



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

February 29, 2024 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2022-442

v.

County of Essex
Custodian of Record

At the February 29, 2024 public meeting, the Government Records Council (“Council”) considered the February 20, 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:

1. 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).
2. Notwithstanding the “deemed” denial of access, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no records responsive to the OPRA request 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 29th Day of February 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: March 4, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 27, 2024 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2022-442

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “[D]ocuments delineating the date, the amount of funding and the source of same[,] as well as the name of the company performing the work and its billing” to replace the heating, ventilation, and air conditioning (“HVAC”) system at 320 University Avenue in Newark “within 2019.”
2. “[D]ocuments delineating the date, the amount of funding and the source of same[,] as well as the name of the company performing the work and its billing” to replace the HVAC system at 321 University Avenue in Newark “within 2019.”
3. “If the 32 (sic) University Avenue’s HVAC system was not replaced, please provide all documents of deliberation by the Administration of the County of Essex [(“County”)] and its applicable operatives regarding same.

Custodian of Record: Olivia Schumann, Esq.

Request Received by Custodian: August 2, 2022

Response Made by Custodian: October 19, 2022

GRC Complaint Received: August 23, 2022

Background³

Request:

On July 25, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

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.

Denial of Access Complaint:

On August 23, 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 the subject OPRA request.

Response:

On October 19, 2022, the fifty-fourth (54th) business day after receipt of the OPRA request, the Custodian responded in writing stating that all relevant County departments performed a search and determined that no responsive records exist.

Statement of Information⁴:

On November 4, 2022, the Custodian filed a Statement of Information (“SOI”) attaching certifications from Al Fusco of the Division of Family Assistance and Benefits and David Antonio from the Department of Public Works. The Custodian certified that she received the Complainant’s OPRA request on August 2, 2022. The Custodian certified that her search included utilizing Mr. Fusco and Mr. Antonio. The Custodian affirmed that Mr. Fusco advised her on August 4, 2022 that no records existed. Fusco Cert. ¶ 4. The Custodian further certified that Mr. Antonio also advised her on October 18, 2022 that no records existed because the HVAC system at both addresses was not replaced. Antonio Cert. ¶ 4, 6. The Custodian certified that she responded to the Complainant in writing on October 19, 2022 advising that no responsive records existed.

The Custodian contended that no unlawful denial of access occurred here because, first and foremost, no responsive records existed. Pavlenko v. Twp. of Delran (Burlington), GRC Complaint No. 2010-325 (March 2012) (citing Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005)). The Custodian argued that both Mr. Fusco and Mr. Antonio have submitted certifications attesting to the fact that no records exist; the Complainant has not provided any evidence to refute said certifications.

The Custodian further argued that notwithstanding the forgoing, OPRA request item No. 3 was invalid because it sought generic “documents of deliberation” and lacks the specificity required to locate responsive records. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian also argued that notwithstanding the invalid nature of the request item, the term “deliberation” signaled that the Complainant obviously sought access to records that would be considered “inter-agency, or intra-agency advisory, consultative, or deliberative material.” Educ. Law Ctr v. N.J. Dep’t of Educ., 198 N.J. 274 (2009).

⁴ On September 27, 2022, this complaint was referred to mediation. On October 17, 2022, this complaint was referred back to the GRC for adjudication.

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).

Here, the Complainant submitted his OPRA request on July 25, 2022 and subsequently filed this complaint asserting that the Custodian failed to respond to it. On October 19, 2022, the fifty-fourth (54th) business day after receipt of the OPRA request, the Custodian responded stating that no records existed. In the SOI, the Custodian certified that she received the subject OPRA request on August 2, 2022 but did not respond in writing until October 19, 2022. Thus, the evidence clearly supports that a "deemed" denial of access occurred.

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.

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 "documents delineating" information about the HVAC system at 320 and 321 University Avenue and if the system was not replaced, "deliberation" from the County and "its applicable operatives" regarding the issue. The Custodian responded stating that no records existed. Following the filing of this

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.

complaint, the Custodian certified in the SOI that no records existed and included supporting certifications from both Mr. Fusco and Mr. Antonio.

Upon review, the GRC is persuaded that no unlawful denial of access has occurred. The evidence of record supports the Custodian's position that no responsive records exist. That is, the Custodian, Mr. Fusco, and Mr. Antonio have certified that no records exist. Further, Mr. Antonio has certified that the HVAC system at 320 and 321 University Avenue was not replaced. Also, the Complainant has not provided any competent, credible evidence necessary to refute the multiple certifications presented by the Custodian in the SOI. Based on the forgoing, a conclusion in line with Pusterhofer is appropriate here.

Accordingly, notwithstanding the "deemed" denial of access, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request. Specifically, the Custodian certified in the SOI, and the record reflects, that no records responsive to the OPRA request exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Finally, because the evidence supports that no responsive records exist, the GRC does not reach the Custodian's additional bases for denying access to the subject OPRA request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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).
2. Notwithstanding the "deemed" denial of access, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no records responsive to the OPRA request exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

February 20, 2024