



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 31, 2019 Government Records Council Meeting

Vesselin Dittrich
Complainant

Complaint No. 2017-66

v.

Hudson County
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council (“Council”) considered the December 11, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted 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 seeking “all records” regarding names on ballots 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. 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 31st Day of January, 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: February 5, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
January 31, 2019 Council Meeting**

**Vesselin Dittrich¹
Complainant**

GRC Complaint No. 2017-66

v.

**Hudson County²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all records regarding election standards, protocols[,] and policies concerning how the names of candidates are written on the ballots.”

Custodian of Record: Barbara A. Netchert
Request Received by Custodian: March 9, 2017
Response Made by Custodian: March 23, 2017
GRC Complaint Received: April 3, 2017

Background³

Request and Response:

On January 26, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to Michael H. Harper, Clerk of the Hudson County (“County”) Board of Elections (“Elections”), seeking the above-mentioned records. On March 7, 2017, the Complainant again submitted his OPRA request to Mr. Harper. On March 9, 2017, Mr. Harper forwarded the request to the Custodian, and simultaneously advised the Complainant that the County Clerk’s office was responsible for ballot design and preparation.

On March 23, 2017, the Custodian responded in writing denying the request because no written standards, protocols, or policies existed. The Custodian noted that while the County has followed N.J.S.A. 19:14-1, *et seq.* to design the ballots, clerks were given authority to determine the final design where the statute does not provide specific direction.

¹ No legal representation listed on record.

² Represented by Neil J. Carroll, Jr., Esq. (Jersey City, 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.

Denial of Access Complaint:

On April 3, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that in correspondence regarding the ballot design in January 2017, Elections alluded to an “office policy” regarding capitalizing and bolding candidates’ names on voting ballots. The Complainant stated that he subsequently submitted an OPRA request seeking “all records” regarding this policy but was denied on the basis that no records existed. The Complainant asserted that the County’s final ballot design came not from the applicable statutes, but from “some unknown source.” The Complainant also questioned the Custodian’s response that no records existed.

Statement of Information:

On April 21, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 9, 2017 through Mr. Harper. The Custodian certified that she responded in writing on March 23, 2017 advising that no records existed.

The Custodian certified that election ballot designs were set forth in N.J.S.A. 19:1-1 et seq. The Custodian averred that State statute also provides county clerks latitude to design a ballot when no voting machines are used. N.J.S.A. 19:49-2. The Custodian noted that this discretion was upheld by the New Jersey courts. See Harrison v. Jones, 44 N.J. Super. 456 (App. Div. 1957); Farrington v. Falcey, 96 N.J. Super. 409 (App. Div. 1967). The Custodian asserted that here, the Complainant initially contacted Elections to determine under what authority the Custodian could bold a candidate’s name on the ballot. The Custodian averred that after receiving Elections’ response, the Complainant submitted the subject OPRA request. The Custodian asserted that she believed the Complainant misunderstood Elections’ initial explanation to indicate the existence of a written policy about name bolding on ballots. The Custodian certified that there were no written policies: the County bolded candidates’ full last names for many years.

Finally, the Custodian certified that, contrary to the Complainant’s allegation, no policies or protocols “disappeared.” The Custodian reiterated that no such records existed.

Additional Submissions:

On May 4, 2017, the Complainant submitted a reply to the SOI. Therein, the Complainant first argued that the Custodian mischaracterized his contact with Elections. The Complainant asserted that he contacted Elections not for an explanation on bolding names, but to report violations of election laws and the U.S. Constitution.⁴ The Complainant disputed that the County relied only on statutes and prevailing case law when designing the ballots. The Complainant argued that the Custodian denied him access to these “office polic[ies]” in order to cover up their illegal actions.

⁴ The Complainant advanced several arguments regarding how the County violated election laws and the U.S. Constitution. The GRC notes that OPRA does not provide it any authority to adjudicate such issues. N.J.S.A. 47:1A-7(b).

The Complainant next argued that his request was not limited to “written . . . policies”; rather, he sought “all records” regarding the names of candidates on ballots. The Complainant asserted that OPRA supported that the Custodian should have provided all written records that pertained to this issue, “as well as the records that were not written.” The Complainant contended that the Custodian’s failure to disclose any records resulted in a violation of OPRA. The Complainant contended that, for instance, the Custodian noted that she relied on a past election ballots to design current ballots. The Complainant asserted that this “allegation,” if true, meant that past ballots were responsive to his request.

The Complainant requested that the GRC require the Custodian to provide to it the “initial contact” document she referred to in her SOI. The Complainant also requested that the GRC require the Custodian to provide the last ten (10) presidential ballots for review to determine the veracity of the Custodian’s certification that no written policy existed.

Finally, the Complainant argued that the Custodian’s motives for denying access rested in her illegally designing the ballots to favor one party. The Complainant thus contended that the Custodian’s actions were clearly knowing and willful. 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.

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 sought “all records” regarding standards, protocols, and policies concerning how names of candidates were written on County ballots. The Custodian denied access to the request, stating that no written policies existed. The Custodian further stated that the County had a non-written practice in place for years and that it adhered to said practice. In the SOI, the Custodian certified to her response. She further expanded on the fact that while guidance was provided for in N.J.S.A. 19:1-1, *et seq.*, the County had no formal written policy.

The Complainant disputed this response in two (2) ways. First, he argued that his request sought “all records;” and thus the Custodian was required to provide both written and “[un]written” records. Second, the Complainant contended that if the Custodian relied on past ballots to design current ones, she should have provided those past ballots as responsive here. The GRC is not persuaded by either argument.

The GRC rejects the Complainant’s first argument because OPRA clearly defines a “government record” as something written and/or tangible. The Complainant insinuates that the

Custodian was required to provide something not tangible such as a verbal conversation not otherwise recorded or committed into a document of some type. To be sure, the forgoing does not fall within the definition of a “government record.” N.J.S.A. 47:1A-1.1. The GRC also rejects the second argument that past ballots were responsive to this request. The subject OPRA request here in no way identifies that the Complainant sought past ballots. Thus, it cannot be presumed that the Custodian would have been able to identify those records as responsive to the request. See MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (holding that “OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’” N.J.S.A. 47:1A-1).

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request seeking “all records” regarding names on ballots 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.

Finally, the GRC notes that the Complainant’s request, on its face, was invalid. Specifically, the request sought “all records” regarding certain types of processes about a specific topic over an indeterminate period of time. See *i.e.* Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated June 30, 2015) (holding that the complainant’s request seeking “all documents” related to an investigation was invalid). As noted in MAG, 375 N.J. Super. 534, “OPRA does not countenance open-ended searches of an agency’s files.” Id. at 549. The request at issue here would have required just that. Further, the Complainant’s arguments regarding what may have been responsive to the request support the overly broad nature of the request at issue here.

Conclusions and Recommendations

The Council Staff 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 seeking “all records” regarding names on ballots 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. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Acting Executive Director

December 11, 2018⁵

⁵ This complaint was prepared for adjudication at the Council’s December 18, 2018 meeting, but could not be adjudicated due to lack of quorum.