



**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  
*Acting Commissioner*

**FINAL DECISION**

**February 23, 2010 Government Records Council Meeting**

Mary K. Campbell  
Complainant

Complaint No. 2009-82

v.

NJ Department of Labor and Workforce Development,  
Division of Unemployment Insurance  
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 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. Because Christina Zarejko failed in a timely manner to forward the Complainant’s December 26, 2008 OPRA request to the Custodian or direct the Complainant to the Custodian, she violated N.J.S.A. 47:1A-5.h. *See also Mourning v. Department of Corrections*, GRC Complaint No. 2006-75 (August 2006), Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007) and Morgano v. NJ Office of the Public Defender, Essex County, GRC Complaint No. 2008-79 (July 2008).
2. 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).
3. Because the Custodian subsequently certified in the Statement of Information that no records which are responsive to the request exist and there is no credible evidence in the record to refute the Custodian’s certification, the Complainant was not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).



4. Although Christina Zarejko violated OPRA by failing to forward the OPRA request to the Custodian or direct the Complainant to the Custodian and thereby prevented the Custodian from responding to the Complainant in a timely manner which consequently resulted in a “deemed denial,” because Ms. Zarejko certified that she never before saw an OPRA request and did not know who the Custodian was for the NJ Department of Labor and Workforce Development, Division of Unemployment Insurance, her failure to promptly forward the OPRA request to the Custodian does not appear to have been purposeful or deliberate. Therefore, it is concluded that Christina Zarejko’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 23<sup>rd</sup> Day of February, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 23, 2010 Council Meeting**

**Mary K. Campbell**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2009-82**

v.

**NJ Department of Labor and Workforce Development,  
Division of Unemployment Insurance**<sup>2</sup>  
**Custodian of Records**

**Records Relevant to Complaint:**<sup>3</sup> Inspect and copy:

1. The records and conclusions of the 1994 Audit of Independent Contractors for the Institute of Electrical and Electronics Engineers (“IEEE”), EIN: 13-1656633, conducted by the State of New Jersey.
2. IEEE’s, EIN: 13-1656633, claim and appeal and any other information submitted by IEEE regarding the Complainant’s status as a possible independent contractor rather than an IEEE employee during the summer and fall of 2005 while the Complainant collected unemployment benefits.

**Request Made:** December 26, 2008

**Response Made:** No response

**Custodian:** Donna Palmucci<sup>4</sup>

**GRC Complaint Filed:** March 9, 2009<sup>5</sup>

**Background**

**December 26, 2008**

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.

**March 9, 2009**

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

- Complainant’s OPRA request dated December 26, 2008

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

<sup>2</sup> Represented by DAG Ellen A. Reichart, on behalf of the New Jersey Attorney General.

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The original Custodian was Gregory Castellani.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

- Facsimile transmission report from 609-683-9653 to 609-633-2884 dated December 3, 2008
- Facsimile transmission report from 609-683-9653 to 609-292-9563 dated December 29, 2008

The Complainant states that on December 26, 2008, she spoke to Christina Zarejko, Chief Auditor for the NJ Department of Labor and Workforce Development, Division of Unemployment Insurance (“DLWD”) regarding an earlier OPRA request the Complainant faxed to Ms. Zarejko on December 3, 2008. The Complainant further verifies that Ms. Zarejko informed the Complainant that she had no record of receiving the December 3, 2008 OPRA request and determined that the fax number used by the Complainant to send the request was incorrect. The Complainant contends that Ms. Zarejko then gave the Complainant her correct fax number (609-292-9563), as well as the correct spelling of her last name. The Complainant verifies that she sent the OPRA request that formed the basis for this complaint to Ms. Zarejko via the corrected fax number that was provided by Ms. Zarejko. The Complainant attaches a copy of a fax transmittal report dated December 29, 2008, which reveals one (1) page was successfully transmitted to the corrected fax number.<sup>6</sup> The Complainant contends that she never received a response to her OPRA request.

The Complainant agrees to mediate this complaint.

