



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

July 28, 2020 Government Records Council Meeting

Marc Aisen
Complainant

Complaint No. 2019-18

v.

NJ Department of Transportation
Custodian of Record

At the July 28, 2020 public meeting, the Government Records Council (“Council”) considered the July 21, 2020 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 has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request seeking a grant application to the Transportation Trust Fund to purchase 360-degree cameras. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. 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 July 2020

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: July 30, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2020 Council Meeting**

**Marc Aisen¹
Complainant**

GRC Complaint No. 2019-18

v.

**New Jersey Department of Transportation²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of \$29.1 million grant application submitted to the Transportation Trust Fund in March 2017 to fund the purchase of 360-degree cameras.³

Custodian of Record: Dina Antinoro
Request Received by Custodian: September 2, 2018
Response Made by Custodian: October 3, 2018
GRC Complaint Received: January 30, 2019

Background⁴

Request and Response:

On September 2, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 4, 2018, the Custodian responded in writing acknowledging receipt of the request. On September 12, 2018, the Custodian e-mailed the Complainant stating that an extension until September 21, 2018 was needed as the New Jersey Department of Transportation (“NJDOT”) was still searching through its records. On September 21, 2018, the Custodian e-mailed the Complainant requesting an additional extension until September 28, 2018.

On September 28, 2018, the Custodian e-mailed the Complainant requesting an additional extension until October 12, 2018. That same day, the Complainant responded to the Custodian stating that he wished to narrow his request for specific information. The Complainant stated that the requested application involved \$29.1 million in funds and was for the purchase of 360-degree camera. The Complainant also stated that the application was made in April 2017. In subsequent

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Vivek N. Mehta.

³ The Complainant sought additional records that are not at issue in this 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.

e-mails, the Complainant clarified that the application could have been made in March 2017 and may be in NJDOT's busing division. The Complainant also stated that the application was called the "Bus Camera Safety Program."

On October 3, 2018, the Custodian responded in writing stating that NJDOT did not maintain the requested records. The Custodian further stated that the Complainant may submit a request to the New Jersey Turnpike Authority ("NJTA") and provided a link to their website.

On January 8, 2019, the Complainant responded to the Custodian via e-mail requesting an appeal of the decision, stating that he knew the requested records existed. On January 15, 2019, the Complainant e-mailed the Custodian stating that NJTA informed him that they did not possess the requested records and reiterated his desire to appeal NJDOT's denial.

Denial of Access Complaint:

On January 30, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he was told by NJDOT that the records did not exist or that they were forwarded to NJTA. The Complainant asserted that he was told by NJTA that they did not have the records.

The Complainant asserted that he contacted the Custodian but was directed to take the matter to the New Jersey Transit Corporation ("NJTC"). The Complainant stated that he requested the records from NJTC but have yet to receive them. The Complainant included a press release announcing the funding for the 360-degree cameras as evidence.

Statement of Information:⁵

On September 6, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on September 2, 2018. The Custodian certified that her search included contacting OPRA liaisons in NJDOT's Commissioner's Office, Division of Communications, Office of Information Technology, Division of Traffic Operations, Division of Budget, Capital Program Development, and the Transportation Trust Fund Authority. The Custodian certified that each division confirmed that they did not receive or possess the application sought by the Complainant, as well as any other responsive records to the request. The Custodian certified that she responded in writing on October 3, 2018, stating that NJDOT did not maintain the requested records.

The Custodian, through counsel, argued that the complaint should be dismissed based on the certification that no responsive records exist. The Custodian asserted that the Appellate Division previously held that if a requested record did not exist, the agency is not required to create the document and the request must be denied. Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005); See also Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005); and Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

⁵ On March 4, 2019, this complaint was referred for mediation. On August 21, 2019 this complaint was referred back to the GRC for adjudication.

The Custodian asserted that NJDOT conducted a diligent search for responsive records, with seven (7) NJDOT divisions confirming that they did not receive or possess the requested records. The Custodian also noted that one of those divisions included the Transportation Trust Fund Authority. The Custodian also asserted that the Complainant failed to provide evidence to contradict the certification. The Custodian therefore requested that the Council find that there was no unlawful denial of access.

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, GRC 2005-49. Here, the Complainant’s request sought a grant application to the Transportation Trust Fund to purchase 360-degree cameras. In the SOI, the Custodian certified that no responsive records exist. The Custodian further certified that she contacted seven (7) NJDOT divisions, including the Transportation Trust Fund Authority. The Custodian certified that all seven (7) divisions confirmed that they did not receive or possess the responsive records. Additionally, while the press release provided by the Complainant demonstrates that funding for the 360-degree cameras existed, it is not evidence demonstrating that NJDOT in fact possessed the application at issue.

Therefore, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request seeking a grant application to the Transportation Trust Fund to purchase 360-degree cameras. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. See Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request seeking a grant application to the Transportation Trust Fund to purchase 360-degree cameras. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado
Staff Attorney

July 21, 2020