



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

December 20, 2011 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2010-227

v.

Township of Morris (Morris)
Custodian of Record

At the December 20, 2011 public meeting, the Government Records Council (“Council”) considered the December 13, 2011 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 the Custodian fulfilled the Complainant’s OPRA request within the statutorily mandated seven (7) business days as prescribed in OPRA, the Custodian did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-5.i., N.J.S.A. 47:1A-6.
2. Because the Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint, and the Custodian provided the Complainant with all the responsive records within the statutorily mandated seven (7) business day response period, the Custodian did not unlawfully deny access to any records responsive to the Complainant’s August 25, 2010 OPRA request. Thus, because the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired at the time of the filing of the within Denial of Access Complaint, the instant complaint is materially defective and should be dismissed. See Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007- 226 (April 2009).

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 20th Day of December, 2011

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 22, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2011 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2010-227

v.

**Township of Morris (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. OPRA log sheets from January 1, 2010 until today [August 25, 2010].
2. The first 50 OPRA requests made to the Custodian from January 1, 2010 until today [August 25, 2010], excluding OPRA requests made by Jesse Wolosky.

Request Made: August 25, 2010

Response Made: August 26, 2010

Custodian: Cathleen Amelio

GRC Complaint Filed: August 31, 2010³

Background

August 25, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail to the Custodian. The Complainant requests that the response to his request be made via e-mail as labeled PDF attachments. The Complainant requests that the records be in chronological order beginning with the oldest date.

August 26, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's request on the first (1st) business day following receipt of such request. The Custodian states that attached to this message are the requested records in PDF format.

August 31, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated August 25, 2010
- Custodian's response to the Complainant's OPRA request dated August 26, 2010

¹ Represented by Walter M. Luers, Esq., of the Law Office of Walter M. Luers, LLC (Clinton, NJ).

² Represented by John Mills, III, Esq. (Morristown, NJ).

³ The GRC received the Denial of Access Complaint on said date.

The Complainant's Counsel maintains that while the Custodian has correctly fulfilled request Item No. 1 (log sheets) of the Complainant's OPRA request, the Custodian failed to correctly fulfill request Item No. 2 (first fifty (50) OPRA requests from January 1, 2010 until August 25, 2010) of the Complainant's request. Counsel states that instead of providing the Complainant with the sought after OPRA requests, the Custodian merely provided the first fifty (50) entries of the requested OPRA log. Counsel asserts that the Custodian provided no explanation for why she interpreted the Complainant's request for the "first 50 OPRA requests" to mean a shorter version of the OPRA log the Complainant had already sought in Item 1 of the instant OPRA request forms. Counsel argues that the Custodian must have mistakenly interpreted the request to be for the first fifty (50) names of requestors from January 1, 2010 to August 25, 2010.

Counsel argues that there is no doubt that the records sought herein are considered "public records" pursuant to OPRA. Counsel maintains that nothing can excuse the Custodian from her legal obligation to adhere to the law and respond to OPRA requests as they are written. Counsel asserts that the Custodian's response to the Complainant's OPRA request inspires doubt regarding whether she has faithfully fulfilled previous OPRA requests.

Counsel requests that the GRC order the Custodian to provide the Complainant with the first fifty (50) OPRA requests received by the Custodian in 2010 and find that the Complainant is a prevailing party. In addition, Counsel requests that the Complainant be awarded a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

August 31, 2010

E-mail from the Custodian to the Complainant's Counsel. The Custodian states that the Complainant's Counsel is correct in stating that she did not provide the Complainant with copies of the first fifty (50) OPRA requests received in 2010 because she misread the request. The Custodian asserts that she will scan the correct information and send it to the Complainant as soon as possible.

August 31, 2010

E-mail from the Custodian to the GRC. The Custodian states that she did not deny the Complainant access to any of the requested records. The Custodian asserts that she never made any statement about being "under the mistaken impression that Mr. Wolosky sought a copy of the OPRA Log Sheet with the first 50 names of requestors." The Custodian maintains that the Complainant did not contact her after she sent out her August 26, 2010 response to his request, so any assertion that she made such a statement regarding her interpretation of the Complainant's request is not true.

August 31, 2010

E-mail from the Custodian to the Complainant's Counsel. The Custodian states that she apologizes for the previous misinterpretation of the Complainant's OPRA request and asserts that attached to this e-mail are the first 50 OPRA request forms of 2010 as requested.

August 31, 2010

E-mail from the Custodian to the Complainant's Counsel. The Custodian asserts that a records custodian has seven (7) business days in which to reply to an OPRA request. The Custodian states that because the correct records were supplied to the Complainant within the statutorily mandated seven (7) business days, there has been no denial of access.

September 8, 2010

Request for the Statement of Information ("SOI") sent to the Custodian.

