



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

October 30, 2018 Government Records Council Meeting

Robert McDonnell
Complainant

Complaint No. 2017-107

v.

Hillsborough Township (Somerset)
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 Supplemental 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 the Council dismiss the complaint because the Complainant withdrew the matter via letter to the Office of Administrative Law on August 29, 2018. Therefore, no further adjudication is required.

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 30th Day of October, 2018

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, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
October 30, 2018 Council Meeting**

**Robert McDonnell¹
Complainant**

GRC Complaint No. 2017-107

v.

**Hillsborough Township (Somerset)²
Custodial Agency**

Records Relevant to Complaint: “Exact copy of document containing the information provided by Somerset Medical now Robert Wood Johnson University Hospital – Somerset to Hillsboro Township. This exact document is identified on page 48 and 49 of the Fitch report dated September 30, 2014. The exact statement from the report identifying the existence of said document is in the form of this exact statement from the report. ‘Recently officials at Somerset Medical Center now Robert Wood Johnson University Hospital – Somerset provided information to the Township regarding the provisions of BLS services for the community. The consultant has spoken with RWJUH officials who confirm their interest in becoming Hillsborough Township’s BLS provider.’”³

Custodian of Record: Pamela Borek

Request Received by Custodian: April 26, 2017

GRC Complaint Received: May 9, 2017

Response Made by Custodian: May 11, 2017

Background

March 27, 2018 Council Meeting:

At its March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. 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.

¹ No legal representation listed on record.

² Represented by William Willard, Esq., of DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum P.C. (Warren, NJ).

³ The Complainant requested that the responsive record be delivered to him via e-mail.

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

2. Based on the inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts and for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Procedural History:

On March 28, 2018, the Council distributed its March 27, 2018 Interim Order to all parties. On June 11, 2018, the complaint was transmitted to the Office of Administrative Law (“OAL”). On August 29, 2018, the Complainant sent a letter to the OAL withdrawing the complaint.⁴ On September 21, 2018, the OAL returned the complaint back to the GRC marked “withdrawn.”

Analysis

No analysis required.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council dismiss the complaint because the Complainant withdrew the matter via letter to the Office of Administrative Law on August 29, 2018. Therefore, no further adjudication is required.

Prepared By: John E. Stewart

October 23, 2018

⁴ The letter is stamped “Received” by the OAL on September 18, 2018.



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PO BOX 819
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

March 27, 2018 Government Records Council Meeting

Robert McDonnell
Complainant

Complaint No. 2017-107

v.

Hillsborough Township (Somerset)
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Findings and Recommendations of the Council Staff 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’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. Based on the inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts and for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 27th Day of March, 2018

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: March 28, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
March 27, 2018 Council Meeting**

**Robert McDonnell¹
Complainant**

GRC Complaint No. 2017-107

v.

**Hillsborough Township (Somerset)²
Custodial Agency**

Records Relevant to Complaint: “Exact copy of document containing the information provided by Somerset Medical now Robert Wood Johnson University Hospital – Somerset to Hillsboro Township. This exact document is identified on page 48 and 49 of the Fitch report dated September 30, 2014. The exact statement from the report identifying the existence of said document is in the form of this exact statement from the report. ‘Recently officials at Somerset Medical Center now Robert Wood Johnson University Hospital – Somerset provided information to the Township regarding the provisions of BLS services for the community. The consultant has spoken with RWJUH officials who confirm their interest in becoming Hillsborough Township’s BLS provider.’”³

Custodian of Record: Pamela Borek
Request Received by Custodian: April 26, 2017
GRC Complaint Received: May 9, 2017⁴
Response Made by Custodian: May 11, 2017

Background⁵

Request:

On April 25, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.⁶

¹ No legal representation listed on record.

² Represented by William Willard, Esq., of DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum P.C. (Warren, NJ).

³ The Complainant requested that the responsive record be delivered to him via e-mail.

⁴ The Complainant e-mailed the complaint to the GRC on May 5, 2017; however, the complaint was not signed. On May 9, 2017, the GRC e-mailed a copy of page 2 of the complaint to the Complainant for his signature. The Complainant returned page 2 with his signature and changed the date to May 9, 2017. On this same date, the Complainant e-mailed a copy of the complaint with the amended date to the Custodian. In view of these circumstances and the actions taken by the Complainant, the GRC considers the complaint filed as of May 9, 2017.

⁵ 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.

⁶ The request was submitted after normal business hours.

Denial of Access Complaint:

On May 9, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he submitted a request to the Custodian on April 25, 2017, and received a receipt acknowledging that the request was received.⁷ The Complainant states that he never received a response from the Custodian.

Response:

On May 11, 2017, the eleventh (11th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the request fails to identify a government record and that she is unaware of any documents responsive to the request.

Statement of Information:

On May 15, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that the Township received the OPRA request electronically through GovPilot on April 26, 2017; however, due to administrative glitches, she was not aware that the Complainant filed the request until May 9, 2017. The Custodian certifies that, although she did not respond to the request until May 11, 2017, it was not her intention to fail to respond to the Complainant’s request within the statutorily-mandated time frame. The Custodian further certifies that the request was denied because it failed to identify a government record. The Custodian asserted that “OPRA is not intended as a research tool, but only operates to make identifiable government records available.” The Custodian cited MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) in support of her assertion. The Custodian stated that there are no records responsive to the Complainant’s request.

Additional Submissions:

On May 25, 2017, the Complainant e-mailed the GRC in response to the Custodian’s SOI. The Complainant states that he never received a letter from the Custodian dated May 11, 2017, and that he first saw a copy of the letter as an attachment to the SOI.

The Complainant also disputes the Custodian’s assertion that there are no records responsive to his request. The Complainant attached to his e-mail a copy of an agreement between the Township of Hillsborough and Fitch and Associates dated April 9, 2014.⁸ The Complainant also attached to the e-mail pages 48 and 49 from the “EMS Assessment – FINAL REPORT” prepared by Fitch and Associates on September 30, 2014, wherein reference is made to officials at Robert Wood Johnson University Hospital – Somerset providing information to the Township regarding the provisions of BLS services for the community. The Complainant states that a proposal referenced on page 49 of the report is a government record.

⁷ The Complainant attached a copy of the receipt to the complaint.

⁸ The agreement is for Fitch and Associates to evaluate the Hillsborough Rescue Squad and HEMS Corporation in consideration of up to \$35,090.00 in fees and costs payable by the Township. The agreement was attested to by the Custodian.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).⁹ 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 evidence of record reveals that the Complainant filed his OPRA request on April 25, 2017 at 5:49 p.m. The Custodian certified that the Township received the request on April 26, 2017. The Custodian certified that she responded to the Complainant's request on May 11, 2017, which is eleven (11) business days following receipt of the request.

Therefore, 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.

Here, the Custodian certified that the Complainant's request failed to identify a government record and that no documents responsive to the request existed. The Complainant disputed the Custodian's certification and proffered a copy of an agreement between the Township of Hillsborough and Fitch and Associates to evaluate the Hillsborough Rescue Squad and HEMS Corporation which was attested to by the Custodian, together with two pages from the Fitch and Associates evaluation report which referenced the document he is seeking.

Based on the inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts and for a

⁹ 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.

determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. 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. Based on the inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts and for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart

March 20, 2018