



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

April 30, 2013 Government Records Council Meeting

Colleen O'Dea
(On behalf of NJ Spotlight)
Complainant

Complaint No. 2012-108

v.

New Jersey Department of Agriculture
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council ("Council") considered the April 23, 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 the Custodian did not unlawfully deny access to the requested records because the Custodian initially responded and certified in the Statement of Information that no records responsive to the Complainant's OPRA request exist and because the Complainant did not submit any evidence to refute the Custodian's certification. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 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 30th Day of April, 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: May 2, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

**Colleen O’Dea¹
(On Behalf of NJ Spotlight)
Complainant**

GRC Complaint No. 2012-108

v.

**New Jersey Department of Agriculture²
Custodian of Records**

Records Relevant to Complaint: Copies via e-mail or pickup of the most recent (2010 or 2011) farmland assessment forms and related records (FA-1, WD-1 and any attachments) for multiple properties listed in the OPRA request.

Request Made: February 24, 2012

Response Made: March 13, 2012

GRC Complaint Filed: April 11, 2012³

Background⁴

Request & Response:

On February 24, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian. On March 6, 2012, the Custodian verbally responded seeking an extension of time to respond. On March 13, 2012, the Custodian responded in writing stating that the New Jersey Department of Agriculture (“NJDA”) did not possess the responsive records and that an OPRA request for the records would be best submitted to the New Jersey Division of Taxation (“Taxation”) because the records are related to taxes. The Custodian further stated that NJDA neither made nor received the responsive records in the course of its official business.

¹ No legal representation listed on record.

² Louis A. Bruni, Custodian of Records. Represented by DAG Cheryl R. Clarke, on behalf of the NJ Attorney General.

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

⁴ The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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Denial of Access Complaint:

On April 11, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”), stating that the records in question are documents that landowners applying for farmland assessment treatment must submit to the municipal tax assessor, who then submits the records to the New Jersey Department of Treasury (“DOT”). The Complainant contends that she believes she has been denied access to the responsive records because the State gave the records to the US Department of Agriculture (“USDA”) and is asserting that it cannot get them back.

The Complainant contends that, as background, she spoke with Mr. William Quinn (“Mr. Quinn”), Director of Communications at DOT, who advised that they receive the records but then forward the records to the NJDA. The Complainant asserts that after the NJDA advised no records exist, she contacted Mr. Quinn, who directed her to Mr. Troy Joshua (“Mr. Joshua”), from the USDA. The Complainant asserts that Mr. Joshua advised the Complainant to file an OPRA request with DOT and he would return the records to them for disclosure. The Complainant states that she did so on February 7, 2012,⁵ and was denied by DOT stating that no records exist and that she should submit an OPRA request to NJDA.

The Complainant states that NJDA responded to her OPRA request at issue herein advising that it had no responsive records and directing the Complainant to Taxation. The Complainant contends that the records at issue are State records and should be provided pursuant to an OPRA request. The Complainant contends that she does not know why the records were forwarded to the USDA, but she should not be denied access to same simply for that reason.⁶

Statement of Information:

On January 25, 2013, the Custodian filed a Statement of Information (“SOI”) certifying that he received the Complainant’s OPRA request on February 24, 2012. The Custodian certifies that he verbally stated his need for an extension of time to the Complainant on March 6, 2012. The Custodian certifies that he responded in writing on March 13, 2012 advising the Complainant that no records existed and referring her to Taxation. The Custodian certifies that NJDA does not possess the responsive records. The Custodian certifies that according to Taxation’s website and Records Management Services schedules, Taxation or the local municipalities maintain the records.

Counsel submits a letter brief arguing that the two (2) types of records at issue were never in the possession of NJDA. Counsel asserts that the records are collected by Taxation and that it is her understanding that they are then forwarded to the USDA National Agriculture Statistics Service, New Jersey Field Office. Counsel thus asserts that the Custodian did not unlawfully deny access to any records because same do not exist. N.J.S.A. 47:1A-1.1. (a “government record” defined as a record “... made, maintained or kept on file ... or ... received in the course of ... its official business ...”)

⁵ This OPRA request is the subject of GRC Complaint No. 2012-109.

⁶ This complaint was referred to mediation on May 9, 2012. This complaint was referred back from mediation on October 17, 2012. The Complainant did not submit an amendment to the Denial of Access Complaint. Colleen O’Dea (On Behalf of NJ Spotlight) v. New Jersey Department of Agriculture, 2012-108 – Findings and Recommendations of the Executive Director

Counsel notes that apparently DOT reopened the Complainant's February 7, 2012 OPRA request⁷ advising that records would be provided. Counsel notes that thereafter, on March 26, 2012, DOT responded advising that no records exist and that the Complainant should contact the USDA and NJDA. Counsel further notes that DOT advised the Complainant that it believed that the responsive records would be returned to Taxation; however, Taxation was not successful in obtaining the records.

Analysis⁸

Unlawful Denial of Access

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 Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access."

Here, the Complainant asserted that she believed she was unlawfully denied access to the responsive records because DOT could not obtain the same records from the USDA and instead referred the Complainant to the NJDA. The Complainant now challenges NJDA's response that no records responsive exist. However, the Custodian initially responded to the Complainant on March 13, 2012 stating that no records exist and further certified to same in the SOI. The Custodian further certified that the records appear to be held by Taxation.

The evidence of record herein supports a conclusion that NJDA does not maintain the responsive records. Specifically, the Complainant noted in her Denial of Access Complaint that the responsive records are submitted to municipal tax assessors who forward the records to DOT. Additionally, the Complainant noted that she talked to Mr. Joshua, who suggested she submit an OPRA request to DOT and he would return the records to them for disclosure. In either instance, the DOT and the USDA⁹ are implicated in receiving and, at some point, maintaining the responsive records.

⁷ Counsel acknowledges that this OPRA request is the subject of GRC Complaint No. 2012-109.

⁸ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

⁹ The GRC notes that the USDA is a federal agency not bound to the provisions of OPRA by definition of a "public agency." N.J.S.A. 47:1A-1.1.

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Thus, because the Custodian initially responded and certified in the SOI that no records responsive to the Complainant's OPRA request exist and because the Complainant did not submit any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to the requested records because the Custodian initially responded and certified in the Statement of Information that no records responsive to the Complainant's OPRA request exist and because the Complainant did not submit any evidence to refute the Custodian's certification. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013