



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

October 25, 2016 Government Records Council Meeting

Bruce W. Hall
Complainant

Complaint No. 2015-46

v.

Township of Lopatcong (Warren)
Custodian of Record

At the October 25, 2016 public meeting, the Government Records Council (“Council”) considered the October 18, 2016 Supplemental 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 Council adopt the Honorable Richard McGill’s September 29, 2016 Initial Decision in which he approved the Settlement Agreement signed by the parties or their representatives, ordered the parties to comply with the settlement terms, and further determined that the proceedings be concluded.

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 25th Day of October, 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: October 27, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 25, 2016 Council Meeting**

**Bruce W. Hall¹
Complainant**

GRC Complaint No. 2015-46

v.

**Township of Lopatcong (Warren)²
Custodial Agency**

Records Relevant to Complaint:

- 1) Copies of Councilwoman Schneider's log of message transactions (Text Picture & Video messaging) for a specifically listed cellular telephone number, covering January 7, 2015, from 7:15 PM to 9:45 PM.
- 2) Copies of Councilwoman Schneider's log of message transactions (Text Picture & Video messaging) for a specifically listed cellular telephone number, covering January 21, 2015, from 7:00 PM to 9:45 PM.

Custodian of Record: Margaret B. Dilts

Request Received by Custodian: February 10, 2015

Response Made by Custodian: February 13, 2015; February 20, 2015

GRC Complaint Received: March 3, 2015

Background

November 17, 2015 Council Meeting:

At its November 17, 2015 public meeting, the Council considered the November 10, 2015 Supplemental 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, found that:

[B]ased on the insufficient and conflicting evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. This complaint should also be referred to the Office of Administrative Law for determination of whether the Custodian or any other agency

¹ No legal representation listed on record.

² Represented by Michael Lavery, Esq. (Hackettstown, NJ).

official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Procedural History:

On November 18, 2015, the Council distributed its Interim Order to all parties. On January 21, 2016, the GRC transmitted the complaint to the Office of Administrative Law (“OAL”). On September 29, 2016, the Honorable Richard McGill, Administrative Law Judge (“ALJ”), issued an Initial Decision, approving the settlement agreement and holding as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

The ALJ “**CONCLUDE[D]** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved.” The ALJ further “**ORDER[ED]** that the parties comply with the terms of the settlement, and . . . that the proceedings in this matter be concluded.”

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council adopt the Honorable Richard McGill’s September 29, 2016 Initial Decision in which he approved the Settlement Agreement signed by the parties or their representatives, ordered the parties to comply with the settlement terms, and further determined that the proceedings be concluded.

Prepared By: Husna Kazmir
Staff Attorney

October 18, 2016

MICHAEL B. LAVERY
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JOHN J. ABROMITIS
LAWRENCE P. COHEN*
KATHERINE E. INGRASSIA*
JAMES F. MOSCAGIURI
KATRINA L. CAMPBELL*
RICHARD W. WENNER*
W. JOSEPH SALVADOR*

*CERTIFIED BY THE SUPREME COURT OF
NEW JERSEY AS A CIVIL TRIAL ATTORNEY
*MEMBER OF NJ AND PA BAR
*MEMBER OF NJ AND NY BAR

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OF COUNSEL:

JAMES A. COURTER
JOEL A. KOBERT
PETER J. COSSMAN

September 22, 2016

Via mail and email: Latoya.Bryant@OAL.state.nj.us

The Honorable Richard McGill, ALJ
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

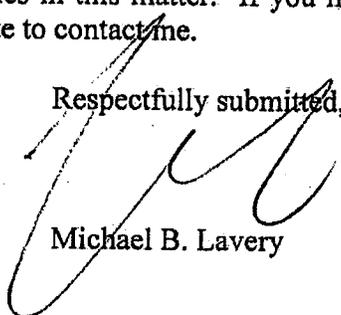
Re: Bruce W. Hall v. Township of Lopatcong
OAL Docket No. GRC 01271-16
Agency Docket No. 2015-46

Dear Judge McGill:

Enclosed please find the original and one copy of the fully executed Settlement Agreement.

I thank the Court for its courtesies in this matter. If you have any questions or require further information, please do not hesitate to contact me.

