



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

July 27, 2010 Government Records Council Meeting

Philip Charles
Complainant

Complaint No. 2009-160

v.

Plainfield Municipal Utilities Authority (Union)
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council (“Council”) considered the July 20, 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. In the absence of any evidence indicating the specific identity of the Plainfield Municipal Utilities Authority employee who received the Complainant’s OPRA request form and forwarded it to a third party on the same date as receipt of the request, the GRC is unable to determine the identity of the Plainfield Municipal Utilities Authority employee who violated OPRA pursuant to N.J.S.A. 47:1A-5.h. See *Barkley v. New Jersey Department of Treasury*, GRC Complaint No. 2009-128 (May 2010).
2. The Custodian has not unlawfully denied access to the Complainant’s OPRA request because she certified that no request was received until the filing of this complaint pursuant to *Avila v. Camden County Prosecutor’s Office*, GRC Complaint No. 2007-287 (July 2008).

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 27th Day of July, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: August 2, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 27, 2010 Council Meeting**

**Philip Charles¹
Complainant**

GRC Complaint No. 2009-160

v.

**Plainfield Municipal Utilities Authority (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of purchase orders and all supporting documentation for purchase order numbers 08-01300 through 08-01350.
2. Copy of a document containing sewer and solid waste service fees and rates for 2008.

Request Made: April 24, 2009

Response Made: None

Custodian: Dollie Hamlin

GRC Complaint Filed: May 11, 2009³

Background

April 24, 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.

May 11, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated April 24, 2009.

The Complainant states that he submitted an OPRA request for immediate access documents to the Plainfield Municipal Utilities Authority ("PMUA") via facsimile on April 24, 2009. The Complainant states that to date he has not received a response.

The Complainant states that OPRA provides that "[i]mmediate access ordinarily shall be granted to budgets, bills, *vouchers* ..." (Emphasis added.) N.J.S.A. 47:1A-5.e. Moreover, the Complainant states that OPRA provides that "... [i]f the custodian is

¹ No legal representation listed on record.

² Represented by Michael V. Camerino, Esq., of Mauro, Savo, Camerino & Grant, P.A. (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

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 ...” N.J.S.A. 47:1A-5.g.

The Complainant asserts that the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because she failed to grant or deny access to the requested record within the statutorily mandated seven (7) business day time frame. The Complainant asserts that this violation is a purposeful attempt to deny access to the requested records.

The Complainant does not agree to mediate this complaint.

July 2, 2009

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

July 10, 2009

Custodian’s SOI attaching the Complainant’s OPRA request dated April 24, 2009.⁴

The Custodian certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”) is not applicable in the instant complaint.

The Custodian certifies that she is unable to locate any evidence that the Complainant’s OPRA request was received at the PMUA. The Complainant certifies that because she did not receive the Complainant’s OPRA request, it is impossible to respond to it.

The Custodian certifies that she did not receive the Complainant’s request prior to being served with notice of the instant complaint and request for the SOI by the GRC on June 25, 2009 and July 2, 2009 respectively. The Custodian certifies that the fifty (50) purchase orders numbered 08-01300 through 08-01350 responsive to request Item No. 1 of the Complainant’s OPRA request will be provided to the Complainant without a special service charge.

The Custodian asserts that the second part of request Item No. 1 for “all supporting documentation,” is vague and does not identify a specific identifiable government record. The Custodian states that in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court held that, “[u]nder OPRA, the requestor’s obligation to specifically describe the documents sought is essential to the agency’s obligation and ability to provide a prompt response.” The Custodian avers that the court further held that in the absence of a request for an identifiable government record, the statutorily mandated time frame does not apply. The Custodian further notes that a number of the requested purchase orders will

⁴ The Custodian does not certify to the search undertaken to locate the records responsive to the Complainant’s request.
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not have any documentation attached to them, which further supports the argument that the Complainant failed to identify specific government records.

