



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
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PHILIP D. MURPHY
Governor

L.T. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Kim E. Davis
Complainant
v.
Township of Deptford (Gloucester)
Custodian of Record

Complaint No. 2018-131

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 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:

1. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s June 14, 2018 OPRA request seeking denial correspondence for a two (2) year period. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Complainant’s cause of action, as it relates to the June 26, 2018 OPRA request, 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 this OPRA request because she had not yet responded, and the statutory time frame had not yet elapsed. Thus, because the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; this portion of the instant complaint is materially defective and therefore should be dismissed. Sallie v. N.J. Dep’t of Banking and Ins., GRC Complaint No. 2007-226 (April 2009); 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 7th Day of January 2020

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: January 9, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Kim E. Davis¹
Complainant**

GRC Complaint No. 2018-131

v.

**Township of Deptford (Gloucester)²
Custodial Agency**

Records Relevant to Complaint:

June 14, 2018 OPRA request: Hardcopies via pickup of correspondence to homeowners seeking designated handicap parking spaces in front of their residence (inclusive of the reasons for the Township of Deptford's ("Township") decision) over the last two (2) years.

June 26, 2018 OPRA request: Hardcopies via pickup of correspondence to homeowners seeking designated handicap parking spaces in front of their residence (inclusive of the reasons for the Township of Deptford's ("Township") decision) over the last three (3) to five (5) years.

Custodian of Record: Dina Zawadski

Request Received by Custodian: June 15, 2018; June 27, 2018

Response Made by Custodian: June 25, 2018; July 6, 2018

GRC Complaint Received: July 6, 2018

Background³

Request and Response:

On June 14, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 25, 2018, the sixth (6th) business day after receipt of the June 14, 2018 OPRA request, Clerk Typist Brittany Todd responded in writing on behalf of the Custodian stating that the Township was unable to locate records responsive to the Complainant's OPRA request.

On June 26, 2018, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records.

¹ No legal representation listed on record.

² Represented by Albert K. Marmero, Esq., of Grace, Marmero, & Associates, LLP (Woodbury, 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.

Denial of Access Complaint:

On July 6, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she previously received a letter from the Township on April 10, 2018 denying her a designated handicap space in front of her residence. The Complainant stated that the letter “reference[d] similar requests denied in the past.” The Complainant asserted that the Township’s policy required all “requests of this nature in writing.”

The Complainant stated she submitted an OPRA request on June 14, 2018 to obtain other denial communications and was told none existed. The Complainant stated that she submitted another OPRA request on June 26, 2018 expanding the applicable time frame but received no response as of this complaint filing.

Response:

On July 6, 2018, the sixth (6th) business day after receipt of the June 14, 2018 OPRA request, Clerk Typist Brittany Todd responded in writing on behalf of the Custodian stating that the Township was unable to locate records responsive to the Complainant’s June 26, 2018 OPRA request.

Statement of Information:⁴

On September 13, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on June 15, and June 27, 2018 respectively. The Custodian certified that for both requests, her search included herself and staff reviewing the Township Clerk’s files, as well as contacting the Community Development Director for him to search his own records. The Custodian affirmed that both searches failed to yield responsive records. The Custodian certified that on her behalf, Ms. Todd responded in writing on June 25, and July 6, 2018 respectively advising that no responsive records existed.

The Custodian argued that the Township timely responded to each OPRA request. The Custodian further certified that no responsive records existed. The Custodian thus asserted that this complaint was similar to Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Analysis

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.

⁴ On August 1, 2018, this complaint was referred to mediation. On August 21, 2018, this complaint was referred back to the GRC for adjudication.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. Regarding the Complainant's June 14, 2018 OPRA request, Ms. Todd responded on behalf of the Custodian advising that no records existed. The Complainant subsequently filed this complaint alleging that a prior letter she received "reference[d] other such requests denied in the past." In the SOI, the Custodian certified that no records existed, and included an explanation of the search the Township undertook to locate responsive records.

A review of the April 10, 2018 letter for which the Complainant based her OPRA request reveals that the Township noted it previously "denied [handicap space] requests in the past." However, the letter does not indicate how the Township denied those requests. Taken in tandem with the Custodian's SOI certification, the GRC is satisfied that no responsive records existed. Further, the GRC does not find any competent, credible evidence in the record to refute the Custodian's certification.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's June 14, 2018 OPRA request seeking denial correspondence for a two (2) year period. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Unripe Cause of Action

OPRA provides that "a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than *seven business days after receiving the request . . .*" N.J.S.A. 47:1A-5(i) (emphasis added). OPRA further states that "[a] person who is denied access to a government record by the custodian of the record . . . may institute a proceeding to challenge the custodian's decision by filing . . . a complaint with the Government Records Council . . ." N.J.S.A. 47:1A-6.

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 submitted her June 26, 2018 OPRA request to the Township on the same day. The Complainant subsequently caused this complaint filing to the GRC via e-mail at 12:47 p.m. on July 6, 2018. Therein, the Complainant argued that the Custodian did not respond to the OPRA request. However, at 1:19 p.m. on the same day, Ms. Todd responded advising that no records existed. In the SOI, the Custodian certified that she received the OPRA request on June 27, 2018. Thus, the final business day to respond was July 9, 2018. This is considering that the Township was closed for business on July 4, 2018 in observance of Independence Day.

The facts of the instant complaint are on point with those in Kohn, GRC 2011-343. Specifically, at the time the Complainant caused her complaint filing, the seven (7) business day time frame had not yet expired. In fact, Ms. Todd responded on behalf of the Custodian on the sixth (6th) business day after receipt of the June 26, 2018 OPRA request. Further, Ms. Todd sent her e-mail response to the Complainant less than an hour after the complaint filing. Thus, at the moment the Complainant submitted her complaint, she had not received an official denial of access, nor had the statutory time frame expired. Based on this, a conclusion like both Sallie and Kohn is reasonable here.

Therefore, the Complainant's cause of action, as it relates to the June 26, 2018 OPRA request, 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 this OPRA request because she had not yet responded, and the statutory time frame had not yet elapsed. Thus, because the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; this portion of the instant complaint is materially defective and therefore should be dismissed. Sallie, GRC 2007-226; Kohn, GRC 2011-343.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's June 14, 2018 OPRA request seeking denial correspondence for a two (2) year period. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Complainant's cause of action, as it relates to the June 26, 2018 OPRA request, 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 this OPRA request because she had not yet responded, and the statutory time frame had not yet elapsed. Thus, because the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; this portion of the instant complaint is materially defective and therefore should be dismissed. Sallie v. N.J. Dep't of Banking and Ins.

GRC Complaint No. 2007-226 (April 2009); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-343 (February 2013).

Prepared By: Frank F. Caruso
Executive Director

December 10, 2019