



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**FINAL DECISION**

**July 27, 2010 Government Records Council Meeting**

Philip Charles  
Complainant

Complaint No. 2009-141

v.

Plainfield Municipal Utilities Authority (Union)  
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council (“Council”) considered the July 20, 2010 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 March 23, 2009 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., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007) and DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007).
2. The Custodian certified in the Statement of Information that no certified transcripts responsive to the Complainant’s March 23, 2009 OPRA request exist, and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing to the Complainant’s March 23, 2009 OPRA request within the statutorily required seven (7) business days resulting in a “deemed” denial, the Custodian has not unlawfully denied access to the Complainant’s OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The evidence of record shows that the Custodian certified in the Statement of Information that no certified transcripts responsive to the Complainant’s April 7, 2009 OPRA request exist, and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, the Custodian has not unlawfully denied access



to the Complainant's OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

4. Because the Custodian responded in writing to the Complainant's April 16, 2009 OPRA request in a timely manner stating that no responsive sound recording exists and subsequently certified to such in the Statement of Information, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian's failure to respond in writing to the Complainant's March 23, 2009 OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., because the Custodian certified in the Statement of Information that no records responsive to the Complainant's March 23, 2009, April 7, 2009 and April 16, 2009 OPRA requests exist, 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.

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 27<sup>th</sup> Day of July, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: August 2, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 27, 2010 Council Meeting**

**Philip Charles<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-141**

v.

**Plainfield Municipal Utilities Authority (Union)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

March 23, 2009 OPRA request: Copy of a certified transcript of the March 17, 2009 Plainfield Municipal Utilities Authority (“PMUA”) regular meeting.

April 7, 2009 OPRA request: Copy of a certified transcript of the February 19, 2009 PMUA regular meeting.

April 16, 2009 OPRA request: Copy of any information stored or maintained electronically, by sound-recording or in a similar device, of the regular meetings for February 19, 2009 and March 17, 2009. If records do not exist in this medium, conversion of the record or providing the record in another medium such as steno or printed medium is acceptable.

**Requests Made:** March 23, 2009, April 7, 2009 and April 16, 2009

**Responses Made:** April 15, 2009 and April 23, 2009

**Custodian:** Dollie S. Hamlin

**GRC Complaint Filed:** April 24, 2009<sup>3</sup>

**Background**

**March 23, 2009**

Complainant’s first (1<sup>st</sup>) Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**April 7, 2009**

Complainant’s second (2<sup>nd</sup>) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

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

<sup>2</sup> Represented by Michael V. Camerino, Esq., of Mauro, Savo, Camerino & Grant, P.A. (Somerville, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

### **April 15, 2009**

Custodian's response to the OPRA request dated March 23, 2009. The Custodian responds in writing to the Complainant's OPRA request on the eighteenth (18<sup>th</sup>) business day following receipt of such request. The Custodian states that the PMUA does not employ a professional certified transcriber for the Board of Commissioners public meetings held throughout the year. The Custodian states that the PMUA does secure a professional certified transcriber for all "Public Hearings" scheduled. The Custodian states that the meeting minutes of the March 17, 2009 regular meeting deemed to be responsive were provided to the Complainant on April 15, 2009 and refused by him as not responsive.

### **April 16, 2009**

Letter from the Complainant to the Custodian attaching the Complainant's third (3<sup>rd</sup>) OPRA request on an official OPRA request form.

The Complainant states that he submitted an OPRA request on March 23, 2009 for a certified transcript of the PMUA's public session meeting held on March 17, 2009. The Complainant states that the Custodian verbally stated on March 17, 2009 that the requested transcript would take longer to provide because it was created by an outside agency. The Complainant states that on April 3, 2009, Ms. Lana Carden ("Ms. Carden"), Human Resources Manager, told the Complainant that the Custodian would contact the Complainant regarding his March 23, 2009 OPRA request.<sup>4</sup>

The Complainant states that he submitted a second (2<sup>nd</sup>) OPRA request on April 7, 2009 and was advised by the Custodian on the same day that the transcript responsive to the Complainant's March 23, 2009 OPRA request would not be ready for two (2) more weeks. The Complainant states that the Custodian contacted the Complainant via telephone on April 9, 2009 advising that the record responsive to the Complainant's March 23, 2009 OPRA request was ready for pickup. The Complainant advised that he would be in the following week to retrieve the record.

