



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lieutenant Governor*

KIMBERLY K. HOLMES  
*Acting Commissioner*

### FINAL DECISION

#### August 29, 2023 Government Records Council Meeting

David Weiner  
Complainant

Complaint No. 2022-185

v.

County of Essex  
Custodian of Record

At the August 29, 2023 public meeting, the Government Records Council (“Council”) considered the August 22, 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 extended time frame results in a “deemed” denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order any further action because the Custodian responded on July 12, 2022 stating that no additional records existed and the Statement of Information submission supports such a conclusion.

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 29<sup>th</sup> Day of August 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: September 5, 2023**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 29, 2023 Council Meeting**

**David Weiner<sup>1</sup>  
Complainant**

**GRC Complaint No. 2022-185**

v.

**County of Essex<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. “Any and all documents delineating” the Certificate of Occupancy issued to Harrar Cafeteria (“Harrar”) by the City of Newark (“City”).
2. “Any and all documents delineating” the business registration certificate for Harrar issued by the Division of Revenue and Enterprise Services.
3. “Any and all documents delineating” the “Police Warrant Record Check and [State Bureau of Investigation (“SBI”)]” issued to Harrar by the New Jersey State Police including the actual SBI number.
4. “Any and all documents delineating” the “Police Warrant Record Check” issued by the City.
5. “Any and all documents delineating” proof of payroll issued to Harrar by the City.
6. “Any and all documents delineating” a “Trade Waste Permit” issued to Harrar by the City.
7. “Any and all documents delineating” the health certificate issued to Harrar by the City.

**Custodian of Record:** Olivia Schumann, Esq.

**Request Received by Custodian:** January 25, 2022

**Response Made by Custodian:** January 25, 2022

**GRC Complaint Received:** May 12, 2022

**Background<sup>3</sup>**

**Request and Response:**

On January 24, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 25, 2022, the Custodian responded in writing advising the Complainant that an extension of time to respond through February 16, 2022 would be required due to lingering disruptions from the COVID-19 public

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> 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.

David Weiner v. County of Essex, 2022-185 – Findings and Recommendations of the Executive Director

health emergency.<sup>4</sup> On February 16, 2022, the Custodian responded in writing advising the Complainant that an extension of time to respond through February 25, 2022 would be required due to lingering disruptions from the COVID-19 public health emergency.

On February 25, 2022, the Custodian responded in writing stating that she was disclosing a “Business Registration Certificate” (“Certificate”) received from the Office of Purchasing. The Custodian noted that in an effort to locate other records, she had been “bounced between” the Department of Public Works, Purchasing, and Division of Family Assistance and Benefits (“DFAB”) and is unsure who may be maintaining any other responsive records. The Custodian stated that because she has asked DFAB to conduct another search, she would need another extension of time to respond through March 4, 2022.

#### Denial of Access Complaint:

On May 12, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated stating “[p]lease see attached rejoinder of 2/16/22 requesting a delay until 2/25/2022.” The Complainant provided no additional statements or arguments identifying the reasons for his dispute.

#### Supplemental Response:

On July 12, 2022, the Custodian responded in writing stating that after checking with several County of Essex (“County”) departments, the Certificate disclosed on February 25, 2022 is the only maintained record responsive to the subject OPRA request.

#### Statement of Information:<sup>5</sup>

On July 12, 2022, the Custodian filed a Statement of Information (“SOI”) attaching five (5) legal certifications from County employees. The Custodian certified that she received the Complainant’s OPRA request, including an attached City Ordinance, on January 25, 2022. The Custodian certified that her search included contacting several County departments and directing them to search for responsive records. The Custodian certified that following multiple extensions of time, she disclosed to the Complainant the Certificate on February 25, 2022. The Custodian affirmed that she subsequently confirmed that the only record maintained by the County was the Certificate.

The Custodian argued that the Council has consistently held that no unlawful denial of access could have occurred where a custodian certifies that all responsive records that existed were provided to a complainant. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Owens v. Mt. Holly Twp. (Burlington), GRC Complaint No. 2013-233

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<sup>4</sup> The GRC notes that on June 4, 2021, Governor Murphy signed into law P.L. 2021, c.103, which provides in relevant part that “[w]hile the state of emergency declared in Executive Order No. 103 of 2020 shall remain in effect, the deadlines in paragraph (1) of subsection i. of section 6 of P.L. 2001, c.404 (C.47:1A-5) shall apply to any request made under [OPRA] after the effective date of this act . . .” Id. Thus, N.J.S.A. 47:1A-5(i)(2) no longer applied and normal statutory response time frames were in effect at the time of the Custodian’s response.

<sup>5</sup> On May 27, 2022, this complaint was referred to mediation. On June 16, 2022, this complaint was referred back to the GRC for adjudication.

(February 2014). The Custodian argued that the County clearly disclosed the only record within its possession responsive to the Complainant's OPRA request. The Custodian further asserted that the City's Ordinance identifying those types of records a business is required to procure only reinforced the County's position that no additional records existed. The Custodian averred that each of the five (5) attached certifications from individuals describing their search performed for responsive records also supports her position. The Custodian thus requested that the Council find that no unlawful denial of access occurred here.

## 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).<sup>6</sup> 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 Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

[Id.]

In this matter, the Complainant here submitted his OPRA request on January 24, 2022. The Custodian responded on January 25, 2022 extending the response time frame through February 16, 2022. The Custodian responded on February 16, 2022 again extending the response time frame through February 25, 2022. The Custodian subsequently responded on February 25, 2022

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<sup>6</sup> 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.

disclosing the Certificate and again extending the response time frame through March 4, 2022 to perform additional searches. This complaint followed, wherein the Complainant noted the Custodian's February 16, 2022 response extending the time frame without providing any additional arguments.<sup>7</sup> On July 12, 2022, over four (4) months later and on the same day as the SOI filing, the Custodian responded in writing advising that no additional records beyond the disclosed Certificate existed.

The Complainant's reason for filing the instant complaint appears to be based in the Custodian's failure to respond within the extended time frame. The GRC reaches this conclusion based on the Complainant's comment in the Denial of Access Complaint stating "[p]lease see attached rejoinder of 2/16/22 requesting a delay until 2/25/2022." However, the Complainant does not acknowledge that the Custodian responded again on February 25, 2022 disclosing the Certificate and further extending the response time frame through March 4, 2022. Notwithstanding this omission, the evidence of record supports that the Custodian failed to follow up before the expiration of that extension. Instead, the Custodian did not respond again until over four (4) months later on July 12, 2022. Thus, and like Kohn, GRC 2007-124, the Custodian's failure to conform with the March 4, 2022 extended deadline results in a "deemed" denial of access.

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 extended time frame results in a "deemed" denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124. However, the GRC declines to order any further action because the Custodian responded on July 12, 2022 stating that no additional records existed and the SOI submission supports such a conclusion.

### **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 extended time frame results in a "deemed" denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order any further action because the Custodian responded on July 12, 2022 stating that no additional records existed and the Statement of Information submission supports such a conclusion.

Prepared By: Frank F. Caruso  
Executive Director

August 22, 2023

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<sup>7</sup> The GRC notes that the Complainant's Denial of Access Complaint borders on failing to state a claim: the Council has previously dismissed such complaints based on this procedural issue. See e.g. Loigman v. Monmouth Cnty. Prosecutor's Office, GRC Complaint No. 2013-342 (July 2014); Georges v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2021-268 (February 2023).