



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 25, 2023 Government Records Council Meeting

Scott Madlinger
Complainant

Complaint No. 2021-169

v.

Berkeley Township Police Department (Ocean)
Custodian of Record

At the April 25, 2023 public meeting, the Government Records Council (“Council”) considered the April 18, 2023 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 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 records “towing logs” submitted to Berkeley Township Police Department from authorized towing companies 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 April 2023

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: May 1, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2023 Council Meeting**

**Scott Madlinger¹
Complainant**

GRC Complaint No. 2021-169

v.

**Berkeley Township Police Department (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of monthly “towing logs” from all authorized towing companies within Berkeley Township (“Township”) from January 2021 through June 2021.

Custodian of Record: Sandra Brelsford
Request Received by Custodian: July 12, 2021
Response Made by Custodian: July 22, 2021
GRC Complaint Received: July 26, 2021

Background³

Request and Response:

On July 12, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 22, 2021, the Complainant e-mailed Chief Kevin Santucci and Lt. Ryan Roth stating that he did not receive a response to his OPRA request.⁴

Later on July 22, 2021, the eighth (8th) business day after receipt of the OPRA request, Lt. Roth responded in writing on behalf of the Custodian disclosing a tow schedule and noting that he was not clear whether the attached was the record sought. Lt. Roth further noted that he did not receive an e-mail from the Custodian regarding the OPRA request. The Complainant responded disputing the record disclosed and noted that “regulations” require tow companies to provide a log to police chiefs on a monthly basis.

¹ No legal representation listed on record.

² Represented by Robin LaBue, Esq., of Rothstein, Mandell, Strohm, Halm & Cipriani, P.C. (Toms River, 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.

⁴ The Complainant executed and submitted his complaint to the GRC via e-mail on July 22, 2021, but it was not received and processed until July 26, 2021.

Denial of Access Complaint:

On July 26, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to the subject OPRA request.

Supplemental Responses:

On July 26, 2021, the Custodian responded in writing stating that in addition to the records disclosed by Lt. Roth, Captain Philip Smith was able to generate a log. The Custodian noted that BTPD was “working on it . . . and it will be ready for [the Complainant] tomorrow.” The Custodian stated that she would e-mail the Complainant when the log was ready. On July 27, 2021, the Custodian responded disclosing the aforementioned log for the time period January 1, 2021 through June 28, 2021.

Statement of Information:

On August 6, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 12, 2021, which was one of twelve (12) individual OPRA requests submitted on the same day. The Custodian certified that she forwarded the OPRA request to Chief Santucci, Custodian’s Counsel, and two (2) Berkeley Township Police Department (“BTPD”) members to include Lt. Roth. The Custodian noted that two of those individuals did not receive the e-mail due to “ongoing server issues within the Township.” The Custodian certified that the response was due on July 21, 2021 and the Complainant filed the instant complaint on July 22, 2021 after not receiving a response. The Custodian affirmed that Lt. Roth responded that day providing the record he believed was responsive to the subject OPRA request. The Custodian certified that after receiving the Complainant’s refusal of the disclosed document as responsive, the Township attempted to create a new document.

The Custodian acknowledged that her response was untimely by one (1) business day. The Custodian also argued that the record sought did not exist within the Township’s files. The Custodian thus argued that although her response was untimely, this complaint should be dismissed because no responsive records existed.

Additional Submissions:

On August 7, 2021, the Complainant e-mailed the GRC providing a copy of the towing log provided to him and noting that he “told [the Custodian] there were vehicle[s] missing from the log . . .” In a second e-mail to the GRC on August 7, 2021, the Complainant disputed that he filed twelve (12) OPRA requests on July 12, 2021. The Complainant also expressed confusion of the Custodian’s SOI statements that his request was filed on “June 12, 2021” with a response date of “June 21, 2021.” The Complainant also argued that the Custodian failed to identify the disclosed incomplete logs in item No. 9 of the SOI.

On August 12, 2021, the Complainant submitted a legal certification challenging the veracity of the SOI.⁵ The Complainant certified that he had no record of submitting twelve (12) OPRA requests to the Township on July 12, 2021. Further, the Complainant certified that contrary to the Custodian's SOI statements on the June dates of submission and response deadline, he filed his OPRA request on July 12, 2021 and the last day of the statutory response timeframe was July 21, 2021. Finally, the Complainant certified that, contrary to the Custodian's SOI statement that no records existed, he received an incomplete towing log via e-mail prior to submission of the SOI.

On August 13, 2021, the Custodian submitted a supplemental legal certification in response to the Complainant's August 12, 2021 certification. Therein, the Custodian certified that during the period of July 12, through July 16, 2021, the Complainant submitted eighteen (18) separate OPRA requests. The Custodian further certified that she sent the subject OPRA request to BTPD, but some recipients did not receive the e-mail due to the server issues. The Custodian certified that on July 22, 2021, Lt. Roth received the Denial of Access Complaint and responded disclosing the towing schedule while noting that he was unsure if the attached was the record sought. The Custodian certified that the Complainant responded disputing the disclosure and noting that Township Code, Chapter 5, § 5-3.9(a)(17) required towing licensees to maintain a log containing certain towing information to be provided to the Chief on a monthly basis. The Custodian affirmed that the towing companies have not filed such a log and thus no records exist.

