



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 10, 2020 Government Records Council Meeting

Paul Liobe
Complainant

Complaint No. 2019-116

v.
County of Sussex
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 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 whether an unlawful denial of access occurred because the Custodian certified, and the record reflects, that no responsive contracts or agreements and correspondence exists. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 10th Day of November 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: November 13, 2020

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting**

**Paul Liobe¹
Complainant**

GRC Complaint No. 2019-116

v.

**County of Sussex²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Any and all contracts or agreements for services between the County of Sussex (“County”) and “Further” (formerly known as “Select Account”) for 2018 and/or 2019.
2. Any and all correspondence between the County and Further for 2018 and/or 2019.

Custodian of Record: Teresa Lyons
Request Received by Custodian: May 9, 2019
Response Made by Custodian: May 20, 2019
GRC Complaint Received: June 24, 2019

Background³

Request and Response:

On May 8, 2019, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On May 20, 2019, the seventh (7th) business day after receipt of the OPRA request, the Custodian responded in writing stating that “technical difficulties” with the County’s OPRA Portal required her to send the response via U.S. mail. The Custodian stated “Further” is a third-party administrator for Horizon and that contracts are maintained by them. The Custodian thus requested that the Complainant resubmit his OPRA request “and identify Horizon.”

On May 23, 2019, the Complainant sent an e-mail to the Custodian seeking an update on the status of his May 8, 2019 OPRA request.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On June 24, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian failed to respond to his May 8, 2019 OPRA request. The Complainant contended that this was notwithstanding his attempt to obtain an update on May 23, 2019.

Statement of Information:⁴

On September 17, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 9, 2019. The Custodian certified that she did not conduct any search because “Further” did not have a contract with the County. The Custodian certified that she responded in writing via U.S. mail on May 20, 2019 due to a technological issue with the County’s OPRA Portal. The Custodian affirmed that she advised the Complainant that “Further” was a third-party administrator for Horizon. The Custodian affirmed that she further asked the Complainant to resubmit his OPRA request identifying Horizon instead of “Further.”

The Custodian contended that she did not disclose any records because the Complainant’s OPRA request erroneously identified “Further” as the contractor instead of Horizon. The Complainant noted that she requested that the Complainant submit a new OPRA request correcting the company name.

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).

In the matter before the Council, the Custodian certified in the SOI that she received the Complainant’s OPRA request on May 9, 2019. The Custodian certified that she responded in writing via U.S. mail on May 20, 2019 stating that no records existed because Further contracted directly with Horizon. The Custodian noted in both the response letter, and later in the SOI, that

⁴ On July 16, 2019, this complaint was referred to mediation. On August 15, 2019, this complaint was referred back for adjudication.

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.

the County's OPRA Portal was experiencing "technical difficulties" that required her to send her response via U.S. mail. The potential delay the Complainant experienced in receiving said response likely resulted from the Custodian sending same via U.S. mail. Notwithstanding, the Custodian has provided sufficient evidence to show that she timely responded in writing. Thus, no "deemed" denial of access occurred here.

Therefore, 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 whether an unlawful denial of access occurred because the Custodian certified, and the record reflects, that no responsive contracts or agreements and correspondence exists. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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 whether an unlawful denial of access occurred because the Custodian certified, and the record reflects, that no responsive contracts or agreements and correspondence exists. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

October 27, 2020