



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 26, 2018 Government Records Council Meeting

Daniel Damigo
Complainant

Complaint No. 2017-124

v.

Borough of Totowa (Bergen)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 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 this complaint should be dismissed because the Complainant failed to appear at an Office of Administrative Law scheduled hearing on May 17, 2018, and further failed to submit to the GRC an explanation for his failure to appear within thirteen (13) days. N.J.A.C. 1:1-18.4(a).

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 26th Day of June, 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: June 29, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
June 26, 2016 Council Meeting**

**Daniel Damigo¹
Complainant**

GRC Complaint No. 2017-124

v.

**Borough of Totowa (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Purported to be copies of all records including warrants, summonses and reports regarding the April 18, 2017 Borough of Totowa Warrant #E17266 for Luis D. Rodriguez, who is a School Board Member in the City of Passaic.³

Custodian of Record: Denise Zarek

Request Received by Custodian: April 19, 2017

Response Made by Custodian: April 20, 2017

GRC Complaint Received: May 30, 2017

Background

January 30, 2018 Council Meeting

At its January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 Findings and Recommendations of the Council Staff 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:

1. The Custodian’s April 20, 2017 written response is insufficient because the Custodian failed to provide a specific legal basis for denying the requested records. N.J.S.A. 47:1A-5(g). See also Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008) and Jenkins v. Borough of Island Heights (Ocean), GRC Complaint No. 2008-139 (February 2009).
2. This complaint should be referred to the Office of Administrative Law for a determination of whether the request filed in this matter is a valid OPRA request, and if so, to (a) determine which records were actually requested; (b) determine if the

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The GRC could not review the OPRA request to determine precisely which records were requested because neither the Complainant nor the Custodian provided the GRC with a copy of the OPRA request. As such, the “Records Relevant to Complaint” were gleaned from the information contained in the complaint.

requested records are “government records” under OPRA subject to disclosure by the Custodian, and if so, to order disclosure of any such records not otherwise exempt; and (c) determine whether the Custodian and/or any other Borough official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Procedural History

On February 1, 2018, the Council distributed its January 30, 2018 Interim Order to the parties. On April 5, 2018, the GRC transmitted the complaint to the Office of Administrative Law (“OAL”). On May 24, 2018, the complaint was transmitted back from the OAL because the Complainant failed to appear for a scheduled hearing on May 17, 2018. The Complainant failed to submit to the GRC an explanation for his failure to appear within thirteen (13) days. N.J.A.C. 1:1-18.4(a).

Analysis

No analysis required.

Conclusions and Recommendations

The Council staff respectfully recommends the Council find that this complaint should be dismissed because the Complainant failed to appear at an Office of Administrative Law scheduled hearing on May 17, 2018, and further failed to submit to the GRC an explanation for his failure to appear within thirteen (13) days. N.J.A.C. 1:1-18.4(a).

Prepared By: John E. Stewart

June 19, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 30, 2018 Government Records Council Meeting

Daniel Damigo
Complainant

Complaint No. 2017-124

v.

Borough of Totowa (Bergen)
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 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:

1. The Custodian’s April 20, 2017 written response is insufficient because the Custodian failed to provide a specific legal basis for denying the requested records. N.J.S.A. 47:1A-5(g). See also Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008) and Jenkins v. Borough of Island Heights (Ocean), GRC Complaint No. 2008-139 (February 2009).
2. This complaint should be referred to the Office of Administrative Law for a determination of whether the request filed in this matter is a valid OPRA request, and if so, to (a) determine which records were actually requested; (b) determine if the requested records are “government records” under OPRA subject to disclosure by the Custodian, and if so, to order disclosure of any such records not otherwise exempt; and (c) determine whether the Custodian and/or any other Borough official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 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: February 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
January 30, 2018 Council Meeting**

**Daniel Damigo¹
Complainant**

GRC Complaint No. 2017-124

v.

**Borough of Totowa (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Purported to be copies of all records including warrants, summonses and reports regarding the April 18, 2017 Borough of Totowa Warrant #E17266 for Luis D. Rodriguez, who is a School Board Member in the City of Passaic.³

Custodian of Record: Denise Zarek

Request Received by Custodian: April 19, 2017

Response Made by Custodian: April 20, 2017

GRC Complaint Received: May 30, 2017

Background⁴

Request and Response:

On April 19, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking what are purported to be the above-mentioned records. On April 20, 2017, the first (1st) business day following receipt of said request, the Custodian responded in writing informing the Complainant that, “. . . you need to complete a New Jersey Records Request Form (attached) and fax your request to the Totowa Municipal Court . . .”

Denial of Access Complaint:

On May 30, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on April 19, 2017, he submitted a request to the Custodian seeking the above-mentioned records. The Complainant states

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The GRC could not review the OPRA request to determine precisely which records were requested because neither the Complainant nor the Custodian provided the GRC with a copy of the OPRA request. As such, the “Records Relevant to Complaint” were gleaned from the information contained in the complaint.

⁴ 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.

that on April 20, 2017, the Custodian e-mailed him a New Jersey Judiciary Records Request form and advised him to submit the request to the Totowa Municipal Court.

