



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 28, 2015 Government Records Council Meeting

Mark Demitroff
Complainant

Complaint No. 2014-228

v.

Buena Vista Township Fire District No. 1 (Atlantic)
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 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 because the “Final Location Survey Plan” does not fall within the definition of a “government record” under OPRA, the District was under no obligation to provide same to the Complainant. Hittinger v. NJ Transit, GRC Complaint No. 2013-324 (July 2014); Owoh v. West Windsor-Plainsboro Sch. Dist. (Mercer), GRC Complaint Nos. 2014-16, *et seq.* (September 2014). Further, because the Plan is not subject to disclosure, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.

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 28th Day of July, 2015

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: July 30, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2015 Council Meeting**

**Mark Demitroff¹
Complainant**

GRC Complaint No. 2014-228

v.

**Buena Vista Township Fire District No. 1 (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Copy of the “Final Location Survey Plan” (“Plan”), dated May 11, 2010, prepared by John S. Yedinak, and referenced in a letter, dated August 3, 2011, from Churchill Engineering to the Richland Fire Volunteer Company No. 1 (“RFVC”).

Custodian of Record: Michael L. Burshtin

Request Received by Custodian: May 28, 2014

Response Made by Custodian: June 1, 2014

GRC Complaint Received: June 9, 2014

Background³

Request and Response:

On May 27, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 1, 2014, the Custodian responded in writing, stating that no responsive records exist.

Denial of Access Complaint:

On June 9, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that his OPRA request stemmed from a basin at the new Richland Fire Company facility designed to handle storm water, which he alleged has been the cause of flooding on his property. The Complainant stated that he was present when Mr. Yedinak came to the site to perform the survey in question. The Complainant questioned why the Custodian was unable to locate the Plan.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

Mark Demitroff v. Buena Vista Township Fire District No. 1 (Atlantic), 2014-228 – Findings and Recommendations of the Executive Director

Statement of Information:

On June 28, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on May 28, 2014. The Custodian affirmed that he reviewed all of the Buena Vista Fire District No. 1’s (“District”) records from 2011 and 2012 but was unable to locate the responsive record. The Custodian certified that he responded in writing on June 1, 2014, advising the Complainant that no records responsive existed.

The Custodian argued that the requested record is not a “government record” under OPRA because the District never made, maintained, received, or kept the records on file. The Custodian stated that the District awarded a contract to Churchill Consulting Engineers, a private company, to design a storm water management basin for the property on which the Richland Fire Company facility was situated. The Custodian stated that the District received the design on August 3, 2011.

The Custodian certified that the Plan was not specifically required for the project and the District never received a copy of same. The Custodian asserted that formal design plans and drawings prepared by Churchill fulfilled the scope of the work and did not mention the Plan. The Custodian further asserted that the Plan represented an internal review of Churchill’s work prior to submitting the formal plans to the District. The Custodian noted that based on his research of the GRC’s website and the GRC’s response to an inquiry, he determined that the Plan did not meet the definition of a “government record” because it represented a private company’s internal audit review.

Additional Submissions:

On June 30, 2014, the Complainant e-mailed the GRC, asserting that the Plan was not part of an internal review. The Complainant asserted that Churchill referenced same in a letter, dated August 3, 2011, to the RVFC. Further, the Complainant noted that the Pinelands Commission referenced the letter in response to public comments related to the storm water basin in another location.

On August 21, 2014, the Complainant e-mailed the GRC, asserting that both Buena Vista Township (“Township”) and the RFVC cited to the Plan as “certified” proof that same was properly constructed. The Complainant asserted that Churchill invoked the Plan to bolster his position that the basin properly met a standard. For these reasons, the Complainant argued that the Plan is not an internal record; rather, it was relied upon by Churchill and subsequently by the Township to “certify” to the Commission that the basin was properly constructed. However, the basin continues to fail, and the Plan would provide insight as to the basin’s continued failure.

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.

OPRA defines a “government record” as:

[A]ny paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file . . . or that has been received* in the course of his or its official business by any officer[.]

N.J.S.A. 47:1A-1.1. (emphasis added).

In Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the custodian claimed that records in possession of a third-party contractor executed on behalf of an agency are not subject to access. The Appellate Division reversed the Law Division’s ruling interpreting Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005) and holding that the defendant did not have to disclose the records responsive to the plaintiff’s OPRA request because the records were not in the defendant’s possession. The Court found that the trial court interpreted Bent too broadly. The Appellate Division held:

We find the circumstances in Bent to be far removed from those existing in the present matter because . . . the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply . . . relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA . . . We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.

Id. at 517.

However, in Hittinger v. NJ Transit, GRC Complaint No. 2013-324 (July 2014), the complainant sought, among other records, contracts and agreements between an advertising agency under contract with NJ Transit and vendors who contracted with said agency. The Council distinguished the facts of Hittinger from the facts present in Burnett. Specifically, in Burnett, the contractor was an insurance broker, who executed settlement agreements on behalf of the custodian. 415 N.J. Super. at 506. Conversely, in Hittinger, the Council determined that the relationship between the advertising agency and NJ Transit was not bound by, nor has any

discretion over, contracts made between the advertising agency and client vendors. Id. at 7. Moreover, the terms of the agreement between NJ Transit and Titan provided that it accepted full responsibility for the procurement of advertising. Id. at 3. The Council therefore held that NJ Transit was not obligated to obtain responsive records pertaining to agreements and communications between the advertising agency and client vendors. Id. at 7.

Additionally, in Owoh v. West Windsor-Plainsboro Sch. Dist. (Mercer), GRC Complaint Nos. 2014-16, 2014-62 & 2014-81 (September 2014), the complainant sought the personnel records of employees at private, for-profit businesses under contract by the custodian. The Council concluded that the businesses are private, for-profit entities, and “it is clear that [they] do not make or maintain their own personnel records on behalf of the District.” Id. at 8. The Council held that such records are not subject to OPRA, because they must be created and maintained “on behalf of” the custodian. Id. at 8 (*citing Burnett*, 415 N.J. Super. at 516-517).

Here, the Complainant has argued that the Plan is not an internal audit record because it is referred to and relied upon by RFVC and the Township. Additionally, the Complainant asserted that the Pinelands Commission referenced the letter in public comment responses related to the storm water basin in another location. However, the evidence does not support that the District ever received a copy of the actual Plan; the Complainant’s argument is based solely on statements made by Churchill in letters to the agencies. There is also no evidence in the record to indicate that Churchill created and maintained the Plan on behalf of the District. For this reason, the GRC is satisfied that the Plan is not a “government record,” similar to reasons cited in both Hittinger and Owoh.

Accordingly, because the Plan does not fall within the definition of a “government record” under OPRA, the District was under no obligation to provide same to the Complainant. Hittinger, GRC 2013-324; Owoh, GRC 2014-16 *et seq.* Further, because the Plan is not subject to disclosure, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the “Final Location Survey Plan” does not fall within the definition of a “government record” under OPRA, the District was under no obligation to provide same to the Complainant. Hittinger v. NJ Transit, GRC Complaint No. 2013-324 (July 2014); Owoh v. West Windsor-Plainsboro Sch. Dist. (Mercer), GRC Complaint Nos. 2014-16, *et seq.* (September 2014). Further, because the Plan is not subject to disclosure, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.

Prepared By: Ernest Bongiovanni
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

July 21, 2015