September 10, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated August 25, 2010
- Custodian's response to the OPRA request dated August 26, 2010
- E-mail from the Custodian to the Complainant's Counsel dated August 31, 2010
- E-mail from the Custodian to the Complainant's Counsel dated August 31, 2010
- E-mail from the Custodian to the Complainant's Counsel dated August 31, 2010
- Copies of the first fifty (50) completed OPRA request forms of the Township of Morris

The Custodian certifies that the requested OPRA log sheets and OPRA requests are kept and maintained in the Office of the Township Clerk for immediate viewing by the public. The Custodian also certifies that the requested OPRA log has a three (3) year retention schedule. In addition, the Custodian certifies that the OPRA requests themselves have a six (6) year retention schedule. The Custodian certifies that the scanning of the requested records required two and a half (2 ½) hours of work. The Custodian further certifies that the telephone numbers of those requestors listed on the responsive records have been redacted.

In addition, the Custodian certifies that she was not informed of the Complainant's dissatisfaction with the Complainant's initial response to his OPRA request until the filing of the Denial of Access Complaint. The Custodian certifies that upon realizing that she misinterpreted the Complainant's request, she forwarded him the first fifty (50) completed OPRA request *forms* as requested on August 31, 2010. The Custodian further certifies that all responsive documents were supplied to the Complainant before the seventh (7th) business day following the request, which would have been September 3, 2010. The Custodian asserts that there has been no denial of access to the requested records and that she has fulfilled all of her obligations pursuant to OPRA.

Analysis

Whether the Custodian unlawfully denied the Complainant access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁴ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

⁴ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA. Jesse Wolosky v. Township of Morris (Morris), 2010-227 – Findings and Recommendations of the Executive Director

In the instant complaint, the Complainant submitted his OPRA request on August 25, 2010. Request Item No. 2 of the Complainant's OPRA request sought "a copy of the first 50 OPRA requests made to the Custodian from January 1, 2010 [through August 25, 2010] excluding OPRA requests made by Jesse Wolosky." The Custodian responded in writing to the Complainant's request on August 26, 2010, the first (1st) business day after receipt of such request, providing access to the OPRA request log up to the first 50 OPRA requests made to the Custodian from January 1, 2010 through August 25, 2010 but excluding those made by the Complainant.

The evidence of record indicates that the Complainant filed his Denial of Access Complaint on August 31, 2010, the fourth (4th) business day after the Custodian's receipt of the Complainant's OPRA request, asserting that he was dissatisfied with the Custodian's response to the request and that he believed that the Custodian misinterpreted request Item No. 2. Specifically, the Complainant asserted that the Custodian failed to correctly fulfill Item 2 (first fifty (50) OPRA requests from January 1, 2010 until August 25, 2010) of the Complainant's request; instead of providing the Complainant with the sought after OPRA request forms, the Custodian merely provided the first fifty (50) entries of the requested OPRA log. The Complainant asserted that the Custodian must have mistakenly interpreted the request to be for the first fifty (50) names of requestors from January 1, 2010 to August 25, 2010. The evidence of record further indicates that on August 31, 2010, in response to the Complainant's assertion that the records provided were not the records sought, the Custodian provided the Complainant with copies of the first fifty OPRA request forms received in 2010, as clarified by the Complainant in his Denial of Access Complaint.

Accordingly, because the Custodian fulfilled the Complainant's OPRA request within the statutorily mandated seven (7) business days as prescribed in OPRA, the Custodian did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-5.i., N.J.S.A. 47:1A-6.

Whether the Complainant's Denial of Access Complaint is ripe for adjudication?

The GRC has held that complaints filed prior to the expiration of the statutorily mandated deadline prescribed in OPRA are not ripe for adjudication.

In Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-226 (April 2009), the Complainant forwarded a complaint to the GRC asserting that he had not received a response from the Custodian and seven (7) business days would have passed by the time the GRC received the Denial of Access Complaint. The Custodian argued in the SOI that the Complainant filed the complaint prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5.i. The Council held that:

"...because the Complainant's cause of action was not ripe at the time he verified his Denial of Access Complaint; to wit, the Custodian had not at that time denied the Complainant access to a government record, the complaint is materially defective and therefore should be dismissed."

As in Sallie, *supra*, the Complainant filed his complaint with the GRC prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5.i. Thus, the Complainant's cause of action was not ripe at the time he verified his Denial of Access Complaint; the Custodian had not at that time denied the Complainant access to a government record.

Because the Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint, and the Custodian provided the Complainant with all the responsive records within the statutorily mandated seven (7) business day response period, the Custodian did not unlawfully deny access to any records responsive to the Complainant's August 25, 2010 OPRA request. Thus, because the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired at the time of the filing of the within Denial of Access Complaint, the instant complaint is materially defective and should be dismissed. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007- 226 (April 2009).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian fulfilled the Complainant's OPRA request within the statutorily mandated seven (7) business days as prescribed in OPRA, the Custodian did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-5.i., N.J.S.A. 47:1A-6.
2. Because the Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint, and the Custodian provided the Complainant with all the responsive records within the statutorily mandated seven (7) business day response period, the Custodian did not unlawfully deny access to any records responsive to the Complainant's August 25, 2010 OPRA request. Thus, because the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired at the time of the filing of the within Denial of Access Complaint, the instant complaint is materially defective and should be dismissed. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007- 226 (April 2009).

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 13, 2011