



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 22, 2022 Government Records Council Meeting

Victoria del Campo
Complainant

Complaint No. 2021-254

v.

NJ Department of Law & Public Safety,
Division on Civil Rights
Custodian of Record

At the February 22, 2022 public meeting, the Government Records Council (“Council”) considered the February 15, 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:

1. Because the GRC attempted on two occasions to obtain a completed Statement of Information from the Custodian, the Custodian’s failure to provide a completed Statement of Information to the GRC hindered the GRC’s obligation to “receive, hear, review and adjudicate [the] complaint” pursuant to N.J.S.A. 47:1A-7(b), and resulted in a violation of N.J.A.C. 5:105-2.4(a). See Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015).
2. Because the Custodian stated that request items number 1, 2, 3, 4, 5, 6, 7, and 9 are investigatory records exempt from access pursuant to N.J.A.C. 13:4-13.1 and there is nothing in the evidence of record to dispute the Custodian’s assertion that the records are investigatory records. Further, because this regulation is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), the Custodian lawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.
3. The Custodian did not unlawfully deny access to request item number 8 because the Custodian stated that the agency did not issue a final determination and the letter dated May 14, 2021 that the Complainant offered as evidence of a final determination is not a final determination but rather a letter memorializing withdrawal of the complaint and closure of the file. However, to the extent that said letter could be considered a final determination, the Custodian did not unlawfully deny access to the record because the Complainant already had it in her possession. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).

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 22nd Day of February 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: February 24, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 22, 2022 Council Meeting**

**Victoria del Campo¹
Complainant**

GRC Complaint No. 2021-254

v.

**New Jersey Department of Law & Public Safety,
Division on Civil Rights²
Custodial Agency**

Records Relevant to Complaint: Copies via e-mail of the following records:

Request item number 1: Each and every case file maintained by the custodial agency with regard to DCR Docket No. E2021-003012.

Request item number 2: The file(s) of the custodial agency investigator(s) assigned to investigate DCR Docket No. E2021-003012, to the extent that such documents are maintained in a separate location from the files described in item number 1.

Request item number 3: The file(s) of the custodial agency's representative(s) assigned to DCR Docket No. E2021-003012, to the extent that such documents are maintained in a separate location from the files described in item numbers 1 and 2.

Request item number 4: The file(s) of the custodial agency's Director(s) assigned to DCR Docket No. E2021-003012, to the extent that such documents are maintained in a separate location from the files described in item numbers 1, 2 and 3.

Request item number 5: Any file containing record(s) of written, telephonic, and/or electronic communications between the custodial agency and the EEOC Charge No. 524-2019-02109, DCR Docket No. E2021-003012 and/or Stephanie Henninger, to the extent that such documents are maintained in a separate location from the files described in item numbers 1, 2, 3 and 4.

¹ No legal representation listed on record. It should be noted that in the complaint there is nothing to indicate that the Complainant is an attorney; however, in the OPRA request, the Complainant stated that Dorsey & Whitney LLP represents Ameriprise Financial Services, LLC. The Complainant has an e-mail address of Dorsey & Whitney, but it is unclear from the evidence of record whether Dorsey & Whitney is a law firm or some other professional organization. Moreover, if Dorsey & Whitney is a law firm representing a client, it is not known from the evidence of record if the Complainant, if she is an attorney, is licensed in New Jersey because Dorsey & Whitney is located in Minnesota.

² No legal representation listed on record.

Request item number 6: Any file containing record(s) of written, telephonic, and/or electronic communications between the custodial agency and Stephanie Henninger and her representatives that refer or relate to DCR Docket No. E2021-003012 and/or Stephanie Henninger, to the extent that such documents are maintained in a separate location from the files described in item numbers 1, 2, 3, 4 and 5.

Request item number 7: Any file containing record(s) of written, telephonic, and/or electronic communications between the custodial agency and Ameriprise Financial Services, LLP and/or its representative that refer or relate to DCR Docket No. E2021-003012 and/or Stephanie Henninger, to the extent that such documents are maintained in a separate location from the files described in item numbers 1, 2, 3, 4, 5 and 6.

Request item number 8: All documents that refer or relate to the final determination made by the custodial agency with respect to DCR Docket No. E2021-003012, to the extent that such documents are maintained in a separate location from the files described in item numbers 1, 2, 3, 4, 5, 6 and 7.

Request item number 9: All documents that refer or relate to the evaluation of any and all data received by the custodial agency from any source with regard to DCR Docket No. E2021-003012 and/or Stephanie Henninger, to the extent that such documents are maintained in a separate location from the files described in item numbers 1, 2, 3, 4, 5, 6, 7 and 8.

Custodian of Record: Rosemary DiSavino

Request Received by Custodian: September 10, 2021

Response Made by Custodian: September 12, 2021

GRC Complaint Received: October 18, 2021

Background³

Request and Response:

On September 10, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 12, 2021, the first (1st) business day following receipt of said request, the Custodian responded in writing informing the Complainant that all her request items were denied pursuant to N.J.A.C. 13:4-13.1 as investigatory records except for her request for an agency final determination in DCR Docket No. E2021-003012, which was denied because the agency did not issue a final determination.

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 October 18, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that her request for the records relevant to the complaint were denied by the Custodian because the agency did not issue a final determination. The Complainant stated that she attached to the complaint a copy of the “final determination closing the investigation following Stephanie Henninger’s withdrawal of the complaint.”⁴ The Complainant stated that, as such, the denial was improper.

Statement of Information:

On October 26, 2021, the GRC sent the Custodian a request for the Statement of Information (“SOI”). The Custodian failed to submit the SOI to the GRC.

