



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
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. 2022-215

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 December 29, 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. 2022-215

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copy of the recording Zoom meeting that took place on April 7, 2022 between Division of Family Assistance & Benefits (“DFAB”) Director Valentina Richardson-Green and approximately fifty (50) employees who applied for overtime to address an existing case backlog.

Custodian of Record: Olivia Schumann, Esq.
Request Received by Custodian: April 7, 2022
Response Made by Custodian: December 29, 2022
GRC Complaint Received: May 19, 2022

Background³

Request and Response:

On April 7, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

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 December 29, 2022, nearly nine (9) months after receipt of the OPRA request, the Custodian responded in writing providing the Complainant with a link to the responsive Zoom recording and passcode necessary to access same.

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.

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Statement of Information:⁴

On December 29, 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 7, 2022. The Custodian affirmed that because of an unintentional error, the subject OPRA request was never entered into the County of Essex’s (“County”) online OPRA portal and was thus never forwarded to DFAB for a response. The Custodian certified that upon learning of this error, she forwarded the OPRA request to DFAB on December 12, 2022. Fusco Cert. ¶ 4 The Custodian certified that on December 29, 2022 she received a link to the Zoom recording from Director Richardson-Green, which she immediately sent to the Complainant via e-mail. Fusco Cert. ¶ 5. The Custodian noted that Mr. Fusco has confirmed that the record requested was the record provided on December 29, 2022. Fusco Cert. ¶ 6.

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 to the Complainant the record 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 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 Complainant submitted his OPRA request to the Custodian on April 7, 2022. The Complainant filed the instant complaint contending that he did not receive a response. Following this complaint filing, the Custodian responded to the Complainant via e-mail on December 29, 2022 disclosing a link and passcode for the responsive

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.

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.

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Zoom recording. In the SOI submitted on the same day, the Custodian certified that she received the OPRA request on April 7, 2022. The Custodian further noted that due to an unintentional error, the OPRA request was never inputted into the County's online OPRA request system. The Custodian contended that upon being made aware of this error, she obtained and disclosed the responsive record on December 29, 2022. However, the response occurred nearly nine (9) months 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 December 29, 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 December 29, 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