



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Colette Lucca
Complainant

Complaint No. 2011-200

v.

Borough of Fair Lawn (Bergen)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 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. Because the Custodian certified in the Statement of Information that the records responsive to request Item Nos. 1 and 5 of the Complainant’s March 28, 2011 OPRA request were timely provided to the Complainant, and because the Complainant did not submit competent, credible evidence to refute the Custodian’s certification, the Custodian has borne her burden of proof that she did not unlawfully deny the Complainant access to the records responsive to request Item Nos. 1 and 5 of the Complainant’s March 28, 2011 OPRA request. N.J.S.A. 47:1A-6.
2. Because the Custodian certified in the Statement of Information that no records exist which are responsive to the Complainant’s March 7, 2011 OPRA request and to Item Nos. 2, 3, and 4 of the Complainant’s March 28, 2011 OPRA request, and because the Complainant has not submitted any evidence to refute the Custodian’s certification in this regard, the Custodian did not unlawfully deny the Complainant access to the records sought in the March 7, 2011 OPRA request and Item Nos. 2, 3, and 4 of the March 28, 2011 OPRA request. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005); N.J.S.A. 47:1A-6.

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 August, 2012

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: September 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Colette Lucca¹
Complainant**

GRC Complaint No. 2011-200

v.

**Borough of Fair Lawn (Bergen)²
Custodian of Records**

Records Relevant to Complaint:³

March 7, 2011 OPRA request:

1. "Video of inside holding room"
2. Time of 911 call
3. All four police officers' notes of arrest
4. "Proof of time of officer stating 'he' asked for alcohol test"

March 28, 2011 OPRA request:

1. Time of the call and/or tape if not a 911 call to the police station
2. "Time of the arrest for September for 09-20710 as it shall be noted on police office daily reports."
3. "Request for repairs will be reported on vehicle report sheet for that date."
4. "End of duty tour sheets for officers in 09-20710."
5. Missing radio log for car #916.

First Request Made: March 7, 2011

First Response Made: March 14, 2011

Second Request Made: March 28, 2011

Second Response Made: March 31, 2011

Custodian: Joanne M. Kwasiewski

GRC Complaint Filed: May 26, 2011⁴

Background

March 7, 2011

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by Bruce Rosenberg, Esq., of Winne, Banta, Hetherington, Basralian & Kahn, P.C. (Hackensack, NJ).

³ The Complainant requested several additional records that are not the subject of this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

March 14, 2011

Custodian's response to the first (1st) OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian asserts there is no video of the inside holding room, and accordingly, no record responsive to request Item No. 1 exists. The Custodian further states that regarding request Item No. 2, there is no 911 call that corresponds with incident in question. The Custodian states that there are no records responsive to the Complainant's request Item No. 3 for notes of the arresting officers. The Custodian maintains that there is no record responsive to the Complainant's request Item No. 4 for a "proof of time of officers stating 'he' asked for an alcohol test."

March 28, 2011

Complainant's second (2nd) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

March 31, 2011

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian asserts that the requested copy of the audio of the 911 tape responsive to request Item No. 1 is attached. The Custodian further states that although Item No. 2 does not exist, attached to this letter is a copy of a daily report that notes the "time of arrest" mentioned in Item No. 2. The Custodian states that access to request Item No. 3 for vehicle reports is denied because the requested record does not exist. The Custodian asserts that although officers do not complete "duty tour sheets" as Item No. 4 states, officers do complete a platoon sheet with every shift. The Custodian further states that the requested radio log for car #916 responsive to request Item No. 5 is attached.

May 26, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's first (1st) OPRA request dated March 7, 2011
- Letter from the Custodian to the Complainant dated March 14, 2011
- Complainant's second (2nd) OPRA request dated March 28, 2011
- Letter from the Custodian to the Complainant dated March 31, 2011⁵

The Complainant asserts that the Borough of Fair Lawn ("Borough") provided her with the wrong daily report sheet despite the fact that she has requested it on two occasions. The Complainant states that on previous occasions, she has had a difficult time getting access to the Borough's audio recordings. The Complainant asserts that she has been unlawfully denied access to the requested records.

The Complainant agrees to mediate this complaint.

⁵ The Complainant attached additional documentation that is not relevant to the adjudication of this complaint.

June 6, 2011

Offer of Mediation sent to the Custodian.

June 9, 2011

The Custodian agrees to mediation and the case is referred to the GRC mediator.

August 12, 2011

The case is referred back from mediation.

August 15, 2011

Request for the Statement of Information (“SOI”) sent to the Custodian.

August 23, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 7, 2011
- Letter from the Custodian to the Complainant dated March 14, 2011
- Complainant’s OPRA request dated March 28, 2011
- Letter from the Custodian to the Complainant dated March 31, 2011⁶

The Custodian certifies that she worked with the Borough’s Police Department to retrieve the requested records. The Custodian certifies the requested radio log for car #916 (Item No. 5 of the Complainant’s March 28, 2011 request) has a six (6) year retention schedule and was provided to the Complainant.

