



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 17, 2015 Government Records Council Meeting

Richard Stolte
Complainant

Complaint Nos. 2015-33 and 2015-89

v.

NJ State Police
Custodian of Record

At the November 17, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 2015 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).
2. Both Custodians have borne their burden of proof that they lawfully denied access to the requested records, described in the Complainant’s December 17, 2014, and February 1, 2015, OPRA requests because they both certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 17th Day of November, 2015

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 19, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 17, 2015 Council Meeting**

**Richard Stolte¹
Complainant**

GRC Complaint No. 2015-33 and 2015-89²

v.

**NJ State Police³
Custodial Agency**

Records Relevant to Complaint: All information (police reports, court records, crash reports, audio/video, Unfounded Investigation Report, Accidental Injury/Death records) for Complainant's deceased brother, Kenneth J. Stolte, Jr., who died on or about Oct. 20, 2000, at 5:45 PM in New Hanover, NJ (Burlington Co.). The matter involved the following agencies: NJ State Police, Department of Defense (Ft. Dix), Pemberton, and Wrightstown police departments

Custodian of Record: Marco Rodriguez, David Robbins

Request Received by Custodian: December 17, 2014; February 1, 2015

Response Made by Custodian: December 29, 2014; January 8, 2015; March 3, 2015

GRC Complaint Received: February 10, 2015

Background⁴

Request and Response:

December 17, 2014, OPRA Request

On December 17, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian⁵ seeking the above-mentioned records. On December 29, 2015, then-Custodian Rodriguez responded in writing, seeking an extension of ten business days until January 12, 2015, claiming that he was searching the database to determine if the agency made or maintained the requested records. Custodian Rodriguez denied the request via e-mail on January 8, 2015.

February 1, 2015, OPRA Request

¹ No legal representation listed on record.

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Deputy Attorney General Adam Robert Gibbons.

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.

⁵ The Custodian at this time was DSFC Marco Rodriguez.

On February 1, 2015, the Complainant submitted an OPRA request seeking the above-mentioned records. On March 3, 2015, the new Custodian (David Robbins) responded in writing, denying the request and noting that the retention policy of the New Jersey State Police (“NJSP”) provides that accident reports are maintained for a period of five years. Custodian Robbins noted that the requested report was over fourteen years old, well beyond the retention period, and therefore no longer maintained.

Denial of Access Complaint:

December 17, 2014 OPRA Request

On February 5, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he received no response from the Custodian after the expiration of the January 12, 2015, extension deadline. The Complainant added that he submitted an additional OPRA request on December 30, 2014, to which he received no reply. The Complainant asserted that regarding the second OPRA request, he received a telephone call from the NJSP on January 8, 2015, asking, “[a]re you sure we were involved in this?” The Complainant made no other legal arguments.

February 1, 2015 OPRA Request

On March 18, 2015, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant alleged that Custodian Robbins telephoned him on March 3, 2015, to report that no responsive reports existed. The Custodian then stated that he received a denial that same day.

The Complainant argued that, contrary to the Custodian’s assertion that the requested files were “pas[t] the retention period,” New Jersey’s Division of Archives and Records Management (DARM)⁶ requires all records and reports to remain permanent in the event of a fatality. To support his argument, the Complainant attached a copy of the Records Retention and Disposition Schedule for New Jersey’s Municipal Police Departments, prepared by DARM.

Statement of Information:

December 17, 2014, OPRA Request

On March 16, 2015, the Custodian’s Counsel filed a Statement of Information (“SOI”).⁷ Custodian Rodriguez certified that he received the Complainant’s OPRA request on December 17, 2014. Custodian Rodriguez averred that he responded in writing on December 29, 2014, seeking an extension, and ultimately denied the request, in writing, on January 8, 2015. He certified that, upon receiving the request, he sent an e-mail to the Fatal Accident Unit, requesting any responsive records. After speaking with a secretary, he contacted the Unit Head, who advised him that the record was not maintained, as it was past the five-year retention period.

⁶ Records retention schedules are now administered by the Bureau of Records Management, which is located in the Department of Treasury. The GRC has no statutory authority over records retention laws. N.J.S.A. 47:1A-7(b).

⁷ This SOI concerned GRC Complaint No. 2015-33.

Custodian Rodriguez averred that he then researched the NJSP retention schedule to confirm the period and found that the retention period was, in fact, five years. He further certified that a search was conducted in the Records Management System, and no records were found. He further averred that no specific date could be provided for destruction. Custodian Rodriguez argued that, assuming the records existed and were ever in the possession of the NJ State Police, the Retention period for such records had passed and the records are no longer in existence.

February 1, 2015, OPRA Request

On April 8, 2015, the Custodian's Counsel filed a second SOI, responding to the second Denial of Access Complaint in which the Complainant asserted that DARM requires records to remain permanent in the event of a fatality. In the second SOI, the Custodian's Counsel noted that the request from February 1, 2015, was the second OPRA request for the same information that the Complainant requested on December 17, 2014. He averred that, upon receipt of the request, he sent an e-mail to the Fatal Accident Unit to request any responsive records. Custodian Robbins noted that the Unit Head advised that the requested record would not be maintained, as it was past the five-year retention period. Custodian Robbins certified that he additionally contacted the Criminal Justice Records Bureau (CJRB), who directed him to the Traffic Office. He stated that a representative from the Traffic office reiterated that records are destroyed after the retention period, so the requested record would not be maintained. Custodian Robbins certified that he responded to the request on March 3, 2015, denying it on the basis that no responsive records existed.

The Custodian's Counsel responded to the Complainant's DARM argument by noting that the schedule attached by the Complainant pertained exclusively to municipal police departments. Custodian Robbins certified that the NJSP maintains its own retention schedule, which he included as an attachment to the SOI. Custodian Robbins certified that current NJSP policy indicates that a "Fatal Accident Report (FAU)" is retained for five (5) years.

Additional Party Submissions

On February 26, 2015, prior to the filing of his second Denial of Access Complaint and after he filed the second OPRA request requesting the aforementioned records, the Complainant corresponded with the GRC. In this letter, the Complainant alleged that he received a phone call from the NJ State Police on February 18, 2015, reiterating that no records responsive to the request had been located.

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).⁸ 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).

Here, the Complainant asserted that he submitted a second OPRA request on February 1, 2015, but did not receive a response until March 3, 2015. In fact, Custodian Robbins' own certification acknowledges that the response, a denial, was made to the Complainant on March 3, 2015, well outside of the 7 business days required by OPRA.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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, 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.

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, no unlawful denial of access occurred. *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, both Custodians certified that, although the requested records may once have existed, they date from about the year 2000. The Custodians further certify that, pursuant to the Records Destruction Schedule, established and approved by the Division of Archives and Records Management, said records were destroyed in the fifth year after creation and do not presently exist.

Therefore, both Custodians have borne their burden of proof that they lawfully denied access to the requested records, described in the Complainant's December 17, 2014, and February 1, 2015, OPRA requests because they both certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

⁸ 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.

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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).
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Prepared By: Husna Kazmir
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

November 10, 2015