



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 15, 2016 Government Records Council Meeting

Eric Richard
Complainant

Complaint No. 2015-117

v.

NJ Department of Treasury,
Division of Pensions and Benefits
Custodian of Record

At the November 15, 2016 public meeting, the Government Records Council (“Council”) considered the November 9, 2016 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. The Custodian bore her burden of proof that she timely responded to the Complainant’s OPRA request and that the two (2) extensions of time were reasonable and warranted. N.J.S.A. 47:1A-6. Therefore, the Custodian’s responses, through Ms. Jablonski, seeking an additional fourteen (14) business days constituted reasonable extensions of time and were not in violation of N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The complaint is materially defective and must be dismissed because the Complainant verified the instant complaint before the statutory time period for the Custodian to respond, as extended, had expired. *See* N.J.S.A. 47:1A-6; Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013).

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 15th Day of November, 2016

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 17, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 15, 2016 Council Meeting**

**Eric Richard¹
Complainant**

GRC Complaint No. 2015-117

v.

**NJ Department of Treasury,
Division of Pensions and Benefits²
Custodial Agency**

Records Relevant to Complaint: Hardcopy via pickup of:

1. The eligible voter file for 2015 Public Employee Retirement System (“PERS”) trustee elections for both State and county races to include employer, home address, and telephone numbers.
2. List of certifying officers, name, title, and to which units they are responsible for distributing paper ballots for PERS elections.

Custodian of Record: Florence Sheppard³
Request Received by Custodian: March 27, 2015
Response Made by Custodian: April 8, 2015
GRC Complaint Received: April 20, 2015

Background⁴

Request and Response:

On March 27, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 8, 2015, the seventh (7th) business day after receipt of the OPRA request, Cynthia Jablonski responded on behalf of the Custodian, seeking additional time until April 17, 2015, in order to process the subject OPRA request. On April 17, 2015, Ms. Jablonski again responded on behalf of the Custodian, stating that additional time until April 28, 2015, was necessary because the request required a programming effort to provide responsive data. Ms. Jablonski noted that she had not yet received a quote for the programming efforts.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Christin Deacon.

³ Cynthia Jablonski was named in the complaint.

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.

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Denial of Access Complaint:

On April 20, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the New Jersey Department of Treasury (“Treasury”) unlawfully extended the deadline to respond on two (2) occasions. The Complainant argued that he needed the responsive records for a project connected to the PERS Board of Trustees election, which began on April 1, 2015. The Complainant asserted that Treasury could have fulfilled his request with the click of a button because they possessed fully assembled records as required to begin the election. The Complainant contended that disclosure is extremely time sensitive and that Treasury’s two (2) extensions significantly hindered his project.

Supplemental Responses:

On April 30, 2015, Ms. Jablonski responded on behalf of the Custodian, stating that the Division of Pensions & Benefits (“DPB”) did not maintain a record responsive to the Complainant’s OPRA request. However, Ms. Jablonski stated that certain data sought is maintained electronically and may be extracted with a special program. Ms. Jablonski stated that, although a custodian is not required to create a record under OPRA, DPB is willing to produce them through an extensive use of information technology.

Ms. Jablonski stated that, in accordance with N.J.S.A. 47:1A-5(d), DPB proposed a special service charge in the amount of \$3,740.52 to retrieve and create the responsive reports. The charge was based on a direct quote from the Office of Information Technology (“OIT”). Ms. Jablonski noted that OIT’s quote forced DPB to explore several alternatives to reduce the total programming costs. However, Ms. Jablonski noted that some of the data, such as home addresses and telephone numbers, were exempt from disclosure and could not be removed during the programming process. Thus, Ms. Jablonski stated that OIT’s plan for disclosure was the best option. Ms. Jablonski stated that DPB would disclose the responsive records within ten (10) business days after the Complainant remitted payment.

Statement of Information:

On May 6, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 27, 2015. The Custodian affirmed that the responsive PERS trustee voting information is stored in an electronic database. The Custodian certified that she initially instructed her employees to perform a search, which resulted in a determination that no record fully responsive to the Complainant’s OPRA request existed. The Custodian certified that she next requested that staff determine whether the responsive information could be extracted from the database. The Custodian certified that her Management Information System staff reviewed the datasets and determined that DPB could not separate confidential data from disclosable data. The Custodian certified that the review necessitated the need for the first extension, about which Ms. Jablonski advised the Complainant in writing on April 8, 2015.

