



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

April 29, 2014 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2013-196

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council ("Council") considered the April 22, 2014 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:

1. Because Millstone Valley Fire Department is a member of the Franklin Fire District No. 1 per N.J.S.A. 40A:14-70.1 and thus serves a governmental function under the supervision and control of the Franklin Fire District No. 1, it is a public agency for purposes of OPRA. Paff v. NJ State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013).
2. As the Council has determined that Millstone Valley Fire Department is a public agency for purposes of OPRA, and in the absence of any exemption applying to the responsive records, the Custodian is required to obtain same from Millstone Valley Fire Department and provide access to the Complainant. Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006). If the Custodian cannot comply with the Council's Order because individuals at Millstone Valley Fire Department will not disclose same, those individuals are required to identify themselves to the GRC and provide a lawful basis for not providing said records.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of April, 2014



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: May 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2014 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2013-196

v.

**Franklin Fire District No. 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail or fax of the Constitution and By-Laws for Millstone Valley Fire Department (“MVFD”) in effect from 2007 through 2013.

Custodian of Record: Tim Szymborski

Request Received by Custodian: February 28, 2013

Response Made by Custodian: March 1, 2013

GRC Complaint Received: July 3, 2013

Background³

Request and Response:

On February 28, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 1, 2013, Dawn Cuddy responded in writing on behalf of the Custodian stating that Franklin Fire District No. 1 (“FFD”) does not maintain a record responsive to the Complainant’s OPRA request. The Complainant responded arguing that a custodian has an obligation to obtain responsive records if they are in a different location and provide same. The Complainant further asserted that it is clear that the FFD took no steps to obtain the records from MVFD, even though the FFD directly supervises them. N.J.S.A. 40A:14-70.1(b).

On March 11, 2013, Ms. Cuddy responded stating that the responsive records are not considered government records under OPRA and the Complainant’s OPRA request is thus denied.

¹ Represented by John A. Birmingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, 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.

Denial of Access Complaint:

On July 3, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s response arguing that the FFD is a public agency with complete authority over MVFD. The Complainant contended that MVFD, as a subordinate of the FFD, is a public agency and its records are subject to access under OPRA. The Complainant requested that the GRC: (1) determine that the Custodian violated OPRA by failing to disclose the responsive record; (2) order immediate disclosure of the records; (3) determine that the Custodian knowingly and willfully violated OPRA warranting the imposition of a civil penalty; (4) determine that the Complainant is a prevailing party subject to reasonable attorney’s fees; and (5) take any further action deemed by the GRC to be equitable and just.

Statement of Information:

On August 9, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the OPRA request on February 28, 2013 and Ms. Cuddy responded in writing on March 1, 2013, stating that the FFD maintained no responsive records.

The Custodian certified that he performed a search for the records and determined that the FFD did not maintain same. The Custodian certified that although there is no law, regulation, rule or policy requiring that a fire district maintain these records, he went above and beyond his duties by contacting MVFD. The Custodian certified that MVFD denied access to the records. Further, the Custodian certifies that he does not believe that the records have been destroyed.

The Custodian certified that the FFD does not maintain a Constitution or By-Laws for any member departments or fire companies. The Custodian certified that since his first years as a Commissioner from 1986 to 1988 and again since 2006, the FFD never maintained such records. The Custodian further certified that MVPD advised that these records were never provided to the FFD. The Custodian reiterated that he found no legal authority requiring that the FFD maintain these records, and even the Custodian’s Counsel failed to locate a law, regulation, etc. requiring same. The Custodian certified that it is his understanding that although the members are under the control of the FFD’s rules, policies and procedures, each member may adopt their own Constitution and By-Laws. The Custodian thus contended that he lawfully denied access to the responsive records as they are not maintained by the FFD.

