



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

December 16, 2014 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2014-120

v.

Franklin Township Fire District No. 1 (Somerset)
Custodian of Record

At the December 16, 2014 public meeting, the Government Records Council (“Council”) considered the December 9, 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 conflicting statements as to the existence of the requested records, this complaint should be referred to Office of Administrative Law for a determination of whether the Custodian lawfully denied access to the requested audio recordings and videos referenced in Mr. Danielsen’s January 13, 2011 e-mail, and if so to (a) order disclosure of said records if still in existence, (b) determine whether the Custodian and/or any other agency official knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11, and (c) make a determination as to whether the Complainant is a prevailing party entitled to prevailing party attorney fees pursuant to N.J.S.A. 47:1A-11.

Interim Order Rendered by the
Government Records Council
On The 16th Day of December, 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: December 17, 2014



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 16, 2014 Council Meeting**

Jeff Carter¹

GRC Complaint No. 2014-120

v.

**Franklin Township Fire District No 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: "...complete copies of the 'many audio recordings and videos' possessed by, and referenced in, the e-mail sent by Joseph F. Danielsen on January 13, 2011 at 7:35 a.m. to an effective majority of the Board of Fire Commissioners. This e-mail was disclosed as responsive to the matter of Jeff Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2012-288 et seq..."³

Custodian of Record: Timothy Szyborski
Request Received by Custodian: March 11, 2014
Response Made by Custodian: March 11, 2014
GRC Complaint Received: March 14, 2014

Background⁴

Request and Response:

On March 11, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On that same date the Custodian's Counsel responded in writing informing the Complainant that the request was denied because the records sought, if they exist, are not government records under OPRA because they were never made, maintained, kept on file or received in the course of Franklin Township Fire District No 1's ("District") official business. Counsel stated that the referenced records are in the possession of a private individual, and emphasized that the records are not, and have never been, in the District's possession.

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

³ The Complainant stated that he attached a copy of the referenced e-mail to the complaint.

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.

Denial of Access Complaint:

On March 14, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on March 10, 2014, he submitted an OPRA request to the Custodian and that the Custodian denied his request on March 11, 2014.

The Complainant, through Counsel, argues that the Custodian’s Counsel acknowledged that Mr. Danielsen possesses the audio and video recordings at issue but that he denied the request. The Complainant asserts that the subject line of Danielsen’s January 13, 2011 e-mail is “Confidential: Nelson vs. Fire District 1.” As such, the Complainant contends that the requested records are related to Nelson and that Danielsen wanted to bring the records to Richard Braslow, Esq., who is the insurance counsel in Nelson. The Complainant further contends that because Danielsen discussed the existence of the requested records with the District’s agents the week before he sent the January 13, 2011 e-mail, the records must be government records under OPRA. Through a series of hypothetical questions, the Complainant further argues that Danielsen assumed he would be reimbursed by the District for the cost of the media which contained the requested records and that the District would not reimburse a private individual for media not made in the course of its official business.

The Complainant further states that the Council has held that custodians are obligated to locate and provide responsive records from wherever they are located. The Complainant states that this holding is applicable to the instant complaint because Danielsen is the District’s information technology vendor, and as such is required to produce responsive records to a valid OPRA request. The Complainant asserts that if the requested records contain anything related to District activity, then by virtue of Danielsen’s obligation as the District’s information technology vendor the recordings are government records.

The Complainant attached a copy of Mr. Danielsen’s January 13, 2011 e-mail to the complaint. In the penultimate paragraph of the e-mail the content states, “...I have many audio recordings and videos which I want to bring to your office if we meet next week; I assume you will reimburse me for the cost of the media/DVD’s (sic).”

Statement of Information:

On April 21, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that the Custodian received the request on March 11, 2014 and responded to the request on that same date. The Custodian further certifies that the request was denied because the records the Complainant seeks, if in existence, are owned, controlled and maintained by Mr. Danielsen, who is a private individual; therefore, the records are not government records. The Custodian certifies that notwithstanding his assertion that the records are not government records, he asked Mr. Danielsen about the status of the requested records and Mr. Danielsen told him that no such records as set forth in the e-mail attached to the OPRA request existed or ever existed.

Additional Submissions:

On May 12, 2014, the Complainant's Counsel submitted a response to the SOI. Counsel states that the Custodian denied the Complainant's request because he stated that the requested records are not government records under OPRA; however, he now asserted in the SOI that the records do not exist and have never existed.