Thus, the Custodian certified that, on April 9, 2015, she sought a quote from OIT to run the responsive data through a special program. The Custodian certified that the quoting process necessitated a second extension, about which Ms. Jablonski advised the Complainant in writing on April 17, 2015. The Custodian certified that after receiving a quote of \$3,740.52, but before she could respond, the Complainant filed the instant complaint. The Custodian certified that Ms. Jablonski responded in writing on her behalf on April 30, 2015, and provided OIT's quote. The Custodian certified that the Complainant never advised her whether he intended to accept or reject the proposed fee.

The Custodian argued that she did not unlawfully deny access to any records. The Custodian asserted that the Complainant sought voluminous amounts of electronic data that is not otherwise readily available for inspection. Rather, the Custodian averred that she needed additional time because the request required substantial technological manipulation. The Custodian asserted that DPB made a good faith effort to seek timely extensions in order to explore all options available and provide the most efficient and cost effective response to the Complainant. NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007)(holding that exceptions to the statutory response time reflect the "Legislature's intention to balance the requestor's interest in . . . prompt access . . . and the operational needs of government.")⁵ The Custodian thus argued that this complaint should be dismissed.

The Custodian also contended that the proposed fee for disclosing the responsive records was reasonable, given that DPB required substantial technological manipulation to respond to the Complainant's OPRA request properly. N.J.S.A. 47:1A-5(d). The Custodian asserted that the total cost also included redactions for personal and personnel information not disclosable under OPRA. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-10; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009); Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005).

Analysis

Issues Presented

The instant complaint provides the Council with several prospective issues to review. However, the threshold issue here is whether the Custodian's two (2) extension requests were reasonable. For that reason, the GRC will first address the reasonableness of the extension requests in an effort to determine whether the complaint was ripe at the time of its filing.

Timeliness

OPRA provides that a custodian may request an extension of time to respond to an OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

⁵ The Custodian also acknowledged that DPB's April 30, 2015 response was a few days beyond the end of the second (2nd) extended time frame.

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In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not agree to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i)."

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant's OPRA request. The Council concluded that because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the Custodian properly requested the extension pursuant to OPRA. In rendering the decision, the Council cited as legal authority Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); and Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009).

Additionally, the Council has found additional extensions of time to be timely when sought inside a prior extended time frame. *See e.g. Delbury v. Greystone Park Psychiatric Hosp. (Morris)*, GRC Complaint No. 2013-240 (Interim Order April 29, 2014), where a second extension of time was found to be timely because “[the custodian] . . . sought a second extension and responded prior to the expiration of same . . .”

Although extensions are rooted in well-settled case law, the Council need not unquestioningly find valid every request for an extension containing a clear deadline. In *Ciccarone v. NJ Dep’t of Treasury*, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.”

In the instant matter, the Custodian, through Ms. Jablonski, sought multiple extensions for the Complainant’s OPRA request as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
April 8, 2015	April 17, 2015	To “continue processing” the OPRA request
April 17, 2015	April 28, 2015	To receive a quote to provide responsive records, which require programming.

The Complainant’s OPRA request sought eligible PERS voter files and a list of certifying officers to include their names, titles, and unit assignments. The Custodian, through Ms. Jablonski, extended the response time on two (2) occasions. Those extensions amounted to fourteen (14) additional business days. As noted above, a requestor’s approval is not required for a valid extension. However, the GRC notes that the record here is unclear whether or not the Complainant agreed to the extensions prior to filing the instant complaint: neither party included correspondence indicating that the Complainant either disputed the extensions or agreed.⁶ The GRC also notes that the filing of this complaint on the first (1st) business day after Ms. Jablonski advised the Complainant of the second (2nd) extension clearly represented the Complainant’s objection to same.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. The GRC must next consider the amount of time the custodian already had to respond

⁶ In *Ciccarone*, GRC 2013-280, the complainant allowed for a few extensions before denying the custodian any additional time. Although the complainant’s acquiescence to extensions was a mitigating factor there, it was not the only factor on which the GRC relied to determine whether the requests for extension were reasonable. Eric Richard v. NJ Department of Treasury, Division of Pensions & Benefits, 2015-117 – Findings and Recommendations of the Executive Director

to the request. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.⁷

The evidence of record indicates that the records at issue were part of a larger database that would have required the Custodian to extract responsive information and redact where she believed information was exempt under OPRA. The Custodian worked with multiple individuals to respond to the OPRA request, including OIT. The Custodian's SOI also reveals a complex search, which included ascertaining how DPB would access database information and turn same into a file. The Custodian also certified that DPB sought varying methods for producing the records to limit the possible cost it would have to pass on to the Complainant.

