



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 10, 2020 Government Records Council Meeting

Chuck Lovey
Complainant

Complaint No. 2019-82 and 2019-102

v.

City of Plainfield (Union)
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 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 did not unlawfully deny access to the Complainant’s two (2) OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed to the Complainant all records that the City possessed. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015). Additionally, the Custodian was not required to disclose any records in the Complainant’s possession, composed by him, or that came into existence after the filing of an OPRA request. Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008); Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 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 10th Day of November 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: November 13, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting**

**Chuck Lovey¹
Complainant**

GRC Complaint No. 2019-82 & 2019-102²

v.

**City of Plainfield (Union)³
Custodial Agency**

Records Relevant to Complaint:

January 30, 2019 OPRA request:⁴ On-site inspection of:

1. All e-mails, letters, or other written communications between the City of Plainfield (“City”) and Jeffrey and Anita Harvey (1080 Rahway Road) from January 15, 2018 to present.
2. All notes, memoranda, or “other documentation relating to” meetings, phone calls, or other oral communications between the City and the Harveys from January 15, 2018 to present.
3. All e-mails, notes, memoranda, or “other documentation relating to communications” between the City and Crabapple Lane homeowners, including but not limited to meeting with them held on February 15 and May 3, 2018; letters from Crabapple Lane homeowners dated February 5, May 3, November 30, 2018 and January 11, 2019; and e-mails from Crabapple Lane homeowners dated February 5, April 19, May 3, August 1, August 10, August 31, December 2, 2018 and January 14, 2019.
4. All permits and approvals issued with respect to the Harvey property.
5. All e-mails, letters, notes, memoranda, and “other documentation relating to communications” between the City, Engineer, and other professional or third-party consultants regarding the Harvey property from August 1, 2017 to present.
6. All e-mails, letters, notes, memoranda, and “other documentation relating to communications” between the City and Somerset/Union County Soil Conservation District regarding the Harvey property between August 1, 2017 and present.
7. All engineering reviews, inspection reports and/or “related documentation” regarding the Harvey property from August 1, 2017 to present.
8. All e-mails, notes, memoranda, engineering reviews, inspection reports, “or other documentation pertaining to the adequacy, condition, or other concerns” about storm drains on Crabapple Lane.

¹ No legal representation listed on record.

² These complaints have been consolidated due to the commonality of the parties and issues.

³ Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, & Minchello, LLC (Iselin, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2019-82.

April 15, 2019 OPRA request:⁵ On-site inspection of any notes, memos, internal and external communications, e-mails, inspection reports, notices of code violations “or any and all other records and documents relating to the Quality of Life Task Force [(“QLTF”)] Initiative directed at” Crabapple Lane and 1080 Rahway Road per an e-mail from Mayor Adrian Mapp dated April 2, 2019.

Custodian of Record: Abubakar Jalloh

Request Received by Custodian: January 30, 2019; April 15, 2019

Response Made by Custodian: February 25, 2019; April 23, 2019

GRC Complaint Received: April 22, 2019; May 29, 2019

Background⁶

Request and Response:

On January 30, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 25, 2019, the Custodian responded by providing inspection of records responsive to the Complainant’s OPRA request.

On April 2, 2019, the Complainant sent a letter to the City advising that he believed the Custodian’s response was “wholly inadequate.” The Complainant argued that the Custodian only provided records responsive to OPRA request item Nos. 1, 2, and 7 while asserting that no records responsive existed for the remaining items. The Complainant noted that Clerk’s Office employee Traci Dillingham advised him on February 25, 2019 that Custodian Counsel’s law firm reviewed the January 30, 2019 OPRA request and “decided on the scope of the documents to be produced.” The Complainant argued that “absurdly curtailed” disclosure implied that the City intended to unlawfully deny access to responsive records. The Complainant stated that as part of this letter, he was re-filing his January 30, 2019 OPRA request and demanded that the City provide a full response by April 12, 2019.

