



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 27, 2019 Government Records Council Meeting

Jeffrey W. Sauter
Complainant

Complaint No. 2013-239

v.

Township of Colts Neck (Monmouth)
Custodian of Record

At the August 27, 2019 public meeting, the Government Records Council (“Council”) considered the August 20, 2019 Supplemental 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 Council should accept the Honorable Joseph A. Ascione’s, Administrative Law Judge, Initial Decision “**CONCLUD[ING]** that the Complainant] has abandoned the prosecution of this petition.” *Id.* at 7. Further, the Council should accept the ALJ’s order that this complaint be “**DISMISSED.**” Thus, no further adjudication is required.

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 27th Day of August 2019

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: August 29, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 27, 2019 Council Meeting**

**Jeffrey W. Sauter¹
Complainant**

GRC Complaint No. 2013-239

v.

**Township of Colts Neck (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Colts Neck Fire Company No. 2's ("Fire Company's") monthly business meeting sign-in sheets for the year 2012.

Custodian of Record: Robert Bowden

Request Received by Custodian: July 18, 2013; July 29, 2013

Response Made by Custodian: July 25, 2013; August 6, 2013; August 16, 2013

GRC Complaint Received: August 26, 2013

Background

September 30, 2014 Council Meeting:

At its September 30, 2014 public meeting, the Council considered the September 23, 2014 Supplemental 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, found that:

[T]he Custodian failed to establish that the complaint should be reconsidered based on new evidence. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Council's June 24, 2014 Interim Order found that this complaint presented issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request or at the time of the Custodian's subsequent certifications. These questions still exist and, as Counsel points out, are joined by uncertainties as to when, how, and to what extent the Complainant gained access to the sought sign-in sheets. Thus, the Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of The Petition Of

¹ No legal representation listed on record.

² Represented by David A. Clark, Esq., of Gluck, Walrath, LLC. (Red Bank, NJ). Represented by Christopher Ackerman, Esq. (Red Bank, N.J.).

Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). As such, the Council's June 24, 2014 Interim Order still stands: this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

Procedural History:

On October 1, 2014, the Council distributed its Interim Order to all parties. On February 11, 2015, the Government Records Council ("GRC") transmitted this complaint to the Office of Administrative Law ("OAL").

On August 8, 2019, the Honorable Joseph A. Ascione, Administrative Law Judge ("ALJ"), issued an Initial Decision:

CONCLUD[ING that the Complainant] has abandoned the prosecution of this petition. [The Complainant] has failed to show the necessary elements to succeed on his claim, and has failed to request additional time from the [OAL] to reschedule a hearing to take appropriate additional testimony. The [OAL] is unable to conclude [the Complainant] met his burden of proof to show a violation of the OPRA request."

[Id. at 7.]

The ALJ further "**ORDER[ED]** that the petition be **DISMISSED.**" Id.

Analysis

Administrative Law Judge's Initial Decision

The Administrative Procedures Act ("APA") provides that:

The head of the agency, upon a review of the record submitted by the [ALJ], shall adopt, reject or modify the [Initial Decision] no later than 45 days after receipt of such recommendations . . . Unless the head of the agency modifies or rejects the report within such period, the decision of the administrative law judge shall be deemed adopted as the final decision of the head of the agency.

[N.J.S.A. 52:14B-10(c).]

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the

administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989) (certif. denied 121 N.J. 615 (1990)). The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ’s unique position and ability to make demeanor-based judgments.” Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ’s credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ’s recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep’t of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” Id. at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

In the matter currently before the Council, the ALJ’s Initial Decision, set forth as “Exhibit A,” determined that:

I FIND the following as **FACT**:

1. There was an OPRA request by the [Complainant] for documents that appears to have existed.
2. Substitute documents were provided to [Complainant] timely. They were not the documents [the Complainant] requested.
3. [The Custodian] alleges they provided all the available documents.
4. [The Custodian] does not deny that the documents existed.
5. [The Custodian] alleges the documents are no longer available, but cannot explain their absence.

An Order issued on June 13, 2019, from [the OAL] requesting [the Complainant] to advise [it] whether he would withdraw the matter, or request an additional hearing date. [The Complainant] provided the [OAL] no communication.