The Complainant states that he went to the PMUA on April 15, 2009 to retrieve the records prepared in response to his March 23, 2009 OPRA request. The Complainant states that Ms. Carden provided the Complainant with two (2) envelopes. The Complainant states that the first envelope contained meeting minutes for the March 17, 2009 meeting and not the certified transcript responsive to the March 23, 2009 OPRA request. The second envelope contained meeting minutes for the February 19, 2009 meeting and not the certified transcript responsive to the April 7, 2009 OPRA request.

The Complainant states that he received a hand delivered letter from the Custodian on April 15, 2009 stating that the Complainant refused to accept the records

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<sup>4</sup> The Complainant notes that the Custodian's Counsel contacted him on April 3, 2009 stating that the Complainant's OPRA request would not be fulfilled because the Complainant was engaged in litigation with the PMUA. The Complainant notes that he requested that Counsel put her response in writing. The Complainant further notes that he faxed a statement to the Custodian and Counsel on the same date and that Counsel subsequently advised that the PMUA would provide records in the next week. It is unclear whether this interaction between the Complainant and Counsel is directly related to the instant complaint, as there is no evidence in the record to memorialize these conversations.

provided in response to the two (2) OPRA requests. The Complainant avers that he did refuse to receive the records provided because they were not responsive to his OPRA requests. The Complainant states that if the certified transcripts responsive to his March 23, 2009 and April 7, 2009 OPRA requests do not exist, OPRA requires that the Custodian indicate the specific basis for a denial of access to the records upon the request form and return it to the Complainant. N.J.S.A. 47:1A-5.g. The Complainant avers that the Custodian failed to do so in this instance. The Complainant states that the PMUA informed him several times that the requested transcripts would be provided; however, the Complainant was not informed that the certified transcripts would not be made available until receiving the Custodian's April 15, 2009 letter. The Complainant states that he believes the PMUA is deliberately attempting to deny access to the records requested in the first two (2) OPRA requests based on semantics.

The Complainant states that he now understands that the specific records requested are not available from the PMUA. However, the Complainant states that he attended both the meetings for which a certified transcript was requested and witnessed a stenographer both typing and using a recording device during the two (2) meetings, which he has now been informed by the Custodian are "regular meetings of the PMUA." The Complainant avers that once the PMUA creates a record of the meeting by the stenographer or a recording device, such is subject to disclosure under OPRA.

The Complainant states that the meeting recordings requested in the attached OPRA request (the 3<sup>rd</sup> OPRA request at issue in this complaint) are government records created in the course of official business pursuant to N.J.S.A. 47:1A-1.1. and should be provided. Specifically, the Complainant requests that if the meeting recordings requested cannot be provided in the medium requested, such records should either be converted to the requested medium or provided in some other meaningful medium. The Complainant further requests that the Custodian provide a specific lawful basis for denying access to the requested records if such are not available. The Complainant states that he reserves the right to ask for the meeting minutes previously provided in the absence of the requested records and asks that the Custodian contact him if approximate costs would exceed \$75.00.<sup>5</sup>

#### **April 23, 2009**

Custodian's response to the April 16, 2009 (3<sup>rd</sup>) 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 the Board secretary has advised that the audio recordings, made on the Board secretary's personal audio recorder, are used solely as a backup to the stenograph machine she uses. The Custodian advises that the Board secretary has advised that she erases the audio recordings once the minutes have been produced.

Additionally, the Custodian reiterates that the PMUA only produces certified transcripts of public hearings held in connection with rate hearings, which is required by law. The Custodian states that the Board secretary merely records the PMUA's regular

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<sup>5</sup> The Complainant's letter dated April 16, 2009 provides clarification of the records being requested by the Complainant in the attached April 16, 2009 (3<sup>rd</sup>) OPRA request.  
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meeting by way of stenograph machine to assist her in preparing meeting minutes. The Custodian states that the minutes created for regular Board meetings are not verbatim because no such transcripts are required by law. The Custodian reiterates that the meeting minutes provided to and refused by the Complainant on April 15, 2009 were produced directly from the stenograph machine recordings made by the secretary, but are not verbatim transcripts of such meetings.

