



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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FINAL DECISION

September 26, 2007 Government Records Council Meeting

Charles Popadines
Complainant

Complaint No. 2007-180

v.

Township of Hanover (Morris)
Custodian of Record

At the September 26, 2007 public meeting, the Government Records Council (“Council”) considered the September 19, 2007 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 since the Complainant’s August 6, 1981 request for records predates OPRA and because the Custodian certifies that the Township of Hanover is not in possession of the Complainant’s request and that no records responsive to the Complainant’s request exist, this complaint should be dismissed. See Laufgas v. City of Patterson, GRC Complaint No. 2006-23 (February 2007); Pusterhofer v. New Jersey Department of Education, 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 26th Day of September, 2007



Vincent P. Maltese, Chairman
Government Records Council

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

Kathryn Forsyth
Government Records Council

Decision Distribution Date: October 2, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 26, 2007 Council Meeting**

**Charles Popadines¹
Complainant**

GRC Complaint No. 2007-180

v.

**Township of Hanover (Morris)²
Custodian of Records**

Records Relevant to Complaint: Records which indicate the Township of Hanover's legal authority to discharge drainage water through a channel located adjacent to the Complainant's previous property.

Request Made: August 6, 1981³

Response Made: N/A

Custodian: Joseph A. Giorgio

GRC Complaint Filed: July 23, 2007

Background

August 6, 1981

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above.

July 23, 2007

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

- Letter from the Complainant to the Mayor of Hanover dated March 15, 2004 attaching an October 29, 1990 correspondence from Mayor Ronald F. Francioli to the Complainant.
- Letter from the Complainant to Mr. Saverio Iannaccone dated April 1, 2004 attaching a newspaper clip written by the Complainant and a letter from Mr. Saverio Iannaccone to the Complainant dated July 21, 1983.
- Letter from the Complainant to Mr. Michael Rubbinaccio dated February 16, 2005.

The Complainant asserts that his August 6, 1981 request for the requested records has gone unanswered for years. The Complainant asserts that the officials of the Township of Hanover are violating OPRA by failing to provide the information that

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant did not provide a copy of his request with this complaint.

shows that the Township had the right to release drainage water adjacent to the Complainant's previous property.

August 16, 2007

Certification from the Custodian to the GRC. The Custodian certifies that he is the Township Clerk responsible for maintaining the Township's records.

The Custodian certifies that he does not have a copy of the Complainant's August 6, 1981 OPRA request in his possession. The Custodian further certifies that the Complainant has questioned the authority of the Township to discharge storm water next to the Complainant's previous property on numerous occasions over the years. The Custodian certifies that the Complainant again questioned the authority of the Township in a letter dated August 20, 2004. The Custodian further certifies that he informed the Complainant in a letter dated August 23, 2004 that no records exist which are responsive to the Complainant's request for records which indicate the Township's legal authority to discharge drainage water adjacent to the Complainant's previous property.⁴

The Custodian also asserts that according to Mason v. City of Hoboken, 192 NJ 73 (App. Div. 2007), the Complainant had forty-five (45) days to challenge a denial of access to an OPRA request. The Custodian asserts that the Complainant's time to challenge a denial of access has long since passed.

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.

⁴ The Custodian attached a copy of his August 23, 2004 letter to the Complainant. The Custodian also attached a copy of a July 21, 1983 letter to the Complainant which is not relevant to the Denial of Access Complaint.

Further, OPRA provides that:

“[t]he *custodian* of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged.” (Emphasis added.) N.J.S.A. 47:1A-5.f.

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. 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 this complaint, the Complainant asserts that the Township of Hanover has violated OPRA many times over the years by failing to provide the requested information. Conversely, the Custodian certifies no records exist which are responsive to the request and that the Complainant’s August 6, 1981 request is not in the possession of the Township of Hanover.

In Laufgas v. City of Patterson, GRC Complaint No. 2006-23 (February 2007), the Council decided that because the Complainant asserted submitting a request for records on June 9, 1999 and OPRA did not become effective until 2002, the Complainant’s request did not constitute a valid request pursuant to OPRA. The Council further decided that it had no authority to adjudicate that portion of the complaint and dismissed the complaint.

Similarly, the Complainant’s August 6, 1981 request for records was submitted twenty-one (21) years prior to the inception of OPRA. Because the Complainant’s August 6, 1981 request predates the effective date of OPRA, it is not a valid OPRA request based on the GRC’s decision in Laufgas.

The Custodian also certifies that not only is the Township not in the possession of the Complainant’s request, but no records exist which are responsive to the Complainant’s repeated inquiries for any records responsive. Pursuant to the GRC’s decision in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), there can be no unlawful denial of access if no records exist. Therefore, this complaint should be dismissed.

The Custodian contends the Complainant's Denial of Access complaint is barred by the holding of Mason v. City of Hoboken, 192 N.J. 73 (App. Div. 2007), which allows only a forty-five (45) day window to challenge a denial of access. In fact, this citation refers to the New Jersey Supreme Court's granting of a petition for certification. This unpublished Law Division decision applies to the commencement of suits in the Superior Court. OPRA, however, contains no prescribed time-frame for challenges to denials of access.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that since the Complainant's August 6, 1981 request for records predates OPRA and because the Custodian certifies that the Township of Hanover is not in possession of the Complainant's request and that no records responsive to the Complainant's request exist, this complaint should be dismissed. See Laufgas v. City of Patterson, GRC Complaint No. 2006-23 (February 2007); Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

September 19, 2007