



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 18, 2018 Government Records Council Meeting

Michael I. Inzelbuch, Esq.
Complainant

Complaint No. 2017-53

v.

NJ Office of Administrative Law
Custodian of Record

At the December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 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 the Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian bore his burden of proof that he responded in writing within the prescribed time frame. As such, there was no “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

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 18th Day of December, 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: December 20, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
December 18, 2018 Council Meeting**

**Michael I. Inzelbuch, Esq.¹
Complainant**

GRC Complaint No. 2017-53

v.

**New Jersey Office of Administrative Law²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the following regarding D.C. and C.C. (O.B.O. D.C.) v. Marlboro Twp. Bd. of Ed., EDS 14086-15:

1. Any and all schedules or calendars maintained by former Administrative Law Judge (“ALJ”) Tiffany Williams.
2. Any and all notes, memoranda, and correspondence from ALJ Williams to ALJ Sanders and/or ALJ Candido.
3. The “work flow” and/or computer listings of any and all activity.
4. Any and all notes, writings, *etc.*, maintained by ALJ Williams.
5. Any and all Orders issued by ALJ Williams.
6. Any and all letters written or received by ALJ Williams.
7. Any and all notes maintained by ALJ Monaco.

Custodian of Record: Patrick Mulligan
Request Received by Custodian: April 4, 2017
Response Made by Custodian: April 5, 2017
GRC Complaint Received: March 13, 2017

Background³

Request:

On February 28, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

¹ No legal representation listed on record.

² No legal representation listed on record.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On March 13, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted an OPRA request to the Office of Administrative Law (“OAL”) on February 28, 2017 and never received a response.

Response:

On April 4, 2017, the Custodian e-mailed the Complainant advising that he just located the subject request in his junk mail folder. The Custodian noted that no facsimile version was located and the OAL Newark Office never received it via facsimile either. The Custodian stated that he would respond accordingly. On the same day, the Complainant e-mailed the Custodian advising that he had written confirmation that the Newark Office received the OPRA request. The Custodian responded noting that he had just spoke with Susan Robinson about the request.

On April 5, 2017, the Complainant e-mailed the GRC refuting the Custodian’s assertions as factually incorrect. The Complainant included multiple attachments, including fax confirmation sheets and an e-mail from Latoya Bryant of the Newark Office advising that she would forward the request to Ms. Robinson.

Statement of Information:

On May 1, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 4, 2017. The Custodian certified that his search included referencing the specific ALJs and OAL matter to identify responsive records in both the OAL’s e-mail accounts and electronic case file system. The Custodian also affirmed that he performed a search of the physical OAL file with supervision from ALJ Kirk (the currently assigned judge) and her judicial assistant.

The Custodian affirmed that he initially responded in writing on April 5, 2017 seeking an extension through April 21, 2017 due to limited staff resources. The Custodian certified that he responded in writing on April 21, 2017 (via certified mail) disclosing records responsive to OPRA request item Nos. 1 through 4 and 7. The Custodian affirmed that no records responsive to item Nos. 5 and 6 existed. The Custodian also affirmed that he disclosed nineteen (19) additional pages of records from ALJ Kirk.

The Custodian certified that he did not become aware of the subject OPRA request until April 4, 2017.⁴ The Custodian affirmed that he had no record of the request being sent because it was in his spam/clutter folder within Microsoft Outlook®. The Custodian further certified that he

⁴ The GRC notes that the Custodian’s acknowledgment of the request appears to have coincided with a duplicate filing of this complaint on April 3, 2017. See Inzelbuch, Esq. v. N.J. Office of Administrative Law, GRC Complaint No. 2017-67 (April 2017). The GRC notes that the Complainant again filed a duplicate complaint on April 28, 2017. See Inzelbuch, Esq. v. N.J. Office of Administrative Law, GRC Complaint No. 2017-93 (May 2017). Both were administratively dismissed as a duplicate of this complaint.

never received the faxed copies; it was possible that staff mistook the subject request for another filed by the Complainant that they had worked on around the same time.

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 October 31, 2007).

Here, the Complainant submitted his OPRA request to the Custodian, copying multiple individuals, via e-mail on February 28, 2017. The Complainant also appeared to fax the request to both OAL sites in Quakerbridge, where the Custodian reports, and Newark. On April 4, 2017, after the filing of this complaint, the Custodian e-mailed the Complainant advising that he never received the subject request until that day because it was in his "junk" mail folder. The Complainant disputed that the Custodian did not receive the request, noting that Ms. Bryant from OAL Newark confirmed receipt. In the SOI, the Custodian again certified that he had no knowledge of the subject OPRA request until after this complaint was filed.

In reviewing the Council's past case law for guidance here, the closest decision the GRC could locate was Verry v. West Milford Bd. of Educ. (Passaic), GRC Complaint No. 2015-156 (Interim Order dated September 27, 2016). There, the custodian certified in the SOI that the OPRA request was received in her inbox; however, she claimed that she did not see the request upon receipt. The custodian further asserted that her departure for vacation prior to seeing the request resulted in additional delays in responding.

The GRC sees this complaint as factually inapposite to Verry. Specifically, the Custodian explained from the outset of the complaint that the request went into his junk mail and that he did not locate it until after the filing of the complaint. The Custodian also certified that he never received the faxed request. Thus, unlike the custodian in Verry, it is reasonable that the Custodian would not have received the subject OPRA request because he was not regularly monitoring a junk mail folder. Further, the GRC finds it reasonable that the Custodian may not have considered checking his junk mail to see if any e-mails were erroneously directed there within the seven (7) business day time frame. Ultimately, the facts here support that the Custodian physically received the request on April 4, 2017 when alerted to it after receipt of this complaint. The facts further

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.

support that the Custodian took the proper steps to respond to it once received; thus, no “deemed” denial of access occurred here.

Therefore, the Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian bore his burden of proof that he responded in writing within the prescribed time frame. As such, there was no “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

The GRC notes that best practices would dictate that a custodian should take steps to ensure e-mailed OPRA request were received, up to and including a periodic check of all e-mail inboxes. However, as applied to the facts here, a custodian’s failure to periodically check a junk mail folder for valid OPRA requests does not necessarily correlate to an automatic “deemed” denial of access.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian bore his burden of proof that he responded in writing within the prescribed time frame. As such, there was no “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

December 11, 2018