



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

April 29, 2014 Government Records Council Meeting

Stephen Jacob Smith
Complainant

Complaint No.: 2013-226

v.

New Jersey Transit
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council ("Council") considered the April 22, 2014 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 lawfully denied the Complainant access to the requested records because the Custodian has certified that no records responsive to the Complainant's OPRA request exist, and there is no evidence in the record to refute the Custodian's certification. N.J.S.A. 47:1A-6; 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 29th Day of April, 2014

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, 2014



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2014 Council Meeting**

**Stephen Jacob Smith¹
Complainant**

GRC Complaint No. 2013-226

v.

**New Jersey Transit²
Custodial Agency**

Records Relevant to Complaint: A full copy of the major investment study (“MIS”) for the Access to the Region’s Core (“ARC”) project.

Custodian of Record: Meghan Clark Umukoro
Request Received by Custodian: July 15, 2013
Response Made by Custodian: July 24, 2013
GRC Complaint Received: August 12, 2013

Background³

Request and Response:

On July 15, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 24, 2013, seven (7) business days later, the Custodian responded in writing stating that no final complete MIS exists, and that NJ TRANSIT is in possession of documents that are advisory, consultative, or deliberative (“ACD”) and therefore not public records releasable under OPRA.

Denial of Access Complaint:

On August 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that there is in fact a completed ARC MIS. The Complainant notes that there are references to a completed MIS in a NJ TRANSIT press release, a Federal Transit Administration (“FTA”) notice in the Federal Register, and NJ TRANSIT board meeting minutes from July 2005, each of which he submitted to the GRC. The Complainant states that a MIS must be completed under federal law prior to the beginning of a the construction phase of a project like ARC, and that Metropolitan Transit

¹ No legal representation listed on record.

² Represented by Jason Frankiewicz, Esq. (Newark, N.J.).

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.

Authority (“MTA”) employees have told him that the MIS was completed. Lastly, the Complainant argues that the existence of an executive summary (“Summary Report”) suggests that there is a longer MIS.

Statement of Information:

On September 30, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on July 15, 2013 and responded on July 24, 2013. The Custodian further certifies that the Summary Report the Complainant possesses is the final report referenced in all public statements submitted by the Complainant. The Custodian notes that the Summary Report was submitted to, and met the requirements of, the FTA. The Custodian states that a search by NJ TRANSIT staff determined that no thousand-plus page MIS exists in NJ TRANSIT’s records, but that the Port Authority of New York and New Jersey (“Port Authority”) was the project manager and was responsible for retaining the master files. The Custodian further states that, while NJ TRANSIT possesses drafts of sections that could have been included in the MIS, the Summary Report is the final full version of the MIS produced and submitted to the FTA.

Additional Submissions:

On February 4, 2014, the GRC requested additional information from both the Custodian and the Complainant.

On February 10, 2014, the Complainant responded to the below questions with the certification that follows:

1. Do you have, or are you aware of, any documents or information showing that NJ TRANSIT, the Port Authority, or the MTA possessed a “full,” longer version of the MIS report, rather than only the Summary Report, at any point subsequent to the completion of the MIS in 2003?
2. Do you have, or are you aware of, any documents or information showing that NJ TRANSIT possessed a “full” version of the MIS report, rather than only the Summary Report, at the time of your July 15, 2013 OPRA request?

The documents I have already submitted to you clearly state that a “major investment study” was done. A major investment study is not an idle phrase, but rather a term of art to refer to an investment-grade study – something thousands of pages long, which could be summarized in 30-something pages (the document that is already public), but is not *only* a document the length [of] the Summary Report.

Notice the language of “done” and “completed” in the documents I originally furnished as evidence – a full study was produced, not a draft or merely a summary of unfinished work (which would be termed a “preliminary” report). So

at one point, the entities which created it – NJ Transit, the Port Authority and the MTA – self-evidently possessed a copy of it.

However I am told that in 2012 Tina Lado, the Port Authority's Director [of] Government & Community Relations, told Joe Clift (former LIRR director of planning, now a member of the Lackawanna Coalition and NJ Assoc. of Railroad Passengers) that the “full” documents (which I'm told are on the order of 1,600 pages) were in the Port Authority's Planning Dept. Archives. So the Port Authority had the documents until at least 2012. (I hope they did not misplace them since then?)