...

Regretfully, here [the Complainant] and [Custodian] failed to produce for testimony any representative of the Fire Company with knowledge of the disappearance of the documents requested.

[The OAL] cannot determine presently whether a violation exists. The [Complainant] and [Custodian] determined after the start of the hearing to end the testimony. The [Complainant] represented himself *pro se*, accordingly, [the OAL] desires to accommodate the [Complainant], in the event he misunderstands the implications of his prior decision. [The OAL] cannot conclude the . . . Township violated his OPRA request. However, additional testimony may prove that allegation.

[The OAL] did not receive any contact after the June 13, 2019 Order, in the absence of contact from the [Complainant], compels me to **CONCLUDE** [the Complainant] has abandoned the prosecution of this petition. [The Complainant] has failed to show the necessary elements to succeed on his claim, and has failed to request additional time from the [OAL] to reschedule a hearing to take appropriate additional testimony. The [OAL] is unable to conclude [the Complainant] met his burden of proof to show a violation of the OPRA request.

[Id. at 5-7.]

Based on the foregoing, the ALJ “**ORDER[ED]** that the petition be **DISMISSED.**” Id. at 7.

Here, the ALJ fairly summarized the evidence, explaining how he weighed the proofs before him and explaining why he arrived at the conclusion that the Complainant abandoned this complaint. The ALJ’s conclusions are aligned and consistent with those determinations. As such, the GRC is satisfied that it can ascertain which evidence the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ’s conclusions.

Therefore, the Council should accept the ALJ’s Initial Decision “**CONCLUD[ING]** that the Complainant] has abandoned the prosecution of this petition.” Id. at 7. Further, the Council should accept the ALJ’s order that this complaint be “**DISMISSED.**” Thus, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should accept the Honorable Joseph A. Ascione’s, Administrative Law Judge, Initial Decision “**CONCLUD[ING]** that the Complainant] has abandoned the prosecution of this petition.” Id. at 7. Further, the Council should accept the ALJ’s order that this complaint be “**DISMISSED.**” Thus, no further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

August 20, 2019



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. GRC 02154-15

AGENCY DKT. NO. 2013-239

JEFFREY W. SAUTER,

Petitioner,

v.

TOWNSHIP OF COLTS NECK

(MONMOUTH),

Respondent.

Jeffrey W. Sauter, petitioner, pro se

David A. Clark, Esq., for respondent (Gluck Walrath, LLC, attorneys)

BEFORE **JOSEPH A. ASCIONE**, ALJ:

Record Closed: July 30, 2019

Decided: August 8, 2019

STATEMENT OF THE CASE

GRC Complaint No. 2013-239

On July 18, 2013, the petitioner, Jeffrey W. Sauter (Sauter) submitted¹ an Open Public Records Act (OPRA) request seeking; 1) Colts Neck Fire Company No. 2 (Fire Company) business meeting sign-in sheets for 2012, and 2) Fire Company drill

¹ The request is dated July 16, 2013.

attendance sheets for 2012. The respondent, Township of Colts Neck, (CN Township), timely responded on July 25, 2013, the response a denial of the CN Township's possession of the records requested, some Fire Company business records were provided, but not copies of the original sign-in sheets. On July 26, 2013, Sauter, corresponded with CN Township advising the provided documents did not meet the OPRA request and pointed out some irregularities in the documents provided.

Petitioner questions whether the volunteers were receiving the appropriate recognition of attendance under the Length of Service Awards Program (LOSAP) which the CN Township taxpayers funded. Sauter attempted to compare the amount the Fire Company and CN Township were crediting the volunteers against the actual attendance at functions. The CN Township received the correspondence on July 29, 2013, and responded on August 6, 2013, advising that items were not in the possession of CN Township, but requested same from the Fire Company. A one-week extension of time was requested to obtain the information. Sauter's August 7, 2012, response questioned the length of time already consumed, the absence of one month's records, and the questioned authenticity of the documents provided. On August 15, 2013, Chris Quincannon (Quincannon), the President of the Fire Company, responded to the custodian of records, Robert Bowden (Bowden), an extensive search was conducted, and to the best of his knowledge all documents within their possession have been surrendered to you. On August 16, 2013, Bowden advised same to Sauter. On August 20, 2013, this complaint ensued, which was filed with the Government Records Counsel (GRC) on August 26, 2013. Subsequent information developed that the petitioner had copies of some of the records, but the CN Township claimed it could not explain the absence of the alleged documents, but it did not have them and had no knowledge of why or how they were missing.