Respectfully submitted,


Michael B. Lavery

MBL/js
Enclosure
cc: Bruce W. Hall (via email)

2016 SEP 22 P 12:23

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

Bruce W. Hall v. Township of Lopatcong
OAL Docket No. GRC 01271-2016N
Agency Ref. No. 2015-46

2016 SEP 22 P 12:23

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (the "Agreement") is made as of this 12th of ~~August~~ ^{September}, 2016, by and among Township of Lopatcong ("Township"), and Bruce W. Hall ("Hall").

WHEREAS, Bruce W. Hall filed an OPRA request requesting certain phone records from then Lopatcong Township Councilwoman Donna Schneider; and

WHEREAS, the Custodian of Records denied access to the requested documents; and

WHEREAS, Mr. Hall filed a complaint with the Government Records Council ("GRC") alleging that his OPRA request was wrongfully denied; and

WHEREAS, the GRC issued an opinion advising that due to factual issues, they could not determine whether or not access to records was wrongfully denied; and

WHEREAS, the GRC referred this matter to the Office of Administrative Law ("OAL") to conduct a hearing to resolve the factual issues; and

WHEREAS, Councilwoman Schneider has resigned from the Township Council of the Township of Lopatcong; and

WHEREAS, the Council agreed that they would not utilize their cell phones during meetings except in cases of emergency;

NOW, THEREFORE, the parties agree to dismiss this matter with prejudice and release each other from any and all claims arising from this matter.

1. GOVERNING LAW AND FORUM SELECTION.

This Agreement is deemed entered into in the State of New Jersey and shall be construed and interpreted in accordance with the laws of the State of New Jersey with reference to New Jersey conflict of law principles. Any claim or cause of action arising out of the enforcement of this Agreement shall be brought exclusively in the Courts of the State of New Jersey, venued in Warren County.

2. ENTIRE AGREEMENT AND INTEGRATION.

The Parties acknowledge that in executing this Agreement they have not relied on any statements, promises or representations made by any other of the parties, or its or their agents, representatives or attorneys, except as specifically memorialized in this Agreement. This Agreement constitutes the complete agreement of the parties concerning the subject matter addressed in it and supersedes and cancels all other previous agreements or understandings between the Parties. This Agreement cannot be modified or rescinded except upon the written consent of the Party against whom the modification or rescission is sought to be enforced.

3. SEVERABILITY.

If any provision of this Agreement or application thereof is held invalid, such invalidity shall not affect other provisions or applications of this Agreement, which can be given effect without the invalid provision or application. To that end, the provisions of this Agreement are severable.

4. CONFIDENTIALITY

In consideration of the settlement proceeds and other valuable consideration, all parties hereto expressly agree that this settlement is confidential and no specifics pertaining to the

settlement will be disclosed to any third party except those who in the normal course of business would have access or as required by law.

5. EXECUTION AND ACKNOWLEDGEMENT.

This Agreement may be executed in facsimile and by multiple counterparts. By signing this Agreement, the Parties each acknowledge the following: that they have read the Agreement; that they understand the Agreement and that they are giving up rights and causes of actions they may have; that they are releasing each other from any and all claims arising from this matter; that they have consulted with legal counsel or have had the opportunity to do so prior to executing this Agreement; that they sign this Agreement knowingly and voluntarily; that they have full authority to enter into, execute, and perform this Agreement; and that no Party has been coerced or induced to enter into this Agreement by any improper action of any other Party.

6. DRAFTING.

Each Party has cooperated in the drafting and preparation of this Agreement. Hence, in any construction or interpretation of this Agreement, the same shall not be construed against any Party on the basis that the Party was the drafter.

7. FAIR CONSTRUCTION.

The language of all parts of this Agreement shall, in all cases, be construed as a whole, according to its fair meaning, and not strictly for or against either Party.

8. WAIVER OF TERMS.

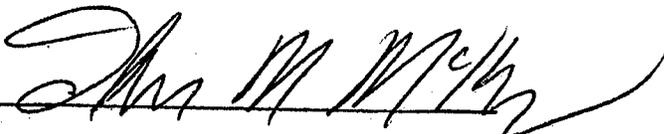
No waiver of any provision of this Agreement shall be valid unless in writing and signed by the party against whom it is sought to be enforced. The failure of any party at any time to insist upon strict performance of any condition, promise, agreement or understanding set forth herein shall not be construed as a waiver or relinquishment of the right to insist upon strict

performance of the same condition, promise, agreement or understanding at a future time.