#### **April 24, 2009**

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

- Complainant’s first (1<sup>st</sup>) OPRA request dated March 23, 2009.
- Complainant’s second (2<sup>nd</sup>) OPRA request dated April 7, 2009.
- Letter from the Custodian to the Complainant dated April 15, 2009.
- Complainant’s third (3<sup>rd</sup>) OPRA request dated April 16, 2009.
- Letter from the Custodian to the Complainant dated April 23, 2009.

The Complainant states that this denial of access complaint arises from the Complainant’s submission of three (3) OPRA requests.

The Complainant states that he submitted the first (1<sup>st</sup>) OPRA request for a certified transcript of the March 17, 2009 public meeting of the PMUA on March 23, 2009. The Complainant states that he went to the PMUA office on March 27, 2009 and was verbally informed by the Custodian that the requested certified transcript would take some time because it was created by an outside vendor.<sup>6</sup>

The Complainant states that he returned to the PMUA office on April 3, 2009 and was advised by Ms. Carden that she did not know the status of the Complainant’s first (1<sup>st</sup>) OPRA request. The Complainant states that he went to the PMUA office on April 7, 2009 and was advised by the Custodian that the requested transcript would not be available for about two (2) weeks. The Complainant states that he hand delivered his second (2<sup>nd</sup>) OPRA request for a certified transcript of the February 19, 2009 public meeting of the PMUA on April 7, 2009.

The Complainant states that he received a telephone call from the PMUA on April 9, 2009 advising that the transcript responsive to the Complainant’s March 23, 2009 OPRA request was ready for pickup. The Complainant states that he advised that he would pick the transcript up the following week. The Complainant states that he went to the PMUA office on April 15, 2009 to retrieve the March 17, 2009 transcript and was handed two (2) envelopes by Ms. Carden. The Complainant states that he opened both envelopes to ensure that the records contained within were responsive to his two (2) OPRA requests. The Complainant states that he found that the envelopes contained meeting minutes from the March 17, 2009 and February 19, 2009 meetings, but not

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<sup>6</sup> The Complainant notes that correspondence submitted as part of a separate complaint before the GRC includes a letter in which the Custodian advises that production of the requested March 17, 2009 certified transcript would take two (2) additional weeks. The correspondence was not included as part of the evidence of record in this complaint.

certified transcripts. The Complainant states that Ms. Carden could not provide an explanation as to why the requested transcripts were not provided to the Complainant.<sup>7</sup>

The Complainant states that he submitted a letter to the PMUA on April 16, 2009 and attached his third (3<sup>rd</sup>) OPRA request for “any information stored or maintained electronically or by sound-recording or in a similar device any copy of the regular meetings for February 19, 2009 and March 17, 2009.” The Complainant states that his letter was an attempt to clarify the PMUA’s apparent confusion regarding the Complainant’s first two (2) OPRA requests. Additionally, the Complainant addressed what he believed were deliberate attempts by the PMUA to deny access to OPRA requests based on semantics.

The Complainant states that the Custodian responded to his third (3<sup>rd</sup>) OPRA request on April 24, 2009 stating that meeting recordings are erased by the Board secretary despite OPRA requirements<sup>8</sup> to maintain records for a specified time. Further, the Complainant states that the Custodian stated that no verbatim transcript of the meeting exists.

The Complainant argues that he believes the Custodian’s April 24, 2009 letter represents a failure by the Custodian to understand what the Complainant requested in his third (3<sup>rd</sup>) OPRA request and what constitutes a government record. Further, the Complainant argues that the PMUA’s destruction of the recording and failure to provide stenographic notes constitutes a denial of access under OPRA. The Complainant argues that he believes it is apparent that the PMUA does not clearly understand their obligations under OPRA. The Complainant argues that the PMUA has denied access to government records which, whether or not such records are required by law to be created, are public records once they are created.

The Complainant does not agree to mediate this complaint.

**May 12, 2009**

Request for the Statement of Information (“SOI”) sent to the Custodian.

**May 13, 2009**

Letter from the Custodian’s Counsel to the GRC. Counsel requests an extension until May 22, 2009 to submit the requested SOI.

**May 14, 2009**

E-mail from the GRC to the Custodian’s Counsel. The GRC grants an extension until May 22, 2009 to submit the requested SOI.

