



**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**

Robert Tesoroni, Jr.  
Complainant

Complaint No. 2009-97

v.

Millville Public Library (Cumberland)  
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. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian has certified that no records responsive to Request Item No. 3 exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the records responsive to Request Item No. 3 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although 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 OPRA request within the statutorily mandated seven (7) business days, because the Custodian certified that she disclosed the records responsive to Request Items Nos. 1 and 2 to the Complainant and further certified that no records responsive to Request Item No. 3 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 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**

**Robert Tesoroni, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-97**

v.

**Millville Public Library (Cumberland)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

**Copies of:**

1. Policy pertaining to individual scheduling of board room for meetings;
2. Minutes in which policy was adopted and approved; and
3. Scheduling calendar for calendar years 2008 and 2009.

**Request Made:** February 27, 2009

**Response Made:** March 12, 2009<sup>3</sup>

**Custodian:** Irene Percelli

**GRC Complaint Filed:** March 17, 2009<sup>4</sup>

**Background**

**February 27, 2009**

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 17, 2009**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated February 27, 2009.

The Complainant asserts that he visited the Millville Public Library ("Library") on March 12, 2009 to inquire about the status of his OPRA request. The Complainant also asserts that the Custodian told him that she had thirty (30) days to respond to his request. The Complainant further asserts that he informed the Custodian that she was obligated to respond to his request within seven (7) business days. The Complainant states that the parties ultimately agreed that nine (9) business days had elapsed since the Custodian received the Complainant's OPRA request.

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The Complainant states that the Custodian responded verbally to his request on March 12, 2009 when the Complainant visited the Millville Public Library.

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

The Complainant asserts that the Custodian stated that she had forwarded the OPRA request to the Library's Board of Directors. The Complainant states that he asked the Custodian what that meant. The Complainant states that the Custodian told him that she was awaiting instruction from the Board on how to proceed with the OPRA request. The Complainant states that he informed the Custodian that according to the OPRA mandated response time, his request was being denied. The Complainant states that the Custodian told him that she was not denying his request. The Complainant states that he then requested access to the records listed above and the Custodian stated that access would not be granted until the Board of Directors instructed the Custodian on how to proceed.

The Complainant agrees to mediate this complaint.

**April 21, 2009**

Offer of Mediation sent to the Custodian.

**April 23, 2009**

The Custodian agrees to mediate this complaint.

**May 1, 2009**

Complaint referred to mediation.

**August 27, 2009**

Complaint referred back from mediation for adjudication.

**November 16, 2009**

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

**November 30, 2009**

Custodian's SOI.<sup>5</sup> The Custodian certifies that her search for the requested records included a search of all Board of Trustee minutes to establish a trail of information related to use of the Library's meeting room, policy and adoption information. The Custodian also certifies that these records are not indexed and are merely filed chronologically in file cabinets in the basement. The Custodian certifies that this search took a great deal of time. The Custodian also certified that she mistakenly believed that she had thirty (30) days to respond to the Complainant's request. The Custodian certifies that the Complainant's OPRA request was the first OPRA request the Library has ever received.

The Custodian further certifies that she provided the Complainant with records responsive to Request Items No. 1 and 2 on June 2, 2009. The Custodian certifies that no meeting room schedule for 2008 and 2009 exists. The Custodian certifies that meeting room use is part of the monthly report made to the Board of Trustees and is not included in the Board of Trustees Meeting minutes, and each page of the calendar is discarded

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<sup>5</sup> The Custodian attached additional material that is not relevant to the adjudication of this Denial of Access Complaint.  
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once it is incorporated into the monthly report. The Custodian certifies that although all Board of Trustees minutes are maintained in perpetuity, the monthly board report is not incorporated into the Board of Trustees minutes.

The Custodian certifies that she was hired in May 2008 and at the time of the Complainant's OPRA request she was not familiar with the state of Board of Trustees minutes, monthly report, policy adoption process, and changes to procedures and documentation. The Custodian certifies that she responded to the Complainant's OPRA request, although such response was untimely, and attempted in good faith to satisfy the Complainant's request within the limitations of her time and knowledge. The Custodian maintains that because the Library is an association library, not a municipal library, it is not clear whether the Library is a public institution subject to OPRA.

### 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 ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides 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.

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:

“...[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>6</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).

The Complainant submitted his OPRA request on February 27, 2009. The Complainant stated that the Custodian responded verbally to his request on March 12, 2009 when the Complainant visited the Library to inquire about the status of his OPRA request. The Custodian certified that she provided the Complainant with records responsive to Request Items No. 1 and 2 on June 2, 2009 and the Complainant has not disputed the disclosure of such records.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The Custodian has certified that no records responsive to Request Item No. 3 exist. The Custodian certified that the Library’s meeting room scheduling calendar for 2008 and 2009 does not exist. The Custodian further certified that meeting room use is

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<sup>6</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.

part of the monthly report made to the Board of Trustees and is not included in the Board of Trustees Meeting minutes. The Custodian also certified that each page of the calendar is discarded once it is incorporated into the monthly report. 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 held the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian has certified that no records responsive to Request Item No. 3 for the Library's meeting room scheduling calendar for 2008 and 2009 exist and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the records responsive to Request Item No. 3.

**Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed,

knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996)).

Although 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 OPRA request within the statutorily mandated seven (7) business days, because the Custodian certified that she disclosed the records responsive to Request Items Nos. 1 and 2 to the Complainant and further certified that no records responsive to Request Item No. 3 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 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian has certified that no records responsive to Request Item No. 3 exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the records responsive to Request Item No. 3 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although 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 OPRA request within the statutorily mandated seven (7) business days, because the Custodian certified that she disclosed the records responsive to Request Items Nos. 1 and 2 to the Complainant and further certified that no records responsive to Request Item No. 3 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.

Prepared By: Karyn Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

February 16, 2010