On April 15, 2019, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On April 22, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”) relevant to GRC 2019-82. The Complainant asserted that on February 25, 2019, the Custodian granted on-site inspection of records responsive to the January 30, 2019 OPRA request. The Complainant argued that at that time, he was only given access to two (2) notices of code violations and a December 11, 2018 letter describing an on-site

⁵ This OPRA request is the subject of GRC Complaint No. 2019-102.

⁶ 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.

inspection at 1080 Rahway Road.⁷ The Complainant contended that this disclosure was insufficient given the scope of his OPRA request. The Complainant noted that he resubmitted the subject OPRA request on April 2, 2019 but did not receive a response to it. The Complainant argued that the City “repeatedly denied access to public records which are germane” to a property issue in the vicinity of Crabapple Lane.

Request and Response (cont’d):

On April 23, 2019, Ms. Dillingham responded in writing on behalf of the Custodian to the Complainant’s April 15, 2019 OPRA request forwarding an e-mail from Mayor Mapp’s Office stating that no responsive records existed. On April 25, 2019, the Complainant e-mailed Ms. Dillingham expressing “surprise” that no records existed. The Complainant noted that he sought information on the QLTF initiative coordinated through Director of Public Works Oren Dabney and that resulted in since-withdrawn code violations on Crabapple Lane. The Complainant stated that he was interested in seeing “the full scope of activities arising from the [QLTF] inspection.” The Complainant asserted that this included not only 1080 Rahway Road, but other violations issued to residents on Crabapple Lane.

On May 1, 2019, Ms. Dillingham e-mailed the Complainant disclosing multiple records, including a property file summary sheet and two (2) notices for 1074-82 Rahway Road, as well as notices for multiple addresses on Crabapple Lane. On May 12, 2019, the Complainant e-mailed Ms. Dillingham asserting that the City’s response was again incomplete. The Complainant contended that he based this conclusion on his correspondence with Mayor Mapp on April 2, 2019 and regrading that occurred at 1080 Rahway Road within days thereafter. The Complainant argued that it seemed unlikely that no evidence of the City’s enforcement existed. The Complainant also noted that “several of the attached documents” relate to violations predating the QLTF and were thus not responsive. The Complainant finally requested that Ms. Dillingham work with the QLTF to obtain and disclose all records responsive to his April 15, 2019 OPRA request. On May 15, 2019, Ms. Dillingham responded that there “are no additional records at this time.”

Denial of Access Complaint (cont’d):

On May 29, 2019, the Complainant filed a Denial of Access Complaint with the GRC relevant to GRC 2019-102. The Complainant asserted that the City’s response to his April 15, 2019 OPRA request was incomplete. The Complainant argued that on April 2, 2019, Mayor Mapp directed the QLTF to address grading issues at that property, which were addressed days later. The Complainant contended that it was “obvious” that the regrading was done “at the City’s behest,” yet no records regarding this action were disclosed. The Complainant questioned this lack of records regarding 1080 Rahway Road, notwithstanding the disclosed violation notice that predated the QLTF. The Complainant also noted that he was aware of four (4) records not disclosed, which he attached his complaint.

⁷ The Complainant attached to his Denial of Access Complaint a list of twenty-two (22) records he identified as “[p]roduced by the City.” Of those, ten (10) records appear to fall outside the scope of the Complainant’s January 30, 2019 OPRA request.

The Complainant contended that based on the forgoing, the City failed to properly respond to his April 15, 2019 OPRA request. The Complainant argued that the City's failure to produce records painted them in a "highly unfavorable light," especially given that the City issues "minor and frequently erroneous" violations on Crabapple Lane while ignoring major violations at 1080 Rahway Road. The Complainant thus requested that the GRC require the City to disclose all records responsive to his OPRA request.

Statement of Information:⁸

On November 19, 2019, the Custodian filed two (2) Statements of Information ("SOI").⁹

GRC 2019-82

The Custodian certified that he received the Complainant's OPRA request on January 30, 2019. The Custodian certified that he responded in writing on February 25, 2019 providing the Complainant inspection of records related to 1080 Rahway Road.

