



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**

**November 14, 2017 Government Records Council Meeting**

Peter Gartner  
Complainant

Complaint No. 2016-135

v.

Borough of Middlesex (Middlesex)  
Custodian of Record

At the November 14, 2017 public meeting, the Government Records Council (“Council”) considered the November 8, 2017 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 has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request because she certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. NJ Dep’t of Educ., 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 14<sup>th</sup> Day of November, 2017

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: November 17, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 14, 2017 Council Meeting**

**Peter Gartner<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-135**

**v.**

**Borough of Middlesex (Middlesex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of all invoices and/or bills submitted by the audit firm from the Borough of Middlesex (“Borough”) Recreation Department audit and the total cost of the audit to date.

**Custodian of Record:** Kathleen Anello  
**Request Received by Custodian:** April 19, 2016  
**Response Made by Custodian:** April 21, 2016  
**GRC Complaint Received:** May 3, 2016

**Background<sup>3</sup>**

**Request and Response:**

On April 19, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 21, 2016, the second (2<sup>nd</sup>) business day after receipt of the OPRA request, Borough Treasurer Caroline Benson responded in writing on behalf of the Custodian, stating that no records existed. Ms. Benson stated that the Borough is billed a flat rate to conduct a municipal audit, which is not broken down by department. Ms. Benson stated that because all departments are part of the same audit, there is no individual cost to audit the Recreation Department.

**Denial of Access Complaint:**

On May 3, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to disclose records in violation of OPRA. The Complainant asserted that this was not the first time

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Aravind Aithal, Esq., of Bob Smith & Associates (Piscataway, NJ).

<sup>3</sup> 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.

the Borough did not disclose records he alleged would be “embarrassing in the operation of their [R]ecreation [D]epartment.” The Complainant requested that the parties who violated OPRA be “held to some standard . . . .”

#### Statement of Information:<sup>4</sup>

On May 26, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 19, 2016. The Custodian affirmed that her search consisted of sending the request to the Finance Office for review. The Custodian also certified that Ms. Benson advised that no records existed because there were no individual costs associated with the Recreation Department. The Custodian further certified that Ms. Benson responded in writing on her behalf on April 21, 2016, advising the Complainant that no records existed. The Custodian finally certified that no records responsive to the Complainant’s OPRA request existed for the reasons cited by Ms. Benson.

#### Additional Submissions:

On May 27, 2017, the Complainant sent an e-mail to the GRC, refuting the Custodian’s SOI. Therein, the Complainant argued that the Custodian submitted the SOI untimely because she did so after Borough business hours.

Further, the Complainant contended that Council President Sean Kaplan and Councilman Stephen Greco told him that the Recreation Department audit (to locate approximately \$20,000 deemed to be missing) was in addition to the municipal audit. The Complainant also contended that his wife, who is a Certified Public Accountant (“CPA”), and a friend, who is also a CPA, both assured him that an audit to find missing money would not be part of a yearly audit but instead would generate additional charges. The Complainant contended that the Borough was “lying” and did not “want to disclose the cost to residents.”

### 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 previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant sought access to bills or invoices

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<sup>4</sup> At 4:40 p.m. on May 26, 2017, the Complainant e-mailed the GRC, asserting that the Borough failed to submit the SOI before their official close of business (4:30 p.m.). The Complainant stated that the Borough was “thumbing their nose” at the GRC by refusing to submit an SOI. However, the Borough submitted its SOI five minutes later, at 4:45 p.m., on the same day.

specific to an audit of the Recreation Department. Ms. Benson responded on behalf of the Custodian, stating that the Borough was billed a flat rate to conduct a municipal audit. Further, Ms. Benson stated that no individual bills for the Recreation Department existed. In the SOI, the Custodian certified to the nonexistence of records.

The Complainant refuted the SOI by stating that members of the Borough Council advised that there was an additional audit conducted on the Recreation Department. Further, the Complainant asserted that two CPAs, one of whom he identified as a “friend,” had informed him that the auditing firm would have billed additional charges for the audit. However, the Complainant’s allegations do not amount to competent, credible evidence that a record existed. The Complainant’s assertions are not supported by any evidence showing that the auditing firm conducted additional audits beyond the general municipal audit.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request because she certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *see Pusterhofer*, GRC 2005-49.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request because she certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *see Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

November 8, 2017