2. Because the Custodian has certified that no records responsive to the Complainant’s OPRA request exist and because there is no evidence in the record to refute the Custodian’s assertion, there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., she did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because no records responsive to the Complainant’s OPRA request exist. The Custodian certifies that she conducted a complete search of the agency’s archived files and subsequently certified that the agency does not possess any records responsive to the Complainant’s request. The Complainant did not submit any evidence to refute the Custodian’s certification in this regard. 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 insufficient response appears 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 11<sup>th</sup> Day of June, 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: June 16, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 11, 2009 Council Meeting**

**Lucious Riley<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-27**

**v.**

**City of East Orange (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of a claim form for veteran's property tax deduction upon property located in East Orange, filed in 1976.<sup>3</sup>

**Request Made:** November 28, 2007

**Response Made:** December 3, 2007

**Custodian:** Cynthia Brown

**GRC Complaint Filed:** February 7, 2008<sup>4</sup>

**Background**

**November 28, 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.

**December 3, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3<sup>rd</sup>) business day following receipt of such request. The Custodian states that access is granted to the 1976 claim form for a veteran's property tax deduction.<sup>5</sup> The Custodian states that the copying cost is \$1.91, which includes copying fees and postage. The Custodian further states that once payment is received, the records will be mailed or made available for pick-up.

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

<sup>2</sup> Represented by Jason Hoet, Esq. (East Orange, NJ).

<sup>3</sup> The evidence of record indicates that discussions between the Custodian and the Complainant prior to the Complainant's OPRA request identified the Complainant's property as the property for which he sought the 1976 claim form.

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

<sup>5</sup> However, the Custodian actually provided the Complainant with the 2007 claim form for veteran's property tax deduction. The evidence of record indicates that on or about December 4, 2007, the Complainant verbally informed the Custodian that the record provided was not the record requested; the Complainant indicated that the record he sought was filed in 1976, while the record provided was filed in 2007.

**December 18, 2007**

Letter from the Custodian to the Complainant. The Custodian states that the 1976 claim form is not in the current files. The Custodian further states that the Tax Assessor's Office must search their archived files for the claim form. The Custodian also states that due to the end of the year close out, the Tax Assessor's Office would not be able to conduct the necessary research until early in 2008.

**December 19, 2007**

Memo from the Custodian to Barbara Williams, Tax Assessor. The Custodian requests that Ms. Williams expedite the search of the archived files for the requested claim form. The Custodian requests that the Tax Assessor respond by December 24, 2007.

**January 7, 2008**

Memo from Barbara Williams, Tax Assessor, to the Custodian. Ms. Williams states that a search of the files indicates that there was a change of ownership of the property in question. Ms. Williams further states that when a change of ownership occurs, all deductions are removed pursuant to N.J.S.A. 54:4-8-10 et. seq. Ms. Williams states that a review of the tax duplicates for the tax years 1984, 1986 and 2002-2007 does not indicate a veteran's deduction for the property in question. Ms. Williams further states that in 2002, the Division of Local Government Services audited the Veterans and Senior Citizens application files and found that deductions were granted without applications on files. Ms. Williams states that a list was compiled and letters were mailed to the property owners requesting the completion of the application with all necessary proof. Ms. Williams also states a review of the list does not indicate that the Complainant was on the list. Ms. Williams further states that this information was verified with the Tax Collector.

**January 7, 2008**

Letter from the Custodian to the Complainant. The Custodian states that Ms. Williams' research of the 1977 tax duplicates indicates that the owner of the property in question was Clifford Bucceln. The Custodian further states that Mr. Bucceln was entitled to a veteran's deduction. The Custodian also states that there is a handwritten notation in the record indicating a change of ownership. The Custodian further states that when a change of ownership occurs, all deductions are removed pursuant to N.J.S.A. 54:4-8-10 et. seq. The Custodian states that a review of the tax duplicates for the tax years 1984, 1986, and 2002-2007 does not indicate a veteran's deduction on the Complainant's property. The Custodian further states that in 2002, a state audit revealed that deductions were granted without applications. The Custodian states that a list was compiled and letters requesting the completion of the application with all necessary proof were mailed to the property owners. The Custodian states that the Complainant's property was not on the list.

**February 7, 2008**

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

- Letter from the Custodian to the Complainant dated December 3, 2007

- Letter from the Custodian to the Complainant dated December 18, 2007
- Letter from the Custodian to the Complainant dated January 7, 2008

The Complainant certifies that the 2007 claim form provided was not responsive to the request. The Complainant further certifies that when he brought this to the Custodian's attention, he was told that the Tax Assessor's Office would have to search the archived files. The Complainant certifies that the Custodian still has not provided him with the correct record. Also, the Complainant declines mediation.

