



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

July 29, 2014 Government Records Council Meeting

James Franklin Godfrey
Complainant

Complaint No. 2013-275

v.

City of Wildwood (Cape May)
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 bore his burden of proving that he did not unlawfully deny access to the Complainant’s worker’s compensation claims. N.J.S.A. 57:1A-6. The Custodian certified both in his SOI and his July 2, 2014 certification that copies of the Complainant’s worker’s compensation claims could not be located after three (3) separate searches. Furthermore, there is no competent credible evidence in the record to refute the Custodian’s certifications that the records do not exist, despite the fact that they may have existed some thirteen (13) years ago. *See* Valdez v. Union City Bd. of Education (Union), GRC Complaint No. 2011-50 (August 2012); Pusterhofer v. N.J. Dep’t 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 29th Day of July, 2014

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: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**James Franklin Godfrey¹
Complainant**

GRC Complaint No. 2013-275

v.

**City of Wildwood (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

“Personnel file with workman’s Comp Claims.”

Custodian of Record: Christopher H. Wood

Request Received by Custodian: August 29, 2013

Response Made by Custodian: September 9, 2013; September 20, 2013

GRC Complaint Received: September 18, 2013

Background³

Request and Response:

On August 29, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 9, 2013, seven (7) business days later, the Custodian responded, in writing, stating that he has been unable to locate the responsive documents and sought an extension of time to respond. The Custodian stated that he would respond to the Complainant’s request by September 20, 2013.

On September 20, 2013, the Custodian responded, in writing, stating that he located the Complainant’s personnel file which could be picked up at the city clerk’s office. Additionally, the Custodian stated that he was unable to locate the Complainant’s worker’s compensation claims. After speaking with the personnel office, the Custodian claimed that the worker’s compensation claims were destroyed in the 1990’s when a roof collapsed at an off-site storage facility.

¹ No legal representation listed on record.

² Represented by Mary D’Arcy Bittner, Esq. (Wildwood, NJ).

³ 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.

Denial of Access Complaint:

On September 18, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s assertion that his worker’s compensation claims were destroyed in a roof collapse. On June 5, 2014, the Complainant emailed the GRC claiming that in 2001, thirteen (13) years ago, during a meeting with then Mayor of Wildwood Fred Wager, the Complainant reviewed his personnel file, which contained his worker’s compensation claims.

Statement of Information:

On March 21, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the City of Wildwood records room was searched on three (3) separate occasions by the Custodian; Deputy City Clerk, Karen M. Gallagher; and Jane Dougherty of the Human Resources Department. The Custodian certified that on the third (3rd) search, he located the Complainant’s personnel file; however he could not locate Complainant’s worker’s compensation claims. On September 20, 2013, the Custodian responded to the Complainant, in writing, stating that his personnel file was ready for pick-up at the clerk’s office.

Additional Submissions:

On July 2, 2014, the Custodian submitted an additional certification, in writing, to the GRC. The Custodian clarified that he did not believe the roof collapse at an off-site storage facility was responsible for the missing records. The Custodian however, maintained that his office was unable to locate the Complainant’s worker’s compensation claims after three (3) separate searches.

Analysis

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. N.J. Dep’t 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 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.” Id.

In Valdez v. Union City Bd. of Education (Union), GRC Complaint No. 2011-50 (August 2012), the complainant sought news releases pertaining to meetings held by the Union City Board of Education. The custodian certified that he and the Confidential Secretary conducted a search of their files and meeting minutes to locate any relevant news releases. The custodian certified that he could not locate any responsive documents after searching for one half hour. The Council found that the custodian's certification was sufficient to show that he performed an adequate search for the requested records. Id.; *see also* Pusterhofer, GRC No. 2005-49.

Here, the Custodian certified in his SOI that after three (3) searches, his office could not locate the Complainant's worker's compensation claims. In contrast, the Complainant argued that his worker's compensation claims were contained within his personnel file in 2001. On July 2, 2014, the Custodian submitted a second (2nd) certification, in writing, reiterating that his office was unable to locate the Complainant's worker's compensation claims.

Therefore, the Custodian bore his burden of proving that he did not unlawfully deny access to the Complainant's worker's compensation claims. N.J.S.A. 57:1A-6. The Custodian certified both in his SOI and his July 2, 2014 certification that copies of the Complainant's worker's compensation claims could not be located after three (3) separate searches. Furthermore, there is no competent credible evidence in the record to refute the Custodian's certifications that the records do not exist, despite the fact that they may have existed some thirteen (13) years ago. *See* Valdez, GRC No. 2011-50; Pusterhofer, GRC No. 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian bore his burden of proving that he did not unlawfully deny access to the Complainant's worker's compensation claims. N.J.S.A. 57:1A-6. The Custodian certified both in his SOI and his July 2, 2014 certification that copies of the Complainant's worker's compensation claims could not be located after three (3) separate searches. Furthermore, there is no competent credible evidence in the record to refute the Custodian's certifications that the records do not exist, despite the fact that they may have existed some thirteen (13) years ago. *See* Valdez v. Union City Bd. of Education (Union), GRC Complaint No. 2011-50 (August 2012); Pusterhofer v. N.J. Dep't of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014