



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

April 30, 2013 Government Records Council Meeting

Judith Papiez
Complainant

Complaint No. 2012-65

v.

County of Mercer, Office of County Counsel
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 Supplemental 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 this complaint be dismissed because the Complainant withdrew her complaint in an e-mail to the GRC dated April 16, 2013. Therefore, no further adjudication is required.

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**

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

**Judith Papiez¹
Complainant**

GRC Complaint No. 2012-65

v.

**County of Mercer, Office of County Counsel²
Custodian of Records**

Records Relevant to Complaint: Electronic copy (via e-mail) of Federal Motor Carrier Safety Administration (“FMCSA”) annual “Summary of Controlled Substance & Alcohol Testing” from 2006 to February 14, 2012 for Mercer County Department of Transportation (“DOT”) and Public Works.

Request Made: February 14, 2012

Response Made: February 15, 2012

GRC Complaint Filed: March 7, 2012³

Background

At its March 22, 2013 public meeting, the Council considered the March 15, 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, found that:

1. Although the Custodian responded in writing to the Complainant’s OPRA request within the statutorily mandated time frame to respond, the Custodian’s written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive summaries because she failed to obtain the summaries from either Robert Wood Johnson or LabCorp and provide to the Complainant pursuant to Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) and Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006). N.J.S.A. 47:1A-

¹ No legal representation listed on record.

² Sarah G. Crowley, Esq., Custodian of Records. No legal representation listed on record.

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

6. Thus, the Custodian must obtain any responsive summaries and provide same to the Complainant. If summaries for a certain year do not exist or did not exist at the time of the OPRA request, the Custodian must legally certify to this fact.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
4. Because the language of N.J.S.A. 47:1A-5(e) is clear and unambiguous as to which specific records are classified as "immediate access" records, the GRC declines to determine that the requested summaries are "immediate access" records because said records are not specifically identified under OPRA as such.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

On March 25, 2013, the Council distributed its Interim Order to all parties. On April 1, 2013, the Custodian responded to the Council's Interim Order certifying that she is providing FMCSA annual summaries from 2006 to 2012 for DOT and Public Works via U.S. mail.

On April 16, 2013, the Complainant e-mailed the GRC advising that she wishes to withdraw this complaint because she is satisfied with the Custodian's compliance.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew her complaint in an e-mail to the GRC dated April 16, 2013. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

April 23, 2013



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

INTERIM ORDER

March 22, 2013 Government Records Council Meeting

Judith Papiez
Complainant

Complaint No. 2012-65

v.

County of Mercer, Office of County Counsel
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council ("Council") considered the March 15, 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:

1. Although the Custodian responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive summaries because she failed to obtain the summaries from either Robert Wood Johnson or LabCorp and provide to the Complainant pursuant to Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) and Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006). N.J.S.A. 47:1A-6. Thus, the Custodian must obtain any responsive summaries and provide same to the Complainant. If summaries for a certain year do not exist or did not exist at the time of the OPRA request, the Custodian must legally certify to this fact.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

4. Because the language of N.J.S.A. 47:1A-5(e) is clear and unambiguous as to which specific records are classified as “immediate access” records, the GRC declines to determine that the requested summaries are “immediate access” records because said records are not specifically identified under OPRA as such.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: March 25, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Judith Papiez¹
Complainant**

GRC Complaint No. 2012-65

v.

**County of Mercer, Office of County Counsel²
Custodian of Records**

Records Relevant to Complaint: Electronic copy (via e-mail) of Federal Motor Carrier Safety Administration (“FMCSA”) annual “Summary of Controlled Substance & Alcohol Testing” from 2006 to February 14, 2012 for Mercer County Department of Transportation (“DOT”) and Public Works.

Request Made: February 14, 2012

Response Made: February 15, 2012

GRC Complaint Filed: March 7, 2012³

Background⁴

The Complainant hand-delivered an OPRA request to the County on February 14, 2012. The Custodian responded in writing on February 15, 2012, the first (1st) business day after receipt of the subject request, stating that additional time would be necessary to retrieve the responsive records. The Complainant e-mailed the County on March 2, 2012 seeking a status update. The Custodian responded on March 19, 2012 advising that the County’s outside contractor, Robert Wood Johnson (“RWJ”), is obtaining the records from LabCorp. The Custodian further advised that the County does not maintain these records and will attempt to get them; however, the County is not required to produce records that the County does not maintain during the course of regular business.

The Complainant filed her Denial of Access Complaint with the Government Records Council (“GRC”) on March 7, 2012. In said complaint, the Complainant argues that the Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide a date certain on which she would respond to the Complainant.

¹ No legal representation listed on record.

² Sarah G. Crowley, Esq., Custodian of Records. No legal representation listed on record.

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.

The Complainant submitted a letter to the GRC on April 23, 2012. In said letter, the Complainant asserts that the Custodian advised that although the County did not maintain the record, the outside contractor was in the process of obtaining same. The Complainant asserts that to date, she has not received the responsive records. The Complainant contends that pursuant to FMCSA §382.401, employers are required to maintain annual summaries: the 2010 and 2011 summaries should be readily available and the 2012 summary completed in by March should also be available. The Complainant contends that the Custodian violated N.J.S.A. 47:1A-5(e) by failing to grant immediate access to all responsive records.

