



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

January 31, 2023 Government Records Council Meeting

Christina Moreira
Complainant

Complaint No. 2022-9

v.

Elizabeth Public Schools (Union)
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:

1. The Custodian did not bear his burden of proof that he 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. Notwithstanding the occurrence of a “deemed” denial, the Custodian has borne his burden of proof that he 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 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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Christina Moreira¹
Complainant**

GRC Complaint No. 2022-9

v.

**Elizabeth Public Schools (Union)²
Custodial Agency**

Records Relevant to Complaint: Copies of the “the most current rate” for an independent evaluation “determined and approved by the” Elizabeth School District (“District”) Board per District Policy 6171.6.

Custodian of Record: Harold F. Kennedy, Jr.

Request Received by Custodian: January 4, 2022

Response Made by Custodian: January 18, 2022

GRC Complaint Received: January 19, 2022

Background³

Request and Response:

On January 4, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 13, 2022 in the evening, the Complainant e-mailed the Custodian seeking a status update and noting that the seven (7) business day response time frame expired earlier that day. On January 14, 2022, the Complainant e-mailed the Custodian again seeking a status update and asking him to explain the delay in the District’s response.

On January 18, 2022, the ninth (9th) business day after receipt of the OPRA request, the Custodian responded in writing stating that the District did not maintain a responsive record. The Custodian noted that “[t]he administrative code does not address a ‘maximum’ or ‘reasonable’ cost” for evaluations. The Custodian further noted that the Board’s remedy for a disagreement over a request for an independent evaluation is to seek a court order.

¹ No legal representation listed on record.

² Represented by Christina M. DiPalo, Esq., of La Corte, Bundy, Varady & Kinsella (Union, 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.

Denial of Access Complaint:

On January 19, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”).⁴ The Complainant asserted that she never received a response to her OPRA request.

Amended Denial of Access Complaint:

On February 7, 2022, the Complainant filed an Amended Denial of Access Complaint with the GRC. The Complainant stated that she received a “late response” from the Custodian that did not satisfy her OPRA request. The Complainant contended that the Custodian’s denial that no records exist contradicted the District’s written policy, which states that the Board would annually determine and approve a cost and that same would be “provided to the parent upon their request for an [independent educational evaluation].” District Policy 6171.6.

Statement of Information:

On February 11, 2022, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that he received the Complainant’s OPRA request on January 4, 2022. The Custodian certified that his search included reviewing Board records and consulting with the Board’s attorney. The Custodian certified that he responded in writing on January 18, 2022 denying the subject OPRA request because no records existed.

The Custodian contended that although the Board policy states that a rate would be approved annually, the District did not maintain any records setting it. The Custodian argued that he did not unlawfully deny access to any records because none existed. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian further acknowledged that his untimely response resulted in a “deemed” denial of access; however, same was inadvertent due to the District’s staggered schedule from January 3, through 11, 2022 due to COVID-19.

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

⁴ The Complainant caused her complaint to be filed with the GRC via e-mail on January 17, 2022.

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.

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).

The Complainant filed the instant complaint contending that the Custodian failed to respond in a timely manner to her OPRA request. In the SOI, the Custodian conceded that his response was untimely, noting that it was impacted by the District's staggered schedule due to COVID-19. The GRC notes that although N.J.S.A. 47:1A-5(i) was amended in March 2022 due to the COVID-19 public health emergency to provide a response exception for public health emergencies, P.L. 2021, c.104 signed into effect on June 4, 2021 provided that agencies were required to adhere to normal OPRA response provisions with a limited exception that does not apply here. Thus, the evidence of record supports that a "deemed" denial of access occurred.

Therefore, the Custodian did not bear his burden of proof that he 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 Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA request sought a rate approved by the Board per District Policy 6171.6. Following the filing of this complaint, the Custodian responded denying the request on the basis that no records existed. The Complainant subsequently filed an Amended Denial of Access Complaint arguing that the Custodian's response was contrary to the District's own policy. In the SOI, the Custodian certified that his search resulting in a determination that no records existed included reviewing Board records and speaking directly with their attorney.

A review of the facts available to the GRC in this case support that, notwithstanding the "deemed" denial, the Custodian lawfully denied access to the OPRA request on the basis that no records existed. While the District policy provides that a rate should exist, it is not necessarily sufficient evidence to overcome the Custodian's SOI certification that none exists. Instead, the GRC finds compelling the Custodian's explanation as to the search conducted and his ultimate certification as competent and credible evidence of the non-existence of records. Thus, a conclusion in line with Pusterhofer is appropriate here.

Accordingly, notwithstanding the occurrence of a “deemed” denial, the Custodian has borne his burden of proof that he 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:

1. The Custodian did not bear his burden of proof that he 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).
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Prepared By: Frank F. Caruso
Executive Director

January 24, 2023