



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

October 29, 2013 Government Records Council Meeting

John Campbell
Complainant

Complaint No. 2013-32

v.

N.J. Turnpike Authority
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 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 failed to inform the Complainant of a specific date when the requested documents would be made available pursuant to N.J.S.A. 47:1A-5(i), the Custodian’s email response to the Complainant dated January 23, 2013, requesting an extension of time is inadequate under OPRA and the Complainant’s request is “deemed” denied pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because there is no challenge from the Complainant that he did not receive the records responsive to the January 23, 2013 OPRA request, the Custodian has borne his burden that he did not unlawfully deny access to the records pursuant to 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 October, 2013

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 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**John Campbell¹
Complainant**

GRC Complaint No. 2013-32

v.

**N.J. Turnpike Authority²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Technical and Fee Proposal documents which contractually included the Southard Road Mitigation Site (Tax Block 219, Lot. 20, Howell Township, Monmouth County) into OPS No. P3399.³
2. Any and all correspondence including emails from and to NJTA which is related to the inclusion of the Southard Road Mitigation Site into P3399.

Custodian of Record: Ramon de la Cruz, Esq.

Request Received by Custodian: January 23, 2013

Response Made by Custodian: February 7, 2013

GRC Complaint Received: February 5, 2013

Background⁴

Request and Response:

On January 23, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian requested an extension of time to respond to the Complainant, but did not give a specific date or period of time in which to respond. On that date, the Complainant granted a thirty (30) day extension to the Custodian.

On February 5, 2013, the Custodian provided the Complainant with requested Item No. 1, in response to a January 30, 2013 OPRA request seeking the same document. On February 7,

¹ No legal representation listed on record.

² No legal representation listed on record.

³ It is the Custodian’s belief that the Complainant is seeking an amended version of the requested document. However, because the Complainant did not seek this record in his Denial of Access complaint, it is not before the Council to adjudicate.

⁴ 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.

2013, the Custodian provided the Complainant with copies of documents related to OPRA request Item No. 2.

Denial of Access Complaint:

On February 5, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant does not provide a basis for filing the complaint.

Statement of Information:

On September 10, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he provided the Complainant with requested Item No. 2 on February 7, 2013. The Custodian also certifies that he had previously provided the Complainant with requested Item No. 1 in response to the Complainant’s January 30, 2013, OPRA request on February 5, 2013.

Analysis

Timeliness

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Additionally, N.J.S.A. 47:1A-5(i) provides that a custodian must inform the requestor when the requested records will be made available and that failure to provide the records by such date results in a “deemed” denial.

In Hardwick v. N.J. Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), the Custodian provided a written response to the Complainant’s OPRA request on the seventh (7th) business day following receipt of same, in which the Custodian requested an extension of time to respond. However, the Custodian failed to notify the Complainant of when the requested records would be provided. The Council held that:

“...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5(i), the Custodian’s written

⁵ 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.

response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant's request is "deemed" denied 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 (October 2007)]."

Hardwick, GRC 2007-164.

The facts of this case are similar to Hardwick. Here, the Custodian provided a written response to the Complainant's request within the statutorily mandated seven (7) business days. In said response, the Custodian requested an extension of time to fulfill the Complainant's OPRA request but failed to provide an anticipated deadline as to when the requested records would be provided. Thus, the Council's ruling in Hardwick applies to this instant matter.

Therefore, because the Custodian failed to inform the Complainant of a specific date when the requested documents would be made available pursuant to N.J.S.A. 47:1A-5(i), the Custodian's email response to the Complainant dated January 23, 2013, requesting an extension of time is inadequate under OPRA and the Complainant's request is "deemed" denied pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

Here, the Custodian certifies that he responded to Complainant's request, stating that he had provided requested Item No. 1 to the Complainant under a subsequently filed OPRA request received on January 30, 2013. The Custodian certifies that he sent a copy of requested Item No. 1 to the Complainant on February 5, 2013. The Complainant does not dispute that he received a copy of requested Item No. 1 on February 5, 2013. The Custodian then sent a letter to the Complainant on February 7, 2013, stating that he had already provided the Complainant with requested Item No. 1 on February 5, 2013, and that he enclosed responsive documents related to requested Item No. 2.

Therefore, because there is no challenge from the Complainant that he did not receive the records responsive to the January 23, 2013 OPRA request, the Custodian has borne his burden that he did not unlawfully deny access to the records pursuant to N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends that:

1. Because the Custodian failed to inform the Complainant of a specific date when the requested documents would be made available pursuant to N.J.S.A. 47:1A-5(i), the Custodian's email response to the Complainant dated January 23, 2013, requesting an extension of time is inadequate under OPRA and the Complainant's request is "deemed" denied pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because there is no challenge from the Complainant that he did not receive the records responsive to the January 23, 2013 OPRA request, the Custodian has borne his burden that he did not unlawfully deny access to the records pursuant to N.J.S.A. 47:1A-6.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Brandon D. Minde, Esq.
Executive Director

October 22, 2013