



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 28, 2018 Government Records Council Meeting

Mark Demitroff
Complainant

Complaint No. 2016-180

v.

Buena Vista Township (Atlantic)
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 21, 2018 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 find that the Custodian has borne her burden of proof that the she lawfully denied access to the Complainant OPRA request. Specifically, the Custodian initially responded that no records existed, certified to these facts in the SOI, and the record reflects that no responsive records existed. N.J.S.A. 47:1A-6; see 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 28th Day of August, 2018

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: August 30, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Mark Demitroff¹
Complainant**

GRC Complaint No. 2016-180

v.

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

Records Relevant to Complaint: Electronic copies of the following regarding the US Department of Housing & Urban Development (“HUD”) Community Development Block Grant (“CDBG”) expenditures by Buena Vista Township (“Township”):

1. The “ultimate” local, State, or Federal HUD approval to use funds “as indicated in the [September 21, 2010] e-mail” included in the request.
2. The original CDBG agreement “referenced” in the e-mail.
3. Chart of accounts related to CDBG redevelopment property expenditures.
4. General ledger related to CDBG redevelopment property expenditures.
5. Cash receipts journal related to CDBG redevelopment property expenditures.
6. Cash disbursements related to CDBG redevelopment property expenditures.
7. Payroll journal related to CDBG redevelopment property expenditures
8. Payable and receivables ledger related to CDBG redevelopment property expenditures
9. Job cost journals related to CDBG redevelopment property expenditures.

Custodian of Record: Lisa Tilton

Request Received by Custodian: May 17, 2016

Response Made by Custodian: May 17, 2016

GRC Complaint Received: June 30, 2016

Background³

Request and Response:

On May 17, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing seeking clarification of the OPRA request. The Custodian asked the

¹ No legal representation listed on record.

² Represented by Eric M. Bernstein, Esq., of Bernstein & Associates, LLC (Warren, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Complainant to provide a date range for the records sought. The Complainant responded via e-mail providing the following time frames:

- Item No. 1: From September 1, 2010 to the present, which he derived from the Records Retention Schedule.
- Item No. 2: From 1984 to the present, accounting for the possible age of the CDBG.
- Item Nos. 3 through 9: From January 1, 2002 to present presenting the time period of the Richland Village Development project.

On May 25, 2016, Chief Financial Officer (“CFO”) Kenia Nunez-Acuna responded to the Complainant in writing on the Custodian’s behalf advising that no CDBG property account or financial records existed. The Complainant responded disputing the non-existence of records. The Complainant asserted that the Richland properties were purchased with HUD funds. CFO Nunez-Acuna then sought additional information, which the Complainant provided by way of a Casino Reinvestment Development Authority (“CRDA”) “Richland Village Train Station Source of Funding Analysis” screenshot.⁴ Later on the same day, the Custodian again responded to the Complainant’s OPRA request advising that no records responsive to item Nos. 1 and 3 through 9 existed. Further, the Custodian advised that she was providing access to records responsive to item No. 2 based on the Complainant’s clarification. The Custodian stated that the subject OPRA request was “complete and closed.”

On May 26, the Complainant, via e-mail, again disputed the Custodian’s response. Therein, he contended that he sought access to records for HUD money used to purchase properties, but that the Custodian provided a CRDA agreement. The Complainant stated that his request clearly sought “redevelopment” property information and not “revitalization” property information. The Complainant also noted that the properties in the agreement are not the same as those “listed” in his OPRA request.⁵ The Complainant thus sought clarification of the Custodian’s response. On May 27, 2016, the Complainant renewed his request for clarification.

Denial of Access Complaint:

On June 30, 2016 the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to provide him records responsive to his OPRA request. The Complainant surmised that the Custodian misunderstood what he was seeking but failed to address his multiple requests to clarify whether responsive records existed. The Complainant contended that he filed this complaint to ascertain whether the Custodian misunderstood his OPRA request. The Complainant also alleged that he filed this complaint to see how the Custodian would respond to retention questions; either those records sought were destroyed or are being hidden.

⁴ The screenshot identified a list of monies spent to include six (6) line items with a CDBG approved funding source. The GRC notes that each line item contains the description “Property acquisition for Richland redevelopment project.” No additional information, such as address or block and lot numbers, are included.

