



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

November 18, 2014 Government Records Council Meeting

Julie Akers
Complainant

Complaint No. 2014-190

v.

Buena Vista Township (Atlantic)
Custodian of Record

At the November 18, 2014 public meeting, the Government Records Council (“Council”) considered the November 10, 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 requested June 30, 2005 Planning Board minutes. N.J.S.A. 47:1A-6. The Custodian certified in the Statement of Information that same could not be located after four (4) searches of various locations with assistance from Lisa Tilton, Diane Morgan and others totaling 13.5 hours. Furthermore, there is no competent, credible evidence in the record to refute the Custodian’s certifications that the records do not exist. *See Kasko v. Town of Westfield (Union)*, GRC Complaint No. 2011-06 (March 2012); *Pusterhofer v. N.J. 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 18th Day of November, 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: November 20, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 18, 2014 Council Meeting**

**Julie Akers¹
Complainant**

GRC Complaint No. 2014-190

v.

**Buena Vista Township (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of minutes from the Buena Vista Township (“Township”) Planning Board meeting held on June 30, 2005.³

Custodian of Record: Linda Gonzales
Request Received by Custodian: April 7, 2014
Response Made by Custodian: April 15, 2014
GRC Complaint Received: May 7, 2014

Background⁴

Request and Response:

On April 7, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 15, 2014, the Custodian responded in writing stating that an extension until April 21, 2014 would be necessary because minutes have been archived.⁵ On April 22, 2014, Lisa Tilton, Deputy Custodian of Records, responded on behalf of the Custodian advising that no records could be located. The Complainant responded via e-mail asking whether a record existed. Ms. Tilton replied that because she was unable to locate the minutes, she could not confirm or deny the existence of same.

Denial of Access Complaint:

On May 7, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that she sought the June 30,

¹ No legal representation listed on record.

² Represented by Eric M. Bernstein, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

³ The Complainant requested additional records that are not issue in this complaint.

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.

⁵ The initial response provided a response date of “April 1, 2014;” however, the Custodian corrected this error on April 16, 2014.

2005 Planning Board minutes because it documented the public hearing at which the Planning Board established an area in need of redevelopment. The Complainant averred that the Township has based the validity of its redevelopment ordinances on that meeting and subsequent actions by the Planning Board. The Complainant contended that she believed the minutes exist and should have been readily retrievable.

Statement of Information:

On May 29, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 7, 2014.

The Custodian certified that on April 8, 2014, Ms. Tilton spent three (3) hours conducting a search of in the Planning/Zoning Board Office, Records Department and contacted the Township Engineer. *See* Ms. Tilton’s legal certification at 3 and 4. The Custodian affirmed that she also conducted a search on April 15, 2014. This three (3) hour search entailed reviewing files in the Clerk’s Office, as well as rechecking the Records Department and Planning/Zoning storage area. The Custodian certified that the Township contacted Diane Morgan, who was the Planning/Zoning Board Secretary at the time of the June 30, 2005 meeting, to assist her and Ms. Tilton in searching for the minutes. *See* Ms. Tilton’s legal certification at 5. They conducted two (2) additional searches of these areas on April 16, 2014 and April 17, 2014. The Custodian certified that, after an exhaustive search of 13.5 hours in various locations, the responsive minutes could not be located. The Custodian certified that Ms. Tilton responded to the Complainant on April 22, 2014 advising the Complainant that no records could be located.

The Custodian contended that the Township went through great lengths to locate the minutes, but could not locate same. The Custodian asserted that her actions were not knowing and willful.

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 Kasko v. Town of Westfield (Union), GRC Complaint No. 2011-06 (March 2012), the complainant sought copies of 2001 quarterly earnings reports for a police officer. The custodian certified in the SOI that she searched for responsive records on three (3) occasions and contacted the Town’s Chief Financial Officer for assistance. The custodian also argued that the GRC previously determined that custodians met their burden of due diligence after conducting an exhaustive search that failed to yield any records (*citing* Rivera v. Union Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (August 2009) and Paff v. Twp. of Blairstown (Warren), GRC Complaint No. 2009-53 (February 2010)). The Council found that the custodian’s certification

was sufficient to show that she performed an adequate search for the requested records and that same did not exist (*citing Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005)). *See also Valdez v. Union City Bd. of Educ. (Union)*, GRC Complaint No. 2011-50 (August 2012).

Here, the Custodian certified in the SOI that, in an attempt to locate the responsive minutes, she, Ms. Tilton and others conducted multiple searches of various locations over four (4) days totaling 13.5 hours. The Custodian also certified that the Township contacted Ms. Morgan for assistance as she was the Planning/Zoning Board Secretary at the time of the June 30, 2005 meeting. However, they were unable to locate the minutes. In contrast, the Complainant argued that the minutes existed and should have been readily retrievable. The facts of this complaint are on point with the facts of Kasko, in that the Custodian's search was clearly exhaustive. In fact, the Custodian's search here was in excess of the search that the custodian in Kasko, conducted. For these reasons, the GRC is satisfied that the Custodian supported her denial based on a failure to locate the responsive record.

Accordingly, the Custodian did not unlawfully deny access to the requested June 30, 2005 Planning Board minutes. N.J.S.A. 47:1A-6. The Custodian certified in the SOI that same could not be located after four (4) searches of various locations with assistance from Ms. Tilton, Ms. Morgan and others totaling 13.5 hours. Furthermore, there is no competent, credible evidence in the record to refute the Custodian's certifications that the records do not exist. *See Kasko*, GRC No. 2011-06; Pusterhofer, GRC No. 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to the requested June 30, 2005 Planning Board minutes. N.J.S.A. 47:1A-6. The Custodian certified in the Statement of Information that same could not be located after four (4) searches of various locations with assistance from Lisa Tilton, Diane Morgan and others totaling 13.5 hours. Furthermore, there is no competent, credible evidence in the record to refute the Custodian's certifications that the records do not exist. *See Kasko v. Town of Westfield (Union)*, GRC Complaint No. 2011-06 (March 2012); Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

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

November 10, 2014