



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Donald Winant
Complainant

Complaint No. 2011-22

v.

Borough of Dumont (Bergen)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 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.

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 August, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 30, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Donald Winant¹
Complainant**

GRC Complaint No. 2011-22

v.

**Borough of Dumont (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Copies of schedules/lists of vouchers and bills paid as per payment of bills resolutions from 1991 through 2003 (“schedules/lists of bills paid”).

Request Made: December 21, 2010

Response Made: January 3, 2011

Custodian: Susan Connelly

GRC Complaint Filed: February 1, 2011³

Background

December 21, 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. The Complainant indicates that his preferred method of delivery is e-mail.

January 3, 2011

Custodian’s response to the OPRA request. The Custodian responds in writing via e-mail on the seventh (7th) business day following receipt of such request.⁴ The Custodian states the payment of bills resolutions from 1991 through 2003 only have a total amount with no lists.

January 3, 2011

E-mail from the Complainant to the Custodian. The Complainant states that per his OPRA request he is seeking “copies of schedules/lists of vouchers and bills paid as per payment of bills resolutions from 1991 through 2003.” The Complainant also states that such schedules and lists of all vouchers and bills paid were always retained in the past. The Complainant further states that is it his understanding that the State of New Jersey’s General Records and Retention Schedule for county and municipal agencies has not changed and still requires permanent retention of the schedules/lists of bills paid.

¹ No legal representation listed on record.

² Represented by Meghan V. Tomlinson, Esq., of Gregg F. Paster & Associates (Rochelle Park, NJ).

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

⁴ Custodian’s Counsel states in the Statement of Information that December 24, 2010 and December 31, 2010 were government holidays.

January 4, 2011

E-mail from the Custodian to the Complainant. The Custodian states that per her response dated January 3, 2011, the records requested do not exist. The Custodian also states that only the bill payment total amounts exist.

February 1, 2011

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

- Complainant’s OPRA request dated December 20, 2010
- E-mail from the Custodian to the Complainant dated January 3, 2011
- E-mail from the Complainant to the Custodian dated January 3, 2011
- E-mail from the Custodian to the Complainant dated January 4, 2011.⁵

The Complainant does not agree to mediate this complaint.

March 4, 2011

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

March 11, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated December 21, 2010
- E-mail from the Custodian to the Complainant dated January 3, 2011
- E-mail from the Complainant to the Custodian dated January 3, 2011
- E-mail from the Custodian to the Complainant dated January 4, 2011

Custodian’s Counsel states that after receipt of the Complainant’s OPRA request on December 21, 2010, the Custodian and Finance Clerk, Ms. Catherine Romeo (“Ms. Romeo”), undertook a variety of actions to search for the requested records. Counsel also states that the Custodian consulted the governing body’s meeting minutes and accompanying resolutions from 1991 through the present. Counsel further states that the Custodian searched the bound official minute books located in the Borough of Dumont’s (“Borough”) safe as well as the Custodian’s personal minute folder.⁶

Counsel states that neither the bound official minute books nor the Custodian’s minute folder contained copies of the requested records. Counsel also states that several of the resolutions authorizing payment from 1991 to the present indicate that the schedules/lists of bills paid are attached; however, such records cannot be located and further it is uncertain whether such records even existed. Counsel further states that the

⁵ The Complainant made no legal arguments or factual assertions in support of his Denial of Access Complaint.

⁶ The Custodian did not certify whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

Custodian sent a letter to the Complainant on January 3, 2011 informing him that only bill payment totals were located.

Counsel states that Ms. Romeo looked up the history of the bills paid lists in the Finance Department's computer filing system but did not locate any schedules/lists of bills paid. Counsel further states that Ms. Romeo searched the Borough archives for bills paid lists but located no bills paid lists.

Counsel also states that the Borough timely responded to the request on January 3, 2011, exactly seven (7) business days after receiving the request and denied access to the requested records because the Custodian could not locate these records.⁷ Counsel states that the Borough therefore determined that the requested records do not exist.