Counsel states that Mr. Danielsen is a District fire fighter as well as the District's information technology vendor, and as such on or about January 13, 2011; he was an agent of the District. Counsel states that Mr. Danielsen never provided a certification with respect to his factual existence and location of the requested records. Counsel further states that the Custodian produced no evidence to support his position that the requested records do not exist. Counsel argues that the Custodian had a legal responsibility to obtain the records as soon as their existence became known to him by way of Danielsen's January 13, 2011 e-mail.

Counsel states that it is the Complainant's position that the requested records are government records as defined in OPRA, that they do exist, that Mr. Danielsen is and was an agent of the District, and that the Complainant is entitled to the records. The Complainant's Counsel further argues, however, that if it is eventually determined that no responsive records exist, or they were destroyed, he is entitled to prevailing party attorney fees. Counsel cites Kelley v. Borough of Riverdale, Docket No. MRS-L-524-14 (April 11, 2014) in support of his position.

On May 28, 2014, the Complainant's Counsel forwarded to the GRC another submission. Claiming new evidence, Counsel submitted a copy of a bill submitted to the District from William T. Cooper, Esq. The bill indicated some of Mr. Cooper's time was spent reviewing an "e-mail from party to litigation." Counsel asserts that this provided proof to the Complainant that Mr. Cooper was paid to review Mr. Danielsen's e-mail which revealed the existence of the requested records. Counsel also complains to the GRC Executive Director that the Custodian did not submit a complete document index to the GRC in accordance with Paff v. NJ Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007), which is a pattern that the Custodian displayed in responding to other complaints filed by Jeff Carter. Counsel contends that this makes a mockery out of OPRA, the GRC and the entire judicial process.⁵

On October 24, 2014, the GRC requested that the Custodian's Counsel obtain a certification from Joseph Danielsen averring, *inter alia*, the content of the audio recordings and videos that he intended to deliver to the offices of Messrs. Braslow and Cooper that he referenced in his January 13, 2011 e-mail.

On October 30, 2014, the Custodian's Counsel forwarded to the GRC a certification prepared by Joseph Danielsen. Mr. Danielsen averred in paragraph 4 of the certification, "[a]s for the audio recordings and videos referenced in that January 13, 2011 correspondence, no such audio recordings and videos exist or ever existed..."

⁵ The Complainant's Counsel goes on to discuss other GRC complaints not relevant to the instant complaint.

On November 12, 2014, the Complainant's Counsel submitted to the GRC a rebuttal to Mr. Danielsen's October 24, 2014 certification. On November 13, 2014, the Custodian's Counsel informed the GRC that the Custodian objected to the rebuttal submitted by the Complainant's Counsel.

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.

Here, the Complaint is seeking copies of the "many audio recordings and videos" possessed by, and referenced in, the e-mail sent by Joseph F. Danielsen on January 13, 2011 at 7:35 a.m. to an effective majority of the Board of Fire Commissioners." The evidence of record reveals that Mr. Danielsen stated in the e-mail dated January 13, 2011 that he had "...many audio recordings and videos which I want to bring to [an attorney's office]..." Subsequently, on October 24, 2014, Mr. Danielsen averred in a certification that "...no such audio recordings and videos exist or ever existed..."

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 conflicting statements as to the existence of the requested records, this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested audio recordings and videos referenced in Mr. Danielsen's January 13, 2011 e-mail, and if so to (a) order disclosure of said records if still in existence, (b) determine whether the Custodian and/or any other agency official knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11, and (c) make a determination as to whether the Complainant is a prevailing party entitled to prevailing party attorney fees pursuant to N.J.S.A. 47:1A-11.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that as there are conflicting statements as to the existence of the requested records, this complaint should be referred to Office of Administrative Law for a determination of whether the Custodian lawfully denied access to the requested audio recordings and videos referenced in Mr. Danielsen's January 13, 2011 e-mail, and if so to (a) order disclosure of said records if still in existence, (b) determine whether the Custodian and/or any other agency official knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11, and (c)

make a determination as to whether the Complainant is a prevailing party entitled to prevailing party attorney fees pursuant to N.J.S.A. 47:1A-11.

Prepared By: John E. Stewart, Esq.

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

December 9, 2014