



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 10, 2020 Government Records Council Meeting

Frank Buday
Complainant

Complaint No. 2019-106

v.

Township of Franklin (Somerset)
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 2020 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 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian and Mr. Hauck certified, and the record reflects, that they disclosed to the Complainant the only responsive Reports that the Township possessed. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); 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).

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 10th Day of November 2020

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 13, 2020

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting**

**Frank Buday¹
Complainant**

GRC Complaint No. 2019-106

v.

**Township of Franklin (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all “Water Main/Service Reports” (“Reports”) for August, September, and October 2018.

Custodian of Record: Ann Marie McCarthy
Request Received by Custodian: May 17, 2019
Response Made by Custodian: May 28, 2019
GRC Complaint Received: June 4, 2019

Background³

Request and Response:

On May 17, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 28, 2019, the Custodian responded in writing disclosing five (5) Reports and noting that no other records existed.

Denial of Access Complaint:

On June 4, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that on September 7, 2018, a water-pipe break occurred on Brookline Avenue. The Complainant stated that the Department of Public Works (“DPW”) engaged a crew of more than ten (10) individuals to fix the issue, and worked until 3:30 a.m. The Complainant stated that he previously submitted an OPRA request for the Brookline Avenue Report but was told no record existed. The Complainant stated that in the instance that a Report was created on a different date, he submitted the subject OPRA request.

¹ No legal representation listed on record.

² Represented by Ruben D. Perez, Esq., of Rainone, Coughlin, Minchello, LLC (Iselin, 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.

The Complainant contended that although the Custodian disclosed several Reports, she stated that no Brookline Avenue Report existed. The Complainant argued that it seems implausible that the Township of Franklin (“Township”) would create a Report for every water main issue except the Brookline Avenue incident. The Complainant stated that he was attaching a police report and printout of an emergency request to prove that the water leak occurred. The Complainant further noted that the water main issue damaged his house and that the Township may be hiding the Report to absolve themselves of liability. The Complainant contended that if the other Reports were disclosable under OPRA, then he was entitled to the Brookline Avenue Report.

Statement of Information:

On June 20, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 17, 2019. The Custodian certified that her search including working with DPW Manager Carl Hauck to locate any potential responsive records. Hauck Cert. ¶ 4-5. The Custodian certified that she responded in writing on May 28, 2019 disclosing five (5) Reports.

The Custodian certified that she disclosed all records that existed and that no Report for the Brookline Avenue water leak existed. Hauck Cert. ¶ 6-7. The Custodian contended that she could not disclose a record that did not exist. N.J.S.A. 47:1A-1.1. The Custodian further contended that she was not required to create a Report to satisfy the Complainant’s OPRA request. The Custodian further argued that because she acted properly, she did not knowingly and willfully violate OPRA.⁴

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 No. 2009-156, *et seq.* (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).

⁴ The Custodian also argued that the Complainant is not a prevailing party entitled to an award of attorney’s fees. N.J.S.A. 47:1A-6. However, this issue is not before the Council because the Complainant is not represented by legal counsel.

In this matter, the Custodian disclosed five (5) Reports in response to the Complainant's OPRA request and noted that they were the only records that existed within the specified time frame. The Complainant filed the instant complaint contending that it was implausible that the Township did not create a Report of the September 7, 2018 incident. The Complainant attached to his complaint copies of the police report and emergency request to prove the incident occurred. The Complainant also insinuated that the Township might be hiding the report to avoid liability. In the SOI, the Custodian certified that she disclosed the five (5) Reports that existed and that the one referred to as missing by the Complainant did not exist. The Custodian included a certification from Mr. Hauck addressing his search and affirming that no Report existed.

In reviewing the evidence of record here, the GRC is satisfied that the Custodian did not unlawfully deny access to the subject OPRA request. The Complainant provided proof that a DPW call occurred on Brookline Avenue on September 7, 2018. However, the existence of the incident does not speak to whether the Township ultimately created a corresponding Report. Further, whether the Township was required to create a Report and failed to do so is of no moment. Instead, both the Custodian and Mr. Hauck certified to their actions in locating and disclosing those Reports that existed, and that the Township did not maintain a Report for the September 7, 2018 repair. Thus, the GRC finds that there is no evidence on the record that refutes their certifications.

Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian and Mr. Hauck certified, and the record reflects, that they disclosed to the Complainant the only responsive Reports that the Township possessed. Danis, GRC 2009-156, *et seq.*; Burns, 2005-68; Holland, 2014-63, *et seq.*

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian and Mr. Hauck certified, and the record reflects, that they disclosed to the Complainant the only responsive Reports that the Township possessed. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); 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).

Prepared By: Frank F. Caruso
Executive Director

October 27, 2020