



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 30, 2019 Government Records Council Meeting

Stacie Percella
Complainant

Complaint No. 2017-226

v.

City of Bayonne (Hudson)
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 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 did not unlawfully deny access to the Complainant’s November 9, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed all records responsive to the Complainant. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).

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 30th Day of July 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 2, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

**Stacie Percella¹
Complainant**

GRC Complaint No. 2017-226

v.

**City of Bayonne²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “[a]ll documents from Mayor James M. Davis, all written letters designating any person as acting Mayor in [his] absence. Name, date of absence, [department] person works for from 2014 – present.”

Custodian of Record: Robert Sloan
Request Received by Custodian: November 9, 2017
Response Made by Custodian: November 21, 2017
GRC Complaint Received: November 28, 2017

Background³

Request and Response:

On November 9, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 21, 2017, Christina LaGatta responded in writing on behalf of the Custodian disclosing five (5) letters to the Complainant.

On the same day, the Complainant asserted that Mayor Davis was “on vacation since April 2016.” The Complainant thus stated that she expected the remaining responsive records by close of business or she would file a Denial of Access Complaint. In response, Ms. LaGatta forwarded a letter from Custodian’s Counsel seeking an extension of thirty (30) days to respond to the subject OPRA request. The Complainant responded questioning the extension given that the City of Bayonne (“City”) already provided an incomplete response.

On November 22, 2017, Law Director John F. Coffey, II, Esq., sent a letter to the Complainant advising that no additional responsive letters existed. Mr. Coffey noted that N.J.S.A.

¹ No legal representation listed on record.

² Represented by Karla Y. Garcia, Esq. (Bayonne, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

40:69A-42 only required a substitute designation when the sitting mayor is prevented from performing their duties.

Denial of Access Complaint:

On November 28, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that she had intimate knowledge that Mayor Davis was either on vacation or sick from the date of the final disclosed letter through the present. The Complainant thus contended that the City should have designated an acting mayor during that this time period.

The Complainant contended that the conflicting responses on November 21, and 22, 2017 represented a “continuous spiteful act . . . to not hand over records” to someone with differing opinions of the City. The Complainant argued that the GRC must act to end the City’s “abuse of power against people who are requesting documents.” The Complainant posited that the GRC’s only recourse was to assess both the Custodian and Mr. Coffey a civil penalty for a knowing and willful violation.

Statement of Information:

On January 8, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 9, 2017. The Custodian certified that his search for the records involved forwarding the request to the Office of the Mayor for review. The Custodian certified that Ms. LaGatta responded in writing on his behalf on November 21, 2017 disclosing five (5) letters. The Custodian affirmed that after receiving the Complainant’s response e-mail, the City sought a thirty (30) day extension to properly address same. The Custodian certified that Mr. Coffey responded on November 22, 2017 advising that all responsive letters were provided.

The Custodian argued that the City sought an extension to avoid the Complainant’s “consistent allegations” of wrongdoing, but to no avail. The Custodian noted that N.J.S.A. 40:69A-42 was passed in the 1950s and the corresponding City ordinance (Section 2-2.5) was passed in 1972. The Custodian argued that these dates were significant because technological advances have drastically affected a mayor’s ability to conduct official business from anywhere in the world. The Custodian argued that contrary to the Complainant’s allegations, the necessity to designate an acting mayor is not as prevalent as it was in the 1950s and 1970s. The Custodian further argued that it is for this reason that the November 21, 2017 disclosure represented all records responsive to the Complainant’s OPRA request.

Additional Submissions:

On January 8, 2018, the Complainant e-mailed the GRC arguing that the City followed their ordinance until April 2016. The Complainant further alleged that the City since violated its own ordinance by leaving the Business Administrator in charge. The Complainant again argued that the Custodian and Mr. Coffey knowingly and willfully violated OPRA and should be fined accordingly. N.J.S.A. 47:1A-11.

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.

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian’s certification that all such records were provided to the complainant. The Council held that the custodian’s certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian’s burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

In the instant matter, the Complainant’s OPRA request sought written letters designating an acting mayor in the absence of Mayor Davis from 2014 through the date of the request. Ms. LaGatta responded on behalf of the Custodian disclosing five (5) letters. However, the Complainant contended that the City’s response was incomplete because she knew that Mayor Davis was either sick or on vacation since April 2016. Custodian’s Counsel subsequently sought a thirty (30) day extension. However, Mr. Coffey responded shortly thereafter stating that all records were provided and no others existed. Mr. Coffey also provided an explanation as to why no other records existed.

In the Denial of Access Complaint, the Complainant spoke to her personal knowledge that the Mayor “was out of the office either sick/[on] vacation from the last letter dated April 7, 2016 to present.” The Complainant contended that the Custodian’s incomplete response was belied by the fact that an acting mayor should have been appointed. In the SOI, the Custodian certified that the City disclosed all responsive records that existed. The Custodian also provided additional information regarding a mayor’s requirement to designate an acting mayor under N.J.S.A. 40:69A-42 and Section 2-2.5 of the City’s Ordinances. In response to the SOI, the Complainant argued that City relied on an erroneous “technology” argument to violate its own ordinances.

Upon review of the evidence of record and arguments submitted by both parties, the GRC is satisfied that the Custodian provided all responsive records. While the Complainant posited that the City should have designated an acting mayor after April 2016, there is no evidence in the record to refute that they endeavored to do so.⁴ Further, there is no other evidence in the record that refutes the Custodian’s certification that no additional records existed. Thus, no unlawful denial of access occurred here because the Custodian disclosed all records responsive to the Complainant’s OPRA request.

⁴ The GRC notes that whether the City was in violation of N.J.S.A. 40:69A-42 or Section 2-2.5 of their ordinances is not within the GRC’s authority to adjudicate. N.J.S.A. 47:1A-7(b).

Therefore, the Custodian did not unlawfully deny access to the Complainant's November 9, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed all records responsive to the Complainant. Danis, GRC 2009-156, *et seq.*

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Custodian did not unlawfully deny access to the Complainant's November 9, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed all records responsive to the Complainant. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).

Prepared By: Frank F. Caruso
Acting Executive Director

July 23, 2019