The Complainant contends that the records he is seeking are in the possession and control of the Borough of Totowa Police Department, and that he so notified the Custodian via e-mail dated April 25, 2017. The Complainant states that in the e-mail he also asked the Custodian to confirm whether she was denying the request. The Complainant states that the Custodian failed to reply to his inquiry. The Complainant asserts that the requested records are subject to disclosure under OPRA, and that the Custodian violated OPRA by denying him access to said records.

Statement of Information:

On November 28, 2017, the GRC requested a completed Statement of Information (“SOI”) from the Custodian. After failing to respond within the provided five (5) business days, the GRC sent a “No Defense” letter to the Custodian on December 12, 2017, requesting the Custodian to forward a completed SOI to the GRC within three (3) business days. The Custodian failed to respond to the GRC’s “No Defense” letter. Therefore, despite the GRC’s efforts to obtain a completed SOI, no such submission was made by the Custodian.

Additional Submissions:

On December 14, 2017, the GRC e-mailed the Complainant, asking him to forward a copy of his OPRA request to the GRC. The GRC also asked the Complainant to explain how he knew for a fact that the requested records were in the possession and control of the Totowa Police Department. The Complainant failed to reply to the GRC’s December 14, 2017 e-mail.

On December 22, 2017, the GRC again e-mailed the Complainant, asking him to reply to the GRC’s requests contained in its December 14, 2017 e-mail. The GRC informed the Complainant that when the GRC cannot verify that a request compliant with OPRA has been filed, the Council generally dismisses the complaint. The GRC further informed the Complainant that the GRC knows that a request was filed in this matter, however, because the Custodian admitted such in her April 20, 2017 e-mail to him. The GRC advised the Complainant that it is important that he provide a copy of the OPRA request to the GRC because if the GRC cannot examine the OPRA request, the complaint may have to be referred to the Office of Administrative Law (“OAL”) for a fact finding hearing. The Complainant failed to reply to the GRC’s December 22, 2017 e-mail.

Analysis

Sufficiency of Response

In Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008), the Council, upon finding that the custodian’s written response was insufficient, noted that, “. . . N.J.S.A. 47:1A-5(g) provides that if a custodian is ‘unable to comply with a request for access, then the custodian shall indicate the specific basis’ for noncompliance.” Subsequently, in Jenkins v. Borough of Island Heights (Ocean), GRC Complaint No. 2008-139 (February 2009), the

complainant requested, *inter alia*, copies of motor vehicle summonses which were maintained exclusively by the municipal court. With respect to this issue, the Council determined that because the requested records were maintained solely by the municipal court, the custodian should have provided a written response to the complainant's request stating that she possessed no records responsive to this request (citations omitted).

Here, the Custodian responded to the Complainant's request by informing the Complainant that ". . . you need to complete a New Jersey Records Request Form (attached) and fax your request to the Totowa Municipal Court . . ." The Custodian did not cite to any provision of OPRA, another State statute, executive order, or regulation as authority for lawfully denying the Complainant's request. Moreover, the Custodian failed to state that the municipality (aside from the court) possessed no records responsive to this request, if that was indeed the case.

Therefore, the Custodian's April 20, 2017 written response is insufficient because the Custodian failed to provide a specific legal basis for denying the requested records. N.J.S.A. 47:1A-5(g). See also Rader, GRC 2007-239 and Jenkins, GRC 2008-139.

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.

Here, the GRC knows that a request for certain records was filed with the Borough of Totowa because the Custodian stated in her April 20, 2017 response to the Complainant that the request was "... received in our office[.]" The GRC attempted to obtain a copy of the OPRA request on two (2) occasions from the Custodian, and on two (2) occasions from the Complainant; however, neither party replied to the GRC. As such, the GRC could not examine the request to determine if (1) the request is compliant with OPRA, and is therefore a valid request; and (2) the records relevant to the complaint, as alleged by the Complainant, are the records that were actually requested.

Therefore, this complaint should be referred to the OAL for a determination of whether the request filed in this matter is a valid OPRA request, and if so, to (a) determine which records were actually requested; (b) determine if the requested records are "government records" under OPRA subject to disclosure by the Custodian, and if so, to order disclosure of any such records not otherwise exempt; (c) determine whether the Custodian and/or any other Borough official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian's April 20, 2017 written response is insufficient because the Custodian failed to provide a specific legal basis for denying the requested records. N.J.S.A. 47:1A-5(g). *See also Rader v. Twp. of Willingboro (Burlington)*, GRC Complaint No. 2007-239 (June 2008) and *Jenkins v. Borough of Island Heights (Ocean)*, GRC Complaint No. 2008-139 (February 2009).
2. This complaint should be referred to the Office of Administrative Law for a determination of whether the request filed in this matter is a valid OPRA request, and if so, to (a) determine which records were actually requested; (b) determine if the requested records are "government records" under OPRA subject to disclosure by the Custodian, and if so, to order disclosure of any such records not otherwise exempt; and (c) determine whether the Custodian and/or any other Borough official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Prepared By: John E. Stewart

January 23, 2018