



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

October 31, 2017 Government Records Council Meeting

Alfred W. Schweikert, III
Complainant

Complaint No. 2016-58

v.

Borough of High Bridge (Hunterdon)
Custodian of Record

At the October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 24, 2017 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. The Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA request within the extended time frame. N.J.S.A. 47:1A-6; Wadhams v. Town of Belvidere (Warren), GRC Complaint No. 2010-209 (October 2011). As such, there was no “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, because the Custodian certified in the Statement of Information that Mr. Young provided to the Complainant the record responsive to OPRA request item No. 1 and because and there is no competent, credible evidence in the record to refute the Custodian’s certification, he did not unlawfully deny access to any records. See Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
2. The Custodian has borne his burden of proof that he lawfully denied access to the amended 2015 Card because he certified in the SOI, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; see 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 31st Day of October, 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: November 2, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Alfred W. Schweikert, III¹
Complainant**

GRC Complaint No. 2016-58

v.

**Borough of High Bridge (Hunterdon)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. Tax Assessor's Card ("Card") for Block 4.07, lot 4. and Block 4.07, lot 5, from 2014.
2. Card for Block 4.07, lot 4, and Block 4.07, lot, 5 after Tax Assessor's visit on July 21, 2015.

Custodian of Record: John Gregory

Request Received by Custodian: October 14, 2015

Response Made by Custodian: October 15, 2015

GRC Complaint Received: February 18, 2016

Background³

Request and Response:

On October 14, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On October 15, 2015, Deputy Clerk Adam Young responded in writing on behalf the Custodian, stating that additional time until November 5, 2015, would be required because the Borough of High Bridge's ("Borough") Tax Assessor was only part-time. On the same day, the Complainant agreed to the extension but noted that his agreement did not absolve the Borough of complying with his OPRA request.

On October 27, 2015, Mr. Young responded to the Complainant, attaching the record responsive to OPRA request item No. 1. Further, Mr. Young stated that he was also attaching an explanation from the Tax Assessor denying the record responsive to OPRA request item No. 2 as

¹ No legal representation listed on record.

² Represented by Barry S. Goodman, Esq., of Greenbaum Rowe, Smith & Davis, LLP (Iselin, 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.

“work product.” In that explanation, the Tax Assessor stated that she was continuing to work on a “corrected” Card and that same is therefore work product.⁴

On November 10, 2015, the Complainant contacted the Government Records Council (“GRC”) on an inquiry basis to seek guidance on the Borough’s failure to “supply [the amended 2015 Card]” and alleged failure to respond within the extended time frame. On the same day, in response to the Complainant’s e-mail to the GRC, the Custodian advised the Complainant that the Borough disclosed the 2014 Card to him via e-mail on October 27, 2015. Further, the Custodian advised the Complainant that there was no “amended” Card for 2015. The Custodian stated that the Tax Assessor took notes during her visit to formulate a response for the Complainant’s pending tax appeal. The Custodian asserted that any work done by the Tax Assessor in response to the appeal would be exempt as “attorney-client privileged” material.

On the same day, the Complainant e-mailed the Custodian, stating that he never received the 2014 Card, neither by e-mail nor U.S. mail. The Complainant also disputed that no amended 2015 Card exists because the Tax Assessor agreed to provide one “by the end of September” in an e-mail to the Complainant on August 3, 2015. The Complainant also stated that should the Borough continue to rely on the attorney-client privilege exemption, the Custodian should heed his suggestion in a September 8, 2015 e-mail to Custodian’s Counsel seeking disclosure of the amended 2015 Card. The Complainant stated that the Borough stated to him that it was amending the 2015 Card and he wished to see that amended Card.

Denial of Access Complaint:

On February 18, 2016, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant stated that the subject OPRA request was the result of a 2015 Borough reassessment that initially miscalculated both the square footage and the number of bedrooms in his house. The Complainant stated that, in filing a tax appeal, he had the Tax Assessor come to his house on July 21, 2015. The Complainant averred that the Tax Assessor advised at that time that his Card would be amended “within a few weeks.” The Complainant stated that, thereafter, he submitted the subject OPRA request because he did not receive either the 2014 or the 2015 amended Cards through discovery associated with his tax appeal.

