



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

October 3, 2023 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2022-212

v.

County of Essex
Custodian of Record

At the October 3, 2023 public meeting, the Government Records Council (“Council”) considered the September 26, 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 GRC declines to order any further action because the Custodian responded on May 23, 2022 disclosing all records that 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 3rd Day of October 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: October 10, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 3, 2023 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2022-212

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “[D]ocuments denoting” names, titles (“including their respective seniority within their title”), and salaries of Division of Family Assistance & Benefits (“DFAB”) employees “managerially approved for a transfer” from July 1, 2021 through April 28, 2022.
2. “[D]ocuments denoting” names, titles (“including their respective seniority within their title”), and salaries of DFAB employees “managerially disapproved for a transfer” from July 1, 2021 through April 28, 2022.
3. Announcements e-mailed to DFAB employees advising of transfer opportunities between July 1, 2021 and April 28, 2022.
4. Announcements managerially e-mailed to CWA Local 1081 advising of transfers opportunities for DFAB employees between July 1, 2021 and April 28, 2022.
5. Announcements managerially e-mailed to CWA Local 1081 recounting transfers among DFAB employees between July 1, 2021 and April 28, 2022.

Custodian of Record: Olivia Schumann, Esq.

Request Received by Custodian: April 29, 2022

Response Made by Custodian: May 23, 2022

GRC Complaint Received: May 19, 2022

Background³

Request and Response:

On April 28, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 29, 2022, the Custodian e-mailed the Complainant acknowledging receipt of the OPRA request and noting that the response deadline is May 10, 2022.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

David Weiner v. County of Essex, 2022-212 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On May 19, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his OPRA request.

Supplemental Response:

On May 23, 2022, the sixteenth (16th) business day after receipt of the OPRA request, the Custodian responded in writing disclosing 211 pages of records and noting that all responsive records have been disclosed. The Custodian further noted that redactions were made to remove employee identification numbers, personal home addresses, and social security numbers not disclosable under OPRA. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-10.

Statement of Information:⁴

On December 13, 2022, the Custodian filed a Statement of Information (“SOI”) attaching a legal certification from DFAB employee Albert Fusco. The Custodian certified that she received the Complainant’s OPRA request on April 29, 2022. The Custodian certified that her search included contacting Albert Fusco from DFAB, who caused 211 pages of records to be hand-delivered to her on May 5, 2022. Fusco Cert. ¶ 4. The Custodian certified that she responded in writing on May 23, 2022 disclosing those records with minimal redactions of employee identification numbers, home addresses, and social security numbers. N.J.S.A. 47:1A-1. The Custodian noted that prior to submitting the SOI, she contacted Mr. Fusco, who again confirmed that the records disclosed on May 23, 2022 represent all responsive records that existed. Fusco Cert. ¶ 5.

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 (February 2014). The Custodian argued that the County clearly disclosed the records responsive to the instant OPRA request. The Custodian further argued that Mr. Fusco’s legal certification supports her position, and no competent, credible evidence exists to refute said certification. 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

⁴ On June 14, 2022, this complaint was referred to mediation. On December 7, 2022, this complaint was referred back to the GRC for adjudication.

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 the matter before the Council, the Custodian acknowledged receipt of the subject OPRA request on April 29, 2022 and noted that the last business day to respond was May 10, 2022. Following the expiration of the statutory response time frame, the Complainant filed the instant complaint contending that he did not receive a response to his OPRA request. Following the complainant filing, the Custodian responded on May 23, 2022 disclosing multiple records. In the SOI, the Custodian certified that she received the OPRA request on April 29, 2022, obtained the responsive records from Mr. Fusco on or about May 5, 2022, and disclosed same on May 23, 2022. However, the response occurred sixteen (16) business days after receipt of the OPRA request. Thus, the evidence of record clearly supports that the Complainant's OPRA request was "deemed" denied.

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. However, the GRC declines to order any further action because the Custodian responded on May 23, 2022 disclosing all records that 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 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 GRC declines to order any further action because the Custodian responded on May 23, 2022 disclosing all records that existed and the Statement of Information submission supports such a conclusion.

Prepared By: Frank F. Caruso
Executive Director

September 26, 2023

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.