The Custodian contends that Item No. 2 of the Complainant's OPRA request also fails to identify a specific government record. The Custodian contends that the Complainant's OPRA request required the Custodian to identify and siphon useful information from all of the records in her control. The Custodian notes that the GRC's Handbook for Records Custodians, 2nd Edition (August 2002), provides that OPRA does not require that a record be created in order to respond to a request for government records.⁵ The Custodian states that in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court held that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The Custodian argues that because the Complainant's OPRA request seeks information rather than an identifiable government record, the Custodian was under no obligation to fulfill this element of the Complainant's OPRA request.⁶

July 12, 2009

The Complainant's response to the Custodian's SOI attaching a copy of the Complainant's April 24, 2009 OPRA request.⁷ The Complainant states that in the SOI, the Custodian indicates that she has been unable to document receipt of the Complainant's OPRA request. The Complainant states that the Custodian further indicated that she could not respond to the Complainant's OPRA request because it was not received by the Custodian.

The Complainant states that 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.*" (Emphasis added.) N.J.S.A. 47:1A-5.h.

The Complainant further states that he submitted his OPRA request via facsimile to the attention of the Custodian on April 24, 2009. The Complainant states that all fax machines imprint documents with the sending location's fax number, time received and name (if applicable) upon their arrival. The Complainant avers that closer review of the copy of the OPRA request submitted by the Custodian as part of the SOI shows that the OPRA request was received at the PMUA on 10:37 a.m. The Complainant states that imprinted immediately above this notation is a second fax machine imprint identifying

⁵ The Handbook for Records Custodians, currently in its third edition, was updated October, 2009.

⁶ The Custodian further argues that this OPRA request should not be viewed in a vacuum because the Complainant has filed numerous requests seeking over 200 plus documents in the past few months, which has required the copying of more than 1,000 pages of records. The Custodian argues that the Complainant's numerous requests and aggressive approach in demanding records from the PMUA has caused a substantial disruption of the agency's operations. See N.J.S.A. 47:1A-5.g. The Custodian included a statement of facts that spans requests not relevant to this complaint, as well other complaints currently awaiting adjudication before the GRC.

⁷ The OPRA request supplied by the Complainant is a copy of the one submitted as part of the Custodian's SOI.

that someone at the PMUA forwarded the Complainant's OPRA request to a third party on the same day at 1:22 p.m.

The Complainant argues that he believes the foregoing is proof that the PMUA received the Complainant's OPRA request on April 24, 2009. The Complainant further argues that not only does this evidence refute the Custodian's assertion, but the Complainant also e-mailed the OPRA request to the Custodian on the same date. In addition, the Complainant argues that he simultaneously provided a copy of the Denial of Access Complaint to the Custodian and the GRC on May 9, 2009, which included a copy of the Complainant's OPRA request. The Complainant argues that there is no reason why the Custodian cannot document receipt of the Complainant's OPRA request.⁸

The Complainant asserts that it appears that the PMUA is attempting to justify an unlawful denial of access under OPRA. The Complainant further asserts that the Custodian's Counsel has been misled by the PMUA into believing that the Complainant's OPRA request was not received.

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 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.*" (Emphasis added.) N.J.S.A. 47:1A-5.h.

⁸ The Complainant argues that even if the Complainant was to believe that the PMUA first received the Complainant's OPRA request on May 9, 2009 as part of the Denial of Access complaint, it does not explain why the PMUA has still "denied access" to the requested records approximately two (2) months after being made aware of the OPRA request.

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.

The GRC first turns to the issue of whether the Complainant’s OPRA request was received by the PMUA.

In the complaint currently before the Council, the Complainant asserts that he sent an OPRA request to the Custodian’s office via facsimile on April 24, 2009. The Custodian certified in the SOI that she never received the Complainant’s OPRA request. The Complainant subsequently argued in a letter to the GRC dated July 12, 2009 that fax imprints on the copy of the OPRA request submitted by the Custodian as part of the SOI prove that the PMUA received the Complainant’s request. Specifically, the Complainant observes that fax machines will imprint a document upon its arrival. The Complainant further notes that the OPRA request provided as part of the SOI contains one notation identifying from where the Complainant sent the request and a second notation showing that someone from the PMUA forwarded the Complainant’s request to a third party later the same day.