The Complainant contended that the Borough never responded to his OPRA request within the extended time frame. The Complainant contended that this is contrary to the Custodian’s November 10, 2015 e-mail, alleging that the Borough did respond on October 27, 2015.

Statement of Information:

On February 26, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 14, 2015. The Custodian certified that Mr. Young initially responded in writing on October 15, 2015, obtaining an extension of time until November 5, 2015 to respond. The Custodian certified that Mr. Young

⁴ The Complainant would later allege in the Denial of Access Complaint that he received no response within the extended time frame.

subsequently responded to the Complainant via e-mail on October 27, 2015, providing access to the 2014 Card and denying access the 2015 Card as “work product.” The Custodian noted that he e-mailed the Complainant in response to an inquiry sent to the GRC, advising him that the Borough responded on October 27, 2015.

The Custodian contended that the Borough timely disclosed the 2014 Card responsive to OPRA request item No. 1. Further, the Custodian contended that the Borough properly denied access to OPRA request item No. 2. Specifically, the Custodian affirmed that there was no 2015 amended Card. Instead, the Tax Assessor took notes during her visit to the Complainant’s house on July 22, 2015. The Custodian contended that those notes were attorney-client privileged because the Tax Assessor took them for the attorney representing the Borough in the Complainant’s tax appeal. N.J.S.A. 47:1A-1.1. Further, the Custodian argued that the notes amounted to “work product” because they were taken in anticipation of litigation. O’Boyle v. Borough of Longport, 218 N.J. 168 (2014) (holding that the “work product” privilege extends to third party consultants whose expertise is necessary to legal representation). Finally, the Custodian argued that the notes, which were handwritten, are exempt as “inter-agency or intra-agency advisory, consultative, or deliberative” (“ACD”) material. N.J.S.A. 47:1A-1.1; O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007) (holding that handwritten notes taken at a Board meeting were not subject to OPRA under the ACD exemption).

Additional Submissions:

On February 27, 2016, the Complainant submitted a rebuttal to the SOI. Therein, the Complainant again disputed that the Borough responded in writing on October 27, 2015. The Complainant included screenshots of both his e-mail “Inbox” and “Delete” box as evidence of his allegation. The Complainant noted that he still did not receive a response, even after raising the issue with the Custodian on November 10, 2015. The Complainant thus asserted that receiving the 2014 Card responsive to OPRA request item No. 1 as part of the SOI was the first time he received the record.

Regarding OPRA request item No. 2, the Complainant reiterated that the Tax Assessor told him that she would “amend [the Complainant’s] tax card and send [him] the amendment.” The Complainant asserted that he still has not received it.⁵ The Complainant also asserted that he believed he was paying his 2016 taxes based on a Card he believed was not amended.

On March 2, 2016, the Custodian’s Counsel submitted a letter brief. Therein, Counsel questioned the screenshots and their validity to this complaint. Specifically, Counsel asserted that the screenshots only show a current view and not the Complainant’s e-mail account on October 27, 2015. Counsel also asserted that the screenshots do not show whether Mr. Young’s e-mail ended up in the Complainant’s “Junk” folder or some other folder in his e-mail account.

Notwithstanding this, Counsel argued that the Custodian provided sufficient proof that Mr. Young timely responded and included such as part of a legal certification. Counsel asserted

⁵ The Complainant noted that he is currently experiencing delays receiving his 2016 Card from the Custodian pursuant to an unrelated OPRA request. The Complainant also noted that the continued delays may result in another Denial of Access Complaint. The GRC’s records indicate that he ultimately did not file a new complaint.

that the GRC's case law supports that a custodian satisfies his burden of proof when certifying that he responded and provides supporting documentation to prove that certification. Deluca v. Town of Guttenberg, GRC Complaint No. 2005-76 (January 2006). Counsel thus requested that the GRC dismiss the instant complaint.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Additionally, OPRA provides that:

If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

N.J.S.A. 47:1A-5(i).

