



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 28, 2022 Government Records Council Meeting

Brian F. McBride
Complainant

Complaint No. 2020-232

v.

Township of Washington (Gloucester)
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 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 this complaint is materially defective and shall be dismissed because the Complainant verified his complaint before the statutory period for the Custodian to respond, *as extended*, had expired and immediate access records are not at issue. See Sallie v. N.J. Dep’t of Banking and Ins., GRC Complaint No. 2007-226 (April 2009) and Hardwick v. N.J. Dep’t of Transp., GRC Complaint No. 2011-52 (August 2012). See also Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013).

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 28th Day of June 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: June 30, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2022 Council Meeting**

**Brian F. McBride¹
Complainant**

GRC Complaint No. 2020-232

v.

**Township of Washington (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of e-mail correspondence with the following parameters:

Senders: Jason Gonter, Stuart Platt, Carmen Saginario, and/or John DiStefano.

Recipients: Jason Gonter, Stuart Platt, Carmen Saginario, and/or John DiStefano.

Subjects or in message body: Brian McBride, Brian F. McBride, McBride, “zoning violation,” “unsafe structure,” “pool,” “swimming pool,” “records,” “OPRA,” and/or “drug test.”

Date range: January 1, 2017 to December 31, 2019.

Custodian of Record: Christine Ciallella

Request Received by Custodian: November 23, 2020

Response Made by Custodian: November 23, 2020

GRC Complaint Received: December 1, 2020

Background³

Request and Response:

On November 23, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian responded to the Complainant in writing stating that all OPRA requests required an extension to December 31, 2020.

Denial of Access Complaint:

On December 1, 2020, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² Represented by Patrick J. Madden, Esq. of Law Offices of Patrick J. Madden, L.L.C. (Haddonfield, NJ). Previously represented by Carmen Saginario, Jr., Esq. of Capehart & Scatchard, P.A. (Mount Laurel, 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.

Government Records Council (“GRC”). The Complainant asserted that he only received an automated response from the Custodian. The Complainant asserted that the Township of Washington (“Township”) disclosed the responsive records to three (3) different agencies as part of a separate litigation. The Complainant therefore argued that the Custodial agency waived its attorney-client privilege when they disclosed the responsive records to the public domain.

Statement of Information:

On March 12, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 23, 2020. The Custodian certified that she responded in writing that same day, stating that an extension of time was needed until December 31, 2020.

The Custodian asserted that the Complainant filed the instant complaint prior to her responding to the OPRA request. The Custodian asserted that responding to the OPRA request was complicated by various issues involving prior counsel and their relationship with the Complainant.

The Custodian asserted that the Complainant had previously sued prior counsel in New Jersey Superior Court and filed a second complaint on December 14, 2020. The Custodian asserted that prior counsel resigned from their position with the Township on January 20, 2021 and she had not been able to effectively communicate with them regarding the OPRA request.

The Custodian next asserted that COVID-19 further complicated the Township’s ability to respond to the OPRA request. The Custodian contended that, along with the holiday closures, the municipal offices were shut down from December 28, 2020 through January 5, 2021 due to a COVID-19 amongst employees. The Custodian contended that she was unable to work from December 9, 2020 through December 21, 2020 due to COVID-19.

The Custodian also noted that the Complainant had already submitted numerous OPRA requests along with the request at issue, in conjunction with another Township resident. The Custodian stated she received eight (8) OPRA requests from the Complainant in December 2020, and seven (7) more in January 2021. The Custodian contended that she received 2 requests in December and 5 requests in January from the other resident. The Custodian argued that these requests were complex and further complicated her ability to respond to the instant request.

The Custodian asserted that she was in the process of responding to the OPRA request at issue and expected that a response would be furnished to the Complainant by April 15, 2021.

Additional Submissions:

On April 5, 2021, the Custodian submitted correspondence to the GRC. The Custodian asserted that following submission of the SOI, the parties exchanged e-mails with respect to narrowing the search terms of the request at issue. The Custodian stated that an initial search returned 10,000 e-mails. The Custodian stated that the Complainant was willing to narrow the search terms and stated that the narrowed terms would be treated “as a brand new OPRA request.”

The Custodian asserted that as a result, she believes the issues presented by the instant complaint have been resolved.

Analysis

Unripe Cause of Action

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007), *certif. denied* by Paff v. Twp. of Plainsboro, 193 N.J. 292 (2007).⁴ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

[t]he GRC has an independent obligation to 'render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct.

[Id.]

