



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 29, 2014 Government Records Council Meeting

Maryanne Shay
Complainant

Complaint No.: 2013-334

v.

Borough of Haddon Heights (Camden)
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council ("Council") considered the April 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 did not unlawfully deny access to the Zoning Board of Adjustment 2012 Annual Report because the Custodian certified that the record does not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., 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 April, 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: May 2, 2014



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Maryanne Shay¹
Complainant**

GRC Complaint No. 2013-334

v.

**Borough of Haddon Heights (Camden)²
Custodial Agency**

Records Relevant to Complaint: A copy of the Zoning Board of Adjustment 2012 Annual Report.

Custodian of Record: Joan D. Moreland, Clerk
Request Received by Custodian: October 30, 2013
Response Made by Custodian: October 31, 2013
GRC Complaint Received: November 15, 2013

Background³

Request and Response:

On October 30, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned record. On October 31, 2013, the first (1st) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the request was denied because no such record exists.

Denial of Access Complaint:

On November 15, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that she submitted the OPRA request to the Custodian on October 30, 2013 and the Custodian responded on October 31, 2013, denying the request because the Custodian stated that no such record exists. The Complainant contends the requested record is required under Municipal Land Use Law N.J.S.A. 40:55D-70.1.

¹ No legal representation listed on record.

² Represented by Albert J. Olizi, Esq., of Mattleman, Weinroth & Miller, P.C. (Cherry Hill, 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.

Statement of Information:

On November 18, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that on October 30, 2013, she received the Complainant’s records request and that she responded to the request on October 31, 2013. The Custodian further certifies that, although she knew the requested record had never been filed in her office, she checked with the Planning/Zoning Board secretary to determine if the record exists. The Custodian certifies that the secretary informed her that the Planning Board attorney, Donald Ryan, Esq., stated that no such record exists. Thereafter, the Custodian certifies that she denied the request because the Complainant sought a nonexistent record.

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. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the record responsive to the request, the Zoning Board of Adjustment 2012 Annual Report, does not exist.

As such, the Custodian did not unlawfully deny access to the Zoning Board of Adjustment 2012 Annual Report because the Custodian certified that the record does not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See* Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to the Zoning Board of Adjustment 2012 Annual Report because the Custodian certified that the record does not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See* Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

April 22, 2014