Additional Submissions:

On August 19, 2013, the Complainant’s Counsel disputed the Custodian’s SOI. Counsel stated that State statute provides that “[a]ny persons desiring to form a volunteer fire company . . . located within or otherwise servicing the area encompassing a fire district . . . shall first present to the board . . . a written application . . .” N.J.S.A. 40A:14-70.1(a). Further, Counsel stated that “[t]he board of fire commissioners . . . may *by resolution grant the petition and constitute such applicants a volunteer fire company of the district.*” Id. (emphasis added). Counsel further stated that N.J.S.A. 40A:14-70.1(b) provides that the member company “. . . shall be under the supervision and control of the board and in performing fire duty shall be deemed to be exercising

a governmental function.” Counsel noted that N.J.S.A. 40A:14-81.3 provides that a fire district have powers, duties and functions within a district similar to municipalities and that supervision of district personnel is exercised by the commissioners or delegated accordingly by resolution to a single commissioner, employee, or employees thereof. Counsel argued that these statutes necessarily provide that MVFD is subordinate of the FFD and is thus a public agency, a fact confirmed by the Custodian’s reference to MVFD as one of its member fire departments throughout his SOI certification. Counsel further asserted that MVFD’s classification as a public agency is consistent with past court and GRC case law. Times of Trenton v. Lafayette Yard, 183 N.J. 519 (2005); Paff v. NJ Fireman’s Ass’n., 2013 N.J. Super. LEXIS 90 (App. Div. 2013); Sauter v. Twp. of Colts Neck, GRC Complaint No. 2005-07 (March 2006).

Counsel disputed the Custodian’s SOI contention that MVFD’s Constitution and By-Laws are not government records under OPRA. Counsel asserted that the Custodian’s actions are contradictory to his SOI certification that the responsive records are not government records under OPRA. Specifically, Counsel argued that the Custodian first denied access because the records were not in the FFD office, then proceeded to attempt to obtain them from an unknown person or persons at the MVFD before again denying access because the FFD never possessed said records in the past. Counsel contended that the FFD’s practice of not obtaining constitutions and bylaws for all member departments provides a basis for suspicion that this practice is in place to shield such records from public oversight. Counsel contends that without the benefit of access to the Constitution and By-Laws, the public would never be able to determine whether same are in conflict with the FFD’s own policies and procedures.

Counsel further contended that MVFD is statutorily subordinate to the FFD and unquestionably qualifies as a “political subdivision” and/or a “subordinate board.” N.J.S.A. 47:1A-1.1. Counsel asserted that he is confident that the GRC will determine that the MVFD is a public agency under OPRA because 1) the MVFD is substantially, if not entirely, funded by tax payer funds; 2) MVFD cannot act as a volunteer fire company without legislative approval from the FFD; and 3) the MVFD is subject to the FFD’s supervision and control. Counsel argued that for these reasons, the responsive records are government records and the Custodian had an obligation to obtain same. Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (Final Decision dated December 8, 2005); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (Interim Order dated December 19, 2007); Burdick v. Twp. of Franklin (Hunterdon), GRC Complaint No. 2010-99 (Interim Order dated March 27, 2012).

Counsel stated that the Council has previously determined that someone other than a custodian can be found to have knowingly and willfully violated OPRA. Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (August 2009). Counsel requested that the GRC seek a certification from the Custodian as to the exact person(s) that declined to provide MVFD’s Constitution and By-Laws to the Custodian for disclosure. Counsel asserted that it is probable that the individuals that declined to provide the records are the named defendants in Nelson v. Commissioners of the Fire District No. 1 et al., Docket No. SOM-L-232-13. Counsel asserted that these same individuals could have denied access in order to protect various relations and to prevent uncovering potential corruption. Counsel further surmised that because the previous FFD Custodian is/was a member of MVFD, more credence is given to the argument that MVFD deliberately withheld access to the responsive records. Counsel contended that this

matter is ripe for an Office of Administrative Law hearing on whether the Custodian and/or unidentified individuals of MVFD knowingly and willfully violated OPRA under the totality of the circumstances.

Analysis

Public Agency

Although not expressly raised by the parties as the issue here, central to the adjudication of this complaint is whether MVFD is a “public agency” for purposes of OPRA. Accordingly, the GRC must first make a determination of whether the MVFD is a “public agency.” If MVFD is found to be a public agency, the Council will address the Complainant’s asserted denial of access

OPRA defines a public agency as:

Any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

N.J.S.A. 47:1A-1.1.

Most definitions of “public agency” under New Jersey statutes and the Administrative Code resemble that contained in OPRA. However, the Open Public Meetings Act (“OPMA”) contains a definition of a “public body” which requires that an entity, “. . . (1) consist of ‘two or more persons’ and (2) be ‘collectively empowered as a voting body’ (3) ‘to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits or other legal relations of any person or collectively authorized to spend public funds.’ N.J.S.A. 10:4-8(a).” Lafayette Yard, 368 N.J. Super. 425 (App. Div. 2004).

