



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

February 26, 2019 Government Records Council Meeting

Rafael Martinez
Complainant

Complaint No. 2017-165

v.

NJ Department of Banking and Insurance
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 2019 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 Custodian did not unlawfully deny access to the records relevant to the complaint, the Business Name & Trade Name Approval Request Forms, because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. 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 26th Day of February, 2019

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: March 1, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
February 26, 2019 Council Meeting**

Rafael Martinez¹
Complainant

GRC Complaint No. 2017-165

v.

New Jersey Department of Banking and Insurance²
Custodial Agency

Records Relevant to Complaint: “I am requesting a copy of ‘all’ records pertaining to the BUSINESS NAME & TRADE NAME APPROVAL REQUEST FORM submitted to NJDOBI requesting business name approval of the name ‘All Trans Risk Solutions LLC.’ I am requesting the records to be provided electronically in pdf format. As per NJSA 47:1A-5.b ‘Acces (sic) to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.? (sic) Please let me know if you have any questions. Thank you, Rafael”³ (Emphasis in original)

Custodian of Record: Matthew Noumoff
Request Received by Custodian: February 16, 2017
Response Made by Custodian: February 27, 2017⁴
GRC Complaint Received: August 3, 2017

Background⁵

Request and Responses:

On February 16, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 27, 2017, the sixth (6th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that he had attached two (2) records responsive to the Complainant’s request: (1) a letter dated October 4, 2013 from the New Jersey Department of Banking and Insurance (“DOBI”) to Capacity Group of Companies regarding a business name approval for All Trans Risk

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Eleanor Heck.

³ This OPRA request was copied from the Custodian’s response because the Complainant failed to attach a copy of the OPRA request to the complaint.

⁴ After the Complainant clarified his request with a supplement, the Custodian also corresponded with him on March 8, 2017, March 9, 2017, March 16, 2017, March 23, 2017, March 30, 2017 and April 5, 2017.

⁵ 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.

Solutions LLC; and (2) a letter dated August 28, 2013 from DOBI to Pro Holdings Group LLC regarding All Trans Insurance Solutions LLC.

On March 1, 2017, the Complainant e-mailed the Custodian stating that he did not receive all of the records he requested. The Complainant stated that, “[w]hen I stated ‘all’ it means everything in the DOBI file pertaining to the name approval of All Trans Risk Solutions LLC without leaving out the following records:

1. Business Name & Trade Name Approval Request Form
2. Documents received with the form above
3. Notes and scrap papers
4. Faxes sent and received
5. Emails sent and received
6. Correspondence sent and received
7. Records showing how name was searched prior to approval
8. Telephone records pertaining to name approval

I hope this clarifies my request . . .”

On March 8, 2017, the fifth (5th) business day following receipt of the Complainant’s supplemental clarification/request, the Custodian replied by stating that he would respond to the Complainant’s inquiry by March 9, 2017. On March 9, 2017, the Custodian notified the Complainant that he was processing the Complainant’s supplemental inquiry, but would need an extension of time until March 16, 2017, to provide a response. On March 16, 2017, the Custodian responded to the Complainant by disclosing e-mails determined to be responsive to the supplemental clarification/request. The Custodian informed the Complainant that one record was denied as “inter-agency or intra-agency advisory, consultative or deliberative (“ACD”) material” pursuant to N.J.S.A. 47:1A-1.1. The Custodian further informed the Complainant that no further records are responsive to the request.

On March 17, 2017, the Complainant e-mailed the Custodian to inform him that the following records have not been disclosed to him:

1. Business Name & Trade Name Approval Request Form
2. Documents received with the form above
3. Name approval letter referred to in the October 18, 2013 e-mail
4. Records showing how name was searched prior to approval and for approval
5. The document being denied as ACD material.

On March 23, 2017, the Custodian disclosed to the Complainant an internal e-mail dated October 3, 2013, from Ruth Jackson to Jessica Jackson, together with a reply e-mail the same date from Jessica Jackson to Ruth Jackson. The Custodian informed the Complainant that the e-mail was previously denied as ACD material, but after reconsideration the agency decided to disclose it to the Complainant. The Custodian further informed the Complainant that no further records are responsive to the request.