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<sup>7</sup> The Complainant notes that he faxed and e-mailed a letter to the Custodian on April 15, 2009 requesting that the Custodian advise why the requested records were not provided. This correspondence was not provided as part of the evidence of record in this complaint.

<sup>8</sup> Records retention requirements are under the authority of the New Jersey Department of State, Division of Archives and Records Management.

**May 22, 2009**

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension until May 29, 2009 to submit the requested SOI.

**June 3, 2009**

Custodian's SOI with the following attachments:

- Complainant's first (1<sup>st</sup>) OPRA request dated March 23, 2009.
- Complainant's second (2<sup>nd</sup>) OPRA request dated April 7, 2009.
- Letter from the Custodian to the Complainant dated April 15, 2009.
- Complainant's third (3<sup>rd</sup>) OPRA request dated April 16, 2009.
- Letter from the Custodian to the Complainant dated April 23, 2009.

The Custodian certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") is not applicable in the instant complaint.

The Custodian certifies that she received the Complainant's March 23, 2009 OPRA request on the same day it was filed. The Custodian certifies that she received the Complainant's April 7, 2009 OPRA request on the same date it was filed.

The Custodian certifies that the PMUA advised the Complainant on April 9, 2009 that the official meeting minutes of the PMUA meetings of March 17, 2009 and February 19, 2009 were ready for pickup.<sup>9</sup> The Custodian certifies that the Complainant came to the PMUA offices on April 15, 2009 to retrieve the records and rejected them, arguing that the records were not the certified transcripts requested.

The Custodian certifies that she received the Complainant's April 16, 2009 OPRA request on the same date. The Custodian certified that she responded on April 23, 2009 stating that the Board secretary uses the audio recordings solely as a backup to the stenograph machine she uses during the meeting. The Custodian certifies that she advised the Complainant that the Board secretary advised the Custodian that the audio recordings are erased once the meeting minutes are created. The Custodian further advised that the PMUA is only required to create certified transcripts for meetings held in connection with rate hearings and that such are produced by an outside court reporter. The Custodian reiterates that the meeting minutes provided to the Complainant on April 15, 2009 was produced directly from the Board secretary's stenograph machine.

The Custodian certifies that the PMUA does not create certified transcripts of its public meetings. The Custodian contends that the Complainant's March 23, 2009 and April 7, 2009 OPRA requests could have been denied on the basis that no records responsive existed. The Custodian notes that the GRC's Handbook for Records Custodians, 2<sup>nd</sup> Edition (August 2002) provides that OPRA does not require that a record

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<sup>9</sup> The evidence of record indicates that the Custodian verbally advised the Complainant via telephone on April 9, 2009 that records responsive were available for pickup.  
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be created in order to respond to a request for government records.<sup>10</sup> The Custodian certifies that although the Complainant used the term “certified transcript,” the Custodian considered the official meeting minutes to be the record requested because “certified transcripts” simply do not exist. The Custodian certifies that the PMUA is only required to create certified transcripts for public hearings regarding rate mediation.

Further, the Custodian certifies that no records responsive to the Complainant’s April 16, 2009 OPRA request exist. The Custodian certifies that there is no legal requirement for public meeting minutes to be taken and provided in an audio tape format.

The Custodian states that the Open Public Meetings Act (“OPMA”) provides that:

“[e]ach public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law...” N.J.S.A. 10:4-14.

Further, the Custodian states that 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 ... The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

The Custodian states that in O’Shea v. West Milford, 391 N.J. Super. 534 (App. Div. 2007), the complainant requested a copy of handwritten notes of an executive session meeting taken by the secretary of the Board of Education (“BOE”) noting that he would not accept the formal minutes. The Custodian states that the court commented that:

“After conducting an *in camera* review of the handwritten notes, the GRC concluded that they were not a public record:

*The in camera inspection disclosed a page of cryptically written notes, punctuated by the frequent use of initials and abbreviations, apparently intended to serve as a memory aid for the Board Secretary. Without further explication from the Board Secretary, the notes cannot be relied on as a factual account of board proceedings. For that reason, the Council has determined that the statutory exemption for [ACD] material applies. Alternatively, the notes constitute a work-in-progress, as opposed to a completed*

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<sup>10</sup> The Handbook for Records Custodians, currently in its third edition, was updated October 2009. Philip Charles v. Plainfield Municipal Utilities Authority (Union), 2009-141 – Findings and Recommendations of the Executive Director 7

*draft, and therefore cannot fairly be characterized as a "government record" under OPRA. The requestor--who has both the approved and unapproved draft minutes--has no discernable interest in obtaining the handwritten notes such that it would be appropriate to override the statutory exemption; consequently, the notes need not be released.*" (Emphasis added.) *Id.* at 537.

