



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

April 30, 2013 Government Records Council Meeting

Colleen O'Dea
(On behalf of NJ Spotlight)
Complainant

Complaint No. 2012-109

v.

New Jersey Department of Treasury
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council ("Council") considered the April 23, 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:

1. The Custodian did not unlawfully deny access to the requested records since the Custodian initially responded and subsequently certified in the Statement of Information that no responsive records to the Complainant's OPRA request exists because the records were held by the United States Department of Agriculture and because the Complainant did not submit any evidence to refute the Custodian's certification in this regard. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
2. The GRC does not have the authority to order the United States Department of Agriculture to provide the responsive records back to New Jersey Department of Treasury so that the Custodian may comply with the Complainant's OPRA request because the United States Department of Agriculture is a Federal agency subject only to the provisions of Freedom of Information Act and not OPRA., N.J.S.A. 47:1A-7(b).

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 30th Day of April, 2013



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: May 2, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

Colleen O’Dea¹
(On Behalf of NJ Spotlight)
Complainant

GRC Complaint No. 2012-109

v.

New Jersey Department of Treasury²
Custodian of Records

Records Relevant to Complaint: Copies via e-mail or pickup of the most recent (2010 or 2011) farmland assessment forms and related records (FA-1, WD-1 and any attachments) for multiple properties listed in the OPRA request.

Request Made: February 7, 2012

Response Made: February 17, 2012

GRC Complaint Filed: April 11, 2012³

Background⁴

Request and Records:

On February 7, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian. On February 17, 2012, Ms. Barbara O’Hare (“Ms. O’Hare”), Government Records Access Unit, responded on behalf of the Custodian in writing stating that no responsive records exist and redirecting the Complainant to the New Jersey Department of Agriculture (“NJDA”) and US Department of Agriculture (“USDA”). The Complainant e-mailed Ms. O’Hare on the same day advising that she has been in contact with both the New Jersey Department of Treasury (“DOT”) and NJDA and was told that DOT receives FA-1 forms and then forwards same to Mr. Troy Joshua (“Mr. Joshua”), USDA. The Complainant stated that Mr. Joshua told her to submit an OPRA request with DOT, at which point DOT would reacquire the forms from Mr. Joshua and provide same to the Complainant. The Complainant further noted that she knows that if she submits a request to NJDA, they will refer her back to DOT. The

¹ No legal representation listed on record.

² Gary Dallett, Custodian of Records for the Division of Taxation. Represented by DAG Jill McNally, on behalf of the NJ Attorney General.

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

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.

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Complainant stated that she did as Mr. Joshua asked and requests that DOT obtain the responsive records from Mr. Joshua.

On February 22, 2012, Ms. O'Hare e-mailed the Complainant stating that the Complainant's OPRA request was being reopened and sent to the New Jersey Division of Taxation ("Taxation"). Ms. O'Hare further stated that the Custodian was contacting NJDA to address the issues raised in the Complainant's February 17, 2012 e-mail. On March 1, 2012, Ms. O'Hare responded stating that an extension of time until March 8, 2012 would be needed because Taxation was obtaining the records and would need to redact personal information. On March 8, 2012, Ms. O'Hare responded stating that DOT would need until March 19, 2012 to respond. On March 19, 2012, Ms. O'Hare responded advising that Taxation does not possess the responsive records and USDA is actively reviewing same at this time. Ms. O'Hare further directed the Complainant to access the records through a Freedom of Information Act ("FOIA") request to USDA or contact the relevant local municipalities.

On March 19, 2012, the Complainant e-mailed Ms. O'Hare disputing the denial and arguing that the records at issue are State records handled through Taxation and not federal records. The Complainant further argued that she followed Mr. Joshua's directive and is being denied access to the records anyway. On March 26, 2012, Ms. O'Hare responded stating that Taxation believed the records would be returned but has not been successful in this instance. Ms. O'Hare again directed the Complainant to seek the records through FOIA or contact local municipalities.

Denial of Access Complaint:

On April 11, 2012, the Complainant filed a Denial of Access Complaint with the GRC stating that the records in question are documents that landowners applying for farmland assessment treatment must submit to the municipal tax assessor, who then submits the records to the DOT. The Complainant contends that she spoke with Mr. William Quinn ("Mr. Quinn"), Director of Communications at DOT, who advised that they receive the records but then forward the records to the NJDA. The Complainant asserts that after the NJDA advised no records exist, she contacted Mr. Quinn, who directed her to Mr. Joshua. The Complainant asserts that Mr. Joshua advised the Complainant to file an OPRA request with DOT and he would return the records to them for disclosure. The Complainant states that she did so on February 7, 2012, and Ms. O'Hare denied access stating that no records existed and referred her to the USDA and NJDA. The Complainant states that DOT reopened her request under the guise that they would provide records, but subsequently responded on March 19, 2012 again advising that no records existed. The Complainant states that she disputed the response, and Ms. O'Hare responded on March 26, 2012 advising that the records were never returned to Taxation and therefore could not be disclosed.

