



State of New Jersey
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

Sean Patrick Vandy
Complainant

Complaint No. 2018-68

v.

NJ Department of Law and Public Safety,
Division of Criminal Justice
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 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 his burden of proof that he 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).

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 26th Day of February 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: March 3, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Sean Patrick Vandy¹
Complainant**

GRC Complaint No. 2018-68

v.

**N.J. Department of Law and Public Safety, Division of Criminal Justice²
Custodial Agency**

Records Relevant to Complaint: Hard copies of: “[A]ll record[s] on case 2017-00252 – 2017-00052[sic].”

Custodian of Record: Lt. Edward Augustyn
Request Received by Custodian: April 3, 2018
Response Made by Custodian: April 12, 2018
GRC Complaint Received: April 16, 2018

Background³

Request:

On March 26, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant included a check of twenty-five (25) dollars to cover any potential copying costs.

Denial of Access Complaint:

On April 16, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his request on March 26, 2018. The Complainant then asserted that the request should have been received by the Custodian by March 30, 2018 at the latest. The Complainant argued that as of April 13, 2018, he has not received a response from the Custodian.

Response:

On April 12, 2018, the seventh (7th) business day after receipt, Deputy Attorney General

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Adam Robert Gibbons.

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.

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Jana Robinson, on behalf of the Custodian, responded to the Complainant providing fifty (50) pages of responsive records. The Deputy also stated that three (3) letters were withheld from access as they were not relevant to the request and constituted criminal investigatory records under N.J.S.A. 47:1A-1.1. The Deputy also stated that the copying costs were waived and the Complainant's check for anticipated copying costs was returned to the Complainant.

Statement of Information:⁴

On September 6, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on April 3, 2018. The Custodian certified that his search included using Infoshare, searching by case file numbers provided by the requestor as well as his name. The Custodian certified that he responded in writing on April 12, 2018, providing fifty (50) pages of records responsive to the Complainant's request. The Custodian also certified that he denied access to three (3) pages of records that referred to a different case from those the Complainant identified.

The Custodian initially contended that because all responsive, non-privileged records were disclosed to the Complainant, the complaint was now moot. See Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 291 (App. Div. 2017) (holding that "[plaintiff's] OPRA litigation was moot before it filed its complaint because it already received the documents it sought"); Mason v. City of Hoboken, Docket No. A-0508-06T5, 2008 N.J. Super. Unpub. LEXIS 1660, *7 (App. Div. Jan. 29, 2008) (affirming dismissal of OPRA complaint as moot after Hoboken provided response to OPRA request).

Regarding the timing, the Custodian certified that he received the Complainant's request on April 3, 2018. The Custodian therefore asserted that, in accordance with N.J.S.A. 47:1A-5(i), the deadline to respond was seven (7) business days, starting the next day. The Custodian asserted that he submitted his response on April 12, 2018, the seventh (7th) business day after receipt, via overnight mail. The Custodian therefore asserted that his response was timely.

The Custodian added that three (3) letters pertaining to the Complainant were located but withheld from access as they were not relevant to the cases identified by the Complainant. The Custodian also asserted that the letters would have been exempt from disclosure as criminal investigatory records, and/or as containing "inter-agency advisory, consultative or deliberative" material. N.J.S.A. 47:1A-1.1.

Additional Submissions:

On January 3, 2020, the GRC submitted a request for additional information to the Custodian. Specifically, the GRC requested that the Custodian provide proof of service that he responded to the Complainant on April 12, 2018.

On January 7, 2020, Custodian's Counsel responded to the GRC providing a copy of the proof of service as well as a certification from the Deputy. Therein, the Deputy certified that she

⁴ The Complaint was referred to mediation on May 24, 2018. The Complaint was referred back from mediation on August 20, 2018.

was the OPRA Counsel for the Division of Criminal Justice (“Division”) and was responsible for reviewing all responsive records located by the Custodian. The Deputy also certified that she was responsible for providing the responses to OPRA requests received by the Division, including the current matter. The Deputy then certified that she reviewed the relevant file and located the proof of service and provided a copy of same to Counsel at the GRC’s request.

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 dated October 31, 2007).

In the instant complaint, the Complainant asserted that he submitted his OPRA request on March 26, 2018, and then assumed that the Custodian received the OPRA request on March 30, 2018, based on four (4) days allowed for the request to arrive via regular mail. The Complainant therefore asserted that as of April 13, 2018, the day he verified his complaint, nine (9) business days had passed since the Custodian received the OPRA request without providing any response.

In the SOI, the Custodian certified that he received the Complainant’s OPRA request on April 3, 2018. Thus, the Custodian asserted that the deadline to respond was April 12, 2018. The Custodian then certified that he responded via overnight mail on April 12, 2018, and thus the response was made timely. Furthermore, at the request of the GRC, Counsel provided a certification from the Deputy who directly responded to the OPRA request. Counsel also provided a copy of the proof of service, which indicates that the Deputy mailed the response on April 12, 2018, the seventh (7th) business after receipt.

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. 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).

Conclusions and Recommendations

The Executive Director 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.

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.

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).

Prepared By: Samuel A. Rosado
Staff Attorney

January 21, 2020⁶

⁶ This complaint was prepared for adjudication at the Council’s January 28, 2020 meeting, but could not be adjudicated due to a lack of quorum.

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