State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

September 29, 2015 Government Records Council Meeting

Robert A. Verry
Complainant
v.
Franklin Fire District No. 1 (Somerset)
Custodian of Record

Complaint No. 2014-365

At the September 29, 2015 public meeting, the Government Records Council ("Council") considered the September 22, 2015 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. This complaint should be held in abeyance until after the Appellate Division has ruled on the Franklin Fire District No. 1's appeal in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196 (Interim Order dated April 29, 2014). Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's decision to this complaint.

2. The Council defers analysis of whether any parties knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the conclusion of proceedings before the Appellate Division.

3. The Council defers analysis of whether the Complainant is a prevailing party, pending the conclusion of proceedings before the Appellate Division.

Interim Order Rendered by the
Government Records Council
On The 29th Day of September, 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: October 1, 2015

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting

Robert A. Verry[1] **GRC Complaint No. 2014-365**
Complainant

v.

Franklin Fire District No. 1 (Somerset)[2]
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Millstone Valley Fire Department's ("MVFD") bank account statements for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.
2. MVFD's checks issues for the years 2010, 2011, 2012, 2013, and from January 1, 2014, to July 31, 2014.

Custodian of Record: Tim Szymborski
Request Received by Custodian: August 6, 2014
Response Made by Custodian: August 14, 2014
GRC Complaint Received: October 29, 2014

Background[3]

Request and Response:

On August 6, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian, seeking the above-mentioned records.

On August 14, 2014, the Custodian's Counsel responded in writing on behalf of the Custodian, advising that the responsive records do not fall within the definition of a "government record" because MVFD is not subject to OPRA. The Custodian's Counsel noted that the issue of MVFD designation as a "public agency" is pending adjudication before the Government Records Council ("GRC") and may ultimately be appealed to the Appellate Division.[4] For that reason, the

[1] Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
[2] Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).
[3] 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.
[4] At the time of Custodian Counsel's response, the GRC was in the process of reviewing a request for reconsideration in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196. The Council adjudicated the matter at its February 24, 2015, meeting. Thereafter, in March 2015, Franklin Fire District No. 1 appealed the Council's decision.

Custodian's Counsel requested that the Complainant not file a complaint either with the GRC or Superior Court until the "public agency" issue is fully resolved.

Denial of Access Complaint:

On October 29, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant disputed the Franklin Fire District No. 1's ("FFD") denial of access, noting that the GRC previously determined that MVFD is a "public agency" for purposes of OPRA. Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196 (Interim Order dated April 29, 2014)(*citing* Paff v. NJ State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013)). The Complainant further noted that pending litigation is not a lawful basis for denying access to responsive records.

The Complainant thus requested that the GRC: 1) determine that the Custodian violated OPRA by failing to provide all responsive records within seven (7) business days; 2) order immediate disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA, thus warranting an assessment of the civil penalty; 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees; and 5) order any further relief deemed to be appropriate.

Statement of Information:

On November 18, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on August 6, 2014, and responded in writing on August 14, 2014, by advising the Complainant that the FFD still considers MVFD not a "public agency." The Custodian affirmed that the Custodian's Counsel reminded the Complainant that it was awaiting the resolution of all issues in Verry and requested that the Complainant take no further action here until that time. However, without waiving his position, the Custodian certified that he did reach out to MVFD. The Custodian affirmed that MVFD's chief advised him that it had "no response."

The Custodian argued that the FFD still maintains its position from Verry, GRC 2013-196, that MVFD is not a "public agency" subject to OPRA. The Custodian thus contended that MVFD's records do not constitute "government records" under OPRA. The Custodian requested that the GRC hold this case in abeyance pending resolution of Verry.

Additional Submissions:

On February 13, 2015, the Complainant's Counsel submitted a letter brief to the GRC, arguing that the Custodian's denial of access was unlawful. Darata v. Monmouth Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim Order dated February 24, 2011)(holding that pending litigation is not a lawful basis for denying access under OPRA); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq.* (Interim Order dated October 28, 2014). The Complainant's Counsel further argued that the Custodian, Custodian's Counsel, FFD, and MVFD all had direct knowledge of the Council's decision in

Verry, GRC 2013-196, which deemed MVFD a "public agency" but nonetheless knowingly chose to deny access to the Complainant's OPRA request.

The Complainant's Counsel further asserted that the Custodian failed to submit the required document index as part of the SOI. Paff v. NJ Dep't of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007). The Complainant's Counsel contended that the Custodian has also failed to provide document indexes on several other occasions, to which he has continuously objected.

