



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**

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

Peter Gartner  
Complainant

Complaint No. 2013-93

v.

Middlesex Borough (Middlesex)  
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 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 the Custodian has borne her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Additionally, because the Custodian certified in the Statement of Information that she advised the Complainant that no records responsive to his March 13, 2013 OPRA request No. 1 existed and provided the responsive records to the remainder of the requests, and there is no competent, credible evidence in the record to refute the Custodian’s certification, she did not unlawfully deny access to any records. *See Burns v. Borough of Collingswood*, GRC Complaint No. 2005-68 (September 2005)(holding that the Custodian did not unlawfully deny access to Complainant’s OPRA request because the Custodian provided all records that existed); *Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005)(holding that a custodian did not unlawfully deny access to a record that did not exist). *See also Wadhams v. Town of Belvidere (Warren)*, GRC Complaint No. 2010-209 (October 2011).

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 October, 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: November 1, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Peter Gartner<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-93**

v.

**Middlesex Borough (Middlesex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

March 13, 2013 OPRA requests:

1. Copy of the Complainant's signed Recreation Commission Policy Guide Confirmation form.
2. Copy of an e-mail from the Recreation Director to a mailing list generated from registrations and/or coaching information containing a flyer for a local business and a list of Middlesex Borough ("Borough") Council members, Recreation Commission members and Borough employees that received the e-mail (noting that no e-mail addresses are necessary).

March 15, 2013 OPRA request: Copy of an e-mail dated January 18, 2013 from the Recreation Department to coaches regarding outside basketball used between breaks in basketball games and a list of Borough Council members, Recreation Commission members and Borough employees that received the e-mail (noting that no e-mail addresses are necessary).

**Custodian of Record:** Kathleen Anello

**Request Received by Custodian:** March 13, 2013 and March 15, 2013

**Response Made by Custodian:** March 25, 2013

**GRC Complaint Received:** March 27, 2013

**Background<sup>3</sup>**

Request and Response:

On March 13, 2013, the Complainant submitted two (2) Open Public Records Act

---

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

<sup>2</sup> Represented by Aravind Aithal, Esq., of Bob Smith & Associates (Piscataway, NJ).

<sup>3</sup> 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.

("OPRA") requests to the Custodian seeking the above-mentioned records. On March 15, 2013, the Complainant submitted a third (3<sup>rd</sup>) OPRA request to the Custodian seeking the above-mentioned records.

On March 25, 2013, the Custodian responded in writing advising that no records responsive to March 13, 2013 OPRA request No. 1 existed and providing access to records responsive to the Complainant's March 13, 2013 OPRA request No. 2 and March 15, 2013 OPRA request. On March 26, 2013, the Custodian sent the same response to the Complainant via e-mail. On March 27, 2013, the Custodian sent the same response to the Complainant again and noted that the e-mails were returned. On April 22, 2013, the Custodian sent three (3) individual e-mails attaching each response because her original e-mails contained attachments too large to transmit. On April 24, 2013, the Custodian sent the responsive records via U.S. mail after several attempts to send same electronically failed.

#### Denial of Access Complaint:

On March 27, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that he submitted three (3) OPRA requests and received no response.

#### Statement of Information:

On May 15, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that she received the Complainant's OPRA requests on March 13 and March 15, 2013. The Custodian certifies that she forwarded the requests to the Recreation Director, who responded providing records for disclosure.

The Custodian certifies that The Custodian certifies that she attempted several times to respond to the Complainant's OPRA requests via e-mail and was unsuccessful. The Custodian certifies that she subsequently mailed her response to the Complainant on April 24, 2013.

### Analysis<sup>4</sup>

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. *Id.* Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>5</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of

---

<sup>4</sup> 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.

<sup>5</sup> A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). OPRA states that in the adjudication of a denial of access complaint, a custodian must bear the burden of proving a lawful denial of access to an OPRA request. N.J.S.A. 47:1A-6. This burden also applies to the issue of whether a custodian timely responded, wherein a failure to do so results in a “deemed” denial.

Here, the evidence of record indicates that the Custodian responded in writing to the Complainant within seven (7) business days from receipt of said requests advising that no records responsive to the Complainant’s March 13, 2013 OPRA request No. 1 exists and providing responsive records to the remaining requests. The Custodian further attempted to provide the records several additional times thereafter when transmission failed. Additionally, there is no evidence in the record to refute the Custodian’s certification.

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. Additionally, because the Custodian certified in the SOI that she advised the Complainant that no records responsive to his March 13, 2013 OPRA request No. 1 existed and provided the responsive records to the remainder of the requests, and there is no competent, credible evidence in the record to refute the Custodian’s certification, she did not unlawfully deny access to any records. *See* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)(holding that the Custodian did not unlawfully deny access to Complainant’s OPRA request because the Custodian provided all records that existed); Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005)(holding that a custodian did not unlawfully deny access to a record that did not exist). *See also* Wadhams v. Town of Belvidere (Warren), GRC Complaint No. 2010-209 (October 2011).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Additionally, because the Custodian certified in the Statement of Information that she advised the Complainant that no records responsive to his March 13, 2013 OPRA request No. 1 existed and provided the responsive records to the remainder of the requests, and there is no competent, credible evidence in the record to refute the Custodian’s certification, she did not unlawfully deny access to any records. *See* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)(holding that the Custodian did not unlawfully deny access to Complainant’s OPRA request because the Custodian provided all records that existed); Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005)(holding that a custodian did not unlawfully deny access to a record that did not exist). *See also* Wadhams v. Town of Belvidere (Warren), GRC Complaint No. 2010-209 (October 2011).

Prepared By: Frank F. Caruso  
Senior Case Manager

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

October 22, 2013