Denial of Access Complaint:

On August 3, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he provided the request to the Custodian on February 16, 2017, and the Custodian denied the request on April 11, 2017. The Complainant listed one record on the Records Denied List: DOBI’s Business Name & Trade Name Approval Request Form, which he identified as Exhibit A. The Complainant provided no additional argument.⁶

Statement of Information:

On October 3, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on February 16, 2017, and responded in writing on February 27, 2017. The Custodian further certified that on March 1, 2017, the Complainant e-mailed the Custodian and clarified the records he was seeking in his February 16, 2017 OPRA request by providing the Custodian with a list of the specific records that he wanted. The Custodian certified that on March 9, 2017, and on March 16, 2017, he disclosed several records responsive to the Complainant’s clarified request. Another record, initially withheld as ACD material, was subsequently disclosed by the Custodian on March 23, 2017.

The Custodian also certified that he e-mailed the Complainant on March 30, 2017 and April 5, 2017 in response to the Complainant’s further inquiries, informing him that there were no other records in existence that were responsive to the Complainant’s request. In the April 5, 2017 e-mail, the Custodian elaborated by informing the Complainant that pursuant to the Records Management Services (“RMS”) Records Retention and Disposition Schedule, requests for license changes and related information by the licensee are required to be kept for three years and then destroyed. As such, the records sought from 2013 were no longer maintained by the agency.

The Custodian certified that the following records were determined to be responsive to the Complainant’s initial OPRA request, as well as the Complainant’s supplemental clarification/request:

RESPONSIVE RECORD	DATE DISCLOSED IN ENTIRETY	REASON FOR DENIAL
Business Name & Trade Name Approval Request Form (Capacity Group of Companies)	N/A	Record not made, maintained, or kept on file. Retained for three years, then destroyed.
Business Name & Trade Name Approval Request Form (Pro Holdings Group)	N/A	Record not made, maintained, or kept on file. Retained for three years, then destroyed.
Letter from Christie to Bass dated 10-04-13	February 27, 2017	N/A

⁶ The Complainant also listed Exhibits B through G, and Exhibit I on the Records Denied List, but these items were not alleged to be denied records.

Letter from Christie to Haeselin dated 08-28-13	February 27, 2017	N/A
E-mail from Jackson to Christie dated 10-22-13	March 16, 2017	N/A
Certificate of Licensure Pro Holdings dated 04-23-13	March 16, 2017	N/A
Letter from Christie to Bass dated 10-04-13	March 16, 2017	N/A
Certificate of Amendment to the Certificate of Formation of All Trans Insurance Solutions dated 10-10-13	March 16, 2017	N/A
Letter from Christie to Bass dated 10-04-13	March 16, 2017	N/A
Certificate of Amendment to the Certificate of Formation of Pro Holdings dated 08-15-13	March 16, 2017	N/A
Certificate of Amendment, Limited Liability Company, changing name of NATCAP LLC to Pro Holdings dated 11-09-09	March 16, 2017	N/A
Short Form Standing Pro Holdings dated 03-29-11	March 16, 2017	N/A
Certificate of Formation NATCAP LLC dated 10-22-09	March 16, 2017	N/A
E-mail between Jackson and Bass dated 10-04-13	March 16, 2017	N/A
Letter from Christie to Bass dated 10-04-13	March 16, 2017	N/A
E-mail between Christie and Bass dated 10-03-13	March 16, 2017	N/A
Letter from Christie to Bass dated 10-04-13	March 16, 2017	N/A
E-mail from Bass to Christie dated 10-03-13	March 16, 2017	N/A
E-mail between Haeselin and Christie dated 08-29-13	March 16, 2017	N/A