### **March 12, 2009**

E-mail from the GRC to Christina Zarejko. The GRC has more than one custodian listed on file for the DLWD and asks the custodian named by the Complainant in the Denial of Access Complaint, Christina Zarejko, for the present status of the DLWD records custodian.

### **March 12, 2009**

Telephone call from David Fish to the GRC. David Fish calls the GRC to state that he is the Executive Director of Legal and Regulatory Services for the DLWD and is in receipt of a copy of the Denial of Access Complaint in the instant matter. Mr. Fish informs the GRC that he will act as the Custodian’s Counsel until a deputy attorney general can be assigned. Mr. Fish also states that the correct records custodian for this complaint is Donna Palmucci and not Ms. Zarejko. Mr. Fish informs the GRC that he intends to contact the Complainant because he believes he can resolve the issues which led to the Complainant filing the complaint.

### **March 18, 2009**

Letter from the GRC to Executive Director Fish. The GRC confirms the March 12, 2009 telephone conversation between Mr. Fish and the GRC.

### **March 19, 2009**

E-mail from Executive Director Fish to the Complainant. Mr. Fish informs the Complainant that he learned that she filed the instant complaint when Ms. Zarejko delivered a copy of it to him. Mr. Fish further informs the Complainant that Ms.

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<sup>6</sup> The OPRA request form is dated December 26, 2008.

Palmucci is the correct Custodian and he contends that he previously informed the Complainant of that fact subsequent to Ms. Zarejko's receipt of the Complainant's December 3, 2008 OPRA request to which Ms. Palmucci provided the response. With respect to the instant complaint, Mr. Fish asserts that his agency has no record of receiving the underlying December 26, 2008 OPRA request from the Complainant; however, he informs the Complainant that he is now responding to any such request by denying her access to the requested records because the unemployment compensation law provides that the records are confidential.

### **March 19, 2009**

E-mail from the GRC to Executive Director Fish and the Custodian. The GRC informs Mr. Fish and the Custodian that, because Mr. Fish stated in his e-mail received by the GRC earlier this date that the agency has no record of receiving an OPRA request from the Complainant dated December 26, 2008, the GRC will need a legal certification from the Custodian regarding said OPRA request.

### **March 20, 2009**

Facsimile transmission from Executive Director Fish to the GRC. Mr. Fish forwards two (2) certifications to the GRC in response to the GRC's e-mail to him dated March 19, 2009: one (1) from the Custodian and one (1) from Ms. Zarejko, both certifications were made this date.

The Custodian certifies that on December 3, 2008, the Complainant faxed an OPRA request to the Custodian.<sup>7</sup> The Custodian certifies that she responded to the Complainant's request on December 11, 2008 identifying herself as the DLWD OPRA Custodian and providing the Complainant with her mailing address, e-mail address and telephone number. The Custodian appended a copy of her December 11, 2008 response to the certification wherein she denied the Complainant access to the requested records. The Custodian further certifies that, although the Complainant knew that Ms. Palmucci was the Custodian, and notwithstanding the fact that the Complainant had the Custodian's name and contact information, the Custodian certifies that she never received a copy of the Complainant's December 26, 2008 OPRA request.

Christina Zarejko certifies that she is employed as Chief Auditor for the DLWD. Ms. Zarejko further certifies that on December 26, 2008, she received a message to call the Complainant. Ms. Zarejko certifies that she called the Complainant on this same date and the Complainant informed her that the Complainant faxed a request for information to Ms. Zarejko on December 3, 2008. Ms. Zarejko avers that she told the Complainant that she never received the fax and she then asked the Complainant for the fax number the Complainant used to transmit the request. Ms. Zarejko certifies that the Complainant stated she sent the fax via 609-633-2884. Ms. Zarejko further certifies that she told the Complainant that Ms. Zarejko's correct fax number is 609-292-9563, and she asked the Complainant to re-fax the request via that number. Ms. Zarejko also certifies that she informed the Complainant that the information the Complainant requested was