The Custodian certifies that this is not a case involving a denial of access to records because the Custodian timely responded pursuant to N.J.S.A. 47:1A-5.i. and the requested records do not exist. The Custodian also certifies that the Borough undertook a diligent good faith effort to search for the requested records, but "there can be no denial of access to a non-existent record." Bent v. Township of Stafford Police Department, 318 N.J. Super. 30, 38 (App. Div. 2005).

Counsel argues that a government agency cannot produce records it does not have. Counsel also argues that there can be no wrongful denial of access to a non-existent record pursuant to O.R. v. Kniewal, 2010 N.J. Super. Unpub. LEXIS 560 (App. Div. March 17, 2010), citing Bent v. Township of Stafford Police Department, 318 N.J. Super. 30, 38 (App. Div. 2005). Counsel states that the Custodian and Ms. Romeo searched five (5) different sources and made a good faith attempt to provide access to the requested records. Counsel also states that if the requested records existed, the Custodian would have located such records within the official bound collection of minutes and accompanying resolutions. Counsel further states that the Borough agrees with the Complainant's statement in his January 3, 2010 e-mail that the requested records should be permanently retained. Counsel states that unfortunately, this is not the case because the requested records never existed, were lost or destroyed.

Counsel states that the Borough failed for several years to appoint a Borough Clerk whose responsibilities would include serving as a "coordinator and records manager responsible for implementing local archives and records retention programs." N.J.S.A. 40A:133(e)(6). Counsel also states that the search for the requested records revealed that such records accompanying resolutions do not begin appearing in the Borough records until March 2005, around the time when the Custodian and Ms. Romeo both took office.

Counsel argues that the Custodian did not unlawfully deny access to the requested records paid because such records do not exist. Counsel also argues that the Borough undertook a diligent, good faith effort to search for the requested records but ultimately the Custodian informed the Complainant that the Borough was unable to locate such records and the Borough could only locate the total amounts of bills paid. Lastly,

⁷ Custodian's Counsel states that the Borough offices were closed on December 24, 2010 and December 31, 2010.

Counsel argues that there can be no redress for the Complainant because the records he seeks do not exist.

November 10, 2011

E-mail from the GRC to Custodian's Counsel. The GRC states upon review of the SOI, that the Custodian did not provide a legal certification asserting the facts in the SOI.

November 28, 2011

E-mail from Custodian's Counsel to the GRC attaching the requested legal certification from the Custodian and Ms. Romeo. The Custodian certifies that on December 21, 2010 she received the Complainant's OPRA request via e-mail for "copies of schedules/lists of vouchers and bills paid as per payment of bills resolutions from 1991 through 2003." The Custodian also certifies that she searched the governing body's minutes and accompanying resolutions from 1991 through 2003. The Custodian further certifies that she searched the bound official minute books in the Borough's safe and the Custodian's personal minute folder. The Custodian additionally certifies that neither the bound official minute book nor the Custodian's personal minute folder contained copies of the records responsive to the Complainant's request. The Custodian certifies that after she could not locate the requested records, she conferred with Ms. Romeo and requested that she search her files for the records sought. The Custodian also certifies that Ms. Romeo informed the Custodian that she looked up the history of bills list in the Finance Department's computer filing system, searched the Borough's vault and the Borough archive, but she was unable to locate any records responsive to the Complainant's OPRA request. The Custodian further certifies that based on Ms. Romeo's search, she determined that no records existed which were responsive to the Complainant's OPRA request. Lastly, the Custodian certifies that she responded via e-mail to the Complainant on January 3, 2011 and informed him that the payment of bills resolutions voted on from 1991 through 2003 have a total amount with no list.

Ms. Romeo certifies that the Custodian asked her to search through the Finance Office's records to locate the requested records. Ms. Romeo also certifies that she looked up the history of the lists of bills paid in the Finance Department's computer system. Ms. Romeo further certifies that she searched the Borough vault and archive for the requested records. Ms. Romeo additionally certifies that despite looking through three (3) separate places she was unable to locate any records responsive to the request. Lastly, Ms. Romeo certifies that she informed the Custodian that she was unable to locate any records responsive.

