



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

March 27, 2012 Government Records Council Meeting

Gregory W. Kasko  
Complainant

Complaint No. 2011-06

v.

Town of Westfield (Union)  
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 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 certified that she undertook an “exhaustive search” for the requested quarterly report on three (3) separate occasions, sought the help of the Town CFO to locate the requested record, and further certified that the retention schedule for the requested 2001 quarterly reports was only six (6) years, and because the Complainant submitted no evidence to refute the Custodian’s certification, the weight of the competent, credible evidence of record indicates that the requested record does not exist at the Town. The Custodian has not unlawfully denied the Complainant access to the requested record. N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). *See also* Kaithern v. West Cape May Borough (Cape May), GRC Complaint No. 2003-135 (April 2004), Rivera v. Union Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and Paff v. Township of Blairstown (Warren), GRC Complaint No. 2009-53 (February 2010).

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 27<sup>th</sup> Day of March, 2012



Robin Berg Tabakin, Chair  
Government Records Council

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

Catherine Starghill, Executive Director  
Government Records Council

**Decision Distribution Date: April 4, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 27, 2012 Council Meeting**

**Gregory W. Kasko<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-06**

v.

**Town of Westfield (Union)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the 2001 quarterly earnings records for Westfield Police Officer Pat Gray.

**Request Made:** December 16, 2010

**Response Made:** December 23, 2010

**Custodian:** Claire Gray

**GRC Complaint Filed:** January 6, 2011<sup>3</sup>

**Background**

**December 16, 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.

**December 23, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request. The Custodian states that since the file is archived, the requested record will not be available within seven (7) business days, but that she will contact him as soon as the file is found.

**December 23, 2010**

E-mail from the Complainant to the Custodian. The Complainant thanks the Custodian for her December 23, 2010 response.

**December 23, 2010**

E-mail from the Complainant to the Custodian. The Complainant states that he is extending the Custodian's deadline to fulfill his request to December 29, 2010. The Complainant asserts that the quarterly earnings records are records that the Town of Westfield ("Town") is required to keep.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Robert J. Merryman, Esq., of Apruzzese, McDermott, Mastro & Murphy, P.C.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

**December 28, 2010**

E-mail from the Custodian to the Complainant. The Custodian responds to the Complainant on the seventh (7<sup>th</sup>) business day<sup>4</sup> following the receipt of the request and informs the Complainant that after a search through the Town's records archives, the requested quarterly earnings records for 2001 cannot be located.

**January 3, 2011**

E-mail from the Complainant to the Custodian. The Complainant states that the files should be stored elsewhere in the event of a fire and demands that the Town provide the requested records or a backup disc that contains the quarterly earnings records. The Complainant asserts that he will file a Complaint with the Government Records Council ("GRC") if the Town does not provide the records.

**January 6, 2011**

Denial of Access Complaint filed with the GRC with the following attachments:

- Custodian's response to the OPRA request dated December 23, 2010
- E-mail from the Complainant to the Custodian dated December 23, 2010
- E-mail from the Complainant to the Custodian dated December 23, 2010
- E-mail from the Custodian to the Complainant dated December 28, 2010
- E-mail from the Complainant to the Custodian dated January 3, 2011

The Complainant states that he received a response to the OPRA request from the Custodian on December 28, 2010 which informed him that the requested records could not be located. The Complainant asserts that the Custodian was able to produce a 2001 wage and tax register in response to a previous OPRA request which is not at issue herein. The Complainant maintains that the Custodian informed him in a December 28, 2010 e-mail that she had located the 2002 quarterly earnings register. The Complainant contends that he finds it hard to believe that the 2001 wage and tax earnings record could be produced, but not the 2001 quarterly earnings report and register. The Complainant further asserts that the Custodian unlawfully denied access to the 2001 quarterly earnings report and register because these records contain information that can expose corruption.

The Complainant does not agree to mediate this complaint.

**February 7, 2011**

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

**February 14, 2011**

Custodian's SOI with the following attachments:<sup>5</sup>

- Complainant's OPRA request dated December 16, 2010
- E-mail from the Custodian to the Complainant dated December 28, 2010

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<sup>4</sup> Accounting for the 2010 Christmas holiday.

<sup>5</sup> The Custodian attached additional documentation not relevant to the adjudication of this Complaint. In addition, the Custodian provided arguments regarding previous OPRA requests that are not at issue in the instant Complaint.

