



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

January 25, 2011 Government Records Council Meeting

Rory W. Moore
Complainant

Complaint No. 2010-125

v.

Township of Nutley (Essex)
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 2011 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. Because the Custodian has certified that no records responsive to the Complainant’s OPRA request 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 requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
2. The GRC does not have the authority to regulate whether the Township should maintain First Aid Squad audits for 2007 through 2009 pursuant to N.J.S.A. 47:1A-7.b. See Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005), Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004), Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003), and Tosciano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 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 25th Day of January, 2011

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: February 7, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2011 Council Meeting**

**Rory W. Moore¹
Complainant**

GRC Complaint No. 2010-125

v.

**Township of Nutley (Essex)²
Custodian of Records**

Records Relevant to Complaint: Copies of the 2007, 2008 and 2009 audits for contributions to the Nutley Emergency Rescue Squad (“NERS”), as prescribed by N.J.S.A. 40:5-2.³

Request Made: May 20, 2010⁴

Response Made: June 1, 2010

Custodian: Evelyn Rosario

GRC Complaint Filed: June 23, 2010⁵

Background

May 20, 2010

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.

June 1, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the fifth (5th) business day following receipt of such

¹ No legal representation listed on record.

² Represented by Kevin Harkins, Esq. (Ridgewood, NJ).

³ N.J.S.A. 40:5-2, Contributions to first aid and emergency or volunteer ambulance or rescue squad associations, states:

“Any county or municipality may make a voluntary contribution of not more than \$70,000 annually to any duly incorporated first aid and emergency or therein, rendering service generally throughout the county, or any of the municipalities or municipality may contribute an additional amount of not more than \$35,000.00 annually; provided however, that the need for such additional funds is established by the association and is directly related to the performance of said association’s duties. Whenever the total annual county or municipal contribution to an association exceeds \$70,000, the chief financial officer of the county or municipality shall receive an audit performed by a certified account or registered municipal accountant of each association’s financial records for the current year which shall certify to the governing body of the county or municipality that such records are being maintained in accordance with sound accounting principles.”

⁴ The OPRA request is date stamped as received by the Custodian on May 24, 2010.

⁵ The GRC received the Denial of Access Complaint on said date.

request. The Custodian states that access to the requested records is denied because the requested records do not exist.

The Custodian also states that the Chief Financial Officer (“CFO”) reviewed the Complainant’s OPRA request and advised the Custodian that pursuant to N.J.S.A. 40:5-2 an audit of the NERS is only necessary if a voluntary contribution in excess of the base amount is made. Furthermore, the Custodian states that because the Township pays the NERS bill directly and has the original invoices in Town Hall, an audit of the NERS financial statements is not required.

June 23, 2010

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

- Complainant’s OPRA request dated May 20, 2010
- Letter from the Custodian to the Complainant dated June 1, 2010, with attachments.⁶

The Complainant asserts that he submitted an OPRA request to the Custodian for the audit of the NERS which is required by N.J.S.A. 40:5-2 (entitled *Contributions to first aid, ambulance and rescue squads*). The Complainant states that he included a copy of the statute, which he obtained from the New Jersey Legislature’s web page, in his OPRA request.

The Complainant states that the Township contributed \$445,000.00 to maintain the NERS in 2004. The Complainant states that he requested a copy of the audits for the NERS for the past three (3) years. The Complainant states that the New Jersey Legislature recently changed N.J.S.A. 40:5-2 to establish the upper limit donation from \$70,000.00 to \$104,000.00. The Complainant also asserts that the Township responded to his OPRA request attaching an older version of N.J.S.A. 40:5-2 and stating that no records responsive to the request exist.

In addition, the Complainant asserts that the Township pays all the expenses for the NERS directly from the budget and that the financial records are maintained in a special database for which the Township purchases a license every June. Further, the Complainant states that the CFO violated her oath of office by falsifying financial information.

The Complainant also asserts that he requested the financial information during a public session and was informed that the NERS has to provide an audit of the donation from individuals, which the Complainant asserts are never accounted for. The Complainant asserts that the audit he is seeking will include the use of the donations. Lastly, the Complainant states that the President of the NERS stated that if he is required to provide an audit, he will stop operations of the NERS.

The Complainant agrees to mediate this complaint.

⁶ The Custodian also attaches a copy of N.J.S.A. 40:5-2.

June 25, 2010

Offer of Mediation sent to the Custodian.

June 28, 2010

The Custodian declines the offer to mediate.

June 29, 2010

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

June 30, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated May 20, 2010
- Letter from the Custodian to the Complainant dated June 1, 2010

The Custodian certifies that the Complainant frequently submits numerous OPRA requests to the Township, the majority of which are unclear. The Custodian also certifies that she reviewed the Complainant’s OPRA request with the CFO. The Custodian certifies that the CFO has advised her that an audit of the NERS is only required if a voluntary contribution in excess of the base amount is made. Further, the Custodian certifies that because the Township pays the NERS bills directly, financial statements are not required and thus the Complainant’s OPRA request could not be fulfilled. The Custodian also certifies that the requested records do not exist.