GRC 2019-102

The Custodian certified that he received the Complainant's OPRA request on April 15, 2019. The Custodian certified that the City responded in writing on April 23, 2019 stating that no records responsive to the subject OPRA request existed.

Regarding both complaints, the Custodian first noted that the Complainant did not take issue with the timeliness of the City's responses. The Custodian argued that the Complainant instead contended that the City's responses were insufficient. The Custodian argued that these complaints were frivolous because the Complainant was provided "unfettered access" to all records responsive to the subject OPRA requests. The Custodian averred that the City maintained no additional records responsive to the subject OPRA requests and cannot be held liable for not providing records that do not exist. The Custodian further argued that the Complainant could not provide any competent, credible evidence refuting that the City was withholding any additional responsive records.

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

⁸ On May 9, 2019, GRC 2019-82 was referred to mediation. On July 9, 2019, GRC 2019-102 was referred to mediation. On October 29, 2019, both complaints were referred back to the GRC for adjudication.

⁹ The Custodian identified events that occurred while these complaints were in mediation. The GRC notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

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.

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian’s certification that all such records were provided to the complainant. The Council held that the custodian’s certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian’s burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015). However, in Macek v. Bergen Cnty. Sheriff’s Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019), the Council held that evidence contained in the record suggested that additional responsive records may exist. Based on this, the Council ordered the Custodian to perform another search and submit a certification regarding the results of that search.

In the matter before the Council, the Complainant submitted two (2) OPRA requests for which the Custodian disclosed records through inspection and via e-mail. The Complainant filed a complaint for each OPRA request arguing that the City failed to provide all records that existed. Regarding GRC 2019-82, the Complainant argued that he only received three (3) records responsive to his multi-item OPRA request. Regarding GRC 2019-102, the Complainant argued that the City failed to disclose several records. The Complainant noted that he attached four (4) responsive records that the City failed to provide. In the SOI, the Custodian certified that the Complainant was provided “unfettered” access to all records that existed and could not disclose records that did not exist. The Custodian also argued that the Complainant failed to provide evidence to refute this certification. Upon review of the submissions and evidence presented here, the GRC is persuaded that this consolidated complaint is similar to Danis, GRC 2009-156 and can be distinguished from Macek, GRC 2017-156.

Regarding the January 30, 2019 OPRA request, the evidence of record shows that the Complainant received more than just three (3) records responsive to his January 30, 2019 OPRA request. That he surmised that additional records existed based on communications he may have had with the City does not provide proof of the existence of records not disclosed.

Regarding the April 15, 2019 OPRA request, the fact that the Complainant contacted the City about 1080 Rahway Road and the regrading subsequently occurred does not prove that the City engaged in any written communications with the property owners. Also, the records the Complainant attached to the Denial of Access Complaint to support his assertion that they were responsive and were withheld suffers two faults. First, because the Complainant already possessed or was the composer of those records, the Custodian was under no obligation to disclose them again. Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008); Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2014-408 (September 2015). Second, two (2) of the four (4) records comprised a letter dated April 15, 2019 (with attachments) and an e-mail chain from April 15, 2019 (7:10 p.m.) through April 16, 2019 (2:56 p.m.). The Custodian was under no obligation to disclose any records created or received after submission of the OPRA request. See Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005); Delbury v.

Greystone Park Psychiatric Hospital (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).

Therefore, the Custodian did not unlawfully deny access to the Complainant's two (2) OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed to the Complainant all records that the City possessed. Danis, GRC 2009-156, *et seq.*; Burns, 2005-68; Holland, 2014-63, *et seq.* Additionally, the Custodian was not required to disclose any records in the Complainant's possession, composed by him, or that came into existence after the filing of an OPRA request. Bart, 403 N.J. Super. 609; Blau GRC 2003-75.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to the Complainant's two (2) OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed to the Complainant all records that the City possessed. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015). Additionally, the Custodian was not required to disclose any records in the Complainant's possession, composed by him, or that came into existence after the filing of an OPRA request. Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008); Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005).

Prepared By: Frank F. Caruso
Executive Director

October 27, 2020