PROCEDURAL HISTORY

At its June 24, 2014 meeting, the GRC considered the matter after review of the June 17, 2014 Initial Findings and Recommendations of the Executive Director. The GRC then issued its Interim Order distributing same on June 25, 2014. The CN Township Custodian requested extensions of time to seek reconsideration of the Order. The CN

Township requested reconsideration on July 24, 2014. On September 30, 2014, reconsideration resulted in development of the unexplained absence of the documents. The case was transmitted to the Office of Administrative Law (OAL) on February 11, 2015, pursuant to N.J.S.A. 52:14B-1 to -15, and N.J.S.A. 52:14F-1 to -23, for a hearing under N.J.A.C. 1:1-1.1 to -21.6. On February 12, 2015, the OAL received the transmittal. The assignment to the undersigned occurred on or about January 6, 2017². An initial telephone conference was conducted on March 22, 2017, and a scheduled hearing in the matter was set for August 7 and 11, 2017. An adjournment request resulted in the first hearing date occurring on September 5, 2017. At that hearing, petitioner had not subpoenaed any witnesses and he could not present his full case. The matter was carried for a hearing in January 2018, counsel for respondent departed the firm and a new counsel took over the matter. A request to adjourn the January hearing date was granted with petitioner's consent. The matter was set for a May 2018 hearing date, at a telephone conference prior to the hearing date, petitioner advised that he desired to submit the record as it presently existed. The parties were given an opportunity to brief any issues. Respondent provided a brief on July 19, 2018, petitioner made no further submissions. The record closed on July 23, 2018. The undersigned's health interfered and resulted in a six-month medical absence. The Acting Director of the OAL, granted extensions of time on September 6, October 22, December 6, 2018, January 22, 2019, March 8, 2019, April 22, 2019. Regretfully, the undersigned must reopen the matter for additional action of the part of petitioner.

DISCUSSION

This tribunal has been unable to answer the questions posed by the GRC. In 2012, there appears to have been a sign-in sheet for the volunteer Fire Company No. 2, whenever they had a regular meeting and or a drill meeting. These meetings occurred monthly. The sign-in sheets and/or a roll call were used by the Fire Company captain to credit donated time to the individual volunteer recipients of the LOSAP. The CN Township

² The previously assigned ALJ received the file in March 2015. The undersigned cannot explain the almost two-year delay in the initial conference. In the record there is reference to a Superior Court action by petitioner. The undersigned does not know if the other litigation resulted in placing this matter on the inactive list for a period of time before the undersigns receipt of this file; however, no inactive orders were discovered.

provided the documents the Fire Company provided to them. These documents were compiled by the Captain Joseph Panetta. Unfortunately, we never heard testimony from Panetta as to whether he had the sign-in sheets at the time he prepared the LOSAP time allocation for the volunteers to the CN Township. The sign-in sheets allegedly disappeared. Quincannon provided the Custodian a certification that he did not possess the documents. Quincannon did not testify. The only representative of the CN Township to testify was the custodian, Bowden, who could only say he only had the documents supplied by the Fire Company.

Petitioner had former Fire Captain Peter Wagar testify to the procedure he used previous to 2012, but he could not personally testify to the procedure Captain Panetta used. By sometime in 2013, the Fire Company allegedly determined not to use sign-in sheets.

Sauter testified the initialed sign-in sheets were the documents he sought. None of them were provided. It appears that in 2012, they existed, as some five unauthenticated copies, were provided to the GRC. They covered meetings through the month of June 2012. Respondent challenge these going into evidence as they were not authenticated. They, however, appear to have signatures of various attendees, signed in different signatures. Sauter did not testify that he signed the proposed document, so this tribunal is constrained to admit them in evidence at this juncture. Sauter also identified that eighty-four percent of the LOSAP credits had to be adjusted as a result of a review of the records.

