



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 24, 2019 Government Records Council Meeting

Judy Faulkner
Complainant

Complaint No. 2017-211

v.

Hillsborough Bureau of Fire Safety (Somerset)
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 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 and Ms. Petner have borne their burden of proof that they lawfully denied access to the Complainant’s OPRA request. Specifically, Ms. Petner initially responded that no records exist, the Custodian relied upon Ms. Petner’s response in the Statement of Information, and Ms. Petner subsequently certified to these facts. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. 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 24th Day of September 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: September 27, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**Judy Faulkner¹
Complainant**

GRC Complaint No. 2017-211

v.

**Hillsborough Bureau of Fire Safety (Somerset)²
Custodial Agency**

Records Relevant to Complaint: “Exact copy of audio recordings of Regular, Work and Executive Session meetings of the Fire Commissioners calendar year 2017 also including the October 10, 2017 meeting.”

Custodian of Record: Pamela Borek

Request Received by Custodian: October 12, 2017

Response Made by Custodian: October 19, 2017

GRC Complaint Received: November 1, 2017

Background³

Request and Response:

On October 12, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 19, 2017, the employee at the Hillsborough Bureau of Fire Safety (“Bureau”) responded in writing, stating that audio recordings of the Hillsborough Township Board of Fire Commissioners’ (“Board”) meeting minutes are taken by the Bureau’s secretary for reference when producing the written meeting minutes, and are not maintained as official records. The employee also stated that the records are erased upon completion of the written meeting minutes.

On October 19, 2017, the Complainant responded to the employee, attaching a copy of the retention schedule⁴ and referred to Record Series #0511-0000. The Complainant stated that at minimum the recording from the October meetings should be provided. That same day, the employee from the Bureau responded stating that no audio recordings were taken at the October meetings.

¹ No legal representation listed on record.

² Represented by Richard Braslow, Esq. (Toms River, NJ).

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.

⁴ The Complainant appears to be referring to the State of New Jersey’s “Records Retention and Disposition Schedule,” and accompanying record series numbers. The retention schedules are administered by Records Management Services.

Denial of Access Complaint:

On November 1, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant initially asserted that it was not clear who exactly responded to her OPRA request; thus, she could not determine who the Records Custodian was for the Bureau.

The Complainant next asserted that regardless of how the audio recordings are used by the secretary, they are official recordings of a public meeting under N.J.S.A. 47:3-16 and described in Chapter 7 of the New Jersey Records Manual regarding Audiovisual Records and Transcripts. The Complainant added that the records would fall under the retention schedule of “M100000-0012 – MUNICIPAL AGENCIES GENERAL RECORDS RETENTION SCHEDULE – Item 0511-0000,” and should therefore be maintained appropriately. The Complainant argued that the Bureau and its employees cannot arbitrarily deem an audio recording of an official public meeting as an unofficial record. The Complainant also asserted that the destruction of the recordings and resulting inability to produce them upon request constituted an unreasonable denial of records.

The Complainant also added that based upon the statements made in the correspondence, the secretary’s use of the recordings should be considered personal use and run afoul of the New Jersey Wiretapping law, contending that consent by all members of the public was required.

Statement of Information:

On November 22, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 12, 2017. The Custodian certified that an employee at the Bureau responded in writing on October 19, 2017.

The Custodian asserted that according to the Bureau, the audio recording is not an official record maintained by Bureau, and that this information was conveyed to the Complainant.

Additional Submissions

On September 9, 2019, the GRC requested additional information from the Custodian. Specifically, the GRC requested a certification from the employee who directly responded to the Complainant and confirm whether responsive records to October 12, 2017 OPRA request existed at the time of the request.

On September 12, 2019, the Custodian responded to the GRC’s request, providing a certification from Lynn Petner (“Ms. Petner”), the Office Administrator for the Hillsborough Fire District/Bureau of Fire Safety. Therein, Ms. Petner certified that she was the employee who responded directly to the Complainant on October 19, 2017. Additionally, Ms. Petner certified that that she provided the response to the Complainant after confirming with the Board Chairman that the requested audio recordings did not exist.

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. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant’s OPRA request sought audio recordings of all regular, work, and executive session meetings of the Bureau Fire Commissioners for the year 2017, including the October 10, 2017 meetings. Ms. Petner responded by stating that audio recordings are made only for use by the secretary to create the written meeting minutes and are thereafter destroyed upon completion. The Complainant contends that the retention schedule guidelines require the audio recordings to be maintained, and at minimum the recordings from the October 10, 2017 meetings should have been available for access. In her SOI, the Custodian relies upon Ms. Petner’s assertion that no responsive records exist since the audio recordings are erased after the written meeting minutes are completed. Upon request from the GRC, Ms. Petner provided a certification stating that she was the Bureau employee who responded to the Complainant, and that no responsive records exist.

The GRC initially notes that audio recordings of meeting minutes are considered government records, regardless of how a public agency classifies them. See *e.g.* Chiappini v. Twp. of Fairfield (Cumberland), GRC Complaint No. 2013-139 (Interim Order dated November 19, 2013). However, notwithstanding the issue of whether the Bureau has been properly maintaining the audio recordings, Ms. Petner certified that no responsive records exist.⁵ Furthermore, the Complainant has not provided evidence to refute Ms. Petner’s certification.

Accordingly, the Custodian and Ms. Petner have borne their burden of proof that they lawfully denied access to the Complainant’s OPRA request. Specifically, Ms. Petner initially responded that no records exist, the Custodian relied upon Ms. Petner’s response in the SOI, and Ms. Petner subsequently certified to these facts. 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 and Ms. Petner have borne their burden of proof that they lawfully denied access to the Complainant’s OPRA request. Specifically, Ms. Petner initially responded that no records exist, the Custodian relied upon Ms. Petner’s response in the Statement of Information, and Ms. Petner subsequently

⁵ The GRC notes that it does not have authority over whether the Township properly adhered to its records retention schedule properly or otherwise. See Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-15 (June 2012).

certified to these facts. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado
Staff Attorney

September 24, 2019