



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 25, 2022 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2020-197

v.

County of Essex
Custodian of Record

At the January 25, 2022 public meeting, the Government Records Council (“Council”) considered the January 18, 2022, 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 Complainant’s OPRA request. Specifically, the Custodian certified in the Statement of Information, 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 25th Day of January 2022

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: January 27, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2020-197

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “[A]ny documents delineating the purchasing” by the County of Essex (“County”) of an unknown quantity of laptops to be distributed to the Division of Family Assistance and Benefits (“DFAB”) for purposes of performing their work function from home.
2. “[A]ny documents delineating the names and titles” of DFAB employees that received the above-purchased laptops.
3. “[A]ny documents delineating how many laptops” were purchased and how many are presently stored within a conference room at 320 University Avenue.

Custodian of Record: Olivia Schumann
Request Received by Custodian: September 3, 2020
Response Made by Custodian: September 3, 2020
GRC Complaint Received: October 1, 2020

Background³

Request and Response:

On September 3, 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 stating that an extension of time to respond through September 24, 2020 was necessary due to the lack of in-office County staff stemming from the ongoing COVID-19 public health emergency. On September 4, 2020, DFAB employee Al Fusco stated in the County’s OPRA Portal that no responsive records existed because DFAB did not purchase or distribute any laptops. On the same day, Office of Purchasing employee Sylvia Raines stated in the OPRA Portal that her office was unable to locate any responsive records.

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.

On September 24, 2020, the Custodian responded in writing stating that the County did not maintain any responsive records and that the subject OPRA request was “considered closed.”

Denial of Access Complaint:

On October 1, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed that no responsive records existed but did not include any arguments to support his position.

Statement of Information:⁴

On October 4, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 3, 2020. The Custodian certified that her search included contacting DFAB and the Office of Purchasing. The Custodian certified that following an extension of time, she responded in writing on September 24, 2020, denying the subject OPRA request because no records existed.

The Custodian included a discussion of events occurring in mediation and a mediation communication as part of the SOI.⁵

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.

Initially, the GRC notes that the Custodian substantially addressed discussions and actions, with accompanying communications, occurring while this complaint was in mediation. The Uniform Mediation Act prohibits the use of mediation communications in administrative proceedings absent all parties waiving the privilege, which has not occurred here. N.J.S.A. 2A:23C-4. For this reason, the GRC cannot consider a majority of the SOI as part of this adjudication and must instead address the complaint on its original merits and the extremely limited attestations contained in the SOI that do not address mediation communications.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep’t of Educ., GRC

⁴ On October 29, 2020, this complaint was referred to mediation. On September 10, 2021, this complaint was referred back to the GRC for adjudication.

⁵ The GRC notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 *et seq.*, communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA request sought ". . . documents . . . delineating" the purchase and assignment of laptops to DFAB staff and information on those unassigned and stored in a conference room located at 320 University Avenue.⁶ Following a brief extension, the Custodian responded in writing stating that no records responsive to the subject OPRA request existed. This complaint followed and the Custodian certified in the SOI to her actions prior to the filing of this complaint. The Custodian also included in her SOI the OPRA Portal message history showing responses from both Mr. Fusco and Ms. Raines supporting that they could not locate any responsive records.

A review of the facts available to the GRC in this case support that the Custodian lawfully denied access to the subject OPRA request on the basis that no records existed. Specifically, both the Custodian has certified to this fact and included evidence of same in the response of both Mr. Fusco and Ms. Raines. Thus, in the absence of any competent, credible evidence to the contrary, a finding that no records existed is appropriate here.

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

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 Complainant's OPRA request. Specifically, the Custodian certified in the Statement of Information, 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

January 18, 2022

⁶ The GRC notes that the Complainant's OPRA request is invalid on its face because it sought "any documents . . . delineating" laptop purchasing and assignments for DFAB employees and fails to identify specific records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). See also Weiner v. Cnty. of Essex, GRC Complaint No. 2020-145 (September 2021).