Sauter does have the burden of proof to prove his case. However, documenting the sign-in sheets existed, shifts the burden to the CN Township to better explain why the documents are unavailable. Respondent's substitute counsel's failure to present the appropriate caretaker of the Fire Company records to explain as best they can why records disappeared is disappointing. This tribunal advised petitioner and counsel at the hearing that my concern was the GRC would remand the matter to the undersigned if this tribunal could not complete the fact finding.

The parties have determined to proceed on the record as it stands. This tribunal accordingly cannot determine if the Fire Company failed to provide CN Township and petitioner with the records requested because they disappeared, or where the result of an intentional violation of the OPRA request.

There was no testimony explaining the absence of the documents which appears to have existed, just that they no longer exist.

FINDINGS OF FACT

I **FIND** the following as **FACT**:

1. There was an OPRA request by the petitioner for documents that appears to have existed.
2. Substitute documents were provided to petitioner timely. They were not the documents petitioner requested.
3. Respondent alleges they provided all the available documents.
4. Respondent does not deny that the documents existed.
5. Respondent alleges the documents are no longer available, but cannot explain their absence.
6. An Order issued on June 13, 2019, from this tribunal requesting petitioner to advise the tribunal whether he would withdraw the matter, or request an additional hearing date. Petitioner provided the tribunal no communication.

CONCLUSIONS OF LAW

OPRA

“Government records shall be readily accessible for inspection, copying or examination by the citizens of this State, with certain exceptions, for the protection of the public interest.” N.J.S.A. 47:1A-1. Procedurally, a custodian must grant access to a government record, or deny a request for access to the government record, as soon as possible, but no later than seven business days after receiving the request, provided the record is readily available and not in storage or archived. N.J.S.A. 47:1A-5(g). The response must also be in writing. See N.J.S.A. 47:1A-5(i). If the custodian fails to respond within those seven days, the failure to respond is deemed a denial of the request. N.J.S.A. 47:1A-5(g). Here the CN Township custodian could not timely produce the documents as the Fire Company claimed all the available documents were provided. They cannot explain the absence of documents which appear to have been made in the ordinary course of business.

A person who is denied access may challenge the decision in Superior Court or file a complaint with the GRC. N.J.S.A. 47:1A-6. During the proceeding, the public agency bears the burden of proving that the denial of access is authorized by law. Ibid. Any public official, officer, employee, or custodian who knowingly and willfully violates the act, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to civil penalties. N.J.S.A. 47:1A-11. Appropriate disciplinary proceedings may also be initiated against the public official, officer, employee, or custodian against whom the penalty has been imposed. Ibid.

Regretfully, here petitioner and respondent failed to produce for testimony any representative of the Fire Company with knowledge of the disappearance of the documents requested.

Accordingly, this tribunal cannot determine presently whether a violation exists. The petitioner and respondent determined after the start of the hearing to end the testimony. The petitioner represented himself pro se, accordingly, this tribunal desires to accommodate the petitioner, in the event he misunderstands the implications of his prior decision. This tribunal cannot conclude the CN Township violated his OPRA request. However, additional testimony may prove that allegation.

CONCLUSION

This tribunal, did not receive any contact after the June 13, 2019 Order, in the absence of contact from the petitioner, compels me to **CONCLUDE** petitioner has abandoned the prosecution of this petition. Petitioner has failed to show the necessary elements to succeed on his claim, and has failed to request additional time from the tribunal to reschedule a hearing to take appropriate additional testimony. The tribunal is unable to conclude petitioner met his burden of proof to show a violation of the OPRA request.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the petition be **DISMISSED**.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



August 8, 2019 _____

DATE

JOSEPH A.ASCIONE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

Peter Wagar
Robert Bowden
Jeffrey Sauter

For Respondent:

None

EXHIBITS IN EVIDENCE

Tribunal

C-1 GRC TRANSMITTAL DOCUMENTS

Petitioner's Exhibits

P-10 OPRA request
P-11 Part of GRC TRANSMITTAL records
P-12 Part of GRC TRANSMITTAL records
P-13 Part of GRC TRANSMITTAL records
P-14 Part of GRC TRANSMITTAL records
P-15 Part of GRC TRANSMITTAL records
P-16 Part of GRC TRANSMITTAL records
P-17 Part of GRC TRANSMITTAL records
P-18 Part of GRC TRANSMITTAL records
P-19 Part of GRC TRANSMITTAL records
P-20 Part of GRC TRANSMITTAL records
P-21 Part of GRC TRANSMITTAL records
P-22 Part of GRC TRANSMITTAL records

Respondent's Exhibits

R-1 Township Statement of Information



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

INTERIM ORDER

September 30, 2014 Government Records Council Meeting

Jeffrey W. Sauter
Complainant

Complaint No. 2013-239

v.