November 30, 2011

E-mail from the Complainant to the GRC, responding to the Custodian's and Ms. Romeo's certifications dated November 28, 2011. The Complainant states that all municipalities are required by DARM to maintain records for varying periods of time. The Complainant also states that pursuant to Municipal Agencies General Records Retention Schedule Series No. 0319-0001 "all Schedule/List of Vouchers and Bills, Associated with Resolution Package or Governing Body Approval, must be kept as permanent records." The Complainant further states that during his tenure as the Borough's Mayor, paper copies of bill lists were kept bound in binders, organized by

fiscal year, and were reviewed by the Borough Auditors.⁸ The Complainant states that to his knowledge, the Borough computerized its financial operations in the mid 1980's. The Complainant also states that this conversion process included computerizing: 1) the vendor files; 2) entering vendor vouchers into the computer system; 3) releasing vouchers for payment upon approvals; 4) vendor check generation and check printing; and 5) full electronic retention of all vendor voucher payments and vendor check payment records.

The Complainant states that since the mid 1980's and during his tenure as Borough Mayor, the Borough undertook various computer hardware and software upgrades and conversions. The Complainant also states during each computer upgrade or conversion, the Borough mandated and required that any and all current and historical data files and databases must be totally converted and accessible within the upgraded systems environment by its computer users. The Complainant further states that such data file conversions and ongoing accessibility enabled the Borough to continuously and instantaneously access historical data for reporting and comparative purposes. The Complainant additionally states that such data file retentions ensured that the Borough always remained in compliance with all file and document retention requirements. Lastly, the Complainant states that because of this conversion the Borough could access any financial record if needed.

The Complainant observes that the Custodian claims that she could not locate the bound official minute binders.⁹ The Complainant asserts the Custodian's claim is a mere excuse to obstruct access to the records responsive to his request. The Complainant further states that if the Custodian's assertions are true and she cannot locate the bound official minute binders containing the vendor check listings, the Custodian could search the computer system's database for the records responsive.

May 15, 2012

E-mail from the GRC to the Custodian. The GRC states that in order to properly adjudicate the Complainant's Denial of Access Complaint, it is requesting a legal certification from the Custodian. The GRC states that the Complainant asserted in his letter to the GRC dated November 30, 2011 that if the vendor check listings cannot be located in the bound minute books, then the Custodian could search the computer system's database for the records responsive. The GRC requests the Custodian to legally certify if this computer database system containing the requested records exists and if such a database does exist, is said database searchable to locate the records responsive?

May 18, 2012

E-mail from the Custodian to the GRC attaching the requested legal certification. The Custodian certifies that no computer system database containing the records responsive exists.

⁸ The Complainant does not state when he was the Borough's Mayor.

⁹ The Custodian certified to the GRC on November 28, 2011 that she could not locate the records responsive to the request within the bound official minute binders, not that she could not locate the official minute binders themselves.

Analysis

Whether the records responsive to the Complainant's OPRA request exist?

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 can be 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 Custodian timely responded in writing to the Complainant's OPRA request that the records of payment of bills resolutions from 1991 through 2003 only have a total amount with no lists. In a subsequent e-mail from the Custodian to the Complainant, the Custodian stated that the records responsive to the

request do not exist. The Custodian certified in the SOI that after a diligent search of the requested records, said records do not exist. The Complainant responded to the Custodian's SOI on November 30, 2011 stating that if the records responsive could not be located in the official minute binder, then the Custodian could search the computer system's database. The GRC requested a legal certification from the Custodian via e-mail on May 15, 2012 requesting the Custodian to legally certify if such a database system exists. The Custodian responded via e-mail on May 18, 2012 certifying that the computer system database containing the requested records does not exist. The Complainant has provided no evidence to the GRC 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, 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.

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.

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012