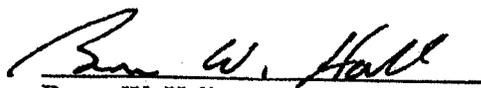
IN WITNESS WHEREOF, the parties, to signify their agreement to the terms of this Settlement and Mutual General Release Agreement, do hereby execute this Agreement.

TOWNSHIP OF LOPATCONG

Dated: September 10th, 2016

By: 

Dated: 8/1, 2016


Bruce W. Hall

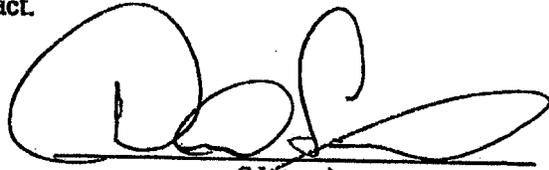
ACKNOWLEDGEMENT

STATE OF ~~NEW JERSEY~~ Florida
COUNTY OF Clay SS:

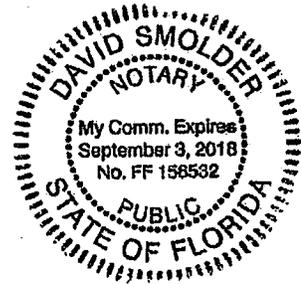
I CERTIFY that on August 1st, 2016, Bruce W. Hall

personally came before me and stated to my satisfaction, that this person:

- (a) was the maker of the attached instrument; and,
- (b) executed this instrument as his own act.


(Notary)

My commission expires on: 9/3/18



ACKNOWLEDGEMENT

STATE OF NEW JERSEY :

SS:

COUNTY OF WARREN :

I CERTIFY that on Sept 12 2016, Mayor Thomas McKay, came before me and this person acknowledged under oath, to my satisfaction, that he is the Mayor of the Township of Lopatcong, the political subdivision named in the attached document; and that

- (a) He signed, sealed, and delivered the attached document as the Mayor of the Township of Lopatcong, the political subdivision named in this document; and
- (b) This document was signed and made by the political subdivision as its voluntary deed by virtue of authority from its Members

Margaret B Dilts
Notary Public
of New Jersey

MARGARET B. DILTS
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES FEBRUARY 18, 2019



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

INTERIM ORDER

November 17, 2015 Government Records Council Meeting

Bruce W. Wall
Complainant

Complaint No. 2015-46

v.

Township of Lopatcong (Warren)
Custodian of Record

At the November 17, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 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, based on the insufficient and conflicting evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. This complaint should also be referred to the Office of Administrative Law for determination of whether the Custodian or any other agency official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 17th Day of November, 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: November 18, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 17, 2015 Council Meeting**

**Bruce W. Hall¹
Complainant**

GRC Complaint No. 2015-46

v.

**Township of Lopatcong (Warren)²
Custodial Agency**

Records Relevant to Complaint:

- 1) Copies of Councilwoman Schneider's log of message transactions (Text Picture & Video messaging) for a specifically listed cellular telephone number, covering January 7, 2015, from 7:15 PM to 9:45 PM.
- 2) Copies of Councilwoman Schneider's log of message transactions (Text Picture & Video messaging) for a specifically listed cellular telephone number, covering January 21, 2015, from 7:00 PM to 9:45 PM.

Custodian of Record: Margaret B. Dilts

Request Received by Custodian: February 10, 2015

Response Made by Custodian: February 13, 2015; February 20, 2015

GRC Complaint Received: March 3, 2015

Background³

Request and Response:

On February 10, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On February 20, 2015, the Custodian responded in writing, denying the request and forwarding a memo from the Custodian's Counsel. The Custodian stated that Councilwoman Schneider's personal phone records and texts are not subject to OPRA. The Custodian argued that such records are not subject to OPRA because those records are not made, maintained, or kept on file in the course of official business. The Custodian additionally argued that even if a public official were to use a

¹ No legal representation listed on record.

² Represented by Michael Lavery, Esq.

