



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 26, 2013 Government Records Council Meeting

Orie J. McMillan
Complainant

Complaint No. 2011-359

v.

City of Newark (Essex)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 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 based upon a preponderance of the evidence in the record establishing that the Custodian was not in possession of records responsive to the Complainant’s request, and the Complainant’s failure to assert an actual denial of access to her request, there has been no unlawful denial of access pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-6. See Pusterhofer v. New Jersey Department of Education, 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, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

**Orie J. McMillan¹
Complainant**

GRC Complaint No. 2011-359

v.

**City of Newark (Essex)²
Custodian of Records**

Records Relevant to Complaint:

- Permits, building violations, and construction bids for contractors, apartment units, and renovations, common areas, lobby renovations, asbestos lead, abatements, etc. from January 1, 2007 to [October 18, 2011].
- Photographs of apartments under renovation at 28, 60 Cedar Lane, etc. 2011

Request Made: October 18, 2011

Response Made: October 25, 2011

Custodian: Robert P. Marasco

GRC Complaint Filed: November 22, 2011³

Background

November 22, 2011

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

- Complainant’s OPRA request dated October 18, 2011
- Letter from the Custodian to the Complainant dated October 25, 2011

The Complainant has failed to assert any arguments in support of her Denial of Access Complaint. However, the October 25, 2011 letter from the Custodian to the Complainant states that the City of Newark (“City”) has conducted a research pertaining to the Complainant’s request and has found that there are no records responsive to the Complainant’s request.

The Complainant agrees to mediate this complaint.⁴

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Custodian declined to respond to the GRC’s request for mediation and a Statement of Information.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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 provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

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.

In the instant Denial of Access Complaint, the Complainant made no arguments in support of the filing of her Complaint against the City of Newark. Furthermore, the Complainant herself attached a copy of the Custodian’s letter dated October 25, 2011 timely responding to her October 18, 2011 request and informing her that there are no records responsive to her OPRA request.

Although the Custodian failed to respond to the GRC’s request for a Statement of Information, a review of the evidence of record in this matter does not indicate any unlawful denial of access to government records. The Custodian’s timely response to the Complainant’s OPRA request indicated that no records exist which are responsive to the request. The Complainant did not dispute the Custodian’s response in her complaint. The GRC has held that there is no denial of access when a Custodian has proven that no responsive records 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. The complainant failed to submit any evidence to refute the custodian's certification. The GRC held that the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, based upon a preponderance of the evidence in the record establishing that the Custodian was not in possession of records responsive to the Complainant's request, and the Complainant's failure to assert an actual denial of access to her request, there has been no unlawful denial of access pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-6. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that based upon a preponderance of the evidence in the record establishing that the Custodian was not in possession of records responsive to the Complainant's request, and the Complainant's failure to assert an actual denial of access to her request, there has been no unlawful denial of access pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-6. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013⁵

⁵ This complaint was originally prepared for the Council's January 29, 2013 meeting; however, the complaint could not be adjudicated due to lack of quorum.