The Custodian states that the court held that:

*"[w]e agree with the GRC that the handwritten notes might be considered 'intra-agency consultative material,' because they were informal notes taken preliminary to the Secretary preparing a draft of minutes for the Board's consideration and approval. However, we also conclude that they are not "government records" at all. While the Secretary's job includes the responsibility to record the proceedings of the Board, N.J.S.A. 18A:17-7, that responsibility is carried out by preparing the minutes.*

*It is clear from the statutory language that the preparation of formal minutes is the Secretary's 'official business' and that the formal minutes themselves, not the Secretary's handwritten notes, are the public record.*

*We reject O'Shea's contention that the Secretary's handwritten notes, jotted down as a memory aid to assist in preparing the formal minutes, are a public record merely because they were 'made' by a government official. Under that rationale any Board member's personal handwritten notes, taken during a meeting to assist the member to recall what occurred, would be a public record because the member might arguably refer to them later in reviewing the Secretary's draft of the formal minutes. Taken further, every yellow-sticky note penned by a government official to help him or her remember a work-related task would be a public record. Such absurd results were not contemplated or required by OPRA.*

*In Atlantic City Convention Center Authority v. South Jersey Publishing Co., 135 N.J. 53, 63-64, 637 A.2d 1261 (1994), the Court held that audiotapes of executive sessions, used to prepare the agency's meeting minutes, were not public records under the Right-to-Know Law, N.J.S.A. 47:1A-1 to -4.*

*'[I]n this case, the Authority used the audio tapes merely as a convenience for its own purposes in preparing the official minutes that it recognizes it must disclose under the Right-to-Know Law. The situation is as though a secretary had taken shorthand notes of the meeting. The secretary's transcribed notes, approved by the body, not the notes themselves, would constitute the official record of the meeting. Simply because a public agency uses an electronic note pad in place of a steno pad as a method to prepare "reasonably comprehensible minutes" does not establish that that electronic record constitutes a Right-to-Know record. Because the*

*audio tapes of these proceedings served only as a convenient means to enable preparation of the official minutes and were not records required to be "made, maintained or kept," N.J.S.A. 47:1A-2, the audio tapes do not constitute Right-to-Know records.*” (Emphasis added) *Id.* at 538-540.

The Custodian contends that based on the foregoing, two (2) facts regarding this complaint are clear:

1. The final product (which the Board secretary created) represents the official public meeting minutes and, as such, satisfies OPMA and is a government record under OPRA pursuant to N.J.S.A. 47:1A-1.1.
2. Neither the Board secretary’s stenograph record nor the audio recording constitutes a government record under OPRA.

The Custodian argues that there is no reason why the rationale used by the court in O’Shea would not apply to the instant complaint.<sup>11</sup> The Custodian reiterates that the Board secretary utilized the audiotape strictly as a backup to assist in preparing final official meeting minutes. The Custodian further reiterates that there is no law requiring the PMUA to create and keep an audio recording of its public meetings.<sup>12</sup>

Moreover, the Custodian contends that a simple reading of the definition of a government record under OPRA further supports the PMUA’s argument. The Custodian asserts that the making of an audiotape is not done in the course of the secretary’s official business; however, composition of the official meeting minutes is done in the course of official business. The Custodian asserts that the Board secretary’s private, backup recording was never received by the PMUA or the Custodian. The Custodian cites to Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005) to support this argument. The Custodian also cites to the court’s holding in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008) (“Not every paper prepared by a public employee fits within the definition of a government record the purposes of [OPRA].”)

