



State of New Jersey
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 30, 2018 Government Records Council Meeting

Megan McNally
Complainant

Complaint No. 2017-230

v.

City of Bayonne (Hudson)
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 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 this complaint is materially defective and must be dismissed because the requested records are not immediate access records and because the Complainant verified the complaint before the statutory time period provided for the Custodian to respond had expired. N.J.S.A. 47:1A-5(i). See also Sallie v. NJ Dep’t of Banking and Ins., 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 30th Day of January, 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: February 2, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Megan McNally¹
Complainant**

GRC Complaint No. 2017-230

v.

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

Records Relevant to Complaint: “[C]opies of all records pertaining to the work of NJACR since the beginning of its contract with the city for animal control services (2015-1017) (sic). I’m assuming there is some kind of monthly/quarterly/annual report regarding the number and type of cases handled, along with information regarding the status of those animals (including wildlife), but I’ll accept whatever documents are available regarding NJACR’s performance.”³

Custodian of Record: Robert F. Sloan
Request Received by Custodian: November 28, 2017
Response Made by Custodian: No response made
GRC Complaint Received: December 4, 2017

Background⁴

Request and Response:

On November 13, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the City of Bayonne seeking the above-mentioned records; however, the request was submitted to Marybeth Golden, who is not the Custodian or the Custodian’s designee.⁵ The Custodian certified that he first received the OPRA request on November 28, 2017, when the Complainant forwarded a copy of her November 13, 2017 request to him. The evidence of record reveals that no response was made prior to the complaint being filed.

¹ No legal representation listed on record.

² Represented by Karla Y. Garcia, Esq. (Bayonne, NJ).

³ NJACR is an abbreviation for New Jersey Animal Control and Rescue, LLC. The organization provides animal control and shelter services.

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 evidence of record reveals that Marybeth Golden was once employed as an assistant in the Clerk’s Office but is no longer employed in that capacity. It is unknown if Ms. Golden ever received the request because no receipt was provided to the Complainant.

Denial of Access Complaint:

On December 4, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that she filed an OPRA request with the City of Bayonne by submitting the request to Marybeth Golden, Robert Sloan and Jay Coffey via e-mail on November 13, 2017.⁶ The Complainant contends that she never received a response to the request.

The Complainant states that on November 28, 2017, she submitted a second request for the same records and gave the City a response deadline date of December 1, 2017; threatening to file a complaint if she did not receive a response by said deadline date. The Complainant states that she did not receive a response and therefore filed the instant complaint.

Statement of Information:

On December 12, 2017, the GRC requested a Statement of Information (“SOI”) from the Custodian. On December 15, 2017, the Custodian’s Counsel requested a two (2) week extension of time to have the Custodian prepare and submit the SOI. The Custodian’s Counsel also informed the GRC that “. . . Marybeth Golden is NOT in charge of OPRA requests for the City of Bayonne.” (Emphasis in original.) On December 15, 2017, the GRC e-mailed the Custodian’s Counsel, granting an extension of time until December 27, 2017.⁷

On December 28, 2017, the GRC forwarded a letter to the Custodian, informing the Custodian that the GRC was still not in receipt of the SOI. The GRC further informed the Custodian that if the SOI was not received by the GRC within three (3) business days, the complaint would proceed to adjudication based only on the information contained in the complaint.

On December 28, 2017, the Custodian submitted the SOI.⁸ The Custodian certified that he received the Complainant’s OPRA request on November 28, 2017. The Custodian further states that the Law Director began to prepare an e-mail response but never sent the e-mail to the Complainant.

The Custodian certifies that the records responsive to the request consist of approximately 51 pages of City of Bayonne Agreement No. CY15-086, and approximately 23 pages of NJ Animal Control and Rescue report from December 2015 until November 2017. The Custodian certifies that he forwarded these records in unredacted form to the Complainant on December 28, 2017.

⁶ The evidence of record reveals that the November 13, 2017 request was submitted only to Marybeth Golden. A second request submitted on November 28, 2017, was sent to Marybeth Golden, Robert Sloan and Jay Coffey. Jay (John) Coffey is the City’s Law Director.

