



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

January 30, 2024 Government Records Council Meeting

Kerry Brown
Complainant

Complaint No. 2022-383

v.

Borough of Chester (Morris)
Custodian of Record

At the January 30, 2024 public meeting, the Government Records Council (“Council”) considered the January 23, 2024 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 current Custodian has borne her burden of proof that, through Custodian’s Counsel, she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, no “deemed” denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

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 30th Day of January 2024

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 5, 2024



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2024 Council Meeting**

**Kerry Brown¹
Complainant**

GRC Complaint No. 2022-383

v.

**Borough of Chester (Morris)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. All signed and dated “Vacation Registration and Quarantine Notice” forms from July 8, 2020 through December 31, 2020.
2. All requests from all employees of vacation requests/extended weekends and approvals/denials from July 8, 2020 through December 31, 2020.

Custodian of Record: Denean Probasco³

Request Received by Custodian: August 15, 2022

Response Made by Custodian: August 19, 2022

GRC Complaint Received: August 3, 2022

Background⁴

Request and Response:

On July 15, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 28, 2022, the Complainant resent her OPRA request to the Custodian.

Denial of Access Complaint:

On August 3, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted she received no response to her OPRA request, which prompted her to resubmit it on July 28, 2022. The Complainant asserted that she still did not receive a response to her request.

¹ No legal representation listed on record.

² Represented by Brian W. Mason, Esq., of Mason, Thompson, LLC (Dover, NJ).

³ The current “Custodian of Record” is Dena Dziergoski.

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.

Response:

On August 19, 2022, Custodian's Counsel sent a letter to the GRC. Therein, Counsel stated that on July 11, 2022, the Custodian formally resigned from her position effective July 23, 2022 with her last day in the office being July 14, 2022. Counsel asserted that the Custodian was in contact with the Complainant up until her last in-office day addressing unrelated OPRA requests. Counsel posited that the Complainant knew of the Custodian's pending departure and chose to send the subject OPRA request to an e-mail address she knew "was unattended." Counsel asserted that the forgoing allegation is based on the Borough of Chester's ("Borough") experience with the Complainant, who is a former employee who left on litigious terms.

Counsel stated that at the time of the subject OPRA request, the Custodian already left the office and never returned without setting up an automatic reply or e-mail forwarding. Counsel stated that the Custodian's resignation gave the Borough three (3) days to address the vacancy and left the Borough with two (2) full time employees and five (5) part-time employees. Counsel argued that the Borough attempted to quickly address the issue by promoting a new administrative assistant to the Deputy Clerk position on July 19, 2022. Counsel noted that the Borough also posted for and has hired a new municipal clerk set to start on August 29, 2022. Counsel stated that until that time, the Custodian's responsibilities are split between the Deputy Clerk, part-time Administrator, and other part-time employees.

Counsel stated that regarding the subject OPRA request, same was not received until reviewing the Custodian's e-mail account after receipt of this complaint on August 15, 2022, where both of the Complainant's e-mails were found unopened. Counsel stated that the OPRA request was immediately disseminated through the Borough, and fifteen (15) pages of records were located. Counsel thus stated that he was responding in writing at this time disclosing to the Complainant those records along with a document index. Counsel further asserted that had the Complainant copied the Administrator or called the Borough, the delayed response could have been avoided.

Statement of Information:

On August 22, 2022, the Custodian filed a Statement of Information ("SOI"). The current Custodian certified that the Borough received the Complainant's OPRA request on August 15, 2022. The current Custodian certified that her search included reviewing all personnel records, e-mail accounts, and the Borough's e-mail server. The current Custodian certified that Custodian's Counsel responded in writing on her behalf on August 19, 2022 disclosing fifteen (15) pages of records without redactions.

The current Custodian referred the GRC to Counsel's August 19, 2022 e-mail regarding the circumstances surrounding the Borough's lack of response. The current Custodian noted that once the Custodian's e-mail account was reviewed on August 15, 2022, all OPRA requests submitted, including the one at issue here, were addressed and responded to as quickly as possible.

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 argued that the Borough failed to respond to her July 15, 2022 OPRA request. The Complainant noted that this is notwithstanding her follow-up e-mail on July 28, 2022. By letter on August 19, 2022, Custodian's Counsel advised that the Custodian submitted her resignation on July 11, 2022, and that her last day in the office was July 14, 2022. Counsel posited that the Complainant likely knew of the Custodian's pending departure but chose to submit the OPRA request directly to an e-mail address she knew "was unattended." Counsel further argued that it was not until August 15, 2022, upon receipt of this complaint from the GRC, that the Borough reviewed the Custodian's e-mail account and located the subject OPRA request. Counsel further stated that he was simultaneously disclosing records to the Complainant, four (4) business days after locating the subject OPRA request. The current Custodian subsequently certified to the above in the SOI.

In reviewing all the facts and arguments presented by the parties, and despite a few missteps by the Borough during its custodial transition, the GRC declines to find that a "deemed" denial occurred here. While there is no evidence to support Counsel's allegation that the Complainant knew of the Custodian's departure and acted tactically, she consciously chose to send the OPRA request directly to the Custodian's e-mail address. This fact is significant considering that the Borough's official OPRA request (used by the Complainant in her initial request) contains an OPRA-specific e-mail address and not the Custodian's specific address. Thus, the Complainant singularly enhanced the potential for a lack of response in not following the transmission method set by the Borough. See Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009)(holding that agencies could set methods of transmission to the extent that they do not present an unreasonable obstacle to access).

Further, Custodian's Counsel has provided sufficient evidence to prove that the Borough could not have known about the OPRA request until receiving the instant complaint. In some situations where a custodian does not receive an OPRA request prior to the filing of a Denial of Access Complaint, the Council has found that no "deemed" denial occurred where the facts warrant such a conclusion. See *e.g.* Herron v. River Vale Bd. of Educ., GRC Complaint No. 2011-

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.

351 (December 2012); Burns v. Warren Cnty. Sheriff's Office, GRC Complaint No. 2018-300 (July 2020).

Therefore, the current Custodian has borne her burden of proof that, through Custodian's Counsel, she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the current Custodian has borne her burden of proof that, through Custodian's Counsel, she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

Prepared By: Frank F. Caruso
Executive Director

January 23, 2024