



PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

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

JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

December 10, 2024 Government Records Council Meeting

Scott Madlinger
Complainant

Complaint No. 2022-535

v.

Borough of Seaside Heights (Ocean)
Custodian of Record

At the December 10, 2024, public meeting, the Government Records Council (“Council”) considered the December 3, 2024 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 a log for the “@seasideheightspd.com” e-mail address. Specifically, the Custodian certified in the Statement of Information that such records do not exist and could not be created by the Borough’s Information Technology contractor, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Moreover, the Custodian was not obligated under OPRA to provide screenshots of the files for the “@seasideheightspd.com” e-mail address because the evidence of record reveals that an OPRA request was not submitted for said screenshots.

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 December 2024

John A. Alexy, 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: December 12, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 10, 2024 Council Meeting**

**Scott Madlinger¹
Complainant**

GRC Complaint No. 2022-535

v.

**Borough of Seaside Heights (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copies via e-mail of “[a] log of sent and received emails for Kelly Dwyer from June 01, 2022 to July 28, 2022, which includes the sender name, recipient name(s), date, and subject line.”

Custodian of Record: Diane Stanbley

Request Received by Custodian: July 28, 2022

Response Made by Custodian: August 9, 2022, August 19, 2022, September 2, 2022, and September 16, 2022

GRC Complaint Received: September 29, 2022

Background³

Request and Responses:

On July 28, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 9, 2022, the eighth (8th) business day following receipt of said request, the Custodian responded in writing disclosing the requested records for Ms. Dwyer’s e-mail address and informing the Complainant that during the records search a second e-mail account was located for Ms. Dwyer. The Custodian informed the Complainant that she would need an extension of time until August 19, 2022, for production of responsive records for the second e-mail account.

On August 19, 2022, the Custodian e-mailed the Complainant to inform him that the Information Technology (“IT”) contractor for the Borough of Seaside Heights (“Borough”) was having difficulty producing the log for the second e-mail account and an extension of time was needed until September 2, 2022. On September 2, 2022, the Custodian e-mailed the Complainant to inform him that the Borough’s IT contractor was still having difficulty extracting and compiling

¹ No legal representation listed on record.

² Represented by Robin La Bue, Esq., of Rothstein, Mandell, Strohm, Halm & Cipriana, P.C. (Toms River, 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.

data from the second e-mail account and another extension of time was needed until September 16, 2022. On September 16, 2022, the Custodian e-mailed the Complainant and informed him that the Borough's IT contractor made numerous attempts to extract the data to prepare the requested record; however, the contractor was unable to produce the e-mail log for the second e-mail account.

Denial of Access Complaint:

On September 29, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that he submitted his OPRA request to the Custodian on July 28, 2022. The Complainant stated that although a response was due by August 8, 2022, he did not receive one; therefore, on August 9, 2022, he e-mailed the Custodian's Counsel to inform her the response was late. The Complainant stated that on that same date, the Custodian partially responded but informed him that Ms. Dwyer uses a second e-mail account, and an extension of time was needed until August 19, 2022, to produce the log for that account.

The Complainant stated that on August 19, 2022, the Custodian took an extension of time until September 2, 2022, and on September 2, 2022, the Custodian took an extension of time until September 16, 2022. The Complainant stated that the Custodian attributed the delay to the IT contractor having trouble producing the log. The Complainant stated that on September 16, 2022, the Custodian's Counsel informed him that they were technically unable to produce the additional log. The Complainant stated that on September 18, 2022, he asked the Custodian to provide screenshots of the send, receive, and deleted files; however, he received no response.

Statement of Information:

On October 27, 2022, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on July 28, 2022, and responded to the request on August 9, 2022. The Custodian certified that the Borough's IT provider is an outside contractor. The Custodian further certified that upon receipt of the request, she contacted the IT contractor to prepare the requested e-mail logs. The Custodian certified that Ms. Dwyer has two (2) e-mail addresses: an "@seaside-heights.org" address, and an "@seasideheightspd.com" address. The Custodian certified that the contractor created the requested e-mail log for the former e-mail address, and it was transmitted to the Complainant on August 9, 2022; however, the contractor could not create the e-mail log for the latter address after several attempts. The Custodian certified that she notified the Complainant on September 16, 2022, that the requested log for the "@seasideheightspd.com" address could not be created.