⁵ The Complainant appeared to be referring to the CRDA screenshot sent to the Custodian and CFO on May 25, 2016.

Statement of Information:⁶

On September 6, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 17, 2016 and immediately sought clarification as to the applicable date range. The Custodian certified that her search included reviewing files within her office, where she was unable to locate responsive records. The Custodian affirmed that she then reached out to various departments and personnel including CFO Nunez-Acuna. The Custodian certified that it was ultimately determined that no records existed. The Custodian certified that she responded in writing on May 25, 2016 through CFO Nunez-Acuna that no records existed. The Custodian certified that, after receiving clarification from the Complainant, she obtained from the proper Township departments fifteen (15) pages of records responsive to item No. 2 and provided them to the Complainant. The Custodian also certified that no records responsive to item Nos. 1 and 3 through 9 existed. The Custodian averred that the Complainant then began asking for further clarification of her response. The Custodian also certified that no records believed to be responsive to the subject OPRA request were destroyed in accordance with the Township’s retention schedules.

The Custodian contended that she did not unlawfully deny access to any records. The Custodian also contended that she had no obligation under OPRA to respond to the Complainant’s follow-up correspondence after satisfying the OPRA request. The Custodian argued that because the Complainant believed the Township should be in possession of certain records is of no moment here: the GRC is not the appropriate forum for this issue. The Custodian requested that the GRC administratively dispose of this complaint because the evidence is clear that she properly responded.⁷

Additional Submissions:

On September 8, 2016, the Complainant submitted to the GRC a rebuttal to the SOI. Therein, the Complainant contended that the Custodian failed to disclose any records relevant to the CDBG used in the Richland development. The Complainant argued that he provided to both the Township and GRC multiple excerpts from e-mails to evidence the Township’s use of CDBG monies to purchase properties. The Complainant argued that the Township possessed, at the very least, “internal documentation and spread sheet” data about the fund per a 2006 e-mail from the CRDA to the Township. The Complainant asserted it is these financial records he sought, and the Custodian confirmed in the SOI were not destroyed.

The Complainant also contended that he believed CFO Nunez-Acuna’s statement that she was not in possession of responsive records. The Complainant alleged that this is because Mayor Chuck Chiarello misappropriated CDBG monies for the Richland project and maintains a separate file of these activities. The Complainant thus alleged that the Custodian did not contact

⁶ On July 25, 2016, this complaint was referred to mediation. On August 19, 2016, this complaint was referred back to the GRC for adjudication.

⁷ The Custodian requested that the GRC consider assessing penalties against the Complainant and/or awarding prevailing party fees for work conducted to defend this complaint. The GRC notes that the only sanction available in OPRA applies to a “public official, officer, employee or custodian . . .” N.J.S.A. 47:1A-11. Further, the prevailing party fee provision only applies to complainants represented by an attorney. N.J.S.A. 47:1A-6.

Mayor Chiarello regarding this request, which accounted for a “large record gap” between what the Township claimed existed and what actually existed. The Complainant included excerpts from records dating back to 1985 purported to be responsive to his OPRA request. The Complainant also asserted that in an August 1, 2016 meeting, Mayor Chiarello is on the record saying that Richland was paid for with “Economic Development funds that date back to the 1970’s.” The Complainant contended that the GRC should require Mayor Chiarello to certify whether he maintained records responsive to the subject OPRA request.

The Complainant contended that, at the least, the Custodian violated OPRA by not providing records responsive to the request and ignoring his follow-up attempts to rectify the issue. See Rivera v. City of Plainfield (Union), GRC Complaint No. 2010-112 (Interim Order dated April 25, 2012). The Complainant further asserted that to date, the Township has failed to provide any responsive records. Further, the Complainant averred that he provided sufficient evidence to call into question the Custodian’s assertion that no records exist relating to the CDBG.