A custodian's failure to respond within an extended time frame results in a "deemed" denial. The Council previously held that such a denial resulted in a violation of OPRA. Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

However, the Council has ruled on whether custodians provided sufficient evidence to prove they timely responded. For instance, in Wadhams v. Town of Belvidere (Warren), GRC Complaint No. 2010-209 (October 2011), the complainant alleged that the custodian never responded to her OPRA request. In the SOI, the custodian provided an e-mail and certifications to support that she responded. The Council ultimately determined that the evidence supported no unlawful denial of access (*citing* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)). *See also* Gartner v. Middlesex Borough (Middlesex), GRC Complaint No. 2013-93 (October 2013).

⁶ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Here, the Custodian initially extended the time frame to respond through November 5, 2015. The Custodian purportedly responded in writing (via e-mail) on October 27, 2015, disclosing the 2014 Card and denying access to the 2015 Card. However, the Complainant e-mailed the GRC on November 10, 2015, seeking guidance because of an alleged failure to respond. In response to that e-mail, the Custodian advised that the Borough had responded on October 27, 2015. The Complainant refuted this allegation in an e-mail and subsequently filed the instant complaint. As part of the SOI, the Custodian certified that Mr. Young responded to the Complainant via e-mail within the extended time frame. In response to the SOI, the Complainant contended otherwise and submitted screenshots of his “Inbox” and “Delete” box as evidence.

In reviewing the submissions of both parties, the GRC finds that the facts of this case are similar to Wadhams, GRC 2010-209, and that no unlawful denial of access to OPRA request item No. 1 occurred. Specifically, the Custodian provided definitive proof that Mr. Young sent the response e-mail to the Complainant’s correct e-mail address at 3:59 p.m. on October 27, 2015, and copied the Custodian. Additionally, the GRC does not find that the screenshots amount to competent, credible evidence that Mr. Young did not send his response.

Therefore, the Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA request within the extended time frame. N.J.S.A. 47:1A-6; Wadhams, GRC 2010-209. As such, there was no “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, because the Custodian certified in the SOI that Mr. Young provided to the Complainant the record responsive to OPRA request item No. 1 and because there is no competent, credible evidence in the record to refute the Custodian’s certification, he did not unlawfully deny access to any records. *See* Burns, GRC 2005-68.

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.

Having already addressed requested item No. 1, the GRC now turns to whether the Custodian lawfully denied access to requested item No. 2. This item sought one specific record: the amended 2015 Card. Ultimately, the threshold issue here is whether an amended 2015 Card existed.⁷

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See* Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). In the initial response, Mr. Young included an e-mail from the Tax Assessor stating that she was “continuing work on it.” Thereafter, in a November 10, 2015 e-mail to the Complainant, the Custodian advised that no amended 2015 Card existed but

⁷ The existence of notes taken at the Complainant’s house on July 21, 2015, is not relevant because OPRA request item No. 2 did not seek those notes.

that notes taken during the July visitation were exempt from disclosure under N.J.S.A. 47:1A-1.1. Further, the Custodian certified to the non-existence of the amended 2015 Card in the SOI. The Complainant disputed each of the Borough's responses that no amended 2015 Card existed. The Complainant contended that the Tax Assessor advised in July 2015 that she would send him an amended Card and that he filed the subject OPRA request after not receiving it. However, he also noted in his February 27, 2016 e-mail to the GRC that he believed he was, at that time, paying taxes based on a Card that was not amended.

In reviewing the facts of this complaint, the GRC concludes that the Custodian lawfully denied access to OPRA request item No. 2 on the basis that no amended 2015 Card existed at the time of the request. Further, the Complainant's assertions regarding the Borough's promise to provide him with the Card once amended do not amount to competent, credible evidence to refute the Custodian's certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the amended 2015 Card because he certified in the SOI, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; *see Pusterhofer*, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA request within the extended time frame. N.J.S.A. 47:1A-6; Wadhams v. Town of Belvidere (Warren), GRC Complaint No. 2010-209 (October 2011). As such, there was no "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, because the Custodian certified in the Statement of Information that Mr. Young provided to the Complainant the record responsive to OPRA request item No. 1 and because and there is no competent, credible evidence in the record to refute the Custodian's certification, he did not unlawfully deny access to any records. *See Burns v. Borough of Collingswood*, GRC Complaint No. 2005-68 (September 2005).
2. The Custodian has borne his burden of proof that he lawfully denied access to the amended 2015 Card because he certified in the SOI, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; *see Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
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October 24, 2017