OPRA requires “[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*.” (Emphasis added.) N.J.S.A. 47:1A-5.h.

Moreover, in Barkley v. New Jersey Department of Treasury, GRC Complaint No. 2009-128 (May 2010), the complainant submitted a Denial of Access Complaint stating that he received an undated letter denying access to the requested records because of an incorrect fee. The custodian certified in the SOI that he had no knowledge of the complainant’s OPRA request until he received the Denial of Access Complaint. The custodian also acknowledged that the response came from the Division of Commercial Recording (“DCR”), which does not respond to OPRA requests.

Subsequent to the submission of the SOI, the GRC requested that the custodian certify as to whether a record exists that would accurately identify the staff member that responded to the complainant. The custodian replied certifying that he could not accurately identify the staff member that sent the response letter.

In its May 27, 2010 Findings and Recommendations, the GRC reiterated the duty of an employee of a public agency to *forward* the request to the custodian of the record or

direct the requestor to the custodian of the record.” (Emphasis added.) N.J.S.A. 47:1A-5.h. Further, the GRC did not dispute that a staff member sent the response to the complainant; however, the GRC determined that:

“ ...in the absence of any evidence indicating the DCR staff member who responded and on what date the form letter response was sent, the GRC is unable to determine the identity of the staff member of the DCR who violated OPRA pursuant to N.J.S.A. 47:1A-5.h.”

In the complaint now before the Council, the evidence of record shows that the Complainant’s OPRA request was received by the PMUA and forwarded to a third party on the same day as receipt. Additionally, a closer examination of the evidence reveals that the Custodian made a copy of the OPRA request submitted as part of this Denial of Access complaint and attached it to the SOI. This evidence supports the Complainant’s argument that an employee at the PMUA received the Complainant’s OPRA request and forwarded it to a third party via facsimile on the same day as receipt.

This complaint is factually similar to Barkley because the evidence of record indicates that here, as in Barkley, the Complainant’s OPRA request was actually received by the public agency, although the identity of the specific employee who received the request is unknown.

Therefore, in the absence of any evidence indicating the specific identity of the PMUA employee who received the Complainant’s OPRA request form and forwarded it to a third party on the same date as receipt of same, the GRC is unable to determine the identity of the PMUA employee who violated OPRA pursuant to N.J.S.A. 47:1A-5.h. See Barkley, *supra*.

The GRC next turns to whether the Custodian unlawfully denied access to the requested records.

The Custodian certified in the SOI that she had no record of receiving the Complainant’s OPRA request until she received the Denial of Access Complaint and SOI request from the GRC on June 25, 2009 and July 2, 2009 respectively.

In Avila v. Camden County Prosecutor’s Office, GRC Complaint No. 2007-287 (July 2008), the Custodian certified that she did not receive the Complainant’s request for two (2) records with which the Complainant took issue in the Denial of Access complaint. The GRC held that “the Custodian has not unlawfully denied access to request Items No. 4 and No. 5 because the Custodian certified that no OPRA request was ever received from the Complainant.”

The facts of Avila, *supra*, are similar to the facts in this complaint; specifically, the Custodian in this matter certified in the SOI that she did not receive the Complainant’s OPRA request until she received the Complainant’s Denial of Access Complaint. Therefore, the Custodian has not unlawfully denied access to the Complainant’s OPRA request because she certified that no request was received until the

filing of this complaint (despite the fact that some unknown PMUA employee did receive the request). See Avila, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. In the absence of any evidence indicating the specific identity of the Plainfield Municipal Utilities Authority employee who received the Complainant's OPRA request form and forwarded it to a third party on the same date as receipt of the request, the GRC is unable to determine the identity of the Plainfield Municipal Utilities Authority employee who violated OPRA pursuant to N.J.S.A. 47:1A-5.h. See Barkley v. New Jersey Department of Treasury, GRC Complaint No. 2009-128 (May 2010).

2. The Custodian has not unlawfully denied access to the Complainant's OPRA request because she certified that no request was received until the filing of this complaint pursuant to Avila v. Camden County Prosecutor's Office, GRC Complaint No. 2007-287 (July 2008).

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 20, 2010