The Custodian certified that despite not having the requested logs, and although not required to create records, BTPD endeavored to produce a responsive record by reviewing computer-aided dispatch ("CAD") records and generating a new report containing all tows entered therein. The Custodian certified that the Complainant disputed the completeness of the disclosed log; however, the Township disclosed all information it could locate and amass in the newly created record. The Custodian again acknowledged that her response was untimely, but that the Township went "beyond its responsibility" by creating a new document to satisfy the subject OPRA request. The Custodian also again reiterated that no logs as required by the Township's Code exist.⁶

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

⁵ The GRC responded to the Complainant's second August 7, 2021 e-mail asserting that if he intended to challenge the veracity of the SOI, he would have to do so in the form of a legal certification within five (5) business days.

⁶ On August 13, 2021, the Complainant e-mailed the GRC and accused the Custodian of "changing her story" after signing the SOI certification "that was not true."

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.

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).

Here, the Complainant contended that the Custodian failed to timely respond to the subject OPRA request. In the SOI, the Custodian certified that the request was received on July 12, 2021 with a deadline date of July 21, 2021. See SOI item Nos. 7 and 8. Further, the Custodian acknowledged that an untimely response occurred, albeit by one (1) business day. However, as part of item No. 12 of the SOI,⁸ and although the Custodian noted that the request was submitted on July 12, 2021, she misidentified the month later in her arguments. The Complainant took issue with this misidentification and subsequently certified to the Custodian’s inaccuracy. In response, the Custodian submitted a supplemental certification again identifying the receipt date and response deadline date as July 12, and 21, 2021 respectively. The Custodian also again acknowledged that she failed to timely respond to the subject OPRA request.

The evidence of record clearly supports that a “deemed” denial of access occurred here and that the GRC should find as such. Further, the Custodian does not refute this violation; instead, she twice acknowledged that she untimely responded to the subject OPRA request. To briefly address the Complainant’s veracity dispute, it is obvious that any references to “June” in the SOI were clearly in error and not an attempt to misrepresent the facts. The GRC finds support for this position in the fact that the Custodian identified “July 12, 2021” and “July 22, 2021” in item Nos. 7 and 8 of the SOI. Further, the Custodian began item No. 12 referencing July 12, 2021. The Custodian also submitted a supplement certification again identifying the forgoing dates. That the Custodian inputted “June” instead of “July” in three (3) places in the SOI clearly indicates a typo on the part of the Custodian’s preparation of the SOI.

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 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

⁸ The Complainant also disputed the Custodian’s asserted number of requests submitted to the Township on July 12, 2021. However, whether he submitted those requests is inconsequential to this complaint because none of those alleged filings are at issue here. Thus, the GRC will not address whether the forgoing represents a factual misrepresentation.

Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA request sought "towing logs" from all authorized towing companies for a six (6) month period. After receiving no response, the Complainant filed the instant complaint; the Custodian subsequently advised that BTPD was working on creating a log and would provide same when complete. The Custodian disclosed the log to the Complainant on July 27, 2021. In the SOI, the Custodian certified that no records existed and argued that BTPD attempted to create a new record. In response to the SOI, the Complainant argued that the assertion that no records existed was contradicted by the incomplete towing log disclosed to him. On August 13, 2021, the Custodian submitted a supplemental certification wherein she acknowledged that although Township Code, Chapter 5, § 5-3.9(a)(17) required towing companies to create logs and submit them to BTPD on a monthly basis, no such logs were actually submitted and thus no records exist. The Custodian described the method by which BTPD created the log and asserted that it went beyond its obligation in doing so.

Upon review, the GRC is persuaded that no responsive records existed. It is important to note that, by his own admission, the Complainant sought the specific logs required to be submitted per Township Code, Chapter 5, § 5-3.9(a)(17), which provides that:

Each licensee under this section shall maintain a log on forms to be provided by the Chief of Police or his/her authorized representative of all vehicles towed, stored and released and all other services rendered, together with an itemized list of all fees charged for any such vehicle, which log shall be provided to the Chief of Police or his/her authorized representative on both a monthly basis and upon request during regular business hours.

The Custodian has certified multiple times that no such logs were ever submitted to BTPD;⁹ thus, no responsive records existed. Yet, despite not being required to create and disclose a replacement to satisfy the request, BTPD reviewed its CAD system and attempted to amass available towing information into a separate log not envisioned by the Township Code.¹⁰

The Complainant argued that the July 27, 2021 disclosure effectively refuted the Custodian's claim that no log existed. To the contrary, the fact that BTPD endeavored to create a log as a replacement for the Code required logs lends additional support to the Custodian's certifications. For instance, the created record does not include multiple pieces of information required to be included in the logs (such as stored/released status and fees charged) that would likely not be included in any police department's CAD system. Beyond this argument, which the GRC does not find persuasive, the Complainant provided no additional evidence to refute the Custodian's multiple certifications. Thus, the evidence of record supports that the Custodian lawfully denied access to the OPRA request on the basis that no records existed. Based on the forgoing, a conclusion in line with Pusterhofer is appropriate here.

⁹ The GRC notes that it has no authority over whether the Township was properly following its own ordinances. N.J.S.A. 47:1A-7(b); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-362 (February 2013).

¹⁰ The GRC notes that while Paff v. Twp. of Galloway, 229 N.J. 340 (2017) could support an agency's requirement to collate and produce electronic information in response to an OPRA request, the Complainant here sought a specific type of log identified in the Township Code. Thus, Paff does not have applicability to the set of facts presented 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 records "towing logs" submitted to BTPD from authorized towing companies 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:

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 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 records "towing logs" submitted to Berkeley Township Police Department from authorized towing companies 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

April 18, 2023