The Custodian certified that on September 18, 2022, the Complainant e-mailed her asking for screenshots of the e-mail log for the same time period in substitution of the log that could not be created. The Custodian certified that, although the Complainant did not submit an OPRA request for screenshots, she provided the screenshots to the Complainant on October 27, 2022; therefore, there was no denial of access to the requested records.

Additional Submissions:

On October 31, 2022, the GRC e-mailed the Custodian a request for additional information. The GRC informed the Custodian that in the SOI she certified that Ms. Dwyer uses an alternative e-mail address and that a log was unable to be compiled by the IT contractor for that address. The GRC asked the Custodian to obtain from the IT contractor a certification outlining the measures that were taken to prepare the e-mail log as well as the specific reasons the log could not be compiled. The GRC also requested from the Custodian a certification explaining why, when she stated in the SOI that she responded to the July 28, 2022 OPRA request on August 9, 2022, she certified that it was a timely response. The GRC advised the Custodian that if the municipality was closed on a business day unbeknownst to the GRC, to certify to the date(s) of any such closure.

On November 14, 2022, the Custodian replied to the GRC's request for additional information. The Custodian submitted two (2) certifications to the GRC. The first certification was prepared by Michael Schlachter of Targeted Technologies, who certified that he is the IT Consultant for the Borough of Seaside Heights. Mr. Schlachter certified that he was able to extract the requested e-mail log for Ms. Dwyer's "seaside-heights.org" address; however, after numerous attempts to extract the data from the "@seasideheightspd.com" address, he was unable to do so. Mr. Schlachter certified that he notified the Custodian that he was "unable to create the log, despite our many attempts."

The second certification was provided by the Custodian. The Custodian certified that the Complainant submitted his request on July 28, 2022, in the late afternoon after she had already left for the day. The Custodian certified that she was not at work on July 29, 2022, and did not receive the request until Monday, August 1, 2022. The Custodian certified that the seventh (7th) business day after August 1, 2022 was August 10, 2022; therefore, her August 9, 2022 response was timely.⁴

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.

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.

⁴ The Complainant did not directly state a claim of a "deemed" denial. However, the GRC would have rejected such a claim had it been raised based on the Custodian's certification, which is uncontradicted.

Here, the exact circumstances appear novel, but the basic tenet of the issue is in conformity with Pusterhofer. There was no record responsive to the request because the Custodian had to create the record in accord with the mandates of Paff v. Galloway, 229 N.J. 340 (2017), which requires a custodian to disclose information stored or maintained electronically. To perform such a task the Paff court stated, “[e]xtracting [e-mail log] information requires ‘programming of information technology,’ a function the Legislature clearly envisioned the municipality performing, *providing it has the means of doing so.*” Id. at 354 (emphasis added) (citation omitted). The Custodian certified in the SOI that, after several attempts to do so, the log requested for the “@seasideheightspd.com” e-mail address could not be extracted and compiled by their IT contractor. Moreover, upon request of the GRC, the contractor executed a certification averring that, despite many attempts, he was unable to compile the log. As such, the GRC is persuaded that no unlawful denial of access has occurred. Furthermore, there is nothing in the evidence of record that contradicts the Custodian’s certification that no responsive records exist for this request item. Based on the forgoing, a conclusion in line with Pusterhofer is appropriate here.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to a log for the “@seasideheightspd.com” e-mail address. Specifically, the Custodian certified in the SOI that such records do not exist and could not be created by the Borough’s IT contractor, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49. Moreover, the Custodian was not obligated under OPRA to provide screenshots of the files for the “@seasideheightspd.com” e-mail address because the evidence of record reveals that an OPRA request was not submitted for said screenshots.

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 a log for the “@seasideheightspd.com” e-mail address. Specifically, the Custodian certified in the Statement of Information that such records do not exist and could not be created by the Borough’s Information Technology contractor, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Moreover, the Custodian was not obligated under OPRA to provide screenshots of the files for the “@seasideheightspd.com” e-mail address because the evidence of record reveals that an OPRA request was not submitted for said screenshots.

Prepared By: John E. Stewart

December 3, 2024