On November 16, 2021, the GRC sent the Custodian a notice that if the GRC did not receive the SOI by November 19, 2021, the complaint would proceed to adjudication based only upon the information contained within the complaint. The Custodian failed to submit the SOI, or otherwise respond to the GRC.

Analysis

Failure to Submit SOI

In furtherance of the GRC’s obligation to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to government records[,]” pursuant to N.J.S.A. 47:1A-7(b), the GRC requires a custodian to submit a completed SOI. The New Jersey Administrative Code provides:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

In Kovacs v. Irvington Police Dep’t (Essex), 2014-196, GRC Complaint No. 2014-196 (January 2015), the GRC sent two requests to the custodian seeking submission of the SOI; however, the custodian never submitted the SOI. The Council subsequently determined that the custodian violated N.J.A.C. 5:105-2.4(a).

Here, the GRC attempted on October 26, 2021, and again on November 16, 2021, to

⁴ The Complainant attached to the complaint a letter dated May 14, 2021 from the custodial agency to Stephanie Henninger and her counsel informing the addressees that the complaint in connection with DCR Docket No. E2021-003012 had been withdrawn by the complainant and that the file was closed.

obtain a completed SOI from the Custodian. However, the Custodian never submitted a completed SOI or otherwise responded to the GRC.

Therefore, because the GRC attempted on two occasions to obtain a completed SOI from the Custodian, the Custodian's failure to provide a completed SOI to the GRC hindered the GRC's obligation to "receive, hear, review and adjudicate [the] complaint" pursuant to N.J.S.A. 47:1A-7(b), and resulted in a violation of N.J.A.C. 5:105-2.4(a). See Kovacs, GRC 2014-196.

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.

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a).]

N.J.A.C. 13:4-13.1 provides in relevant part that ". . . the Division's investigatory records shall be considered confidential and exempt from public access pursuant to [OPRA], other than any final agency disposition or any finding of probable cause."

The Custodian, in the response to the request, stated that the records responsive to request items number 1, 2, 3, 4, 5, 6, 7, and 9 are investigatory records. As such, the Custodian denied access because investigatory records are exempt from access pursuant to N.J.A.C. 13:4-13.1. This complaint followed, wherein the Complainant argued that the Custodian unlawfully denied access to the subject OPRA request because a "final determination" was rendered. Unfortunately, the Custodian failed to submit an SOI elaborating on the denial.

Notwithstanding the failure to submit an SOI, a plain reading of the subject OPRA request clearly supports the Custodian's denial of access. To wit; DCR's regulations expressly exempt investigation files from disclosure under OPRA. N.J.A.C. 13:4-13.1. Further, the Complainant's OPRA request clearly sought all investigatory "file(s)" and "documents" related to DCR's investigation in DCR Docket No. E2021-003012. Moreover, there is nothing in the evidence of record to dispute that said records are investigatory records.

Therefore, because the Custodian stated that request items number 1, 2, 3, 4, 5, 6, 7, and 9 are investigatory records exempt from access pursuant to N.J.A.C. 13:4-13.1 and there is nothing in the evidence of record to dispute the Custodian's assertion that the records are investigatory records. Further, because this regulation is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a), the Custodian lawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

With respect to request item number 8, the Custodian in the response to the request, denied the record because she stated that the agency did not issue a final determination. In rebuttal, the Complainant attached to the Denial of Access Complaint a letter in connection with DCR Docket No. E2021-003012 that she stated was a copy of the "final determination closing the investigation following Stephanie Henninger's withdrawal of the complaint."

The GRC examined the letter attached to the complaint from the custodial agency to Stephanie Henninger and her counsel dated May 14, 2021. The letter is not a final determination and does not refer or relate to a final determination. Rather, the letter memorialized withdrawal of the complaint and closure of the file. However, to the extent that said letter would be a final determination, the Custodian did not unlawfully deny access to it because the Complainant already had the record in her possession at the time of the request. This is in accord with Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), wherein the Appellate Division held that a complainant could not have been denied access to a requested record if he already had it in his possession at the time of the OPRA request. [Id. at 617].

Therefore, the Custodian did not unlawfully deny access to request item number 8 because the Custodian stated that the agency did not issue a final determination and the letter dated May 14, 2021 that the Complainant offered as evidence of a final determination is not a final determination but rather a letter memorializing withdrawal of the complaint and closure of the file. However, to the extent that said letter could be considered a final determination, the Custodian did not unlawfully deny access to the record because the Complainant already had it in her possession. See Bart, 403 N.J. Super. 609.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the GRC attempted on two occasions to obtain a completed Statement of Information from the Custodian, the Custodian's failure to provide a completed Statement of Information to the GRC hindered the GRC's obligation to "receive, hear, review and adjudicate [the] complaint" pursuant to N.J.S.A. 47:1A-7(b), and resulted in a violation of N.J.A.C. 5:105-2.4(a). See Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015).
2. Because the Custodian stated that request items number 1, 2, 3, 4, 5, 6, 7, and 9 are investigatory records exempt from access pursuant to N.J.A.C. 13:4-13.1 and there is nothing in the evidence of record to dispute the Custodian's assertion that the records are investigatory records. Further, because this regulation is applicable to OPRA by

operation of N.J.S.A. 47:1A-9(a), the Custodian lawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

3. The Custodian did not unlawfully deny access to request item number 8 because the Custodian stated that the agency did not issue a final determination and the letter dated May 14, 2021 that the Complainant offered as evidence of a final determination is not a final determination but rather a letter memorializing withdrawal of the complaint and closure of the file. However, to the extent that said letter could be considered a final determination, the Custodian did not unlawfully deny access to the record because the Complainant already had it in her possession. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).

Prepared By: John E. Stewart
Staff Attorney

February 15, 2022