E-mail between Haeselin and Christie dated 08-29-13 (2 nd)	March 16, 2017	N/A
Letter from Christie to Haeselin dated 08-28-13	March 16, 2017	N/A
Certificate of Amendment to the Certificate of Formation of Pro Holdings dated 08-15-13	March 16, 2017	N/A
Letter from Christie to Haeselin dated 08-28-13	March 16, 2017	N/A
Certificate of Amendment to the Certificate of Formation of Pro Holdings dated 08-15-13	March 16, 2017	N/A
E-mail from Haeselin to Christie dated 08-29-13	March 16, 2017	N/A
E-mail between Haeselin and Christie dated 08-19-13	March 16, 2017	N/A
Letter from Christie to Haeselin dated 08-28-13	March 16, 2017	N/A
E-mail between Haeselin and Christie dated 08-29-13	March 16, 2017	N/A
E-mail exchange between R. Jackson and J. Jackson dated 10-03-13	Withheld from disclosure on March 16, 2017 as ACD material. After further review, the record was disclosed on March 23, 2017	N/A

The Custodian's Counsel, after recapping the procedural history, asserted that the Complainant's complaint is without merit because there was no denial of access and the Complainant failed to allege any violation of OPRA.

Counsel stated that the Custodian disclosed all records found to be responsive to the Complainant's request, including one record initially withheld as ACD material. Counsel stated that with respect to the Business Name & Trade Name Approval Request Form (filed by Capacity Group of Companies and Pro Holdings Group), the records must be retained for three years. Counsel stated that the three-year retention period began to run when DOBI issued the August 28, 2013 and October 4, 2013 approval letters. Counsel noted that the Complainant filed the OPRA request for these records on February 16, 2017, which was more than three years later, and the record was no longer on file at that time. Counsel argued that the Custodian could not produce a record that the agency does not possess.

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.

On February 16, 2017, the Complainant requested a copy of all records pertaining to the Business Name & Trade Name Approval Request Form submitted to DOBI requesting business name approval of the name All Trans Risk Solutions LLC. On February 27, 2017, the Custodian located two (2) responsive records which were disclosed to the Complainant. On March 1, 2017, the Complainant, not satisfied with the Custodian’s response, supplemented and clarified his request. Thereafter, the Custodian on March 16, 2017 and March 23, 2017, disclosed twenty-five (25) additional records responsive to the request. On March 30, 2018, the Custodian informed the Complainant that no other records existed that were responsive to the request.

On August 3, 2017, the Complainant filed the instant complaint. The Complainant alleged that the Custodian denied him access to one (1) record: “DOBI’s Business Name & Trade Name Approval Request Form.” The Complainant referenced this record as “Exhibit A” on the Records Denied List. This is therefore the only record relevant to this complaint.

The Custodian made it clear to the Complainant via e-mail dated March 30, 2018, that the agency provided all records responsive to the Complainant’s request, and no other records responsive to the request existed. Thereafter, via e-mail dated April 5, 2017, the Custodian further informed the Complainant that pursuant to the RMS Records Retention and Disposition Schedule, requests for license changes and related information by the licensee are required to be kept for three years and then destroyed. As such, the records sought from 2013 were no longer maintained by the agency. The Custodian in the SOI listed the Business Name & Trade Name Approval Request Forms (filed by Capacity Group of Companies and Pro Holdings Group), the records that are relevant to this complaint, as the records no longer in existence.

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.

Here, the Custodian certified that the records relevant to the complaint, the Business Name & Trade Name Approval Request Forms (filed by Capacity Group of Companies and Pro Holdings Group), do not exist because RMS requires those records to only be retained for three years prior to destruction. The evidence of record reveals that the three-year retention period began to run when DOBI issued the August 28, 2013 and October 4, 2013 approval letters, and the Complainant

filed the request for these records on February 16, 2017, which was more than three years later. As such, the records were no longer in existence at the time of the request.

Therefore, the Custodian did not unlawfully deny access to the records relevant to the complaint, the Business Name & Trade Name Approval Request Forms, because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Custodian did not unlawfully deny access to the records relevant to the complaint, the Business Name & Trade Name Approval Request Forms, because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart
Staff Attorney

February 19, 2019