⁷ By copy of the December 15, 2017 e-mail, the GRC asked the Complainant to explain to the GRC how she obtained Marybeth Golden’s name as the custodian of records for the City of Bayonne, and to include any documentation confirming Marybeth Golden as the Custodian. Although the Complainant did reply to the GRC, she could not provide any proof that Ms. Golden is, or was, the Custodian. The GRC notes that the City, on its OPRA request form, references City Clerk Robert Sloan as the Custodian of Records.

⁸ The SOI addressed the November 28, 2017 request, as well as another request that did not form the basis of this complaint. Only the statements/arguments relevant to the November 28, 2017 request will be considered by the GRC.

Additional Submissions:

On December 28, 2017, the Complainant responded to the Custodian's SOI by stating that the two OPRA requests mentioned in the SOI were for different sets of records. The Complainant states that the November 28, 2017 request sought "monthly reports, which I believed would show the disposition of the animals collected every month." The Complainant further states that she does not "know why the City thought that a copy of the contract was responsive to my 11/28 request . . ." The Complainant also states that the disclosed records do not contain all of the records responsive to her November 28, 2017 request.

Analysis

Unlawful Denial of Access

OPRA provides that 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. OPRA also 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 City's Law Director began to prepare a response to the Complainant's November 28, 2017 request; however, the response was never sent to the Complainant. The Custodian disclosed responsive records to the Complainant on December 28, 2017, which was twenty-one (21) business days after receipt of the request. In the SOI, the Custodian did not provide a lawful reason for the denial.

However, the Council is permitted to raise defenses regarding the disclosure of records *sua sponte* pursuant to Paff v. Twp. of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007), *certif. denied* by Paff v. Twp. of Plainsboro, 193 N.J. 292 (2007).⁹ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

[t]he GRC has an independent obligation to 'render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct .

Id.

⁹ On appeal from Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (March 2006). [unpublished]

Here, the Custodian certified that he did not receive the Complainant's OPRA request until November 28, 2017. The evidence of record reveals that the Complainant digitally signed and dated the Denial of Access Complaint on December 3, 2017, and that the complaint was filed with the GRC on December 4, 2017, which is the fourth (4th) business day after the Custodian received the request.

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.

The facts in the instant complaint are similar to those in Sallie. Here, the Complainant filed a complaint with the GRC prior to expiration of the statutorily mandated seven (7) business day time frame for the Custodian to respond, as set forth in N.J.S.A. 47:1A-5(i). As such, the complaint was filed prior to a denial of access to the requested records by the Custodian. Thus, the cause of action was not ripe at the time the Complainant filed the complaint.

The GRC notes that, although the Custodian disclosed to the Complainant a copy of its agreement with NJACR, which would ordinarily be an immediate access record, the Complainant did not seek such a record. The Complainant even questioned disclosure of the agreement in her response to the SOI. Moreover, a review of the request reveals that the Complainant never requested a contract or agreement, but rather requested copies of a “. . . monthly/quarterly/annual report regarding the number and type of cases handled, along with information regarding the status of those animals . . .” As such, the GRC concludes that disclosure of the agreement did not serve to trigger the immediate access provision of N.J.S.A. 47:1A-5(e).

Therefore, this complaint is materially defective and must be dismissed because the requested records are not immediate access records and because the Complainant verified the complaint before the statutory time period provided for the Custodian to respond had expired. N.J.S.A. 47:1A-5(i). *See also Sallie*, GRC 2007-226.

The GRC acknowledges that a “deemed” denial took place following the filing of this complaint; however, it will not address this issue because the complaint is not properly before the Council.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that this complaint is materially defective and must be dismissed because the requested records are not immediate access

records and because the Complainant verified the complaint before the statutory time period provided for the Custodian to respond had expired. N.J.S.A. 47:1A-5(i). *See also Sallie v. NJ Dep't of Banking and Ins.*, GRC Complaint No. 2007- 226 (April 2009).

Prepared By: John E. Stewart

January 23, 2018