



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

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Derek J. Kearns
Complainant

Complaint No. 2010-292

v.

Township of Lyndhurst (Bergen)
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 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 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, 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 requested records. N.J.S.A. 47:1A-6. Because the Custodian has certified that there are no records responsive to the request, the Council declines to address the issue of whether the League is a public agency subject to OPRA.

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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 5, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Derek J. Kearns¹
Complainant**

GRC Complaint No. 2010-292

v.

**Township of Lyndhurst (Bergen)²
Custodian of Records**

Records Relevant to Complaint:

1. Financial records of the Lyndhurst Youth Soccer Club for 2008, 2009, and 2010 recreational teams
2. Any and all records (correspondence and e-mail) of the Lyndhurst Youth Soccer Club for 2008, 2009, and 2010 recreational teams

Request Made: September 25, 2010

Response Made: October 1, 2010

Custodian: Helen Polito

GRC Complaint Filed: November 8, 2011³

Background

September 25, 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.

October 1, 2010

The Custodian's Counsel's response to the OPRA request with attachments:

- A copy of an invoice from Martin Sales, Inc., to the Township of Lyndhurst
- A copy of the Lyndhurst Youth Soccer League Constitution and By-Laws

Counsel responds in writing via letter to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. Counsel states that access to the requested record is denied because the Lyndhurst Youth Soccer League ("League") is independent of and is not a department or division of the Township of Lyndhurst ("Lyndhurst"). Counsel asserts that the League is a 501(c)(3) non-profit entity under the Internal Revenue Code and the Township does not control or maintain records for the

¹ No legal representation listed on record.

² Represented by Donovan Bezer, Esq., of Stryker, Tams, & Dill LLP (Newark, NJ).

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

League. Counsel maintains that none of the records of the League are public records subject to OPRA.

Counsel states that because the League creates recreational opportunities for children of the greater Lyndhurst community, the Township has occasionally spent public funds on recreation equipment for children who participate in the League. Counsel states that he has attached a copy of an invoice to demonstrate such expenditures. Counsel asserts that he is also attaching a copy of the League's Constitution and By-Laws as proof of its creation as an independent non-profit corporation in 2008. Counsel maintains that the attached documents are provided as a courtesy to the Complainant and not as records responsive to the Complainant's request.

November 8, 2010

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

- Complainant's OPRA request dated September 25, 2010
- Letter from the Custodian to the Complainant dated October 1, 2010

The Complainant agrees to mediate this complaint.

November 26, 2010

The Offer of Mediation is sent to the Custodian.

November 28, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel requests that the GRC grant the Custodian five (5) additional business days to decide whether she wishes to mediate the complaint.

November 29, 2010

E-mail from the GRC to the Custodian. The GRC states that the Custodian has been granted a five (5) business day extension to respond to the offer of mediation.

December 1, 2010

The Custodian agrees to mediate the complaint and the complaint is referred to mediation.

May 13, 2011

The complaint is referred back from mediation.

May 13, 2011

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

May 19, 2011

Custodian's SOI. The Custodian certifies that a search yielded no records responsive to the Complainant's request because the Township is not in possession of any record responsive to the Complainant's request.

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 Council has consistently held that there exists no denial of access when a custodian has demonstrated that no records responsive to a complainant’s request exist. 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 and the Complainant submitted no evidence to refute said certification. 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.

In the matter before the Council, the Complainant requested financial records, correspondence and e-mail of the Lyndhurst Youth Soccer League from 2008, 2009 and 2010 from the Township. The Custodian certified in the SOI that no records responsive to the Complainant’s OPRA request exist. The Complainant has provided no evidence to refute the Custodian’s certification in this regard.

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, 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 requested records. N.J.S.A. 47:1A-6. Because the Custodian has certified that there are no records responsive to the request, the Council declines to address the issue of whether the League is a public agency subject to OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that 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, 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 requested records. N.J.S.A. 47:1A-6. Because the Custodian has certified that there are no records responsive to the request, the Council declines to address the issue of whether the League is a public agency subject to OPRA.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012