



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**January 29, 2013 Government Records Council Meeting**

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2011-356

v.

Township of Galloway (Atlantic)  
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 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 in the Statement of Information that no records responsive to the Complainant’s request exist, absent evidence in the record to refute the Custodian’s certification, the Custodian has met the burden of proving that she did 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) and N.J.S.A. 47:1A-6. Additionally, in light of said certification, the GRC need not decide if whether the requested information is indeed a government record within the definition of a “government record” prescribed in 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 29<sup>th</sup> Day of January, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council



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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 5, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 29, 2013 Council Meeting**

**Harry B. Scheeler, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-356**

v.

**Township of Galloway (Atlantic)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Internet browser history from any and all computers utilized by Galloway Township (“Township”) Manager Stephen Bonanni, including computers located in the Township Manager’s Office and Department of Public Works. Please include date, time, and URL’s for every website visited from June 2011 to current.
2. Internet browser history from all Township cell phones utilized by Township Manager Stephen Bonanni, specifically including cell phone number 609-839-0929. Please include date, time, and URL’s for every website visited from June 2011 to current.
3. Any and all deleted records located on Township computer hard drives and Blackberry cell number 609-839-0929 utilized by Township Manager Stephen Bonanni including deleted documents, cleared browser history, cleared cookie history, and cleared cache history.<sup>3</sup>

**Request Made:** October 30, 2011

**Response Made:** November 7, 2011

**Custodian:** Kimberly Hodson<sup>4</sup>

**GRC Complaint Filed:** November 19, 2011<sup>5</sup>

**Background**

**November 19, 2011**

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

- Complainant’s OPRA request dated October 30, 2011
- Letter from the Custodian to the Complainant dated November 7, 2011<sup>6</sup>

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

<sup>2</sup> Represented by Michael J. Blee, Esq. (Absecon, NJ).

<sup>3</sup> The Complainant’s request also requested additional items that are not at issue in the instant complaint.

<sup>4</sup> As of the adjudication of this complaint, Ms. Hodson is no longer employed by Galloway Township. The acting custodian as of March 6, 2012 is Leticia Loeser.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

In the attached November 7, 2011 letter in response to the Complainant's request, the Custodian asserts that the requested records at issue are being denied because the Township takes the position that internet browsing history is not a tangible public record. The Custodian states that browsing history on a public computer is not required to be kept during the course of regular business. The Custodian further asserts that the fulfillment of this request would require research and the creation of a record to reflect the information requested. The Custodian also states that the browsing history is automatically cleared after certain time periods. The Custodian cites the GRC decision of Librizzi v. Township of Verona Police Department, GRC Complaint No. 2009-213 (August 2010) in support of their position.

The Custodian states that the only cell phone records maintained by the Township are cell phone bills that delineate total costs, calls, and data usage. The Custodian asserts that such records will not indicate the content of text messages or websites that have been visited. The Custodian further states that the Township has no record of text messages and is not required to create or maintain such records.

In addition, the Custodian maintains that the Township does not keep "deleted records" and that the Complainant's request for "any and all" deleted records are not identifiable and constitutes an invalid request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005).

In the Denial of Access Complaint, the Complainant states that he has been unlawfully denied access to the requested records and argues that the GRC has ruled that a computer itself is a government record and that when the Township utilizes the computers for governmental purposes, not only is the computer subject to OPRA, but the content on the computer is as well. The Complainant further states that all of the Township computers are maintained by a Township information technology employee and that all of the computers are used in the course of official business.

The Complainant maintains that the Township Clerk informed him that browsing history is automatically cleared at certain times. However the Complainant contends that such deletion would be in violation of DARM.

The Complainant does not agree to mediate this complaint.

### **March 6, 2012**

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated October 30, 2011
- Letter from the Custodian to the Complainant dated November 7, 2011

The Custodian certifies that a search for the requested records yielded no responsive government records.

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<sup>6</sup> The Complainant attaches additional documentation that is not relevant to the adjudication of this complaint.  
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In support of her certification, the Custodian’s Counsel argues that the statutory definition of a government record disqualifies the requested internet histories from being considered a government record because they are not maintained in the course of regular business. Counsel further contends that the Complainant’s request is merely a request for information and not a specifically identifiable record.

Counsel further argues that a computer itself is not a government record and that the Complainant’s request to the contrary is outside of the definition of a government record that is prescribed in OPRA. Counsel maintains that deleted files and internet browsing history are not maintained in any way and accordingly are not government records, as their maintenance is not a function or requirement of the Township or State of New Jersey by statute or municipal ordinance. The Custodian again certifies that the Township does not possess any phone records responsive to Item No. 3 of 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 provides that:

“[i]f the custodian is 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. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

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.

In the instant Denial of Access Complaint, the Complainant asserts that he has been denied access to all of the records requested in his October 30, 2011 OPRA request to the Township of Galloway. However, in response to the GRC's request for a Statement of Information, the Custodian certified that the Township does not possess any records that are responsive to the Complainant's request. Complainant submitted no evidence that the records do exist. Although the Complainant argued that the records must exist or their deletion would violate records retention schedules, these arguments do not rise to the level of competent, credible evidence sufficient to overcome the Custodian's certification. Thus, the Complainant has failed to submit any evidence disputing the Custodian's certification that said records do not 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. The complainant failed to submit any evidence to refute the custodian's certification. The GRC held that the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the Statement of Information that no records responsive to the Complainant's request exist, absent evidence in the record to refute the Custodian's certification, the Custodian has met the burden of proving that she did 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) and N.J.S.A. 47:1A-6. Additionally, in light of said certification, the GRC need not decide if whether the requested information is indeed a government record within the definition of a "government record" prescribed in OPRA.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Custodian certified in the Statement of Information that no records responsive to the Complainant's request exist, absent evidence in the record to refute the Custodian's certification, the Custodian has met the burden of proving that she did 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) and N.J.S.A. 47:1A-6. Additionally, in light of said certification, the GRC need not decide if whether the requested information is indeed a government record within the definition of a "government record" prescribed in OPRA.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

January 22, 2013