The Complainant contends that the records at issue are State records and should be provided pursuant to an OPRA request. The Complainant contends that she does not know why

the records were forwarded to the USDA, but she should not be denied access to same simply for that reason.⁵

Statement of Information:

On January 28, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on February 8, 2012. The Custodian certifies that he reviewed his records and determined that Taxation did not retain the responsive records. The Custodian certifies that Ms. O’Hare responded to the Complainant on his behalf on February 17, 2012 advising that no records exist. The Custodian certifies that the Complainant contacted DOT advising that she spoke with Mr. Joshua who advised that he would return the responsive records to Taxation. The Custodian certifies that after he reopened the Complainant’s OPRA request, he spoke with Mr. Joshua on February 22, 2012, who confirmed that he would return the original records pending confirmation from his supervisors that this was permissible. The Custodian certifies that DOT subsequently sought two (2) extensions of time. The Custodian certifies that during that time frame, Mr. Joshua contacted the Custodian advising that he could not return the records due to confidentiality concerns. The Custodian certifies that DOT responded to the Complainant on March 19, 2012 denying access because he could not obtain the responsive records.

Counsel submitted a letter brief contending that despite his best efforts, the Custodian was unable to obtain and provide access to the responsive records that were in the possession of the USDA. Counsel argues that under OPRA, a custodian is not required to create new records in order to respond to OPRA requests. New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) (*citing* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005)). Counsel further asserts that the GRC has previously adjudicated many complaints finding that a custodian did not violate OPRA because no records existed. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005); Recht v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-240 (November 2007); Riggins v. Borough of Jamesburg (Middlesex), GRC Complaint No. 2009-105 (March 2010). Counsel contends that Taxation was unable to obtain the responsive records from USDA and made the Complainant aware of this fact on multiple occasions. Counsel further notes that the Complainant stated that she understood DOT did not possess the records in her initial OPRA request. Counsel contends that DOT went above and beyond the provisions of OPRA in responding to and attempting to obtain the responsive records from USDA. Counsel contends that this complaint should be dismissed accordingly because no responsive records are maintained by DOT.

⁵ This complaint was referred to mediation on May 9, 2012. This complaint was referred back from mediation on October 17, 2012. The Complainant did not submit an amendment to the Denial of Access Complaint. Colleen O’Dea (On Behalf of NJ Spotlight) v. New Jersey Department of Treasury, 2012-109 – Findings and Recommendations of the Executive Director

Analysis⁶

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.

Part of the OPRA analysis requires a determination as to whether a custodian was in possession of responsive records at the time of an OPRA request.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian’s certification. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access.”

Here, the Complainant argued that the records at issue are State records and should be provided by DOT. The Complainant further argued that although she does not know why the records were forwarded to the USDA, this should not be the reason access to the records is denied.

In the SOI, the Custodian certified that on several occasions, DOT attempted to obtain the responsive records from the USDA and that Mr. Joshua ultimately advised that the records would not be returned to DOT based on confidentiality concerns. Counsel, in support of the Custodian’s position, argued that the Custodian went above and beyond OPRA to attempt to provide access to the records; however, the USDA would not return same and thus no records responsive to the Complainant’s OPRA request exist at DOT.

The evidence of record supports that DOT forwarded the responsive records to the USDA prior to the Complainant’s OPRA request and kept no copies on file. Regardless of the Complainant’s questions as to why the records were forwarded to the USDA, DOT relinquished control of the records and was no longer in possession of same at the time of the Complainant’s OPRA request. Additionally, the Custodian certified to this fact in the SOI and further certified to his failed attempts to obtain the records from the USDA.

The Custodian did not unlawfully deny access to the requested records since the Custodian initially responded and subsequently certified in the SOI that no responsive records to the Complainant’s OPRA request exist because the records were held by the USDA and because

⁶ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

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the Complainant did not submit any evidence to refute the Custodian's certification. See Pusterhofer, *supra*.

Additionally, this complaint raises the question of whether the GRC has the authority to order a Federal agency to provide records back to a State agency that referred same, for disclosure pursuant to an OPRA request. The GRC has previously determined that a Federal agency is not subject to the provisions of OPRA based on OPRA's comprehensive definition of a "public agency." See Hwang v. Ridgewood Post Office, GRC Complaint No. 2012-117 (April 2012). Moreover, the Freedom of Information Act ("FOIA") governs access to records of a Federal agency.

Here, the USDA was created under 7 USC § 2201 and placed in the executive branch of the Federal government pursuant to 7 USC § 2202. Thus, access to records is governed by FOIA and not OPRA. The GRC has no authority over the actions of Federal agencies regarding access to records in their possession. N.J.S.A. 47:1A-7(b).

Therefore, the GRC does not have the authority to order the USDA to provide the responsive records back to DOT so that the Custodian may comply with the Complainant's OPRA request because the USDA is a Federal agency subject only to the provisions of FOIA and not OPRA., N.J.S.A. 47:1A-7(b).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to the requested records since the Custodian initially responded and subsequently certified in the Statement of Information that no responsive records to the Complainant's OPRA request exists because the records were held by the United States Department of Agriculture and because the Complainant did not submit any evidence to refute the Custodian's certification in this regard. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. The GRC does not have the authority to order the United States Department of Agriculture to provide the responsive records back to New Jersey Department of Treasury so that the Custodian may comply with the Complainant's OPRA request because the United States Department of Agriculture is a Federal agency subject only to the provisions of Freedom of Information Act and not OPRA., N.J.S.A. 47:1A-7(b).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013