In closing, the Custodian certifies that the only documents responsive to the Complainant’s three (3) OPRA requests were the official meeting minutes of the March 17, 2009 and February 19, 2009 meetings, which were created pursuant to N.J.S.A. 10:4-14. The Custodian certifies that the stenograph records and the audio recordings were created by the Board secretary to assist in composing the official meeting minutes. The Custodian contends that based on the foregoing, the stenograph records and audio recordings are not government records and the official meeting minutes were the only responsive records.<sup>13</sup>

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<sup>11</sup> The Custodian asserts that under the old Right to Know Law, the definition of a government record was more broadly interpreted than under OPRA. However, it should be noted that OPRA actually more broadly defines what a government record encompasses.

<sup>12</sup> The Custodian notes that the facts of this complaint are inapposite to the facts of an Idaho case, Fox v. Estep, 797 P.2d 854 (1990). However, Fox is not precedential in this jurisdiction.

<sup>13</sup> The Custodian further argues that these three (3) OPRA requests should not be viewed in a vacuum because the Complainant has filed numerous requests seeking over 200 plus documents in the past few months which has required the copying of more than 1,000 pages of records. The Custodian argues that the Philip Charles v. Plainfield Municipal Utilities Authority (Union), 2009-141 – Findings and Recommendations of the Executive Director

## Analysis

### **Whether the Custodian unlawfully denied access to the requested 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:

“... 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 ... *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also states 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 therefore.” (Emphasis added.) N.J.S.A. 47:1A- 5.g.

Further, OPRA 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:

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Complainant’s numerous requests and aggressive approach in demanding records from the PMUA has caused a substantial disruption to the public agency’s business. The Custodian included a statement of facts that spans requests not relevant to this complaint, as well other complaints currently awaiting adjudication before the GRC.

“...[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.

Complainant’s March 23, 2009 OPRA request:

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.<sup>14</sup> 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).

Additionally, in DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007), the Custodian verbally advised the Complainant that she would not be able to provide the requested records within the seven (7) business day time frame. The Council held that:

“[w]hile the Custodian may have verbally contacted the Complainant within the statutorily mandated seven (7) business day time frame required to respond to OPRA requests, she failed to do so in writing, therefore creating a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i and the Council’s decision in Paff.”

In the instant complaint, the Custodian responded in writing to the Complainant acknowledging that the Complainant was provided with meeting minutes of the March 17, 2009 meeting in response to his March 23, 2009 OPRA request, but the Complainant refused to accept them as responsive. There is evidence in the record that the Custodian verbally informed the Complainant on April 9, 2009 that records responsive to the Complainant’s OPRA request were available for pickup; however, N.J.S.A. 47:1A-5.i is specific regarding the duty of a custodian to respond in writing within the statutorily

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<sup>14</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

mandated seven (7) business day time frame when responding to an official OPRA request for government records.

Therefore, the Custodian's failure to respond in writing to the Complainant's March 23, 2009 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., Kelley, supra, and DeLuca, supra.

Additionally, the Custodian responded in writing to the Complainant's March 23, 2009 OPRA request on April 15, 2009 stating that the PMUA does not employ a professional certified transcriber for the public meetings of the Board of Commissioners held throughout the year. Further, the Custodian stated that the meeting minutes of March 17, 2009 which the Custodian deemed to be responsive to the Complainant's March 23, 2009 OPRA request were provided to the Complainant and refused by him on April 15, 2009.

The Complainant subsequently acknowledged on April 16, 2009 in a letter to the Custodian that the specific records requested in the Complainant's March 23, 2009 OPRA request are not available from the PMUA. The Custodian certified in the SOI that no certified transcripts responsive to the Complainant's March 23, 2009 OPRA request exists.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian certified in the SOI 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.

Similarly, in this complaint, the Custodian certified in the SOI that no certified transcripts responsive to the Complainant's March 23, 2009 OPRA request exist, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing to the Complainant's March 23, 2009 OPRA request within the statutorily required seven (7) business days, resulting in a "deemed" denial, the Custodian has not unlawfully denied access to the Complainant's March 23, 2009 OPRA request pursuant to Pusterhofer, supra.

#### Complainant's April 7, 2009 OPRA request:

The evidence of record shows that the Custodian provided the Complainant with meeting minutes of the February 19, 2009 Board meeting in respond to his April 7, 2009 OPRA request. The Complainant refused to accept the meeting minutes on April 15, 2009, stating in a letter to the Complainant dated April 16, 2009 that he refused receipt of the meeting minutes because they were not the certified transcript requested by the Complainant.