The Complainant's Counsel also asserted that all of the requested records are "government records." The Complainant's Counsel also argued that the MVFD's Chief's assertion that they had "no response" is problematic, given that the Council has already determined that same is a "public agency." The Complainant's Counsel reiterated all requests for relief and further asked that the Council determine that MVFD's Chief also knowingly and willfully violated OPRA.

Analysis

Abeyance of Complaint

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The complaint currently before the Council presents a novel issue. Specifically, the Complainant sought access to records from MVFD through the FFD. The Complainant's assertion that MVFD must comply with his OPRA request was based on the Council's prior decision in Verry, GRC 2013-196 (holding that, as a matter of first impression, volunteer fire companies within a fire district are public agencies subject to the provisions of OPRA).[5] However, the FFD has appealed the decision, maintaining that there is no distinction between non-district and district volunteer fire companies. Based on the forgoing, the Custodian's Counsel denied the request and asked the Complainant not to file a complaint until the "public agency" issue was fully resolved.

Notwithstanding Custodian Counsel's request, the Complainant filed the instant complaint on October 29, 2014, arguing that pending litigation was not a lawful basis for denial. Subsequent to FFD's reiteration, as stated in the SOI, of FFD's position and request for abeyance of the instant complaint, the Complainant's Counsel cited to Darata, GRC 2009-312, and Carter, GRC 2013-328, in support of the unlawful denial of access assertion.

The GRC begins by acknowledging that, as noted by the Complainant and Complainant's Counsel, pending litigation is not a lawful basis for denying access to an OPRA request. The custodians in Darata, GRC 2009-312, and Carter, GRC 2013-328, attempted to use pending

[5] The GRC notes that the Council's decision in Verry, GRC 2013-196, was the first decision on the novel issue of whether a fire district member volunteer fire company met the definition of a "public agency" under OPRA.

litigation as a reason for not providing records or not responding to an OPRA request respectively. However, those complaints did not address whether the agencies were considered public agencies under OPRA, thus calling into question whether the responsive records met OPRA's definition of a "government record." Specifically in Darata, the complainant sought attorney-billing records from the County, which were clearly disclosable based on a plain reading of N.J.S.A. 47:1A-1.1 (providing that attorney bills are not exempt under the attorney-client privilege exemption but may be redacted as might be appropriate). Moreover, in Carter, the custodian contended that he was waiting for the GRC to determine the reasonableness of a special service charge before responding to a similarly worded OPRA request.

The FFD's response in the instant complaint could arguably be construed as denying access based solely on pending litigation. However, a fundamentally different issue is at play in this complaint. Specifically, the FFD still contends that MVFD is not a "public agency" under the law and – more important – is challenging the Council's prior decision in Verry, GRC 2013-196, in the Appellate Division. The GRC recognizes that the FFD is not asserting that access should be denied based on pending litigation. Rather, the FFD is instead requesting that the "public agency" issue be resolved at the Appellate Division prior to deciding this complaint. Thus, the GRC must decide whether the parties should be reasonably required to incur additional time, effort, and cost to litigate an issue that is currently before the Appellate Division.

The GRC begins by noting that the Administrative Procedures Act gives the GRC broad latitude to effectuate the purposes of OPRA. N.J.S.A. 52:14B-1 *et seq.* In considering all the issues presented, as well as the overriding question of MVFD's status as a "public agency," the instant complaint should be held in abeyance pending the Appellate Division's decision in Verry, GRC 2013-196. Notwithstanding the Council's prior decision as a matter of first impression, adjudication of this complaint will likely cause all parties more time, effort, and additional cost than is reasonably necessary. Any decision to the contrary would lead to additional litigation via appeals, reconsiderations, *etc.*, and implicates unnecessary costs for all parties. Additionally, by holding the complaint in abeyance, the GRC will avoid unnecessary adjudication and conserve precious public resources. The GRC is thus satisfied that abeyance is the most acceptable course of action at this time for all parties involved.

Accordingly, the instant complaint should be held in abeyance until the Appellate Division has ruled on the FFD's appeal in Verry, GRC 2013-196. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's ultimate decision properly to this complaint.

Knowing & Willful

The Council defers analysis of whether any parties knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the conclusion of proceedings before the Appellate Division.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the

conclusion of proceedings before the Appellate Division.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. This complaint should be held in abeyance until after the Appellate Division has ruled on the Franklin Fire District No. 1's appeal in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196 (Interim Order dated April 29, 2014). Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's decision to this complaint.

2. The Council defers analysis of whether any parties knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the conclusion of proceedings before the Appellate Division.

3. The Council defers analysis of whether the Complainant is a prevailing party, pending the conclusion of proceedings before the Appellate Division.

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

Reviewed By: Joseph D. Glover
Executive Director

September 22, 2015