Township of Colts Neck (Monmouth)
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 2014 Supplemental 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 Executive Director respectfully recommends the Council find that the Custodian failed to establish that the complaint should be reconsidered based on new evidence. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Council’s June 24, 2014 Interim Order found that this complaint presented issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant’s request or at the time of the Custodian’s subsequent certifications. These questions still exist and, as Counsel points out, are joined by uncertainties as to when, how, and to what extent the Complainant gained access to the sought sign-in sheets. Thus, the Custodian’s request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). As such, the Council’s June 24, 2014 Interim Order still stands: this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.



Interim Order Rendered by the
Government Records Council
On The 30th Day of September, 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: October 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting

Jeffrey W. Sauter¹
Complainant

GRC Complaint No. 2013-239

v.

Township of Colts Neck (Monmouth)²
Custodial Agency

Records Relevant to Complaint: Colts Neck Fire Company No. 2's ("Fire Company's") monthly business meeting sign-in sheets for the year 2012.

Custodian of Record: Robert Bowden

Request Received by Custodian: July 18, 2013; July 29, 2013

Response Made by Custodian: July 25, 2013; August 6, 2013; August 16, 2013

GRC Complaint Received: August 26, 2013

Background

June 24, 2014 Council Meeting:

At its June 24, 2014 public meeting, the Council considered the June 17, 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, found that there are issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request, or at the time of the Custodian's subsequent certifications, this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

Procedural History:

On June 25, 2014, the Council distributed its Interim Order to all parties. On July 8, 2014, the Custodian requested an extension of time until July 18, 2014 to submit a request for reconsideration. On July 8, 2014, the GRC granted this request. On July 16, 2014, the Custodian

¹ No legal representation listed on record.

² Represented by Christopher Ackerman, Esq. (Red Bank, N.J.).

sought additional time until July 25, 2014 to submit a request for reconsideration, stating that he had only just received relevant documents related to a matter filed by the Complainant in Superior Court. On July 16, 2014, the GRC granted this request.

On July 24, 2014, the Custodian filed a request for reconsideration of the Council's June 24, 2014 Interim Order based on new evidence. On August 4, 2014, the Complainant submitted a response to the Custodian's request for reconsideration.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian filed the request for an extension of time to seek reconsideration of the Council's Order dated June 24, 2014 on July 8, 2014, eight (8) days from the issuance of the Council's Order. The Custodian sought a second extension on July 16, 2014 until July 25, 2014. The GRC granted these requests, and the Custodian filed his request for reconsideration on July 24, 2014.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or

irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384.

Here, Counsel for the Custodian ("Counsel") reiterates that the Custodian certified in his SOI that all of the documents in the Township's possession were provided to the Complainant. Counsel points out that the Township is not claiming that the sign-in sheets sought by the Complainant do not or did not exist; rather, Counsel states that these documents are missing and the Township does not know where they are. Additionally, Counsel argues that the fact that the Complainant obtained five (5) of the requested sign-in sheets from an unidentified member of the Fire Company does not prove that the Township or Fire Company have withheld records. Instead, Counsel contends that the Complainant should identify the source of these sign-in sheets to the GRC so that the Township can determine if the documents were stolen, if the Complainant has all of the requested documents in his possession, or if the Complainant has access to all of the requested documents. *Citing Bart v. City of Paterson Hous. Auth.*, 403 N.J. Super. 609 (App. Div. 2008).

Further, Counsel argues that the additional certification provided by the Complainant only establish that it was the practice of the Fire Company to utilize the requested sign-in sheets. Counsel advances that these documents are not in the possession of the Township or the Fire Company due to their unwanted removal, and that the Complainant should be forthcoming with any knowledge he has relating to the documents' disappearance.