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.

municipally-owned telephone, the identity of a caller to a public official is not subject to disclosure under OPRA, pursuant to North Jersey Newspapers Co. v. Passaic County Bd. Of Chosen Freeholders, 127 N.J. 9 (1992), Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). The Custodian also acknowledged a prior GRC case concerning text messages, Alt v. City of Vineland, GRC Complaint No. 2013-205 (June 2014), where a request for text messages sent/received by the Mayor on his city-issued and/or personal cellphone regarding city business was deemed invalid.

Denial of Access Complaint:

On February 27, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he attended the Lopatcong Council meetings on January 7 and January 21, 2015, where he witnessed what appeared to be Councilwoman Donna Schneider texting. He further observed that when she stopped texting, “some members in the audience proceeded to text as well.” Based only on his observations, the Complainant’s “reasonable conclusion” was that Councilwoman Schneider must have been texting members of the audience. The Complainant believed that the sequences of communications appear to have influenced the Councilwoman’s comments and remarks.

The Complainant stated that he attended the Lopatcong Town Council meeting held on February 4, 2015, and addressed the Councilwoman directly as to whether she was texting during the meetings. According to the Complainant, she responded, “Yes, to my babysitter.” The Complainant then stated that he verified the last four digits of the Councilwoman’s cellphone number and that her carrier is Verizon.

The Complainant asserted that denial of his request was improper as the request was not, in fact, broad and did not ask the Custodian to perform duties beyond her official capacity. The Complainant argued that his request was analogous to requesting the private handwritten notes of a public official during an official meeting, suggesting that if an OPRA request were submitted for those handwritten notes, the Custodian would have an obligation as part of her normal duties to request the public official to turn over the notes.

The Complainant additionally argued that the requested phone logs are electronically captured and stored records, which Verizon makes available online for at least 18 months as part of their billing services. The Complainant further asserted that cell phone numbers are not by default considered “unlisted” just because they are cell phone numbers. He suggested that the definition of “unlisted” is an official term whereby account owners request that the phone carrier specifically record their telephone numbers as such and that typically phone companies charge for the service. The Complainant argued that unless the owner of the number has specifically requested the option from their carrier, it cannot be assumed that the number is by default considered “unlisted” simply because it is a cell phone number.

The Complainant made additional arguments concerning the Open Public Meetings Act (“OPMA”). However, the GRC will not consider those arguments, as the GRC has no jurisdiction over OPMA, instead having jurisdiction only over OPRA, which provides that, “A person who is denied access to a government record by the custodian of the record, at the option

of the requestor, may institute a proceeding to challenge the custodian's decision by... [filing] a complaint with the Government Records Council established pursuant to [OPRA]." N.J.S.A. 47:1A-6.

Statement of Information:

On May 27, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on February 10, 2015. The Custodian certified that she responded in writing on February 13, 2015. The Custodian made no additional legal arguments, apart from noting that the Councilwoman's private cellphone was not paid for by taxpayers.

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 Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-280 (June 2015), the GRC considered a request for the "destination location of telephone calls" made by the Custodian on a cell phone used for official Borough business. The GRC sent the case to the Office of Administrative Law (OAL) for a hearing to resolve the facts and ultimately accepted the Administrative Law Judge's (ALJ) Initial Decision in the matter. In that decision, the ALJ determined that "[t]he mere use of a private cell phone at work to make private calls does not trigger the statute." Verry v. Borough of South Bound Brook (Somerset), OAL Docket No GRC 6463-13 (June 2015), Id. at 3-4. The ALJ further reasoned that a basic privacy test did not weigh in favor of disclosing personal cell phone bills simply because the Custodian may have used a personal cell phone on occasion.

Here, the Complainant's request sought copies of the Councilwoman's log of message transactions for her private cell number, during a particular time and date range. Although the Complainant stated that he observed the Councilwoman texting during the town's council meetings, he provided no evidence that she was using her private phone number to conduct township business other than to cite his mere suspicions and observations that others in the audience were texting as well. The Custodian contends that the records requested are from the Councilwoman's private cell phone and not in the possession of the Township. Based on the facts of record, the GRC is unable to determine whether an unlawful denial of access occurred in the instant matter.

Accordingly, based on the insufficient and conflicting evidence in the matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. The complaint should also be referred to the Office of

Administrative Law for determination of whether the Custodian or any other agency official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that, based on the insufficient and conflicting evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. This complaint should also be referred to the Office of Administrative Law for determination of whether the Custodian or any other agency official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Husna Kazmir
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

November 10, 2015