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<sup>7</sup> Actually two (2) OPRA requests were filed by the Complainant dated December 3, 2008. The requests sought similar but slightly different records than those records requested in the OPRA request dated December 26, 2008, which is the OPRA request that forms the basis for the instant complaint. Mary Campbell v. NJ Department of Labor and Workforce Development, Division of Unemployment Insurance, 2009-82 – Findings and Recommendations of the Executive Director

confidential by law and would not be disclosed by the DLWD. Ms. Zarejko avers that on December 29, 2008, she received a fax from the Complainant which contained an OPRA request dated December 26, 2008. Ms. Zarejko further avers that she never before saw an OPRA request, did not know who was the Custodian for the DLWD and thought her verbal denial of the Complainant's request was sufficient. Ms. Zarejko certifies that when she received the Complainant's Denial of Access Complaint she brought it to the attention of Mr. Fish. Ms. Zarejko further certifies that Mr. Fish told her the OPRA Custodian was Donna Palmucci and that he thought Ms. Palmucci had received a similar complaint in the past from the Complainant.<sup>8</sup>

**March 24, 2009**

Offer of Mediation sent to the Custodian.

**March 26, 2009**

E-mail from the GRC to the Custodian. The GRC confirms an earlier telephone conversation this date with the Custodian wherein the Custodian requested an extension of time to decide on mediation. The GRC grants a five (5) business day extension of time for the Custodian to decide whether to mediate this complaint.

**March 31, 2009**

The Custodian agrees to mediation.

**April 17, 2009**

The complaint is referred for mediation.

**October 27, 2009**

The complaint is referred back from mediation to the GRC for adjudication.

**October 27, 2009**

Letter from the GRC to the Complainant. The GRC provides the Complainant with an opportunity to amend her complaint no later than November 6, 2009, in the event some issues were resolved during the mediation process and no longer require adjudication.

**October 27, 2009**

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

**October 27, 2009**

E-mail from the Custodian to the GRC. The Custodian states she needs additional time to prepare the SOI.

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<sup>8</sup> The Complainant did reply to the certifications of the Custodian and Ms. Zarejko by e-mail to the GRC dated March 23, 2009, however her reply was not responsive to the averments set forth in said certifications.

**October 27, 2009**

E-mail from the GRC to the Custodian. The GRC grants the Custodian a five (5) business day extension of time to prepare and submit the SOI.

**November 12, 2009**

E-mail from David Fish to the GRC. Mr. Fish confirms a second five (5) business day extension of time granted by the GRC in order for the Custodian to prepare and submit the SOI.

**November 20, 2009<sup>9</sup>**

Custodian's SOI with the following attachments:

- New Jersey Department of State, Division of Archives and Records Management *Records Retention and Disposition Schedule* in two (2) pages approving Item No. 1 of the records relevant to this complaint for destruction<sup>10</sup>
- Complainant's OPRA request dated December 26, 2008
- E-mail from the GRC to Christina Zarejko dated March 12, 2009
- E-mail from Christina Zarejko to Executive Director Fish dated March 12, 2009
- E-mail from Executive Director Fish to the Complainant dated March 19, 2009
- Copy of N.J.S.A. 43:21-11(g) undated

The Custodian certifies that she consulted the Employer Accounts Audit Application which indicated that there was an audit of Item No. 1 of the records relevant to the complaint which was closed on October 16, 1997. The Custodian therefore certifies that said records would have been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management on or about October 16, 2002, and no further search was required. With respect to Item No. 2 of the records relevant to the complaint, the Custodian searched the Employer Accounts Audit Application and was unable to locate any record of an audit of IEEE performed in or after 2005. The Custodian avers that because no records relevant to Item No. 2 of the complaint exist, it was not necessary to continue to search the records.

The Custodian certifies that on December 3, 2008, the Complainant faxed an OPRA request to the Custodian. The Custodian further certifies that she responded to the Complainant's request on December 11, 2008 identifying herself as the DLWD OPRA Custodian and providing the Complainant with her mailing address, e-mail address and telephone number. The Custodian certifies that she denied the Complainant's request because the requested records are exempt from disclosure under N.J.S.A. 43:21-11(g), which provides that all records, reports and other information obtained from employers and employees is confidential and shall not be published or open to public inspection. The Custodian avers further that the cited statutory provision has not been abrogated by OPRA.

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<sup>9</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.

