



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

December 15, 2020 Government Records Council Meeting

Frank J. Festa, Jr.
Complainant

Complaint No. 2019-165

v.

Township of Marlboro (Monmouth)
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 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 requests. 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 whether an unlawful denial of access occurred because the Custodian certified, and the record reflects, that she disclosed the only record that could be located. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).

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 15th Day of December 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: December 17, 2020

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**Frank J. Festa, Jr.¹
Complainant**

GRC Complaint No. 2019-165

v.

**Township of Marlboro (Monmouth)²
Custodial Agency**

Records Relevant to Complaint:

OPRA Request No. 1: Electronic copies via e-mail regarding Block 249, Lot 4:

1. “How long has the [Township of Marlboro (“Township”)] permitted stormwater runoff from Clayton Road onto this property?”
2. “What measures are in place to control that stormwater runoff?”

OPRA Request No. 2: Electronic copies via e-mail regarding Block 249, Lot 4:

1. “[A]ny documents received by the Township or any division or employee from any Consulting Company, Engineering firm, Attorney, or person”
2. “Any documents sent from the Township or any division or employee to any Consulting Company, Engineering firm, Attorney or person”

OPRA Request No. 3: Electronic copies via e-mail regarding Block 249, Lot 4:

1. Any documents sent to the Township engineering division from Ms. Laura Neumann of CME Associates Consulting & Engineers”

Custodian of Record: Suzanne Branagan
Request Received by Custodian: January 12, 2016
Response Made by Custodian: January 20, 2016
GRC Complaint Received: August 16, 2019

Background³

¹ No legal representation listed on record.

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, LLC (Iselin, 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.

Request and Response:

On January 12, 2016, the Complainant submitted three (3) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On January 14, 2016, the second (2nd) business day after receipt of OPRA request No. 3, the Custodian responded in writing disclosing the Complainant’s Grading and Clearing permit application (“Application”) totaling six (6) pages. On January 20, 2016, the sixth (6th) business day after receipt of OPRA request Nos. 1 and 2, the Custodian responded in writing. The Custodian stated that no records responsive to OPRA request No. 1 existed. The Custodian also again disclosed the Application in response to OPRA request No. 2.

Denial of Access Complaint:

On August 16, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his OPRA requests.

Statement of Information:

On September 26, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s three (3) OPRA requests on January 12, 2016. The Custodian certified that she responded in writing to OPRA request No. 3 on January 14, 2016. The Custodian further affirmed that she responded in writing to OPRA request Nos. 1 and 2 on January 20, 2016. The Custodian stated that nearly four (4) years later, the Complainant filed this complaint alleging an unlawful denial of access.

The Custodian stated that OPRA “only allows requests for records, not requests for information.” *MAG Entm’t, LLC v. Div. of ABC*, 375 N.J. Super. 534, 546 (App. Div. 2005); *Bent v. Stafford Police Dep’t*, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian further contended that the OPRA response time frame did not apply where requests failed to identify specific records. *N.J. Builders Ass’n v. N.J. Council on Affordable Hous.*, 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian contended that the evidence of record is clear that she timely responded to all three (3) OPRA requests disclosing the only record that existed.

The Custodian argued that the Complainant was “fully aware” of the Township’s responses and pursued this action with intent to harass the Township. The Custodian thus contended that this complaint was frivolous and must be dismissed.

Additional Submissions:

On October 28, 2019, the Complainant e-mailed the GRC alleging several communication issues with the Township. The Complainant asserted that the Township was not assisting him to locate specific records and instead denied his OPRA requests as invalid.⁴

⁴ The Complainant’s e-mail was sent in relation to each of his ten (10) complaints being concurrently adjudicated.

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 Complainant contended that the Custodian failed to respond to his three (3) January 12, 2016 OPRA requests. In the SOI, the Custodian certified that she responded to the Complainant's OPRA requests on January 14, and 20, 2016 respectively disclosing the Application. The Custodian attached as part of the SOI her written responses sent to the Complainant via e-mail on those dates. Thus, the Custodian has provided sufficient evidence to show that she timely responded in writing to the Complainant's three (3) OPRA requests.⁶ 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 requests. 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 whether an unlawful denial of access occurred because the Custodian certified, and the record reflects, that she disclosed the only record that could be located. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).

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 requests. 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 whether an unlawful denial of access occurred because the Custodian certified, and the record reflects, that she disclosed the only record that could be located. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).

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.

⁶ The GRC notes that the Complainant's OPRA requests are invalid on their face because they ask questions and seek "any documents." MAG, 375 N.J. Super., at 546; Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009); Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

Prepared By: Frank F. Caruso
Executive Director

December 8, 2020