The Complainant, in turn, certified in his response that he possesses copies of only five (5) of the sign-in sheets, that he has no knowledge of the whereabouts of the original documents, and that he played no part in the removal of the records.

The Custodian failed to establish that the complaint should be reconsidered based on new evidence. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. The Council's June 24, 2014 Interim Order found that this complaint presented issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request or at the time of the Custodian's subsequent certifications. These questions still exist and, as Counsel points out, are joined by uncertainties as to when, how, and to what extent the Complainant gained access to the sought sign-in sheets. Thus, the Custodian's request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6. As such, the Council's June 24, 2014 Interim Order still stands: this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian failed to establish that the complaint should be reconsidered based on new evidence. The

Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Council's June 24, 2014 Interim Order found that this complaint presented issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request or at the time of the Custodian's subsequent certifications. These questions still exist and, as Counsel points out, are joined by uncertainties as to when, how, and to what extent the Complainant gained access to the sought sign-in sheets. Thus, the Custodian's request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). As such, the Council's June 24, 2014 Interim Order still stands: this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

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

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 24, 2014 Government Records Council Meeting

Jeffrey W. Sauter
Complainant

Complaint No. 2013-239

v.

Township of Colts Neck (Monmouth)
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 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 as there are issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant’s request, or at the time of the Custodian’s subsequent certifications, this complaint should be referred to OAL for a determination of whether the lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 24th Day of June, 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: June 25, 2014



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Jeffrey W. Sauter¹
Complainant**

GRC Complaint No. 2013-239

v.

**Township of Colts Neck (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Colts Neck Fire Company No. 2's ("Fire Company's") monthly business meeting sign-in sheets for the year 2012.

Custodian of Record: Robert Bowden

Request Received by Custodian: July 18, 2013; July 29, 2013

Response Made by Custodian: July 25, 2013; August 6, 2013; August 16, 2013

GRC Complaint Received: August 26, 2013

Background³

Request and Response:

On July 16, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. The Custodian received this request on July 18, 2013. On July 25, 2013, five (5) business days later, the Custodian responded in writing stating that the requested records were ready for pick-up. On July 26, 2013, the Complainant wrote to the Custodian re-submitting his original OPRA request and stating that not all of the requested documents had been provided. The Custodian received this request on July 29, 2013. On August 6, 2013, six (6) business days later, the Custodian responded stating that the Township of Colts Neck ("Township") did not have the requested documents but seeking an extension of time until August 16, 2013 so that the Fire Company could provide the requested documents. On August 7, 2013, the Complainant replied asking that the documents be provided as soon as possible. On August 16, 2013, the Custodian advised the Complainant that he had requested the documents from the Fire Company, and provided a letter from the Fire Company stating that "all documents that are in our possession have been surrendered"

¹ No legal representation listed on record.

² Represented by Christopher Ackerman, Esq. (Red Bank, 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.

Denial of Access Complaint:

On August 26, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he requested the “sign-in sheets” of the Fire Company’s monthly business meetings but, in fact, received the “call sheets” that are not the official records of meeting attendance. The Complainant also asserts that he has documents for eleven (11) of twelve (12) of the Fire Company’s business meetings, and that three (3) of the twelve (12) “call sheets” he received may not be authentic. The Complainant argues that the Custodian’s statements that he had asked that the Fire Company provide the requested documents suggest that the documents do exist. The Complainant also contends that the Custodian did not respond to his requests within the seven (7) business day statutory period.

Statement of Information:

On January 7, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on July 18, 2013 and provided all records that he received from the Fire Company on July 25, 2013. The Custodian further certifies that, following his receipt of the Complainant’s July 26, 2013 letter stating that “business meeting sign-in sheets for 2012” were not turned over, he requested an extension of time and, on August 16, 2013, wrote again stating that an extensive search conducted by the Fire Company had indicated that the documents previously provided to the Township constituted the entire record within the Fire Company’s possession. The Custodian certifies that the requested business meeting sign-in sheets are not in the possession of the Township or Fire Company. The Custodian also provided a certification from Fire Company President Chris Quincannon that certifies same.

