



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

May 29, 2012 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2011-92

v.

Essex County Prosecutor's Office
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council ("Council") considered the May 22, 2012 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:

1. Because the Custodian responded to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days requesting an extension of time to respond to said request and provided a date certain on which she would respond to said request (March 23, 2011), the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009). Moreover, because the Custodian responded in writing five (5) business days before the expiration of the extended time frame to respond stating that no records responsive exist, the Custodian properly responded pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. The Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request exist and the Complainant has submitted no credible evidence to refute the Custodian's certification. Therefore, the Custodian has not unlawfully denied access to the records requested pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

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 29th Day of May, 2012

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: June 4, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2011-92

v.

**Essex County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint: Copy of all microfilm, phonographs, transcripts and tape recordings of a 911 call made on January 16, 1993 relevant to Indictment No. 1390-4-93.

Request Made: February 22, 2011

Response Made: March 8, 2011

Custodian: Debra G. Simms, Esq.

GRC Complaint Filed: April 6, 2011³

Background

February 22, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

March 8, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the third (3rd) business day following receipt of such request.⁴ The Custodian states that she will need an extension of time until March 23, 2011 because the relevant file, if it exists, is likely stored off-site and requires extra time for retrieval.

March 16, 2011

Letter from the Custodian to the Complainant. The Custodian states that she previously requested an extension of time until March 23, 2011 to respond to the Complainant's OPRA request. The Custodian states that after retrieving and reviewing the relevant case files, she determined that no records responsive exist.

¹ No legal representation listed on record.

² Represented by James Paganelli, Esq. (Newark, NJ).

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

⁴ The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on March 3, 2011.

April 6, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated February 22, 2011.

The Complainant states that he submitted an OPRA request to the Essex County Prosecutor’s Office (“ECPO”) on February 22, 2011. The Complainant states that the Custodian failed to respond within the statutorily mandated seven (7) business day time frame.

April 15, 2011

Offer of Mediation sent to both parties.

April 18, 2011

The Custodian declines mediation.⁵

May 17, 2011

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

May 24, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated February 22, 2011 with the ECPO’s date stamp of March 3, 2011.
- Letter from the Custodian to the Complainant dated March 8, 2011.
- Certified mail receipt (date unknown).⁶
- Letter from the Custodian to the Complainant dated March 16, 2011.
- Certified mail receipt dated March 23, 2011.

The Custodian certifies that her search for the requested records included retrieving the files for the 18 year old homicide case relevant to this request from storage. The Custodian certifies that she reviewed the case files and determined that no records responsive to the request exist.

The Custodian also certifies that whether any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable.

The Custodian certifies that she received the Complainant’s OPRA request on March 3, 2011. The Custodian certifies that she responded in writing on March 8, 2011, the third (3rd) business day after receipt of said request, requesting an extension of time until March 23, 2011 because the relevant case files were possibly in off-site storage. The Custodian certifies that after retrieving and reviewing the files, she determined that no records responsive exist. The Custodian certifies that she responded in writing to the

⁵ The GRC notes that the Custodian initially agreed to mediate this complaint on the same date but subsequently withdrew her consent. The Complainant did not respond to the Offer of Mediation.

⁶ A date stamp is included on the receipt; however, it is illegible.

Complainant on March 16, 2011 advising the Complainant that no records responsive to the request exist.

Analysis

Whether the Custodian properly responded to the Complainant's OPRA request?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ... If the government record *is in storage or archived*, the *requestor shall be so advised within seven business days* after the custodian receives the request. The *requestor shall be advised by the custodian when the record can be made available*. If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

The Complainant filed the instant complaint arguing that the Custodian failed to respond to his OPRA request within the statutorily mandated seven (7) business days. Therefore, the GRC must address whether the Custodian timely responded to the Complainant's OPRA request.

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.⁷ 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.,

⁷ 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.

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Additionally, N.J.S.A. 47:1A-5.i. provides that if a record is in storage, the custodian must advise a requestor "... within seven business days after ..." receiving said OPRA request providing a date certain on which the custodian will respond. See Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009). Moreover, a custodian must respond in writing within the extended deadline granting or denying access to the records in question. See Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008)(holding that the custodian's failure to provide access to the responsive records by the anticipated deadline results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.).

In this instant complaint, the Custodian certified in the SOI that she received the Complainant's OPRA request on March 3, 2011. The Custodian supported this fact by providing a copy of the Complainant's OPRA request with a March 3, 2011 date stamp thereon. The Custodian also provided her written response to the Complainant in which she advised the Complainant that she received his OPRA request on March 3, 2011.

The Custodian further responded to the Complainant in writing on March 8, 2011, the third (3rd) business day after receipt of the Complainant's OPRA request, seeking an extension of time until March 23, 2011 to respond because the files that may have contained the responsive records were in storage. The Custodian's request for an extension is consistent with N.J.S.A. 47:1A-5.i.

Moreover, the Custodian again responded in writing on March 16, 2011, five (5) business days prior to the expiration of the extended time frame to respond, stating that no records responsive to the Complainant's OPRA request exist. Thus, the Custodian properly responded within the extended time frame.

Therefore, because the Custodian responded to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days requesting an extension of time to respond to said request and provided a date certain on which she would respond to said request (March 23, 2011), the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, supra. Moreover, because the Custodian responded in writing five (5) business days before the expiration of the extended time frame to respond stating that no records responsive exist, the Custodian properly responded pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Whether the Custodian unlawfully denied 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.

In response to the Complainant’s OPRA request, the Custodian responded in writing on March 16, 2011 stating that no records responsive exist. The Custodian subsequently certified to this fact in the SOI.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant’s request existed. The complainant submitted no evidence to refute the custodian’s certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

In this complaint, the Custodian certified in the SOI that no records responsive to the Complainant’s OPRA request exist and the Complainant has submitted no credible evidence to refute the Custodian’s certification. Therefore, the Custodian has not unlawfully denied access to the records requested pursuant to Pusterhofer, supra. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian responded to the Complainant’s OPRA request in writing within the statutorily mandated seven (7) business days requesting an extension of time to respond to said request and provided a date certain on

which she would respond to said request (March 23, 2011), the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009). Moreover, because the Custodian responded in writing five (5) business days before the expiration of the extended time frame to respond stating that no records responsive exist, the Custodian properly responded pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

2. The Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request exist and the Complainant has submitted no credible evidence to refute the Custodian's certification. Therefore, the Custodian has not unlawfully denied access to the records requested pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012