



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

August 24, 2021 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2020-114

v.

County of Essex
Custodian of Record

At the August 24, 2021 public meeting, the Government Records Council (“Council”) considered the August 17, 2021 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 lawfully denied access to the subject OPRA request because she and Mr. Fusco certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; 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 24th Day of August 2021

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: August 25, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 24, 2021 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2020-114

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “Any documents delineating” the Division of Family Assistance and Benefits’ (“DFAB”) parking plan for the County-owned 320-321 University Avenue site.
2. “Any documents delineating” the DFAB parking plan for disabled employees at the County-owned 320-321 University Avenue site.
3. “Any documents delineating” the DFAB parking plan for that agency’s 200 employees the County-owned 320-321 University Avenue site to include names, titles, and permanency dates.

Custodian of Record: Olivia Schumann, Esq.
Request Received by Custodian: May 7, 2020
Response Made by Custodian: May 7, 2020
GRC Complaint Received: June 8, 2020

Background³

Request and Response:

On May 7, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing extending the response time frame through May 28, 2020 due on “effort(s) to contain the spread of the novel coronavirus.” On May 28, 2020, the Custodian responded in writing extending the time frame through June 18, 2020 due to the lack of in-office DFAB staff due to the ongoing public health emergency. On June 4, 2020, the Custodian responded in writing denying the subject OPRA request based on DFAB employee Al Fusco’s statement that “there are no documents responsive to the” subject 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 8, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that Custodian unlawfully denied access to the subject OPRA request because no records existed.⁴

Statement of Information:

On June 30, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 7, 2020. The Custodian certified that her search involved forwarding the OPRA request to Mr. Fusco to perform a search of DFAB’s records. The Custodian certified that following two (2) extensions of time, she responded in writing on June 4, 2020 denying the request because no records existed.

The Custodian contended that she did not unlawfully deny access to the subject OPRA request because no records existed. Fusco Cert., ¶ 5; 14. The Custodian argued that such a finding is consistent with prior Council case law on this issue. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Pavlenko v. Twp. of Delran (Burlington), GRC Complaint No. 2010-325 (March 2012).

Analysis

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 Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). In the matter before the Council, the Custodian initially responded stating that no records existed. The Custodian subsequently certified to this fact in the SOI and included a certification from Mr. Fusco, who conducted a search for the responsive records. In reviewing the Custodian’s response, SOI certification, and Mr. Fusco’s certification, the facts support that no responsive record exist. Thus, no unlawful denial of access occurred here

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the subject OPRA request because she and Mr. Fusco certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

⁴ The Complainant identified the May 7, 2020 OPRA request as the subject of the complaint but included in his filing a response to a different OPRA request. Both the Custodian and GRC attempted to clarify in writing whether the Complainant intended to have the different OPRA request considered as part of this complaint. However, the Complainant did not respond to those attempts. Thus, the GRC is proceeding with this adjudication addressing only the May 7, 2020 OPRA request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that she lawfully denied access to the subject OPRA request because she and Mr. Fusco certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

August 17, 2021