



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**July 28, 2015 Government Records Council Meeting**

Robert W. Moss  
Complainant

Complaint No. 2014-419

v.

City of Newark Zoning Board (Essex)  
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian lawfully denied the Complainant’s OPRA request, because the Custodian certified that the requested records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 28<sup>th</sup> Day of July, 2015

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: July 30, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 28, 2015 Council Meeting**

**Robert W. Moss<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-419**

v.

**City of Newark Zoning Board (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopy via U.S. mail of a City of Newark Zoning Board (“Board”) resolution, dated November 14, 2014, denying an application submitted by “Mr. Pereira for a parking variance on Bruen Street.”

**Custodian of Record:** Robert P. Marasco<sup>3</sup>  
**Request Received by Custodian:** December 5, 2014  
**Response Made by Custodian:** December 5, 2014  
**GRC Complaint Received:** December 10, 2014

**Background<sup>4</sup>**

**Request and Response:**

On December 5, 2014, the Complainant hand-delivered an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. Ruth Jackson, an employee of the City, asked the Complainant to clarify the correct address for the property or meeting date. In reply, the Complainant provided an amended date to Ms. Jackson, November 13, 2014, that he received from the City of Newark’s (“City”) website. Ms. Jackson again advised that no meeting took place on that date. Ms. Jackson later responded in writing on behalf of the Custodian to confirm that the Complainant had rescinded his OPRA request and that the City considered same closed.

**Denial of Access Complaint:**

On December 10, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted he made a reasonable attempt

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

<sup>2</sup> Represented by Vivian Sanks King, Esq. (Newark, NJ).

<sup>3</sup> The current custodian of record is Kenneth Louis.

<sup>4</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

to identify the date of the meeting at which the Board approved the responsive resolution. The Complainant noted that an article describing the meeting was posted to NJ.com, although same was posted on November 25, 2014.<sup>5</sup> The Complainant also noted that, after Ms. Jackson requested clarification, he accessed the Board's meeting schedule through the City's website and saw a Board meeting on November 13, 2014.<sup>6</sup> The Complainant asserted that he contacted the City and was advised that no meeting occurred on November 13, 2014 either. The Complainant asserted that the City provided no further information.

The Complainant contended that the Custodian denied access to records pertaining to meetings posted on the City's website and that the Custodian refused to identify the actual dates on which the Board held meetings. The Complainant finds it unreasonable to assume that no Board meeting occurred, especially given that NJ.com posted an article intimating details of the meeting. The Complainant argued that it is incumbent upon the City and Board's staff to provide correct meeting dates in the instance that the website is incorrect. The Complainant asserted that his OPRA request was reasonable and that the Custodian should have easily been able to locate the responsive resolution. The Complainant asserted that the Custodian unlawfully denied access to the responsive records.

#### Statement of Information:

On December 22, 2014, the Custodian filed a Statement of Information ("SOF"). The Custodian certified that City received the Complainant's OPRA request on December 5, 2014. The Custodian certified that Ms. Jackson sought clarification at that time, which the Complainant provided. However, the Custodian certified that neither the initial request nor the Complainant's clarification contained the correct meeting date; as a result, staff could not locate responsive records. The Custodian affirmed that the Complainant was not receptive to the response and advised that he would attempt to obtain the resolution by other means. The Custodian certified that Ms. Jackson responded in writing on his behalf on the same day to confirm that the Complainant rescinded his OPRA request.

### Analysis

#### Issues Presented

The initial threshold issue is whether the GRC has the authority to adjudicate the complaint based on the Custodian's allegation that the Complainant rescinded his OPRA request prior to filing a complaint. The evidence of records lacks any written communications between the parties on this point, as a majority of the interactions were orally communicated. For this reason, it is unclear whether the Complainant actually withdrew his request or whether Ms. Jackson misinterpreted the oral statements. Thus, in the absence of the Complainant's written confirmation that he withdrew his request from consideration, the GRC will adjudicate the matter accordingly.

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<sup>5</sup> [http://www.nj.com/essex/index.ssf/2014/11/ironbound\\_residents\\_win\\_fight\\_against\\_another\\_parking\\_lot.html](http://www.nj.com/essex/index.ssf/2014/11/ironbound_residents_win_fight_against_another_parking_lot.html) (Accessed July 1, 2015).

<sup>6</sup> <http://www.ci.newark.nj.us/wp-content/uploads/2013/07/2014-Land-Use-Board-Calendar.pdf> (Accessed July 1, 2015).

## **Unlawful Denial of Access**

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.

In Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Complainant sought a resolution from a Board meeting and provided two (2) dates (November 13, and 14, 2014) based on information obtained from the City’s website in tandem with an article posted to NJ.com on November 25, 2014. Ms. Jackson twice responded on behalf of the Custodian advising that the dates the Complainant provided were incorrect. Further, the Custodian certified in the SOI that the Board was unable to locate responsive records based on these dates. A review of both the City’s Board meeting schedule and the news article supports that the meeting in question likely occurred on a later date. The GRC is thus satisfied that the evidence of record supports the City’s denial of access.

Based on the foregoing, the Custodian did not unlawfully deny access to the Complainant’s OPRA request, because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See* Pusterhofer, GRC 2005-49.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied the Complainant’s OPRA request, because the Custodian certified that the requested records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See* Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover  
Executive Director

July 21, 2015