If NJ Transit has not lost them, those “full” documents are somewhere in their archives as well, since they were obviously also involved in the project. David Widawsky, a Port Authority employee, edited the “full” document into the summary report that the Port Authority, NJT and the MTA then stamped their names onto it and then released it.

As you can see, the Summary Report that was released is . . . well, a summary. It *summarizes* something. That “something” is the 1,600-or-so-page document, whose creation was contracted out to the Port Authority, NJ Transit and the MTA to Parsons Brinckerhoff (I know that Paul Mosier, a PB employee, was the manager of that project), and which in 2012 (and hopefully still today) was in the Port Authority's Planning Dept. Archives.

Certification of Stephen Jacob Smith, dated February 10, 2014.

On February 12, 2014, the Custodian provided the following certification:

1. Does there exist a longer, if not “final,” MIS report that underlies the Summary Report?

Answer: There is not a longer full final, or draft, MIS report. NJ TRANSIT only possesses draft sections/technical memoranda.

2. If a longer MIS report exists, or existed, did NJ TRANSIT ever have possession of such a report?

Answer: See response to number 1.

3. If a longer MIS report exists, or existed, is such a report in the possession of the Port Authority, the MTA, or the FTA?

Answer: See response to number 1.

4. If a longer MIS report exists, or existed, was such a report ever publically available?

Answer: See response to number 1.

5. What is the nature of the documents that NJ TRANSIT asserts are “advisory, consultative, or deliberative” in its July 24, 2013 letter to the Complainant, and why are those documents covered by this OPRA exception?

Answer: Draft sections/technical memoranda that were not finalized. These draft sections did not become part of the Summary MIS report. The FTA reviewed and accepted the receipt of the Summary MIS Report.

Certification of Meghan Clark Umukoro, dated February 12, 2014.

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.

The Council has consistently found that no denial of access occurred when a custodian demonstrates 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. Id. The Custodian subsequently certified that no records responsive to the Complainant’s request existed, and the Complainant submitted no evidence to refute said certification. Id. 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. Id.

Here, the Complainant requested the “full” MIS done for the ARC project. As in Pusterhofer, the Custodian has certified that, in light of a search done by NJ TRANSIT staff, there is no “full,” longer MIS responsive to the Complainant’s request in the possession of NJ TRANSIT. The Custodian additionally certified that that “completed” or “final” MIS report referenced in the documents submitted by the Complainant is the Summary Report, which was accepted by the FTA and is in the Complainant’s possession.

While the Custodian’s initial response stated first that no longer MIS exists and then that NJ TRANSIT “is in possession of [ACD] documents,” the Custodian’s later certification explained that the ACD materials referenced are draft sections and technical memoranda that did not become part of the Summary Report. Thus, whether or not these materials are in fact exempt from disclosure under N.J.S.A. 47:1A-1.1, the documents are not responsive to the Complainant’s request for “the full copy of the [MIS] for the [ARC] project”

Notably, the Complainant states that the Port Authority had a 1,600 page report in its archives as of 2012 and, therefore, that “full” set of documents must be in “[NJ TRANSIT’s] archives as well, since they were obviously also involved in the project. [A Port Authority employee] edited the ‘full’ document into the summary report that the Port Authority, [NJ TRANSIT] and the MTA then stamped their names onto” Regardless of whether the Summary Report represents the distillate of a “full” report that at one point did exist in the Port Authority’s archives,⁴ it is evident from the Custodian’s certifications that such a document was not in NJ TRANSIT’s possession at the time of the Complainant’s OPRA request.

Therefore, the Custodian lawfully denied the Complainant access to the requested records because the Custodian has certified that no records responsive to the Complainant’s OPRA request exist, and there is no evidence in the record to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC (2005-49).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied the Complainant access to the requested records because the Custodian has certified that no records responsive to the Complainant’s OPRA request exist, and there is no evidence in the record to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

April 22, 2014

⁴ The Port Authority, a bi-state agency, is subject to the Freedom of Information Act, not OPRA. See Frey v. DVRPC, GRC Complaint No. 2012-139.