From the Custodian's receipt of the OPRA request, she asked Ms. Jablonski to seek the first (1st) extension of seven (7) business days to contact OIT. The Custodian then asked Ms. Jablonski to seek an additional seven (7) business days to allow time for OIT to provide the quote. Thus, the Custodian sought, in addition to the original seven (7) business days, nearly a full month of business days for the OPRA request. Further, Ms. Jablonski provided a vague reason for the first (1st) extension. However, Ms. Jablonski provided a specific reason for the second (2nd) extension: DPB was waiting for a programming quote. Thus, the record proves particularly extenuating circumstances, although not necessarily harmful, involving receiving a quote for programming from OIT.

Based on the evidence of record, the GRC finds that extending the response time for the OPRA request to the extent demonstrated in the instant matter was not excessive. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). The GRC further finds it reasonable for DPB to seek fourteen (14) additional business days based on the described search undertaken to disclose the responsive records. It is reasonable to allow for the time necessary for a search to be conducted and for OIT to calculate an accurate quote to perform the work the Custodian described in the SOI.

Accordingly, the Custodian bore her burden of proof that she timely responded to the Complainant's OPRA request and that the two (2) extensions of time were reasonable and warranted. N.J.S.A. 47:1A-6. Therefore, the Custodian's responses, through Ms. Jablonski, seeking an additional fourteen (14) business days constituted reasonable extensions of time and were not in violation of N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).

Unripe Cause of Action

OPRA provides that "a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than *seven business days after receiving the request . . .*" N.J.S.A. 47:1A-5(i) (emphasis added). OPRA further states that "[a] person who is denied access to a government record by the custodian of the record . . . may institute a proceeding to challenge the custodian's decision by filing . . . a complaint with the Government Records Council . . ." N.J.S.A. 47:1A-6.

⁷ "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.

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In Sallie v. N.J. Dep't of Banking and Ins., 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:

[B]ecause 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.

Id.; see also Herron v. Borough of Red Bank (Monmouth), GRC Complaint No. 2012-113 (April 2012).

The Council subsequently applied this reasoning to complaints filed during the pendency of a reasonable extension of time. Specifically, In Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013), the custodian responded to the complainant's requests within the statutorily-mandated time frame by requesting an extension of time for several weeks. In support of his request for the extension of time, the custodian cited, *inter alia*, the voluminous nature of the requests. The complainant verified his complaint a few days later but prior to the expiration of the extended time frame and prior to a written response. The Council held that, "because the [c]omplainant verified his complaint before the statutory time period for the Custodian to respond *as extended* had expired, the complaint is materially defective and must be dismissed" (emphasis in original).

Here, the GRC has already determined that the Custodian reasonably sought two (2) extensions of time to respond to the Complainant's OPRA request. Notwithstanding this proper response, the Complainant verified the complaint on April 20, 2015, the first (1st) business day of the second (2nd) extended time frame. The Complainant, in a manner similar to the actions of the complainant in Inzelbuch, GRC 2012-323, filed his complaint prior to expiration of the extended time frame; thus, the required denial of access for the OPRA request did not exist at the time of the filing of this complaint.

Therefore, the complaint is materially defective and must be dismissed because the Complainant verified the instant complaint before the statutory time period for the Custodian to respond, as extended, had expired. See N.J.S.A. 47:1A-6; Inzelbuch, GRC 2012-323.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian bore her burden of proof that she timely responded to the Complainant's OPRA request and that the two (2) extensions of time were reasonable and warranted. N.J.S.A. 47:1A-6. Therefore, the Custodian's responses, through Ms.

Jablonski, seeking an additional fourteen (14) business days constituted reasonable extensions of time and were not in violation of N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).

2. The complaint is materially defective and must be dismissed because the Complainant verified the instant complaint before the statutory time period for the Custodian to respond, as extended, had expired. *See* N.J.S.A. 47:1A-6; Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013).

Prepared By: Frank F. Caruso
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November 9, 2016