



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 31, 2023 Government Records Council Meeting

Marc Liebeskind
Complainant

Complaint No. 2021-326

v.

Borough of Highland Park (Middlesex)
Custodian of Record

At the January 31, 2023 public meeting, the Government Records Council (“Council”) considered the January 24, 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 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). However, the Council need not order any further action because the Custodian disclosed the responsive data to the Complainant on December 13, 2021.

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 31st Day of January 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: February 6, 2023

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2023 Council Meeting**

**Marc Liebeskind¹
Complainant**

GRC Complaint No. 2021-326

v.

**Borough of Highland Park (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of data collected by Level G Associates for its parking study.

Custodian of Record: Joan Hullings³
Request Received by Custodian: November 29, 2021
Response Made by Custodian: December 13, 2021
GRC Complaint Received: December 13, 2021

Background⁴

Request:

On November 29, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On December 13, 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.

Response:

On December 13, 2021, the tenth (10th) business day after receipt of the subject OPRA request, the Custodian responded in writing disclosing to the Complainant via e-mail the responsive data obtained from Level G Associates.

¹ No legal representation listed on record.

² Represented by Lucille E. Davy, Esq., of Mason, Griffin & Pierson, P.C. (Princeton, NJ).

³ The current Custodian of Record is Jennifer Santiago.

⁴ 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.

Statement of Information:

On January 7, 2022, the current Custodian filed a Statement of Information (“SOI”). The current Custodian certified that both the Custodian and her received the Complainant’s OPRA request on November 29, 2021. The current Custodian certified that the Custodian contacted Level G to obtain the responsive data, which she received on December 5, 2021. The current Custodian averred that due to an oversight, the Custodian did not send the responsive data to the Complainant upon receipt. The current Custodian stated that instead of contacting the Borough of Highland Park (“Borough”) to seek a status update on his request, the Complainant filed this complaint on December 13, 2021. The current Custodian averred that upon receipt of the complaint, the Custodian realized her oversight and disclosed the responsive data to the Complainant via e-mail that same day.

The current Custodian argued that because the Complainant is now in possession of the records sought, this complaint is moot.

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).⁵ 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 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).

In this matter, the Complainant submitted his OPRA request on November 29, 2021 and subsequently filed this complaint on December 13, 2021 after not receiving a response. On the same day the Complainant filed this complaint, the Custodian responded disclosing the responsive data to the Complainant via e-mail. In the SOI, the current Custodian certified that the Borough received the OPRA request on November 29, 2021 but did not respond until December 13, 2021 due to an internal oversight brought to the Borough’s attention through the complaint filing. The calculated response time period here is ten (10) business days, or three (3) business days beyond the statutory time frame within which OPRA requires a written response. Thus, the evidence supports that a “deemed” denial of access occurred.

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

⁵ 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.

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. However, the Council need not order any further action because the Custodian disclosed the responsive data to the Complainant on December 13, 2021.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that 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). However, the Council need not order any further action because the Custodian disclosed the responsive data to the Complainant on December 13, 2021.

Prepared By: Frank F. Caruso
Executive Director

January 24, 2023