In Lafayette Yard, the Appellate Division held that Lafayette Yard was both a “public body” subject to the open meetings requirements of OPMA, N.J.S.A. 10:4-1 et seq., and a “public agency” required under OPRA, and ordered disclosure of records to plaintiff. In so doing, the Court noted the definition of a “public agency” in OPRA at N.J.S.A. 47:1A-1.1 and held that:

- (1) a private, non-profit corporation created for the express purpose of redeveloping property donated to it by the City of Trenton,
- (2) having a Board of Trustees appointed by the Mayor and City Council,

- (3) with the mandated reversion of the donated property after the completion of the project and repayment of the debt,
- (4) having corporate bylaws requiring the distribution of all assets to the city upon the dissolution or liquidation of the corporation,
- (5) having a Disposition Agreement with the city that designates the city as the “agency” and the corporation as the “redeveloper” pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -49, and
- (6) having the authority to issue tax-exempt bonds for the financing of the project

qualified the corporation as a ‘public body’ under OPMA. The [C]ourt further held that the corporation was “an ‘instrumentality’ created by the City and a ‘public agency’ under . . . OPRA for essentially the same reasons that it is a ‘public body’ under the OPMA.” Id. at 442.

The decision of the Superior Court that Lafayette Yard qualified as a “public body” was affirmed by the New Jersey Supreme Court (Lafayette Yard, 183 N.J. 519 (2005)). *See also Snyder v. American Ass’n of Blood Banks*, 144 N.J. 269 (1996)(finding that the legislature did not create or authorize the American Association of Blood Banks to perform a specific governmental purpose); Williams v. Nat’l Car Rental Sys., Inc., 225 N.J. Super. 164 (1988)(finding that the broad powers conferred upon the Port Authority leave no doubt that it is a public authority or public agency); Blazer Corp. v. N.J. Sports and Exposition Auth., 195 N.J. Super. 542 (1984)(citing Wade v. N.J. Turnpike Auth., 132 N.J. Super. 92 (Law Div. 1975), (“The Court noted the official comment to N.J.S.A. 59:1-3: ‘The definition of ‘Public Entity’ provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to all entities exercising governmental functions.’”).

More recently, in Fair Share Hous. Ctr., Inc. v. NJ State League of Municipalities, 207 N.J. 489 (2011), the Supreme Court was tasked with reviewing the Appellate Division’s decision holding that the New Jersey State League of Municipalities (“League”) was not a public agency under OPRA. 413 N.J. Super. 423. The Court acknowledged that although the Appellate Division relied on its previous holding in Lafayette Yard, it erred in “. . . importing into OPRA’s definition of ‘public agency’ the definition of a ‘public body’ found in [OPMA] . . . [t]he language defining a ‘public body’ . . . under OPRA [is] distinctly different.” Id. at 504-505. The Court held that a creation test, as opposed to a governmental function test, controlled in determining whether an entity was a public agency for purposes of OPRA. Specifically, the Court held that:

In Lafayette Yard, we remained faithful to the text of [OPRA] and determined that, in essence, the nonprofit corporation (an ‘instrumentality’) was *created* by a public subdivision therefore making it a ‘public agency.’ *See Id.* at 535-36 . . . The creation test, not the governmental-function test, controlled. Our decision in this case, finding that the [League] is a ‘public agency,’ is wholly consistent with . . . Lafayette Yard.

Id. at 507.

Thereafter, the Council was tasked with determining whether a volunteer fire company was a public agency for purposes of OPRA. In Carrow v. Borough of Newfield (Gloucester), GRC Complaint No. 2012-111 (February 2013), the Council applied the Supreme Court's decision in League and determined that "[b]ecause the Newfield Fire Company was not created by the Borough of Newfield and thus is not an 'instrumentality or agency' of the Borough, the Company is not a public agency subject to the provisions of OPRA . . ." Id. at 10. The Council reasoned that although volunteer fire companies may receive contributions from a contracting municipality and perform a government function, such companies are created solely by the membership and never by a municipality.

However, in Paff v. NJ State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013), the Appellate Division reversed a Law Division decision holding that the Firemen's Association was not a public agency and remanded the complaint to the trial court for further proceedings. There, the Court provided a comprehensive history of the Association, which was established in 1885 by a group of "incorporated local firemen's relief associations, whose mission was to provide assistance to indigent firefighters and their families." Id. at 279. However, the Association ". . . changed over time, as a result of mandatory statutes, Department of Banking and Insurance regulations, and a judicial decision, Szabo v. NJ State Firemen's Ass'n, 230 N.J. Super. 265 (Ch. Div.1988)." Id. at 280.