The Custodian certifies that the Borough does not possess any records responsive to the Complainant’s March 7, 2011 OPRA request and cites Pusterhofer v. New Jersey Department of Education, GRC Case No. 2005-49 (July 2005), in support of her argument that a Custodian cannot release records that do not exist.

The Custodian further certifies that in response to Item No. 1 of the Complainant’s March 28, 2011 OPRA request, the Custodian supplied the Complainant with a copy of the requested 911 call and redacted information regarding the unlisted cellular phone number on the tape. The Custodian maintains that the redaction of the unlisted cellular phone number is required pursuant to OPRA. In addition, the Custodian certifies that the Borough does not possess any records responsive to Item Nos. 2, 3, and 4 of the Complainant’s March 28, 2011 OPRA request, and again cites Pusterhofer in support of the legality of her actions. However, the Custodian certifies that the Complainant was provided with an analogous daily report involving the arrest in controversy in an effort to assist the Complainant.

⁶ The Custodian attached additional documentation that is not relevant of the adjudication of this complaint. Colette Lucca v. Borough of Fair Lawn (Bergen), 2011-200 – Findings and Recommendations of the Executive Director

Analysis

Whether the Custodian unlawfully denied the Complainant access to records responsive to Item Nos. 1 and 5 of the Complainant's March 28, 2011 request?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

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 the instant complaint, the Complainant argues that the Custodian unlawfully denied access to the records responsive to Item Nos. 1 and 5 of the March 28, 2011 OPRA request. In response, the Custodian certified in the Statement of Information that the records responsive to these request items were timely provided to the Complainant. The Complainant has not provided any competent, credible evidence to refute the Custodian's certification in this regard. Moreover, the Custodian's March 31, 2011 letter to the Complainant is further evidence that said records have been provided to the Complainant.

Accordingly, because the Custodian certified in the Statement of Information that the records responsive to request Item Nos. 1 and 5 of the Complainant's March 28, 2011 OPRA request were timely provided to the Complainant, and because the Complainant did not submit competent, credible evidence to refute the Custodian's certification, the Custodian has borne her burden of proof that she did not unlawfully deny the

Complainant access to the records responsive to request Item Nos. 1 and 5 of the Complainant's March 28, 2011 OPRA request. N.J.S.A. 47:1A-6.

Whether the Custodian unlawfully denied the Complainant access to the records sought in the March 7, 2011 OPRA request and Item Nos. 2, 3, and 4 of the March 28, 2011 OPRA request?

In the instant complaint, the Complainant also argued that the Custodian unlawfully denied access to the records requested in the March 7, 2011 OPRA request as well as Item Nos. 2, 3, and 4 of the March 28, 2011 OPRA request.

The Custodian certified in the Statement of Information that no records exist which are responsive to the Complainant's March 7, 2011 OPRA request and to Item Nos. 2, 3, and 4 of the Complainant's March 28, 2011 OPRA request. The Complainant has not submitted any evidence to refute the Custodian's certification in this regard.

The Council has consistently held that no denial of access occurs when a custodian has demonstrated that no records responsive to a complainant's request exist. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed and the complainant submitted no evidence to refute said certification. The GRC held the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the Statement of Information that no records exist which are responsive to the Complainant's March 7, 2011 OPRA request and to Item Nos. 2, 3, and 4 of the Complainant's March 28, 2011 OPRA request, and because the Complainant has not submitted any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny the Complainant access to the records sought in the March 7, 2011 OPRA request and Item Nos. 2, 3, and 4 of the March 28, 2011 OPRA request. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005); N.J.S.A. 47:1A-6.

Moreover, the Custodian certified in the SOI that, in an effort to assist the Complainant, she did provide the Complainant with a daily report that was similar to the type of daily report the Complainant sought in Item No. 2 of her March 28, 2011 request and which contained information regarding the arrest which was the subject of the Complainant's OPRA requests. Although the Complainant asserted that the daily report received is not responsive to Item No. 2 of her request, the evidence is clear that no record responsive to Item No. 2 of said request exists and that the provision of the daily report was merely the Custodian's attempt to accommodate the Complainant.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified in the Statement of Information that the records responsive to request Item Nos. 1 and 5 of the Complainant's March 28, 2011 OPRA request were timely provided to the Complainant, and because the Complainant did not submit competent, credible evidence to refute the Custodian's certification, the Custodian has borne her burden of proof that she did not unlawfully deny the Complainant access to the records responsive to request Item Nos. 1 and 5 of the Complainant's March 28, 2011 OPRA request. N.J.S.A. 47:1A-6.
2. Because the Custodian certified in the Statement of Information that no records exist which are responsive to the Complainant's March 7, 2011 OPRA request and to Item Nos. 2, 3, and 4 of the Complainant's March 28, 2011 OPRA request, and because the Complainant has not submitted any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny the Complainant access to the records sought in the March 7, 2011 OPRA request and Item Nos. 2, 3, and 4 of the March 28, 2011 OPRA request. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005); N.J.S.A. 47:1A-6.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012