



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

January 31, 2017 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2015-200

v.

Essex County Prosecutor's Office
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council ("Council") considered the January 24, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian has borne her burden of proof that she lawfully denied access to the requested records, described under Item Nos. 1-5 of the Complainant's June 10, 2015 OPRA request, because she certified, and the record reflects that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). The Council need not address the Custodian's additional arguments pertaining to Item No. 3 because she conducted a search and could not locate any responsive records.

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 31st Day of January, 2017

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: February 3, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2015-200

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

1. Stephen J. Taylor billing records in State v. Barkley, Ind. No. 1390-4-93
2. [Essex County Prosecutor's Office ("ECPO")] billing records in Barkley files in State v. Barkley, Ind. No. 1390-4-93
3. Time sheet(s) by ECPO in State v. Barkley, Ind. No. 1390-4-93
4. Employment history of John H. Haggery, III, Esq. as an employee at ECPO, as well as his salary, tenure, position and title, and pension
5. Stephen J. Taylor time sheet(s) in State v. Barkley, Ind. No. 1390-4-93

Custodian of Record: Debra G. Simms, Esq.
Request Received by Custodian: June 10, 2015
Response Made by Custodian: June 18, 2015
GRC Complaint Received: July 6, 2015

Background³

Request and Response:

On June 10, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 18, 2015, the Custodian responded in writing, denying access to all the requested items on several grounds.

Regarding Item Nos. 1, 2, 4, and 5, the Custodian stated that no responsive records exist. For Item Nos. 3, the Custodian added that the request for ECPO time sheets is invalid as lacking sufficient specificity pursuant to Bent v. Twp. of Stafford Police Dep't, Custodian of Records, 381 N.J. Super. 30 (App. Div. 2005), MAG Entm't LLC v. Div. of ABC, 375 N.J. Super. 534

¹ No representation listed on record.

² Represented by James Paganelli, Esq. (Newark, 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.

(App. Div. 2005), Reda v. Twp. of West Milford, GRC Complaint No. 2002-58 (January 2003), Asarnow v. Dep't of Labor & Workforce Dev., GRC Complaint No. 2006-24 (May 2006), Bart v. Passaic Cnty. Public Hous. Auth., 406 N.J. Super. 445 (App. Div. 2009).

Denial of Access Complaint:

On Jul 6, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant did not provide any arguments in furtherance of his claim that he was unlawfully denied access to the records.

Statement of Information:

On August 11, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 10, 2015. The Custodian then certified that she responded in writing on June 18, 2015, denying access to the records on several grounds.

For requested Item Nos. 1, 2, 4, and 5 of the Complainant’s OPRA request, the Custodian certified that no responsive records exist, based on a search through the identified case file and the ECPO database. Additionally, the Custodian certified that all four requested items were subject to six (6) year retention schedules and that if any responsive records existed, they may have been destroyed, because the identified case is more than twenty (20) years old.

Regarding requested Item No. 3, the Custodian argued that the request for ECPO time sheets pertaining to the State v. Barkley case was invalid, as it lacked a specific name to conduct a search. The Custodian cited Bent, which stated that a proper OPRA request “must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency’s documents.” 381 N.J. Super. at 37. However, notwithstanding the Custodian’s claims that the item lacked specificity, the Custodian conducted a search of the case file and the agency’s time sheet database, yielding no responsive records. The Custodian added that such time sheets, if they ever existed, are also subject to a six (6) year retention schedule.

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.

The Council has previously found that, in light of a custodian’s certification that no records responsive to the request exist, no unlawful denial of access occurred. *See* Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified that

no responsive records exist for Item Nos. 1, 2, 4, and 5. The Custodian noted that even if responsive records had existed, they may have been destroyed in accordance with applicable retention schedules, since the case file at issue is over twenty (20) years old. Additionally, the Custodian certified that she conducted a search for responsive records for Item No. 3, notwithstanding her challenge against Item No. 3's validity. The search yielded no results, and the Custodian certified that any responsive records to Item No. 3 would also be subject to the similar retention schedules as the other Items. Moreover, the Complainant offered no information to refute the Custodian's certification.

Therefore, the Custodian has borne her burden of proof that she lawfully denied access to the requested records, described under Item Nos. 1-5 of the Complainant's June 10, 2015 OPRA request, because she certified and the record reflects that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49. The Council need not address the Custodian's additional arguments pertaining to Item No. 3 because she conducted a search and could not locate any responsive records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that she lawfully denied access to the requested records, described under Item Nos. 1-5 of the Complainant's June 10, 2015 OPRA request, because she certified, and the record reflects that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). The Council need not address the Custodian's additional arguments pertaining to Item No. 3 because she conducted a search and could not locate any responsive records.

Prepared By: Samuel A. Rosado
Staff Attorney

January 24, 2017