



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**June 28, 2016 Government Records Council Meeting**

Jeffrey W. Sauter  
Complainant

Complaint No. 2015-206

v.

Township of Colts Neck (Monmouth)  
Custodian of Record

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 2016 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:

1. Although the Custodian timely responded in writing to the Complainant’s OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would respond to the Complainant. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).
2. The Custodian did not unlawfully deny access to the Complainant’s OPRA request because she certified in the SOI that: 1) an extensive search failed to yield the 2007 and 2008 “Length of Service Award Program” reports, and 2) the Township was still developing a responsive 2014 “Length of Service Award Program” report. Additionally, there is no competent, credible evidence in the record to refute the Custodian’s certification. *See* Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Valdez v. Union City Bd. of Education (Union), GRC Complaint No. 2011-50 (August 2012); Thompson v. Twp. of Mansfield (Warren), GRC Complaint No. 2014-420.
3. The Custodian’s failure to provide a date certain on which she would respond resulted in an insufficient response. N.J.S.A. 47:1A-5(i); Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008). However, the Custodian lawfully denied access to the Complainant’s OPRA request because she was unable to locate the 2007 and 2008 “Length of Service Award Program” reports and because no 2014 “Length of Service Award Program” report existed. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.



Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 28<sup>th</sup> Day of June, 2016

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: June 30, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 28, 2016 Council Meeting**

**Jeffrey W. Sauter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-206**

v.

**Township of Colts Neck (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via pickup of “Length of Service Award Program” (“LOSAP”) statistics for the Colts Neck Fire Company No. 2 (“CNFC”) for the years 2007, 2008, and 2014, which are single page statistic sheets reporting total calls, meetings, and drills that each member attended, and the associated LOSAP points earned.<sup>3</sup>

**Custodian of Record:** Beth Kara

**Request Received by Custodian:** June 1, 2015

**Response Made by Custodian:** June 10, 2015

**GRC Complaint Received:** July 10, 2016

**Background<sup>4</sup>**

**Request and Response:**

On May 31, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 10, 2015, the seventh (7<sup>th</sup>) business day after receipt of the OPRA request, the Custodian’s Counsel responded in writing on behalf of the Custodian, stating that, after an extensive search, the Township of Colts Neck (“Township”) was unable to locate CNFC LOSAP reports for 2007 and 2008. Counsel further noted that the Township was still gathering and collating 2014 LOSAP records and would notify the Complainant once they were ready for disclosure.

On June 17, 2015, the Complainant wrote a letter to the Custodian, questioning whether she contacted the Township’s “subunit” or CNFC to obtain the missing 2007 and 2008 LOSAP reports. The Complainant noted that, if CNFC maintained copies of those reports, the Township could obtain same to complete their own records. The Complainant asked the Custodian to verify

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

<sup>2</sup> Represented by Michael J. Giarrusso, Esq., of Dilworth Paxson, LLP (Red Bank, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</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.

whether she checked with CNFC or an agent with the Township “subunit.” The Complainant further surmised that the Township could have destroyed those records in accordance with the State’s records retention policy.<sup>5</sup> The Complainant further averred that he still considered the subject OPRA request “open” until that point which the Custodian provided adequate proof that she performed a sufficient search or that the Township properly destroyed the records.

On June 18, 2015, the Custodian’s Counsel again responded in writing on behalf of the Custodian stating that the Township conducted an additional search for 2014 CNFC LOSAP records and confirmed that no responsive reports exist.

Denial of Access Complaint:

On July 10, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s denial of access to CNFC’s LOSAP reports for 2007, 2008, and 2014. The Complainant contended that Township Ordinance §36 required “agents” of the Township to submit the requested reports to the Township. The Complainant asserted that those reports provided in response to a prior and the current OPRA request evidenced the existence of the reports at issue here.<sup>6</sup>

Statement of Information:

On August 6, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 1, 2015. The Custodian certified that her search included contacting CNFC to inquire about the responsive reports. The Custodian certified that she had various conversations with Custodian’s Counsel and CNFC and that both she and CNFC conducted an exhaustive search of their files. The Custodian affirmed that this search failed to yield the 2007 and 2008 LOSAP report. Further, the Custodian certified that no 2014 LOSAP report existed because the Township was still in the process of developing same. The Custodian certified that the Custodian’s Counsel responded in writing on June 10, and June 18, 2015, advising the Complainant that no records existed.

The Custodian asserted that there appeared to be a “hole in the file” where 2007 and 2008 LOSAP reports went missing. The Custodian asserted that she could not say whether the reports were stolen or misplaced. The Custodian also recertified that no 2014 LOSAP report existed because the Township was still developing the report.

Additional Submissions:

On August 16, 2015, the Complainant submitted a rebuttal to the SOI. Therein, the Complainant disputed that the Custodian contacted CNFC as part of her search. The Complainant asserted that he asked for confirmation of the Custodian’s search in his June 17, 2015 letter, but the Custodian never provided one. The Complainant asserted that the Custodian

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<sup>5</sup> The Complainant simultaneously provided an OPRA request for a copy of the relevant “Request and Authorization for Records Disposal.” The Custodian’s Counsel denied the request on June 29, 2015 because no records existed.

<sup>6</sup> The GRC reiterates that the Complainant requested additional records that are not at issue this complaint.

could not now certify that she contacted CNFC, because the evidence of record did not support her claim.

