



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 30, 2020 Government Records Council Meeting

Kevin Alexander
Complainant

Complaint No. 2019-219

v.

Union County Department of Corrections
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 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:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request. Specifically, the Custodian certified that no responsive records exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; 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 30th Day of June 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: July 2, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

**Kevin Alexander¹
Complainant**

GRC Complaint No. 2019-219

v.

**Union County Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Copies via U.S. mail of cost savings analysis since the dismantling of the law library at Union County Jail (“UCJ”).³

Custodian of Record: Marlene Russo

Request Received by Custodian: October 2, 2019

Response Made by Custodian: October 18, 2019

GRC Complaint Received: October 29, 2019

Background⁴

Request and Response:

On October 2, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On October 24, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that he did not receive a response to the subject OPRA request. The Complainant argued that the Director of UCJ was hiding behind the Board of Chosen Freeholders as well as the Custodian by not answering the subject OPRA request personally. The Complainant further argued that he had previously submitted OPRA requests to the Board of Chosen Freeholders as well as directly to the Director for the same records. The Complainant asserted that the Director has made a habit of turning to the Custodian for a response to OPRA requests addressed to his attention.

¹ No legal representation listed on record.

² Represented by April C. Bauknight, Esq., Assistant County Counsel, County of Union, N.J., (Elizabeth, N.J.).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ 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.

Supplemental Response:

On October 25, 2019, the Custodian responded in writing to the Complainant's OPRA request. The Custodian further averred that no records responsive to the OPRA request exist.⁵ The Custodian advised the Complainant that the law library at UCJ was not dismantled.

Statement of Information:

On November 27, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on October 2, 2019. The Custodian certified that she sent a "complete response" to the Complainant on October 25, 2019, the sixteenth (16th) business day after receipt of said request, advising that no responsive records existed pertaining to the "cost saving effect" of the dismantling of the UCJ law library.

Additional Submissions:

On December 2, 2019, the Complainant submitted a letter in response to the Custodian's SOI.⁶ The Complainant alleged that the Custodian and County Counsel were "engaging in stall tactics". The Complainant argued that the cost effect of destroying law library could be easily gleaned from viewing the "budget debt" documentation prior to its dismantling.

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).⁷ 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).

The Complainant submitted his OPRA request to the Custodian on October 2, 2019. Although the Custodian was responding to multiple requests over the course of the few weeks, including a duplicate version of this request, she did not respond directly to the subject OPRA request until October 25, 2019, the sixteenth (16th) business day after receipt of the request. In the

⁵ The Custodian noted that the subject OPRA request was a duplicate of the OPRA request at issue in Alexander v. Cnty. of Union, GRC Complaint No. 2019-218, which is scheduled to be adjudicated concurrently with this complaint. The Custodian also addressed several issues arising from other OPRA requests and resulting correspondence.

⁶ The Complainant included in his letter discussion of the County's responses to other OPRA requests not at issue in the instant complaint.

⁷ 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.

Denial of Access Complaint, the Complainant contended that the Custodian did not respond to his OPRA request. The Custodian certified to her delayed response in the SOI. Thus, notwithstanding that the subject OPRA and duplicate requests were submitted in a short time frame, the Custodian nonetheless had an obligation to timely respond.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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, GRC 2007-11.

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.

The GRC has previously found that, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's certification, no unlawful denial of access occurred. In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

In the matter before the Council, the Complainant's OPRA request sought a cost savings analysis regarding the alleged dismantling of the law library at UCJ. The Custodian responded in writing advising the Complainant that no responsive records exist.

The Complainant's OPRA request did not name a specific record sought to illustrate the cost savings for the alleged action at UCJ. Notwithstanding, after reviewing the evidence on record, the GRC is satisfied that the Custodian lawfully denied access to the Complainant's OPRA request. The Custodian certified in the SOI that the responsive records did not exist. Further, the Complainant has not provided competent, credible evidence to refute the Custodian's certification.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request. Specifically, the Custodian certified that no responsive records exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request. Specifically, the Custodian certified that no responsive records exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Brandon Garcia
Case Manager

June 23, 2020