



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
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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. 2022-465

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 29<sup>th</sup> 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 Weiner<sup>1</sup>  
Complainant**

**GRC Complaint No. 2022-465**

v.

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

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

1. “[D]ocuments delineating” the foreclosure of a specific property in Newark by Essex County Sheriff’s Office (“ECISO”) in 2007.
2. “[D]ocuments delineating” the purchase of the property on November 20, 2007.

**Custodian of Record:** Olivia Schumann, Esq.  
**Request Received by Custodian:** July 14, 2022  
**Response Made by Custodian:** None.  
**GRC Complaint Received:** September 1, 2022

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

**Request:**

On July 14, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

**Denial of Access Complaint:**

On September 1, 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.

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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.

## Statement of Information<sup>4</sup>:

On November 9, 2022, the Custodian filed a Statement of Information (“SOI”) attaching certifications from Mary Beasley of the Foreclosure Unit, ECSO. The Custodian certified that she received the Complainant submitted his OPRA request on July 14, 2022; however, same was not entered into the County of Essex’s (“County”) OPRA Portal system due to “an unintentional error.” The Custodian averred that this error occurred because of her “serious workload . . .” at the time the OPRA request was submitted to the County. The Custodian affirmed that on November 3, 2022, upon learning of this error while preparing the SOI, the OPRA request was sent to the Foreclosure Unit for review. The Custodian certified that Ms. Beasley performed a search and spoke with her superior regarding the OPRA request. Beasley Cert. ¶ 5. The Custodian affirmed that Ms. Beasley advised the Custodian on the same day that no records existed because the ECSO did not maintain records as far back as 2007. Id.

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 Ms. Beasley submitted a certification attesting to the fact that no records exist because ECSO did not maintain records from 2007. The Custodian further argued that the Complainant has not provided any evidence to refute said certifications.

## 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>5</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).

Here, the Complainant submitted his OPRA request on July 14, 2022 and subsequently filed this complaint asserting that the Custodian failed to respond to it. In the SOI, the Custodian certified that the OPRA request was submitted on July 14, 2022, but was never entered into the County’s OPRA Portal system due to “an unintentional error” that was the result of her “serious workload. . .” Notwithstanding the error, the evidence clearly supports that a “deemed” denial of access occurred because the Custodian failed to respond to the subject OPRA request.

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

<sup>5</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.

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" ECSO's foreclosure and the purchase of a property in Newark from 2007. Following the filing of this complaint, the Custodian certified in the SOI that no records existed and included a supporting certification from Ms. Beasley.

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 and Ms. Beasley have certified that no records exist. Further, Ms. Beasley certified that the ECSO did not maintain records as far back as 2007. 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.

### **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