The Complainant subsequently acknowledged on April 16, 2009 in a letter to the Custodian that the specific records requested in the Complainant's April 7, 2009 OPRA requests are not available from the PMUA. The Custodian certified in the SOI that no certified transcripts responsive to the Complainant's April 7, 2009 OPRA request exists.

As previously stated herein, Pusterhofer applies to the instant complaint because the evidence of record shows that the Custodian certified in the SOI that no certified transcripts responsive to the Complainant's April 7, 2009 OPRA requests exist, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian has not unlawfully denied access to the Complainant's April 7, 2009 OPRA request pursuant to Pusterhofer, *supra*.

#### Complainant's April 16, 2009 OPRA request:

Upon acknowledging that no records response to the March 23, 2009 and April 7, 2009 OPRA requests were available for disclosure, the Complainant submitted a third (3) OPRA request for a "[c]opy of any information stored or maintained electronically, by sound-recording or in a similar device, of the regular meetings for February 19, 2009 and March 17, 2009. If records do not exist in this medium, conversion of the record or providing the record in another medium such as steno or printed medium is acceptable."

The Custodian responded in writing to the April 16, 2009 OPRA request on April 23, 2009, the fifth (5<sup>th</sup>) business day after receipt of the Complainant's OPRA request, stating that the Board secretary advised that the audio recording is used solely as a backup to the stenographer machine. The Custodian further advised the Complainant that the Board secretary erases the audio recordings once the minutes have been produced. The Custodian further stated that the Board secretary recorded the PMUA's "regular meeting minutes" by way of stenograph machine and that the minutes created are not verbatim because no such transcripts are required by law. The Custodian reiterated that the meeting minutes provided to and refused by the Complainant on April 15, 2009 were produced from the stenograph machine and are responsive to the Complainant's OPRA request.

The Complainant argued in the Denial of Access complaint that the PMUA's destruction of the recording and failure to provide stenographic notes constitutes a denial of access under OPRA. The Custodian argued in the SOI that sufficient case law exists that exempts the stenographic record and the audiotape from disclosure under OPRA because such materials were created to assist the Board secretary in creating the official meeting minutes. The Custodian cited to O'Shea v. West Milford, 391 N.J. Super. 534 (App. Div. 2007), Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005) and Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008) to support her argument.

Subsequent to the Complainant's filing of the instant Denial of Access Complaint, the Custodian certified in the SOI that no records responsive to the Complainant's April 16, 2009 OPRA request exist (as was previously stated in the Custodian's April 23, 2009 response to the Complainant).

The facts in Pusterhofer, as recounted above, also apply to the Custodian's handling of this request. Therefore, because the Custodian responded in writing to the Complainant's April 16, 2009 OPRA request in a timely manner stating that no sound recording responsive exists and subsequently certified to such in the SOI, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See Pusterhofer, supra.*

**Whether the Custodian's "deemed" denial of the Complainant's March 23, 2009 OPRA request 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's failure to respond in writing to the Complainant's March 23, 2009 OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., because the Custodian certified in the SOI that no records responsive to the Complainant's March 23, 2009, April 7, 2009 and April 16, 2009 OPRA requests exist, 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.



## 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 March 23, 2009 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., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007) and DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007).
2. The Custodian certified in the Statement of Information that no certified transcripts responsive to the Complainant's March 23, 2009 OPRA request exist, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing to the Complainant's March 23, 2009 OPRA request within the statutorily required seven (7) business days resulting in a "deemed" denial, the Custodian has not unlawfully denied access to the Complainant's OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The evidence of record shows that the Custodian certified in the Statement of Information that no certified transcripts responsive to the Complainant's April 7, 2009 OPRA request exist, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian has not unlawfully denied access to the Complainant's OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Because the Custodian responded in writing to the Complainant's April 16, 2009 OPRA request in a timely manner stating that no responsive sound recording exists and subsequently certified to such in the Statement of Information, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian's failure to respond in writing to the Complainant's March 23, 2009 OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., because the Custodian certified in the Statement of Information that no records responsive to the Complainant's March 23, 2009, April 7, 2009 and April 16, 2009 OPRA requests exist, 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.

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July 20, 2010