<sup>10</sup> This document was not dated but was signed by the Secretary of the State Records Committee on September 16, 2004.

The Custodian certifies that she never received a copy of the Complainant's December 26, 2008 OPRA request. The Custodian further certifies that she did not see the Complainant's request until early March 2009, when Ms. Zarejko delivered it to her along with the Denial of Access Complaint.

The Custodian avers that because the records which constitute Item No. 1 of the records relevant to the complaint have been destroyed and do not exist, they cannot be disclosed; however, the Custodian also avers that even if said records were available they would be exempt from disclosure under N.J.S.A. 43:21-11(g), which provides that all records, reports and other information obtained from employers and employees is confidential and shall not be published or open to public inspection. The Custodian avers that this is a statute that has not been abrogated under OPRA. The Custodian certifies that there are no records responsive to the Complainant's request for Item No. 2 of the records relevant to the complaint.

### **Analysis**

**Whether Christina Zarejko, the DLWD employee who received the records request, violated OPRA by not forwarding the request to the Custodian or directing the requestor to the Custodian pursuant to N.J.S.A. 47:1A-5.h.?**

OPRA provides that:

“[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5.h.

In this matter, the Complainant stated that on December 26, 2008, she talked to Christina Zarejko, the Chief Auditor for the NJ Department of Labor and Workforce Development, Division of Unemployment Insurance, regarding an OPRA request the Complainant alleged that she faxed to Ms. Zarejko on December 3, 2008. The Complainant further stated that Ms. Zarejko informed the Complainant that she had no record of receiving such a request and she checked the fax number to which the Complainant said she faxed the OPRA request. The Complainant asserted that Ms. Zarejko informed the Complainant that the fax number was incorrect and provided a correct fax number. Ms. Zarejko certified that she asked the Complainant to re-fax the request to her office at the corrected fax number. Ms. Zarejko further certified that she told the Complainant that the information the Complainant sought was confidential and could not be disclosed pursuant to a statutory provision. Ms. Zarejko also certified that she received a fax from the Complainant on December 29, 2008 which contained an OPRA request dated December 26, 2008, but that she took no further action with respect to the request.<sup>11</sup>

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<sup>11</sup> Although there appears to be some controversy surrounding the date of the OPRA request which gives rise to this complaint, the record is clear concerning the date of said request. The December 3, 2008 OPRA request is not the request which forms the basis for this complaint; the December 26, 2008 OPRA request forms the basis for the complaint. The Custodian certified that an OPRA request from the Complainant dated December 3, 2008 was faxed from the Complainant to her on that same date. The Custodian also

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N.J.S.A. 47:1A-5.h. provides, and the Council has consistently held, that an employee of a public agency who receives an OPRA request must either direct the requestor to the custodian or forward the requestor's OPRA request to the custodian. In Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006), the Council determined that because the employee who received an OPRA request did not forward the request to the custodian or direct the requestor to the custodian the employee violated N.J.S.A. 47:1A-5.h. Similarly, in Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), the Council found that because an employee improperly forwarded the complainant's OPRA request to the custodian the employee violated N.J.S.A. 47:1A-5.h. More recently, in Morgano v. NJ Office of the Public Defender, Essex County, GRC Complaint No. 2008-79 (July 2008), the Council determined that a deputy public defender who personally responded to an OPRA request, rather than forwarding the OPRA request to the Custodian or directing the Complainant to the Custodian, violated OPRA.

Accordingly, because employee Christina Zarejko failed in a timely manner to forward the Complainant's December 26, 2008 OPRA request to the Custodian or direct the Complainant to the Custodian, she violated N.J.S.A. 47:1A-5.h. See Mourning, *supra*, Vessio, *supra*, and Morgano, *supra*.