July 6, 2010

Letter from the Complainant to the GRC. The Complainant responds to the Custodian’s SOI and attaches a flyer created by the NERS soliciting donations.⁷

The Complainant asserts that Rosemary Costa (“Ms. Costa”), the CFO for the Township, prepared the SOI and provided an accounting and legal response to his complaint. The Complainant disputes Ms. Costa’s qualifications for the CFO position.

The Complainant questions how the NERS can provide services without the amount of donations exceeding \$70,000.00. The Complainant asserts that, according to his calculations, if the NERS answered 2,506 calls at \$283.00 per vehicle per call, this would result in a cost to the Township of \$709,198.00. In addition, the Complainant argues that the emergency vehicles logged an average of 21,566 miles over 2,502 calls, which averages to 8.6 miles per call. The Complainant also asserts that the Township logged 12,807 volunteer hours.

Furthermore, the Complainant argues that the supervisor for the NERS makes \$75,000.00 with additional benefits. The Complainant asserts that the total costs of the NERS amount to \$709,198.00; including \$57,194.21 in donations, this would leave a deficit of \$652,003.79, which was never addressed by Ms. Costa.

⁷ The NERS flyer, which is dated February 2010, notes that in 2009, the NERS answered 2,506 calls, logged 21,566 miles on NERS vehicles, volunteered 12,807 hours on call and received \$57,194.21 in donations. The flyer further states that the cost to NERS each time a vehicle leaves the building is \$283, and solicits monetary donations.

The Complainant asserts that the Township has more than 15 full time employees, and the gross income exceeds \$10,000,000.00. The Complainant further asserts that Ms. Costa has claimed that no accounting standards apply.

The Complainant also asserts that Ms. Costa incorrectly uses the word “voluntarily” as it appears in N.J.S.A. 40:5-2. The Complainant asserts that the law states that the Township may provide voluntarily contributions, as long as an audit is performed. The Complainant also asserts that Ms. Costa is avoiding N.J.S.A. 40:5-2.2(b), which states:

“A joint commission has been established by and between such county and municipality, on which commission the county and municipality shall have equal representation and which commission shall, after proper investigation, recommend, in writing, to the county and municipality the expenditure of the funds so raised; neither said county nor any municipality shall expend all or any part of said funds, unless and until such recommendation is received and followed.”

The Complainant also contends that Ms. Costa intentionally ignores the law to mislead the GRC. Furthermore, the Complainant contends that Ms. Costa intentionally omitted the Township list of employee titles and asserts that the EMS were added to the employee list but do not appear on the official list of Township employees. The Complainant asserts that adding the NERS to the employee list would establish that the Commissioners are providing additional funds to the NERS than those permitted by law, but are not adhering to the required audits.

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 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 Complainant requested audits for the NERS from 2007 through 2009. The Custodian responded in writing on the fifth (5th) business day after receipt of the OPRA request stating that no records responsive to the request exist. The Custodian further stated that no records responsive exist because the Township is only required to have audits if voluntary donations in excess of the base amount are made.

Conversely, the Complainant asserts that based on his calculations, these audits should exist because \$652,003.79 is unaccounted for.⁸ However, the Complainant’s calculations do not rise to the level of competent, credible evidence sufficient to refute the Custodian’s certification herein.

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 Complainant did not submit credible evidence to refute the Custodian’s certification. 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 and no credible evidence existed to refute the Custodian’s certification.

Therefore, because the Custodian has certified that no records responsive to the Complainant’s OPRA request 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 requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

The Complainant also asserts that the CFO does not address a deficit in the NERS budget of \$652,003.79. The Complainant asserts that pursuant to N.J.S.A. 40:5-2, audits of the NERS budget for 2007 through 2009 should exist.

Pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council’s powers and duties, the GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain. See Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005) (the GRC does not have authority over the content of a record); Gillespie v. Newark Public Schools, GRC

⁸ The Complainant appears to base his calculations on the NERS flyer which he submitted to the GRC. Rory W. Moore v. Township of Nutley (Essex), 2010-125 – Findings and Recommendations of the Executive Director

Complaint No. 2004-105 (November 2004) (the GRC does not have the authority to adjudicate the validity of a record); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate); Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005) (the GRC does not have authority over the condition of records provided by a Custodian). Therefore, the GRC does not have the authority to regulate whether the Township should maintain NERS audits for the years 2007 through 2009.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian has certified that no records responsive to the Complainant's OPRA request 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 requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
2. The GRC does not have the authority to regulate whether the Township should maintain First Aid Squad audits for 2007 through 2009 pursuant to N.J.S.A. 47:1A-7.b. See Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005), Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004), Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003), and Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005).

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 18, 2011