The Custodian certifies that she conducted an exhaustive search on three (3) separate occasions in the attics of the Police Station in an effort to locate the requested 2001 quarterly earnings report of Pat Gray. The Custodian further certifies that she also contacted the Town Chief Financial Officer (“CFO”) in an effort to locate the requested record. The Custodian certifies that the record was not found. The Custodian certifies that the requested record has a six (6) year retention schedule. The Custodian certifies that she is unaware of the record ever being destroyed.

The Custodian cites Kaithern v. West Cape May Borough (Cape May), GRC Complaint No. 2003-135 (April 2004) for the proposition that the GRC has consistently held that when a custodian has conducted a reasonable search for requested records and has determined such records cannot be located, the failure to provide the requested documents does not violate OPRA. The Custodian further argues that the New Jersey Appellate Division further supports the fact that there is no violation of OPRA when a custodian determines that the requested records are not available and cites Bent v. Township of Stafford, 381 N.J. Super. 30, 38 (App. Div. 2005) in support of her arguments. The Custodian contends that it has been established that once it has been found that a custodian has made an “exhaustive” search for records pursuant to N.J.S.A. 47:1A-6, a custodian has met their burden of due diligence. See Rivera v. Union Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and Paff v. Township of Blairstown (Warren), GRC Complaint No. 2009-53 (February 2010).

The Custodian certifies that she has conducted more than a “reasonable search” as she contacted outside entities and conducted numerous searches in an effort to obtain the requested record. The Custodian asserts that there has been no denial of access.

### **Analysis**

#### **Whether the Custodian unlawfully denied the Complainant 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.

In the instant Complaint, the Complainant asserted that the Town unlawfully denied him access to the requested 2001 quarterly earnings records of Westfield Police Officer Pat Gray. The Custodian contended that the requested record does not exist. In her SOI, the Custodian certified that she conducted an exhaustive search for the requested quarterly earnings through the Town’s records.

It is well settled that in the absence of any credible evidence to the contrary, a custodian’s certification that a reasonable search failed to produce requested records prevails. Accordingly, in Paff v. Township of Blairstown (Warren), GRC Complaint No. 2009-53 (February 2010), the GRC held that the Custodian’s certification that a fruitless search involving the assistance of police officials, a risk management consultant, and the township attorney qualified as sufficient evidence to prove that the requested records were not in the township’s possession at the time of the complainant’s request.

In addition, the Council has consistently held that no denial of access occurs when a custodian has certified 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.

Here, the Custodian certified in the SOI that she undertook an “exhaustive search” for the requested quarterly report on three (3) separate occasions. In addition, the Custodian certified that she also sought the help of the Town CFO to locate the requested record. The Custodian further certified that the retention schedule for the requested 2001 quarterly reports was only six (6) years. The Complainant submitted no evidence to refute the Custodian’s certification. Accordingly, the weight of the competent, credible evidence indicates that the requested 2001 quarterly earnings report no longer exists at the Town.

Therefore, because the Custodian certified that she undertook an “exhaustive search” for the requested quarterly report on three (3) separate occasions, sought the help of the Town CFO to locate the requested record, and further certified that the retention schedule for the requested 2001 quarterly reports was only six (6) years, and because the

Complainant submitted no evidence to refute the Custodian's certification, the weight of the competent, credible evidence of record indicates that the requested record does not exist at the Town. The Custodian has not unlawfully denied the Complainant access to the requested record. N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). *See also* Kaithern v. West Cape May Borough (Cape May), GRC Complaint No. 2003-135 (April 2004), Rivera v. Union Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and Paff v. Township of Blirstown (Warren), GRC Complaint No. 2009-53 (February 2010).

Moreover, although the Complainant asserted that the requested records must exist at the Town, the GRC has no jurisdiction over the veracity, content, and record keeping methods of public agencies. *See* Van Pelt v. Twp. Of Edison BOE, GRC Complaint No. 2007-179 (January 2008) (holding that the GRC does not have authority to regulate the manner in which a Township maintains its files or what records must be maintained).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Custodian certified that she undertook an "exhaustive search" for the requested quarterly report on three (3) separate occasions, sought the help of the Town CFO to locate the requested record, and further certified that the retention schedule for the requested 2001 quarterly reports was only six (6) years, and because the Complainant submitted no evidence to refute the Custodian's certification, the weight of the competent, credible evidence of record indicates that the requested record does not exist at the Town. The Custodian has not unlawfully denied the Complainant access to the requested record. N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). *See also* Kaithern v. West Cape May Borough (Cape May), GRC Complaint No. 2003-135 (April 2004), Rivera v. Union Board of Education (Hudson), GRC Complaint No. 2008-112 (August 2009) and Paff v. Township of Blirstown (Warren), GRC Complaint No. 2009-53 (February 2010).

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

March 20, 2012