The Custodian filed her Statement of Information (“SOI”) on May 25, 2012. In the SOI, the Custodian certifies she received the Complainant’s OPRA request on February 14, 2012. The Custodian certifies she responded on February 15, 2012 stating that she needed an extension of time. The Custodian certifies that she responded again on March 19, 2012 advising that the County did not maintain the responsive records, but that RWJ was attempting to obtain same from LabCorp.

The Custodian argues that the records at issue are not maintained by the County and thus she is not required to provide records not in her possession during the course of regular business.

Analysis⁵

Sufficiency of the Custodian’s Response

OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant’s OPRA request on the seventh (7th) business day following receipt of said request. In the response, the custodian requested an extension of time to respond to said request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian’s request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

Here, the Custodian responded in writing to the Complainant’s OPRA request on the first (1st) business day after receipt of same stating that additional time would be necessary to retrieve the responsive records. However, the Custodian failed to provide a date certain on which she would respond to the Complainant providing access to any responsive records.

Therefore, although the Custodian responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, the Custodian’s written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, *supra*, because the Custodian failed

⁵ 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.

to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).

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 the instant complaint, the Complainant sought FMCSA “annual ‘Summary of Controlled Substance & Alcohol Testing’” reports from 2006 to February 14, 2012. The Custodian responded on March 19, 2012 noting the RWJ was obtaining the records from LabCorp. The Custodian further note that although the County is not required to produce records not in its possession, she would try to obtain same.

The Complainant submitted a letter to the GRC on April 23, 2012 asserting that she had not received the responsive records at that time. The Complainant further argued that the County should have summaries for 2010 and 2011 available, as well as a 2012 summary completed in March 2012. In the SOI, the Custodian certified that RWJ was in the process of obtaining the records from LabCorp. However, the Custodian argued that she was not required to provide the records because she did not maintain same in the course of regular business.

In Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006), the Council determined that electronic correspondence stored in a government official’s personal e-mail account was a government record subject to disclosure when used for Borough business. The Council found that “the location of the records does not inhibit the Custodian from obtaining the records and providing access to the records pursuant to OPRA.”

In Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) the motion judge in the Law Division, interpreting Bent v. Township of Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) held that the defendant did not have to disclose the records responsive to the plaintiff’s OPRA request because the records were not in the defendant’s possession. The Appellate Division held that the motion judge interpreted Bent, *supra* too broadly. The Appellate Division held:

“We find the circumstances in Bent, *supra*, to be far removed from those existing in the present matter because ... the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply ... relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA ... We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.” *Id.* at 517.

The GRC subsequently expanded this premise to agencies entered into a shared services agreement. See Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012).

Both Burnett and Meyers apply in the instant complaint. Specifically, the Custodian confirmed that her outside contractor RWJ was attempting to obtain the responsive summaries from LabCorp. However, it appears that LabCorp is also contracted to perform official business for the County by way of administering controlled substance and alcohol testing. Thus, any records "... made by or on behalf of ..." the County in the course of its official business are subject to disclosure. Burnett, *supra*. Thus, if summaries responsive to the Complainant's OPRA request exist, regardless of their location at either RWJ or LabCorp, the Custodian should have obtained and provided same, with redactions if necessary.

Therefore, the Custodian failed to bear her burden of proving a lawful denial of access to the responsive summaries because she failed to obtain the summaries from either RWJ or LabCorp and provide to the Complainant pursuant to Burnett and Meyers. N.J.S.A. 47:1A-6. Thus, the Custodian must obtain any responsive summaries and provide same to the Complainant. If summaries for a certain year do not exist or did not exist at the time of the OPRA request, the Custodian must legally certify to this fact.

Finally, OPRA provides that "immediate access ordinarily shall be granted ..." to certain specific types of government records. N.J.S.A. 47:1A-5(e). Here, the Complainant contended that the Custodian violated N.J.S.A. 47:1A-5(e) by failing to grant immediate access to all responsive records. A review of N.J.S.A. 47:1A-5(e) reveals that the summaries sought are not specifically identified as "immediate access" records. Thus, the GRC must adhere to the clear and unambiguous language of N.J.S.A. 47:1A-5(e). and recognize only those specific records identified as immediate access records.

Therefore, because the language of N.J.S.A. 47:1A-5(e) is clear and unambiguous as to which specific records are classified as "immediate access" records, the GRC declines to determine that the requested summaries are "immediate access" records because said records are not specifically identified under OPRA as such.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Department of

Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).

2. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive summaries because she failed to obtain the summaries from either Robert Wood Johnson or LabCorp and provide to the Complainant pursuant to Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) and Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006). N.J.S.A. 47:1A-6. Thus, the Custodian must obtain any responsive summaries and provide same to the Complainant. If summaries for a certain year do not exist or did not exist at the time of the OPRA request, the Custodian must legally certify to this fact.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
4. Because the language of N.J.S.A. 47:1A-5(e) is clear and unambiguous as to which specific records are classified as "immediate access" records, the GRC declines to determine that the requested summaries are "immediate access" records because said records are not specifically identified under OPRA as such.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.