



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 29, 2020 Government Records Council Meeting

Kimberly Skorka
Complainant

Complaint No. 2018-297

v.

Highlands Business Partnership (Monmouth)
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 2020 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 her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, no “deemed” denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Further, the Council need not address the special service charge issue or order disclosure of the responsive records because the Custodian did so without payment of the assessed fee on December 4, 2018.

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 29th Day of September 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: October 1, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2020 Council Meeting**

**Kimberly Skorka¹
Complainant**

GRC Complaint No. 2018-297

v.

**Highlands Business Partnership (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all documentation for all business transactions” with ShoreGrafx from June 16, through October 31, 2018.

Custodian of Record: Carla Cefalo

Request Received by Custodian: November 15, 2018

Response Made by Custodian: November 20, 2018

GRC Complaint Received: November 29, 2018

Background³

Request and Response:

On November 15, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

On November 20, 2018, the third (3rd) business day after receipt of the subject OPRA request, the Custodian responded in writing advising that the OPRA request, in tandem with five (5) additional OPRA requests and others submitted daily, represent a substantial disruption of agency operations. The Custodian stated that due to Highlands Business Partnership’s (“HBP”) limited staff and high workload, a special service charge of \$24.00 per hour will be assessed. The Custodian stated that she estimates that it will take 1.5 hours of time to address the subject OPRA request and five (5) others, resulting in a special service charge of \$36.00. The Custodian further stated that because the estimated charge exceeded \$25.00, the Complainant must submit a 50% deposit, or \$18.00, prior to HBP preparing a response. Finally, the Custodian noted that she previously attempted to allow the Complainant to inspect records without a charge, without success. The Custodian thus stated that should the Complainant reject the estimated special service charge or not respond, she will deem the request denied pursuant to N.J.S.A. 47:1A-5(c) and

¹ No legal representation listed on record.

² Represented by Steven Mlenak, Esq., of Greenbaum, Rowe, Smith & Davis, LLP. (Roseland, 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.

Caggiano v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007).

On November 28, 2018, the Complainant e-mailed Highlands Borough (“Borough”) Municipal Clerk Bonnie Brookes stating that she had not yet received a response from the Custodian. The Complainant requested that Ms. Brookes confirm whether the seven (7) business day time frame expired. On November 29, 2018, Ms. Brookes responded confirming the accuracy of the Complainant’s calculation.

Denial of Access Complaint:

On November 29, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to the subject OPRA request within seven (7) business days. The Complainant noted that prior to filing this complaint, she confirmed with Ms. Brookes that the statutory time frame expired.

Supplemental Response:

On November 29, 2018, Borough Council President Carolyn Broullon forwarded the Custodian’s response to the Complainant. On the same day, the Complainant e-mailed the Custodian stating that it was “disappointing that rather than ask[ing] for more time [the Custodian is] shaking [her] down for money and denying [her] request.” The Complainant noted that she spread her OPRA requests out to lessen the burden on the HBP. The Complainant also noted that a response only required ninety (90) minutes and it seemed implausible that no one from HBP or the volunteer list could assist in the response. The Custodian responded in writing noting that she would need to address the Complainant’s issues with the HBP Board, who insisted on charging the Complainant. The Custodian noted that while she could still offer inspection with supervision by a member of the HBP Board, no other individuals have authority to assist in the OPRA request process. The Custodian noted that HBP employee Diane McIlwaine, who was the only individual who could address the subject OPRA request, was out until further notice.

On November 30, 2018, the Complainant responded asking whether a scanner would be available during inspection or if she could only inspect responsive records. The Complainant noted that she “absolutely refuse[d] to be shaken down,” asserting that the HBP receives adequate money from local taxes. On December 4, 2018, the Custodian responded in writing via e-mail disclosing the invoices responsive to the subject OPRA request.

Statement of Information:

On December 19, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 15, 2018. The Custodian certified that she responded in writing via e-mail on November 20, 2018 assessing a special service charge of \$36.00 with a 50% deposit required.

The Custodian averred that the subject OPRA request was one of six (6) submitted over a week-long period. The Custodian stated that given HBP's staff and workload, the pending Thanksgiving holiday, and Ms. McIlwaine's long-term absence contributed to their decision to assess a special service charge. The Custodian noted that the Complainant subsequently objected to the assessed fee; however, HBP was not required to disclose responsive records until the Complainant paid.

The Custodian additionally noted that the HBP received twenty-eight (28) OPRA request since August. The Custodian averred that the HBP Board voted to allow the Custodian to assess a special service charge based on their feeling that the Complainant was using OPRA to harass the HBP. The Custodian noted that the Borough has offered to schedule a meeting with the HBP to resolve any questions or concerns, but the Complainant declined. The Custodian certified that notwithstanding that the Complainant did not pay the assessed special service charge, she disclosed responsive invoices to the Complainant on December 4, 2018.

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).⁴ 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).

In the matter before the Council, the Complainant contended that the Custodian failed to respond to her November 15, 2018 OPRA request within the statutorily mandated time frame. In the SOI, however, the Custodian certified that she responded in writing via e-mail (with a letter attachment) on November 20, 2018 stating that a special service charge would be assessed to address the subject OPRA request⁵ in tandem with five (5) other OPRA requests. The Custodian included in the SOI a copy of the e-mail and letter attachment to support that she timely responded.

By the GRC's calculation, the Custodian sent her response to the Complainant on the third (3rd) business day after receipt of the subject OPRA request. It is unclear whether the Complainant never received the response, did not realize that the response applied to the subject OPRA request,

⁴ 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.

⁵ The GRC notes that the records ultimately disclosed were invoices, which are typically subject to "immediate" access under N.J.S.A. 47:1A-5(e). However, it was not clear from the wording of the subject OPRA request, which sought "all documentation," that same required an "immediate" response.

or did not agree with the response. Notwithstanding, the evidence supports that a timely response occurred here.

Accordingly, the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Further, the Council need not address the special service charge issue or order disclosure of the responsive records because the Custodian did so without payment of the assessed fee on December 4, 2018.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Further, the Council need not address the special service charge issue or order disclosure of the responsive records because the Custodian did so without payment of the assessed fee on December 4, 2018.

Prepared By: Frank F. Caruso
Executive Director

September 22, 2020