On August 7, 2018, the GRC sought additional information from the Custodian. Specifically, the GRC stated that the Complainant’s submissions contained multiple screen shots eluding to the possibility that the Township had and used, as some point in the past, CDBG funds. Further, the GRC stated that the Complainant’s request sought a number of records related to that potential grant. The GRC stated that the submissions raised the following questions: 1) whether the grant was still ongoing, or if it had concluded well prior to the request; 2) whether the CDBG was effectively replaced by the CRDA agreement; and 3) whether the Custodian conducted a search broader than within her office and through the CFO. The GRC thus requested that the Custodian provide a certification answering the following:

1. Regarding the existence of a CDBG:
 - a. Within what time frame did the Township have and spend CDBG money?
 - b. Did the agreement with the CRDA effectively end the Township’s usage of CDBG money and if so, on what date?
 - c. Once Atlantic County (“County”) reached the threshold to be designated as eligible to receive direct entitlements, did the County maintain records in place of the Township
2. Regarding the search conducted, did the Custodian contact Mayor Chiarello to ascertain whether he was maintaining records responsive to the Complainant’s OPRA request?

The GRC required the Custodian to submit his legal certification by close of business on August 10, 2018.

On August 9, 2018, the Custodian responded to the GRC’s request for additional information. Therein, the Custodian certified that The Township typically had one (1) year to spend CDBG money, unless extended annually by agreement. The Custodian affirmed that the CRDA agreement did not end the Township’s usage of CDBG money. The Custodian also certified that she was not aware of whether the County maintained records in place of the Township; an inquiry would have to be made to the County. Finally, the Custodian affirmed that she did not reach out to Mayor Chiarello because he was not the individual responsible for

maintaining records on the Township's CDBG projects. The Custodian affirmed that any responsive records that might have existed would have been maintained only by her office and/or the Finance Department.

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, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA request sought a number of records as discussed in an e-mail dated September 21, 2010. The Custodian initially sought clarification, and later responded that no records existed. Following additional communications, the Custodian provided CRDA records that the Complainant contended were not responsive to his OPRA request. Thereafter, the Complainant filed the instant complaint, to which the Custodian certified in the SOI that no responsive records existed.

In his response to the SOI, the Complainant included screenshots in multiple submissions to argue that records existed. Those screen shots included CDBG grant documents from 1985 and 1990, a 2004 ledger and check, e-mails from the CRDA in 2006, and an e-mail from February 2013 discussing whether purchases were tied to ordinances in 2004 or 2005. The Complainant also alleged that Mayor Chiarello recently noted in a public meeting that Richland Village improvements were paid for with "[e]conomic [d]evelopment funds that date back to the 1970s . . . [t]he money . . . was paid back [but] the [S]tate said [the Township] could keep using it . . ." All available evidence on the record prompted the GRC to seek additional information from the Custodian. By way of her certification, the Custodian provided two (2) salient responses. The first was that the Township was required to use CDBG money within a year of the award, unless annually agreeing to extend the time frame. The second was that she conducted a search of the only two (2) places that any responsive records would exist: her office and the Finance Department.

In reviewing the evidence of record here, the GRC is persuaded that the Custodian lawfully denied access to the Complainant's OPRA request because no responsive records existed. First, the September 21, 2010 e-mail that spawned the subject request provides that CDBG money was once possessed by the Township, but had long prior been "repaid to the Township and used as a loan pool for local business." Id. That e-mail also noted that HUD had no record of the grant because "it was over 20 years old." Id. The e-mail thus suggests that any potential CDBG spending occurred long before the composition of that e-mail. Mayor Chiarello's comments referenced by the Complainant appear to corroborate the forgoing.

Second, the additional screenshots provided by the Complainant as proof that records existed predated the subject OPRA request by, or spoke on matters that occurred, ten (10) or more years earlier. As the Custodian certified that the Township was required to use CDBG monies within a year of receiving them, it is likely that no records existed in 2016. That the Complainant is still personally maintaining records he believed to be responsive is of no moment.⁸ Third, the Custodian provided an explanation for her search in the SOI and August 9, 2018 submission that substantiated a diligent attempt to locate responsive records.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant OPRA request. Specifically, the Custodian initially responded that no records existed, certified to these facts in the SOI, and the record reflects that no responsive records existed. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Custodian has borne her burden of proof that she lawfully denied access to the Complainant OPRA request. Specifically, the Custodian initially responded that no records existed, certified to these facts in the SOI, and the record reflects that no responsive records existed. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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

August 21, 2018

⁸ The GRC notes that it does not have authority over whether the Township adhered to its records retention schedule properly or otherwise. See Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-15 (June 2012).