The court further stated that:

[a]side from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. Of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), *certif. denied*, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), *aff'd*, 24 N.J. 139 (1957).

[Id.]

In Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007-226 (April 2009), the complainant forwarded a complaint to the GRC asserting that he had not received a response from the custodian and by the time the GRC received his complaint seven business days would

⁴ On appeal from Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

have passed. The Council held that “. . . the Complainant’s cause of action was not ripe at the time he verified his Denial of Access Complaint.” The Council reasoned that because the complainant filed the complaint before the statutorily mandated seven business day period had expired, the custodian had not yet denied the complainant access to a government record. As such, the Council dismissed the complaint.

The Council has applied the same analysis to a valid extension of time. In Hardwick v. N.J. Dep’t of Transp., GRC Complaint No. 2011-52 (August 2012), the custodian within the statutorily mandated seven business day period requested a valid extension of time. Thereafter, the complainant filed a Denial of Access Complaint within the extended period. The Council held that because the complainant filed his complaint with the GRC prior to expiration of the custodian’s extension of time, and as of the date the complaint was filed the custodian had not denied access to any responsive records, the complaint was unripe for adjudication and must be dismissed.

Furthermore, the Legislature amended OPRA on March 20, 2020, due to the global pandemic. P.L. 2020, c.10. Based on that amendment, N.J.S.A. 47:1A-5 now provides that:

During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, provided, however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.”

[Id.]

Here, the Custodian did not claim that any of the records sought were exempt from disclosure. Rather, the Custodian certified that although the request was in the process of being addressed, the pandemic along with collateral litigation with the Complainant was hindering the Township’s ability to process the request. However, the GRC notes *sua sponte* that the complaint was filed prematurely and is therefore unripe for adjudication.

The Complainant submitted his OPRA request on November 23, 2020. The Custodian certified, and the evidence of record demonstrates, that the Complainant received a written response immediately, stating that an extension until December 31, 2020 was needed to fulfill the request. OPRA provides that a custodian “. . . shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request . . .” N.J.S.A. 47:1A-5(i). However, the Council has long held that extensions of time are proper when a custodian requests an extension in writing within the statutorily mandated seven business days and provides an anticipated deadline date as to when the requested records would be made available. See Starkey v. N.J. Dep’t of Transp., GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010) and O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010). See also Rivera v. City of Plainfield Police Dep’t

(Union), GRC Complaint No. 2009-317 (May 2011) and Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010).

Ultimately, the GRC finds that the Custodian's extension of time to December 31, 2020 was reasonable given the circumstances outlined on the record. Specifically, the Complainant's request seeks a substantial quantity of e-mail correspondence spanning a period of two (2) years. Additionally, the Custodian certified to the numerous other OPRA requests submitted by the Complainant submitted during the same period, and certified to the pandemic's impact on the Township's staffing and operating hours during the month of December.

N.J.S.A. 47:1A-6 provides that "[a] person who is denied access to a government record by the custodian of the record . . . may institute a proceeding to challenge the custodian's decision by filing . . . a complaint with the Government Records Council . . ." For such a complaint to be ripe, the complainant must have been denied access to a government record. In the instant complaint, however, the Complainant verified his complaint on December 1, 2020, which was within the extended period, and before he was denied access to any of the records responsive to his request. Thus, the Complainant here acted in a similar manner as the complainants in Sallie, GRC 2007-226 and Hardwick, GRC 2011-52, by filing a Denial of Access Complaint with the GRC prior to expiration of the valid period for the Custodian to respond, and therefore prior to any denial of access to the requested records.

Moreover, even if the Custodian's response seeking an extension was invalid or unreasonable, the matter would still be unripe for adjudication, as the Complainant verified the complaint before the statutory seven (7) business day deadline expired. The Complainant submitted his OPRA request on November 23, 2020, and verified the instant matter on December 1, 2020, the fifth (5th) business day after receipt.

Accordingly, this complaint is materially defective and shall be dismissed because the Complainant verified his complaint before the statutory period for the Custodian to respond, *as extended*, had expired and immediate access records are not at issue. See Sallie, GRC 2007-226 and Hardwick, GRC 2011-52. See also Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint is materially defective and shall be dismissed because the Complainant verified his complaint before the statutory period for the Custodian to respond, *as extended*, had expired and immediate access records are not at issue. See Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007-226 (April 2009) and Hardwick v. N.J. Dep't of Transp., GRC Complaint No. 2011-52 (August 2012). See also Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013).

Prepared By: Samuel A. Rosado
Staff Attorney

June 21, 2022