The Complainant further contested the Custodian's assertion that the responsive reports may have been "stolen." The Complainant asserted that the Township has continually indicated that the reports were not destroyed; therefore, they must exist. The Complainant contended that if someone had broken into the Township Hall and stolen the records, the Custodian never offered police reports to prove the criminal act occurred. The Complainant noted that the Custodian's "stolen" argument also appeared in Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2013-239 (Interim Order dated June 24, 2014), which is currently awaiting adjudication at the Office of Administrative Law.

Moreover, the Complainant contended that the Township used a "no records exist" defense in Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2014-187 (Interim Order dated December 16, 2014). The Complainant noted that the Township custodian at that time then disclosed the responsive records upon receipt of the Council's Order, asserting that his failure to disclose the records was based on a "misunderstanding."

The Complainant contended that, based on the foregoing, the Custodian knowingly and willfully violated OPRA. The Complainant contended that the Custodian failed to provide documentation to support her search for the responsive records. Additionally, the Complainant asserted that the Custodian failed to provide any evidence that the reports were stolen. The Complainant further argued that, given that he has filed other substantially similar OPRA requests and has two (2) current complaints pending adjudication before the GRC, the Custodian fully understood the records sought. The Complainant contended that the Custodian purposely withheld some responsive records for over two (2) weeks and continued to withhold 2007 and 2008 LOSAP reports purposely for some unknown reason. The Complainant noted that he inferred the above based on the custodian's handling of Sauter, GRC 2014-187.<sup>7</sup>

## Analysis

### Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant's OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant's OPRA request. In the response, the custodian requested an extension of time to respond to said request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

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<sup>7</sup> The GRC notes that the custodian in that complaint was Robert Bowden, who is no longer the Township's custodian of record and did not respond to the request at issue here.

Here, the Custodian responded in writing to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day, stating that the Township was still gathering and collating 2014 LOSAP records and would notify the Complainant once the Township was ready to disclose them. However, the Custodian failed to provide a date certain on which she would respond by either granting access to the responsive records or advising the Complainant that her request was denied.

Therefore, although the Custodian timely responded in writing to the Complainant's OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, GRC 2007-164, because she failed to provide a date certain upon which she would respond to the Complainant. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).

### **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. N.J. 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.

In Valdez v. Union City Bd. of Education (Union), GRC Complaint No. 2011-50 (August 2012), the complainant sought news releases pertaining to meetings held by the Union City Board of Education. The custodian certified that he and the Confidential Secretary conducted a search of their files and meeting minutes to locate any relevant news releases. The custodian certified that he could not locate any responsive documents after searching for a half hour. The Council found that the custodian's certification was sufficient to show that he performed an adequate search for the requested records. *Id.*; (*citing* Pusterhofer, GRC No. 2005-49). *See also* Thompson v. Twp. of Mansfield (Warren), GRC Complaint No. 2014-420.

In the instant matter, the Custodian certified in the SOI that she was unable to locate responsive records. Specifically, the Custodian certified that both her and CNFC conducted an extensive search for the 2007 and 2008 reports but were unable to locate same. As in Valdes, the GRC is satisfied here that the Custodian took reasonable steps to locate the 2007 and 2008 reports without avail. Additionally, the Custodian certified that no 2014 LOSAP report existed because the Township was still developing the report. The GRC is therefore satisfied that the evidence of record supports that no records exist. Moreover, the GRC does not believe that the

Complainant's assertions regarding the absence of a record destruction receipt<sup>8</sup> or a police report for "stolen records" reaches the threshold of competent, credible evidence necessary to refute the Custodian's certification. Finally, the GRC does not agree that the former custodian's actions in Sauter, GRC 2014-187, evidence the existence of records here.

Accordingly, the Custodian did not unlawfully deny access to the Complainant's OPRA request because she certified in the SOI that: 1) an extensive search failed to yield the 2007 and 2008 LOSAP reports, and 2) the Township was still developing a responsive 2014 LOSAP report. Additionally, there is no competent, credible evidence in the record to refute the Custodian's certification. *See* Pusterhofer, GRC 2005-49; Valdes, GRC 2011-50; Thompson, GRC 2014-420.

### **Knowing & Willful**

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states "[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

The Custodian's failure to provide a date certain on which she would respond resulted in an insufficient response. N.J.S.A. 47:1A-5(i); Hardwick, GRC 2007-164. However, the Custodian lawfully denied access to the Complainant's OPRA request because she was unable to locate the 2007 and 2008 LOSAP reports and because no 2014 LOSAP report existed. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was

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<sup>8</sup> The GRC notes that it has no authority to adjudicate complaints alleging that an agency destroyed records in violation of its retention schedule. N.J.S.A. 47:1A-7(b).

intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian timely responded in writing to the Complainant's OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would respond to the Complainant. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).
2. The Custodian did not unlawfully deny access to the Complainant's OPRA request because she certified in the SOI that: 1) an extensive search failed to yield the 2007 and 2008 "Length of Service Award Program" reports, and 2) the Township was still developing a responsive 2014 "Length of Service Award Program" report. Additionally, there is no competent, credible evidence in the record to refute the Custodian's certification. *See* Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Valdez v. Union City Bd. of Education (Union), GRC Complaint No. 2011-50 (August 2012); Thompson v. Twp. of Mansfield (Warren), GRC Complaint No. 2014-420.
3. The Custodian's failure to provide a date certain on which she would respond resulted in an insufficient response. N.J.S.A. 47:1A-5(i); Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008). However, the Custodian lawfully denied access to the Complainant's OPRA request because she was unable to locate the 2007 and 2008 "Length of Service Award Program" reports and because no 2014 "Length of Service Award Program" report existed. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

June 21, 2016