### **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

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certified that the request form was sent from the Complainant to the Custodian's fax number and addressed to the Custodian by name. The Custodian also certified that on the date she received the request she telephoned and spoke with the Complainant, and subsequently on December 11, 2008, the Custodian certified that she responded to the Complainant's December 3, 2008 OPRA request in writing and provided the Complainant with a legal reason for denying her access to the requested records. The Custodian further certified that at all times while communicating with the Complainant she identified herself by name as the Custodian. Nowhere in the complaint does the Complainant state that the underlying OPRA request was dated December 3, 2008. Conversely, the Complainant attached to her complaint a copy of an OPRA request dated December 26, 2008, which she verified is the request that is the subject of the complaint. The records listed in the complaint as the records denied are identical to the records requested in the December 26, 2008 request. Moreover, the Custodian certified that she responded to the December 3, 2008 request, whereas there was no response to the Complainant's December 26, 2008 request. The Complainant verified that no response was provided for the request which forms the basis of this complaint.

business...[a] government record shall not include...*criminal investigatory records...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA 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 thereof ...” N.J.S.A. 47:1A-5.g.

OPRA also states:

“[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* ... If the government record is in storage or archived, the requestor shall be so *advised within seven business days* after the custodian *receives the request*. The requestor shall be advised by the custodian *when the record can be made available*. If the *record is not made available by that time*, access shall be *deemed denied*.” (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. 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.<sup>12</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA

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<sup>12</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 is required. *Mary Campbell v. NJ Department of Labor and Workforce Development, Division of Unemployment Insurance, 2009-82* – 8  
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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).

Here, employee Christina Zarejko elicited and accepted the Complainant’s OPRA request, then after receiving the request, took no further action. Ms. Zarejko failed to forward the OPRA request to the Custodian in a timely manner and consequently the Custodian failed to respond in writing to the Complainant’s OPRA request.

Accordingly, 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).

Despite the Custodian’s deemed denial, the Custodian certified in the SOI that no records responsive to the Complainant’s request exist and provided credible evidence to support her certification. The Complainant has not submitted any evidence 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 billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed. The GRC determined that although the Custodian failed to respond to the OPRA request in a timely manner, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Because the Custodian subsequently certified in the SOI that no records which are responsive to the request exist and there is no credible evidence in the record to refute the Custodian’s certification, the Complainant was not unlawfully denied access to the requested records pursuant to Pusterhofer, supra.

**Whether Christina Zarejko’s failure to forward the Complainant’s OPRA request to the Custodian or direct the Complainant to the Custodian, which prevented the Custodian from responding to the Complainant in a timely manner consequently resulting in a “deemed” denial of access, rises 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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days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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, 107 (App. Div. 1996)).

In the instant complaint, the Complainant faxed her OPRA request to Christina Zarejko, even though the evidence of record reveals that the Complainant had been previously informed that Donna Palmucci was the DLWD Custodian. Although Christina Zarejko violated OPRA by failing to forward the OPRA request to the Custodian or direct the Complainant to the Custodian and thereby prevented the Custodian from responding to the Complainant in a timely manner which consequently resulted in a “deemed denial,” because Ms. Zarejko certified that she never before saw an OPRA request and did not know who the Custodian was for the DLWD, her failure to promptly forward the OPRA request to the Custodian does not appear to have been purposeful or deliberate. Therefore, it is concluded that Christina Zarejko’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. Because Christina Zarejko failed in a timely manner to forward the Complainant’s December 26, 2008 OPRA request to the Custodian or direct

the Complainant to the Custodian, she violated N.J.S.A. 47:1A-5.h. See also Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006), Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007) and Morgano v. NJ Office of the Public Defender, Essex County, GRC Complaint No. 2008-79 (July 2008).

2. 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).
3. Because the Custodian subsequently certified in the Statement of Information that no records which are responsive to the request exist and there is no credible evidence in the record to refute the Custodian's certification, the Complainant was not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although Christina Zarejko violated OPRA by failing to forward the OPRA request to the Custodian or direct the Complainant to the Custodian and thereby prevented the Custodian from responding to the Complainant in a timely manner which consequently resulted in a "deemed denial," because Ms. Zarejko certified that she never before saw an OPRA request and did not know who the Custodian was for the NJ Department of Labor and Workforce Development, Division of Unemployment Insurance, her failure to promptly forward the OPRA request to the Custodian does not appear to have been purposeful or deliberate. Therefore, it is concluded that Christina Zarejko'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.

Prepared By: John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director

February 16, 2010