The Custodian states that he requested the records from the Fire Company because it is a separate entity from the Township and, as such, the Township does not maintain control of its records. The Custodian argues that all responses were timely provided to the Complainant. The Custodian also contends that the Complainant’s request is overly broad and that custodians are not required to conduct research or create new records in response to an OPRA request. *Citing N.J. Builders Ass’n v. N.J. Council on Affordable Hous.*, 390 N.J. Super. 166, 180 (App. Div. 2007); *Bent v. Twp. of Stafford Police Dep’t*, 381 N.J. Super. 30, 37 (App. Div. 2005).

Additional Submissions:

On January 23, 2014, the Complainant provided a response to the Custodian’s SOI. The Complainant contends that the requested records are created by the Fire Company in the normal course of business. The Complainant certifies that he has been a member of the Fire Company for twenty (20) years, and that “the member sign-in sheet circulated at every monthly business meeting has been standard practice for many years, and continues to my knowledge as the official record of attendance today.” The Complainant attached a certification from one Kevin Sauter, which states:

1. I am member of the [Fire Company].

2. I have been a member [the Fire Company] for more than 30 years.

....

4. I am aware that starting on or about August 16, 2006, as President of [the Fire Company], I started the standing practice of having all members sign-in as the “official” record of attendance at monthly business meetings

5. I am aware this requirement was utilized as our companies’ official attendance record for all company business meetings was standard practice from August 2006 to on or about September 18, 2013

....

Certification of Kevin Sauter, January 13, 2014.

The Complainant also provided a certification from one Peter Wagar stating that has been a member of the Fire Company for twenty-five (25) years, and that “the member sign-in sheet, circulated at every meeting, has been standard practice for many years and continues to be utilized as the ‘official’ record of attendance.” Certification of Peter Wagar, January 11, 2014.

On March 17, 2014, the Complainant provided an additional letter to the GRC. The Complainant states that on March 7, 2014 he learned that certain Length of Service Award Program “LOSAP” payments had been made by the Township. The Complainant contends that the requested documents must exist, contrary to the Custodian’s assertions, because such documents are necessary for the Township to authorize the “LOSAP” payments.

On May 1, 2014, the Complainant provided a final letter to the GRC. With it, the Complainant provided to the GRC five (5) of the requested 2012 business meeting sign-in sheets. The Complainant states that these documents were provided to him in a confidential manner by another member of the Fire Company. The Complainant asserts that the discovery of these documents show that the requested records were knowingly and willfully not disclosed.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

⁴ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Here, the Custodian responded in writing five (5) days after receiving the Complainant's initial request stating that the requested documents could be picked up. The Custodian then replied six (6) business days after receiving the Complainant's second request for the 2012 business meeting sign-in sheets by seeking an extension of time to respond until August 16, 2013. On August 16, 2013, the Custodian again responded to the Complainant, this time by stating that the Township and the Fire Company had provided all responsive records.

Therefore, the Custodian bore his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian responded in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days of receiving the request. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley, GRC 2007-11.

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.

Here, the Custodian certified that, following an extensive search, all responsive records in possession of both the Township and the Fire Company were provided to the Complainant on July 25, 2013.⁵ The Custodian provided an additional certification of same from the President of the Fire Company. The Complainant, in turn, provided three (3) certifications from current, long-serving members of the Fire Company stating that member sign-in sheets were used as the official record of attendance during the time period specified in the Complainant's request. The Complainant also provided the GRC with copies of five (5) of the requested business meeting sign-in sheets.

The Administrative Procedures Act provides that the Office of Administrative Law ("OAL") "shall acquire jurisdiction over a matter only after it has been [determined] to be a contested case by an agency head and has been filed with the [OAL] . . ." N.J.A.C. 1:1-3.2(a). Accordingly, as there are issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request, or at the time of the Custodian's subsequent certifications, this complaint should be referred to OAL for a determination of whether the lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

⁵ The GRC has twice previously determined that the Township Clerk here is responsible for the records held by the Fire Company. *See* Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2004-68 (May 2005); Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2005-07 (March 2006).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that as there are issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request, or at the time of the Custodian's subsequent certifications, this complaint should be referred to OAL for a determination of whether the lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

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

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

June 17, 2014