



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

May 23, 2017 Government Records Council Meeting

Aleksandra Wos
Complainant

v.

Borough of Cliffside Park (Bergen)
Custodian of Record

Complaint No. 2015-401

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 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 requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date by which 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). See 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); Starkey v. NJ Dep’t of Transp., GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. The Complainant’s cause of action was not ripe at the time of the filing of this Denial of access Complaint: to wit, the Custodian had not denied access to any responsive records because the Custodian responded to the Complainant’s OPRA request within the statutorily mandated seven (7) business days set forth in N.J.S.A. 47:1A-5(i) by requesting an additional ninety (90) business days to respond. Thus, the extended (90) business day time frame for the Custodian to respond had not expired at the time the Denial of Access Complaint was filed. Therefore, the instant complaint is materially defective and should be dismissed. See Sallie, 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 23rd Day of May, 2017

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: May 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 23, 2017 Council Meeting**

**Aleksandra Vos¹
Complainant**

GRC Complaint No. 2015-401

v.

**Borough of Cliffside Park (Bergen)²
Custodial Agency**

Records Relevant to Complaint:

“Reports concerning the environmental inspections, environmental test results, notification and reports sent to the New Jersey Department of Environmental Protection (NJDEP), No Further Action letters from the NJDEP, bids for environmental remediation, as well as, any and all invoices for the environmental remediation conducted on Block 605 Lot 19 commonly known as 237 Main Street, Cliffside Park, New Jersey as it was completed on the above property which was subject to condemnation proceedings under case L-6191-08.” (*sic*).

Custodian of Record: Sercan Zoklu

Request Received by Custodian: December 3, 2015

Response Made by Custodian: December 4, 2015; January 19, 2016

GRC Complaint Received: December 10, 2015

Background³

Request and Response:

On December 3, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 4, 2015, the Custodian responded, stating that because the request records were archived, a ninety (90) day extension was needed to fulfill the request.

Denial of Access Complaint:

On December 10, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the Borough of Cliffside

¹ No legal representation listed on record.

² Represented by Christine Gillen, Esq. of Diktas Gillen, P.C. (Cliffside Park, NJ).

³ 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.

Park (“Borough”) won an award in 2009 for costs associated with an environmental cleanup of her property. In 2014, the Borough sent her a refund check from that award, along with a release to sign. According to the Complainant, she refused to sign the release and instead submitted the instant OPRA request to ensure that the cleanup occurred on her property. The Complainant claimed that the Custodian had advised her that records were not readily available. Of particular note, the Complainant did not explicitly object to the extension of time sought by the Custodian.

Statement of Information:⁴

On April 15, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 3, 2015. The Custodian certified that he responded the next day, stating that because the records were archived, he needed an extension of ninety (90) days fulfill the request. The request was forwarded to the Borough Engineer, who had possession of the file potentially containing responsive records. The Custodian certified that he did not receive any additional correspondence from the Complainant before she filed the complaint.

The Custodian certified that the ninety (90) day extension was just and reasonable and that the Custodian nevertheless provided the responsive records on January 19, 2016, well within the extension period. The Custodian emphasized that the Complainant did not voice an objection to the extension, neither at the time it was requested nor within her complaint. The Custodian believed that the Complainant incorrectly assumed that the extension constituted a denial. The Custodian argued that there was no denial of access and that the agency complied with OPRA.

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 dated October 31, 2007).

In the instant matter, the Complainant stated that she submitted her OPRA request on December 3, 2015. The Custodian certified that he received said request the next day, December

⁴ The GRC referred the complaint to mediation on January 7, 2016. Following unsuccessful efforts by the parties to mediate the matter, the complaint was referred back to the GRC on April 1, 2016.

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.

4, 2015, seeking a ninety (90) day extension of time to respond. The Complainant filed her Denial of Access Complaint on December 10, 2015. Thus, the GRC must address whether the Custodian lawfully sought an extension of time to respond to the Complainant's OPRA request.

OPRA provides that a custodian may request an extension of time to respond to the Complainant's OPRA request but that a specific date on which the Custodian will further respond must be provided. N.J.S.A. 47:1A-5(i). OPRA also provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the complainant filed an OPRA request on November 5, 2009. The custodian responded to the request in writing on the fourth (4th) business day following receipt of such request, requesting an extension of time to respond to the request and providing an anticipated deadline date when 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 Transp., 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.'

[Rivera, GRC 2009-317.]

In Rivera, the Council noted that the custodian provided the Complainant with a written response to his OPRA requests on the fourth (4th) business day following receipt of said request, seeking a two (2) week extension of time to respond to said request; the Council determined 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 when the requested records would be made available, 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, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council determined 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.

As such, the Council held that the Custodian did not unlawfully deny access to the requested records. *See also* Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010), and O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010).

In the matter now before the Council, the evidence of record demonstrates that the Custodian responded in writing to the Complainant's OPRA request on the second (2nd) business day from receipt of such request by seeking a ninety (90) day extension to respond to the Complainant's OPRA request.

Therefore, because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date by which 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). *See* Rivera v. City of Plainfield Police Department (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 Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).

Ripeness

OPRA provides that “[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may . . . in lieu of filing an action in Superior Court, file a complaint with the Government Records Council.” N.J.S.A. 47:1A-6.

In the instant complaint, the Custodian properly requested an extension of time for ninety (90) days to respond to the Complainant's OPRA request under N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Complainant filed a Denial of Access Complaint with the GRC on December 10, 2015, well within the estimated extended deadline.

As one means of challenging denials of access to a government record, OPRA provides for the filing of a complaint with the GRC. N.J.S.A. 47:1A-6. In order for such a complaint to be ripe, a complainant must have been denied access to a government record. In the instant matter, however, the Complainant filed a complaint with the GRC prior to being denied access to any records responsive to her request and before the statutorily mandated seven (7) business day time frame for the Custodian to respond expired.

In Sallie v. NJ 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.

In current matter, the Complainant acted similarly to the complainant in Sallie, supra, by filing a Denial of Access Complaint with the GRC prior to the Custodian responding to the request. The Custodian herein responded to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days, seeking an additional ninety (90) days to respond to the Complainant's OPRA request. N.J.S.A. 47:1A-5(i) states that a custodian's response is due seven (7) business days after *receipt* of an OPRA request. The Complainant filed her complaint well within the ninety (90) day extension.

Therefore, the Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint: to wit, the Custodian had not denied access to any responsive records because the Custodian responded to the Complainant's OPRA request within the statutorily mandated seven (7) business days set forth in N.J.S.A. 47:1A-5(i) by requesting an additional ninety (90) business days to respond. Thus, the extended (90) business day time frame for the Custodian to respond had not expired at the time the Denial of Access Complaint was filed. Therefore, the instant complaint is materially defective and should be dismissed. *See Sallie.*

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date by which 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). *See 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); Starkey v. NJ Dep't of Transp., GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. The Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint: to wit, the Custodian had not denied access to any responsive records because the Custodian responded to the Complainant's OPRA request within the

statutorily mandated seven (7) business days set forth in N.J.S.A. 47:1A-5(i) by requesting an additional ninety (90) business days to respond. Thus, the extended (90) business day time frame for the Custodian to respond had not expired at the time the Denial of Access Complaint was filed. Therefore, the instant complaint is materially defective and should be dismissed. *See Sallie*, GRC Complaint No. 2007- 226 (April 2009).

Prepared By: Samuel A. Rosado
Staff Attorney

May 16, 2017