



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 12, 2019 Government Records Council Meeting

Megan McNally
Complainant

Complaint No. 2017-221

v.

City of Bayonne (Hudson)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 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 Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint. The Custodian had not denied access to any records responsive to the Complainant’s August 6, 2017 OPRA request because he had not received it until November 9, 2017. Thus, the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; the instant complaint is materially defective and therefore should be dismissed. N.J.S.A. 47:1A-5(i). Sallie v. N.J. Dep’t of Banking and Ins., GRC Complaint No. 2007-226 (April 2009). See also Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-343 (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 12th Day of November 2019

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 15, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Megan McNally¹
Complainant**

GRC Complaint No. 2017-221

v.

**City of Bayonne (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic version of a ferry survey report prepared for the City of Bayonne (“City”).

Custodian of Record: Robert Sloan³

Request Received by Custodian: November 9, 2017

Response Made by Custodian: January 12, 2018

GRC Complaint Received: November 14, 2017

Background⁴

Request:

On August 6, 2017, the Complainant e-mailed an Open Public Records Act (“OPRA”) request to Marybeth Golden seeking the above-mentioned records. On September 30, 2017, the Complainant e-mailed Ms. Golden seeking a status update regarding the August 6, 2017 request.

Denial of Access Complaint:

On November 14, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted she originally submitted her OPRA request on August 6, 2017, then followed up on September 30, 2017 seeking a status update. The Complainant stated the Custodian failed to respond to her OPRA request.

Response:

On January 12, 2018, the Custodian responded in writing via e-mail attaching the requested report.

¹ No legal representation listed on record.

² Represented by Jessica Connors, Esq. (Hudson, NJ).

³ The current Custodian of Record is Madelene Medina.

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.

Megan McNally v. City of Bayonne (Hudson), 2017-221 – Findings and Recommendations of the Executive Director

Statement of Information:

On January 25, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian asserted that the Complainant e-mailed her OPRA request to Ms. Golden, an employee whom “no longer performed that work for the City.” The Custodian asserted that the City first received the Complainant’s OPRA request on November 9, 2017 as part of the Denial of Access Complaint. The Custodian additionally averred that the request was not forwarded to Christina Lagatta, the individual in charge of handling OPRA requests until December 17, 2017. The Custodian asserted that Ms. Lagatta was on vacation from December 11, until December 18, 2017, and City Hall was closed on December 22, and December 25, 2017. The Custodian further stated, “between vacations and holidays there were unfortunate delays in obtaining the complainant a response.” The Custodian certified that Ms. Lagatta responded on his behalf on January 12, 2018 disclosing the requested report.

Additional Submissions:

On September 5, 2019, the GRC requested additional information from the Custodian. Specifically, the GRC sought answers to the following questions:

1. Was Ms. Golden employed by the City at the time of the Complainant’s OPRA request and/or September 30, 2017 follow-up e-mail?
2. If so, did Ms. Golden receive the request or follow-up e-mail?
3. Was Ms. Golden’s e-mail address still in operation at the time of the Complainant’s OPRA request and/or follow-up e-mail?

The GRC requested that the Custodian provide a certified response to the foregoing by end of business September 10, 2019.

On September 9, 2019, the current Custodian responded to the GRC’s request for additional information attaching a certification from Ms. Golden. Therein, the current Custodian certified that Ms. Golden was transferred from the City Clerk’s Office to the Municipal Court on January 23, 2017. See also Golden Cert. ¶ 1. The current Custodian certified that “[t]o the best of [her] knowledge, the e-mail account ‘mgolden@baynj.org’ was not in operation or monitored by Ms. Golden after her transfer on January 23, 2017. . . .” Golden Cert. ¶ 4. The current Custodian affirmed that said e-mail account was not monitored by any employee after the approximate date of January 27, 2017.

Analysis

Ripeness

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 (January 2010).

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.

Similarly, in Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-343 (February 2013), the complainant caused his Denial of Access Complaint to be filed on October 31, 2011. The custodian certified in the SOI that he did not receive the complainant's October 19, 2011 OPRA request until October 20, 2011. The Council held that because the statutorily mandated seven (7) business day time frame for the custodian to respond had not expired; the complaint was materially defective and should be dismissed. (Citing Sallie, GRC 2007-226). See also Herron v. Borough of Red Bank (Monmouth), GRC Complaint No. 2012-113 (April 2012).

In the matter before the Council, the Complainant e-mailed her OPRA request to Ms. Golden, who no longer worked in the Clerk's Office, on August 6, 2017. The Custodian certified in the SOI that he did not receive the request until November 9, 2017 as part of the Denial of Access Complaint. The current Custodian subsequently certified that Ms. Golden, transferred to the Municipal Court as of January 23, 2017, had no access to her e-mail account at the time that the request was submitted. Thus, the evidence supports that there was no way for the Custodian to have received the Complainant's OPRA request prior to the filing of this complaint.

Therefore, the Complainant's cause of action was not ripe at the time she filed her Denial of Access Complaint. Specifically, the Custodian had not denied access to any records responsive to the Complainant's August 6, 2017 OPRA request because he did not receive it until November 9, 2017. Thus, because the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; the instant complaint is materially defective and therefore should be dismissed. Sallie, GRC 2007-226. See also Kohn, GRC 2011-343.

Finally, the GRC acknowledges that a "deemed" denial occurred following the filing of this complaint; however, it will not address this issue because the complaint is not properly before

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.

the Council. Additionally, the GRC acknowledges that the Custodian disclosed the responsive records via e-mail on January 12, 2018.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint. The Custodian had not denied access to any records responsive to the Complainant's August 6, 2017 OPRA request because he had not received it until November 9, 2017. Thus, the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; the instant complaint is materially defective and therefore should be dismissed. N.J.S.A. 47:1A-5(i). Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007-226 (April 2009). See also Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-343 (February 2013).

Prepared By: Brandon Garcia
Case Manager

October 30, 2019