



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Kenelmn Eden
Complainant

Complaint No. 2014-369

v.

Little Egg Harbor Township (Ocean)
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 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 because OPRA does not require custodians to research and compile information to create a record that may be responsive to an OPRA request, the Custodian had no legal duty to create a record containing the information that the Complainant specifically requested. Thus, the Custodian has met the burden of proof that access to any responsive records was not unlawfully denied. N.J.S.A. 47:1A-6; MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). See also Fang v. Dep’t of Transportation, GRC Complaint No. 2006-93 (May 2007), and Kehoe v. NJ Dep’t of Env’tl. Prot., Div. of Fish and Wildlife, GRC Complaint No. 2010-300 (July 2012). Additionally, because the Custodian certified that no records responsive to the Complainant’s request exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records. N.J.S.A. 47:1A-6; 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 30th Day of June, 2015

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 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting**

**Kenelmn Eden¹
Complainant**

GRC Complaint No. 2014-369

v.

**Little Egg Harbor Township (Ocean)²
Custodial Agency**

Records Relevant to Complaint: A list of Little Egg Harbor residential properties with assessed values ranging from \$300,000 to \$400,000. The list should include the assessed value, address, and block and lot for each entry and should be listed in ascending order of assessed value.³

Custodian of Record: Diana K. McCracken

Request Received by Custodian: October 2, 2014

Response Made by Custodian: October 3, 2014

GRC Complaint Received: November 5, 2014

Background⁴

Request and Response:

On October 2, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 3, 2014, the first (1st) business day following receipt of said request, the Custodian responded in writing, denying the Complainant’s request because she stated that the records he requested do not exist. The Custodian referred the Complainant to the Ocean County Tax Board’s website for assistance in obtaining the information he was seeking.

Denial of Access Complaint:

On November 5, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that he provided his request to the Custodian on October 2, 2014, and the Custodian denied the request on October 3, 2014, as a nonexistent record.

¹ No legal representation listed on record.

² Represented by Robin LaBue, Esq., of Gilmore & Monahan, P.A. (Toms River, NJ).

³ Although the Complainant did not specify the preferred method of delivery, he submitted the request electronically.

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 attached to the complaint an e-mail, addressed to the Custodian and dated October 3, 2014, wherein he disputed the denial. The Complainant informed the Custodian that the requested information is stored in the VITAL System electronically as a MOD4 report to which the Tax Assessor has easy access. When the Complainant failed to receive a reply to his October 3, 2014, e-mail, he followed-up with another e-mail on October 14, 2014. The Complainant states that he met with the Custodian on October 31, 2014, and again inquired about his request. The Complainant states that the Custodian checked with the Tax Assessor's staff and was told that they have no records responsive to the request.

Statement of Information:

On November 18, 2014, the Custodian filed a Statement of Information ("SOF"). The Custodian certifies that she received the Complainant's OPRA request on October 2, 2014, and responded in writing on October 3, 2014, denying the request.

The Custodian's Counsel states that the record requested by the Complainant does not exist, and that although the information requested may be the type of information maintained by the Tax Assessor, OPRA does not require the Custodian to gather responsive information and produce a new document. Counsel states that pursuant to the court's decision in MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), OPRA is not intended as a research tool litigants may use to force government officials to identify and siphon useful information.

The Custodian's Counsel asserts that to comply with the request, the Custodian would have had to research information and compile same in order to create a responsive record, which is beyond the scope of OPRA. Counsel contends that the Custodian denied the request because the record does not exist.

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 Fang v. Dep't of Transportation, GRC Complaint No. 2006-93 (May 2007), the complainant sought disciplinary action records and specified the particular information that the records had to contain. The custodian certified that no records existed which contained a compilation of the information specified by the complainant in the request. The Council, relying upon the court's decision in MAG, 375 N.J. Super. 534, held that "[b]ecause OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. See [MAG]."

The Council subsequently applied its decision in Fang, GRC 2006-93, to the facts of Kehoe v. NJ Dep't of Env'tl. Prot., Div. of Fish and Wildlife, GRC Complaint No. 2010-300 (July 2012), to reach the same conclusion. The Council went on to determine that the custodian did not unlawfully deny access to the responsive records because he certified "...that no records responsive to the Complainant's requests exist, and because there is no credible evidence in the record to refute the Custodian's certification..." (citing Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005)) Id. at 7. In Pusterhofer the GRC determined that because the custodian certified 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, similar to the facts of Fang, GRC 2006-93 and Kehoe, GRC 2010-300, the Custodian certified that no records exist which contain a compilation of the information specified by the Complainant. Moreover, no credible evidence exists in the record to refute the Custodian's certification. The Custodian further certified that she properly denied access to the request because OPRA does not require an agency to gather responsive information and create a new document. The Custodian cited MAG, 375 N.J. Super. 534, as legal authority supporting her position.

Therefore, because OPRA does not require custodians to research and compile information to create a record that may be responsive to an OPRA request, the Custodian had no legal duty to create a record containing the information that the Complainant specifically requested. Thus, the Custodian has met the burden of proof that access to any responsive records was not unlawfully denied. N.J.S.A. 47:1A-6; MAG, 375 N.J. Super. 534. See also Fang, GRC 2006-93, and Kehoe, GRC 2010-300. Additionally, because the Custodian certified that no records responsive to the Complainant's request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because OPRA does not require custodians to research and compile information to create a record that may be responsive to an OPRA request, the Custodian had no legal duty to create a record containing the information that the Complainant specifically requested. Thus, the Custodian has met the burden of proof that access to any responsive records was not unlawfully denied. N.J.S.A. 47:1A-6; MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). See also Fang v. Dep't of Transportation, GRC Complaint No. 2006-93 (May 2007), and Kehoe v. NJ Dep't of Env'tl. Prot., Div. of Fish and Wildlife, GRC Complaint No. 2010-300 (July 2012). Additionally, because the Custodian certified that no records responsive to the Complainant's request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart

Reviewed By: Joseph D. Glover
Executive Director

June 23, 2015