The Court first noted that in NJ League, the Supreme Court held that OPRA lacks a "government-function" test, but that "[w]hile proof of governmental function is not necessary to qualify an entity as a public agency, the Court did not preclude the possibility that such proof would be relevant and perhaps sufficient to qualify the entity." Id. at 289. *See* Sussex Commons Ass'n, LLC v. Rutgers, the State Univ., 210 N.J. 531 (2012)(holding that Rutgers Law Clinic did not perform a government function and was not controlled by either Rutgers or any other government agency). The Court thus determined that the Association was a "public agency" under OPRA, reasoning that it ". . . owes its existence to state law, which authorized its creation, granted it powers, including powers over local associations, and barred the creation of a competing state association. N.J.S.A. 43:17-41." Id. at 290. The Court noted that the Association's financial activities bring its public agency status in line with OPRA's aim of providing the public with insight into fiscal affairs to combat waste and corruption. The Court further reasoned that not only did the Association receive tax money as evidenced by N.J.S.A. 54:18-2 and N.J.S.A. 54:18A-2, but that the Association serves numerous government functions.

Complainant's Counsel here contended that the issue of MVFD is clearly a "public agency" for purposes of OPRA based on a plain reading of N.J.S.A. 40A:14-70.1. The Custodian advanced no arguments regarding the "public agency" question.

The GRC first notes that this matter is inapposite to its decision in Carrow, GRC 2012-111, because there was no evidence there that the Newfield Fire Company was part of a fire district. Notwithstanding that MVFD was likely created by the volunteer membership, is clear that member companies within a fire district exercise a government duty and are under the supervision and control of the district, which is clearly a "public agency." N.J.S.A. 40A:14-70.1. In essence, although the creation of a volunteer fire company is reserved only for the membership, said company organizing within a fire district is expressly required to apply to the

district. As the Court noted in Firemen's Ass'n, the relationship between the Association and its existence are owed to state law, as is the relationship between the creation and function of a volunteer fire company within a fire district. Thus, in applying the Court's decision in Firemen's Ass'n, to the facts of this complaint, the GRC is satisfied that MVFD is a "public agency" for purposes of OPRA.

Therefore, because MVFD is a member of the FFD per N.J.S.A. 40A:14-70.1 and thus serves a governmental function under the supervision and control of the FFD, it is a public agency for purposes of OPRA. Firemen's Ass'n, 230 N.J. Super. at 265.

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 Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006), the Council determined that electronic correspondence stored in a government official's personal e-mail account was a government record subject to disclosure when used for Borough business. The Council found that "the location of the records does not inhibit the Custodian from obtaining the records and providing access to the records pursuant to OPRA."

Further, in Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) the Appellate Division reviewed the Law Division's ruling, interpreting Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), holding that the defendant did not have to disclose the records responsive to the plaintiff's OPRA request because the records were not in the defendant's possession. The Appellate Division held that the motion judge interpreted Bent, *supra* too broadly. The Appellate Division held:

We find the circumstances in Bent . . . to be far removed from those existing in the present matter because . . . the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply . . . relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA . . . We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.

Id. at 517.

As the Council has determined that MVFD is a public agency for purposes of OPRA, and in the absence of any exemption applying to the responsive records, the Custodian is required to obtain same from MVFD and provide access to the Complainant. Meyers, GRC 2005-127. If the Custodian cannot comply with the Council's Order because individuals at MVFD will not

disclose same, those individuals are required to identify themselves to the GRC and provide a lawful basis for not providing said records.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because Millstone Valley Fire Department is a member of the Franklin Fire District No. 1 per N.J.S.A. 40A:14-70.1 and thus serves a governmental function under the supervision and control of the Franklin Fire District No. 1, it is a public agency for purposes of OPRA. Paff v. NJ State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013).
2. As the Council has determined that Millstone Valley Fire Department is a public agency for purposes of OPRA, and in the absence of any exemption applying to the responsive records, the Custodian is required to obtain same from Millstone Valley Fire Department and provide access to the Complainant. Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006). If the Custodian cannot comply with the Council's Order because individuals at Millstone Valley Fire Department will not disclose same, those individuals are required to identify themselves to the GRC and provide a lawful basis for not providing said records.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**

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4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

April 22, 2014