### **February 11, 2008**

Request for the Statement of Information sent to the Custodian.

### **February 19, 2008**

E-mail from the GRC to the Custodian. The GRC states that, pursuant to a telephone conversation with the Custodian, the new deadline for submission of the completed Statement of Information is February 27, 2008.

### **March 7, 2008<sup>6</sup>**

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

- Complainant's OPRA request dated November 28, 2007
- Letter from the Custodian to the Complainant dated December 3, 2007
- Letter from the Custodian to the Complainant dated December 18, 2007
- Memo from the Custodian to the Tax Assessor dated December 19, 2007
- Memo from the Tax Assessor to the Custodian dated January 7, 2008
- Letter from the Custodian to the Complainant dated January 7, 2008
- Real Property tax list dated 1977
- Deed for the property in question dated 1976

The Custodian certifies that the only existing record responsive to the Complainant's request is the claim form for veteran's property tax deduction filed on September 17, 2007. The Custodian further certifies that the Complainant was provided with the claim form for veteran's property tax deduction filed in 2007 on December 4, 2007. The Custodian states that he made every good faith effort to comply with the Complainant's OPRA request.

## **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.

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<sup>6</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.  
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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 provides that:

“A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If 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.” N.J.S.A. 47:1A-5.g.

OPRA also provides that:

“Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived. 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, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor.” 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. 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.

The Custodian responded in writing to the Complainant’s OPRA request on the third (3<sup>rd</sup>) business day stating that access was granted to the 1976 claim form for veteran’s property tax deduction. However, the Custodian actually provided the Complainant with the 2007 claim form for veteran’s property tax deduction. On or about

December 4, 2007, the Complainant verbally informed the Custodian that the record provided was not the record requested. The Complainant indicated that the record he sought was filed in 1976, but the record provided was filed in 2007.

N.J.S.A. 47:1A-5.g. states that if a Custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for noncompliance.

In John A. Bart, Esq. v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), on the seventh (7<sup>th</sup>) business day following the custodian’s receipt of the complainant’s OPRA request, the complainant received a response from the custodian granting access to records that were not responsive to the complainant’s request. Because the custodian provided records that were not responsive to the Complainant’s request, the GRC found that the custodian’s written response to the complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g.

Although the Custodian herein responded in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because she failed to provide access to the correct record requested by the Complainant. The Complainant requested access to a claim form for a veteran’s property tax deduction filed in 1976. Like the custodian in Bart, this Custodian responded in writing in a timely manner granting access to a record. However, also like the custodian in Bart, the Custodian herein granted access to a non-responsive record. By not providing access to the record responsive to the Complainant’s OPRA request and failing to indicate the specific basis for the denial of access to the requested record, the Custodian has violated N.J.S.A. 47:1A-5.g.

Therefore, pursuant to N.J.S.A. 47:1A-5.g. and John A. Bart, Esq. v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), the Custodian’s response to the Complainant’s OPRA request is insufficient because she failed to grant access to the record specifically requested by the Complainant.

However, the Custodian herein certified in the SOI that no records responsive to the Complainant’s OPRA request existed at the time of Complainant’s request, and there is no credible evidence in the record to refute the Custodian’s certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone records showing a call made to him from the New Jersey Department of Education. The Custodian certified that no records responsive to the Complainant’s request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Therefore, because the Custodian has certified that no records responsive to the Complainant’s OPRA request exist and because there is no evidence in the record to refute the Custodian’s assertion, there was no unlawful denial of access pursuant to Pusterhofer, supra.

**Whether the Custodian’s delay in access to the requested record 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).

Although the Custodian provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., she did not unlawfully deny access to the requested record pursuant to Pusterhofer, *supra*, because no records responsive to the Complainant’s OPRA request exist. The Custodian certifies that she conducted a complete search of the agency’s archived files and subsequently certified that the agency does not possess any records responsive to the Complainant’s request. The Complainant did not submit any evidence to refute the Custodian’s certification in this regard. 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 insufficient response appears 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. Pursuant to N.J.S.A. 47:1A-5.g. and John A. Bart, Esq. v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), the Custodian's response to the Complainant's OPRA request is insufficient because she failed to grant access to the record specifically requested by the Complainant.
2. Because the Custodian has certified that no records responsive to the Complainant's OPRA request exist and because there is no evidence in the record to refute the Custodian's assertion, there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., she did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because no records responsive to the Complainant's OPRA request exist. The Custodian certifies that she conducted a complete search of the agency's archived files and subsequently certified that the agency does not possess any records responsive to the Complainant's request. The Complainant did not submit any evidence to refute the Custodian's certification in this regard. 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 insufficient response appears negligent and heedless since she 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

May 20, 2009