



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

April 30, 2024 Government Records Council Meeting

Saul Jaffe
Complainant

Complaint No. 2022-560

v.

City of Passaic (Passaic)
Custodian of Record

At the April 30, 2024 public meeting, the Government Records Council (“Council”) considered the April 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:

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. 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 30th Day of April 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: May 2, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Saul Jaffe¹
Complainant**

GRC Complaint No. 2022-560

v.

**City of Passaic (Passaic)²
Custodial Agency**

Records Relevant to Complaint: On-site inspection or electronic copies via e-mail of site plans for 503 Paulison Avenue (Shoprite) “showing entryway and parking plans as approved” by the City of Passaic (“City”).

Custodian of Record: Weatherly Frias
Request Received by Custodian: September 16, 2022
Response Made by Custodian: October 17, 2022
GRC Complaint Received: October 17, 2022

Background³

Request:

On September 16, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, Passport Agent Katherine Monsalve forwarded the subject OPRA request to Code Enforcement, Zoning, and Engineering. On September 20, 2022, Zoning e-mailed Ms. Monsalve stating that no records existed. On September 23, 2022, Engineering e-mailed Ms. Monsalve stating that no records existed.

Denial of Access Complaint:

On October 17, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he went to the City to view approved site plans for 503 Paulison Avenue, showing the parking lot and entranceway. The Complainant asserted that Zoning told him they possessed the records, but that he could not access

¹ No legal representation listed on record.

² Represented by Jonathan N. Frodella, Esq., of PRB Attorneys at Law, LLC (Newark, NJ).

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.

them. The Complainant stated that he was directed to submit an OPRA request, which he did at that time.

The Complainant first contended that he was denied “immediate access” to the plans, citing N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). The Complainant further argued that the Custodian failed to respond within the statutorily mandated time frame. N.J.S.A. 47:1A-5(i)(1).

Response:

On October 17, 2022, the twentieth (20th) business day after receipt of the OPRA request, Ms. Monsalve responded in writing on behalf of the Custodian stating that Code Enforcement was requesting that the response time frame be extended through November 3, 2022. On the same day, the Complainant e-mailed Ms. Monsalve demanding a reason for the extension and noting that he would deny any further delay pending a valid reason. The Complainant also noted that because he did not receive a response within seven (7) business days, a complaint was already filed with the GRC.

On October 18, 2022, the Custodian responded in writing advising the Complainant that Code Enforcement, Zoning, and Engineering have determined that no responsive records existed. On the same day, the Complainant e-mailed the Custodian disputing the response and arguing that all buildings in every city in New Jersey have site plans that are required to be approved by “zoning or other boards before being built.” The Complainant argued that it was impossible that no plans showing the outside parking lot exist. The Complainant argued that he would be pursuing his complaint and seeking “substantial damages.”

Statement of Information:

On December 9, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 16, 2022. The Custodian affirmed that the search for responsive records consisted of forwarding the OPRA request to Code, Zoning, and Engineering. The Custodian averred that on October 17, 2022, Ms. Monsalve responded on her behalf extending the response time frame through November 3, 2022. The Custodian certified that she subsequently responded in writing on October 18, 2022 advising that no responsive records existed. The Custodian disputed the Denial of Access Complaint by certifying that no records existed.⁴

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

⁴ The Complainant submitted a sur-reply to the SOI on December 19, 2022. However, said sur-reply is not considered here because it was filed out of time per N.J.A.C. 5:105-2.4(n) and the Complainant did not seek an extension of said time frame. The GRC also notes that the sur-reply essentially reiterates those points captured in the Denial of Access Complaint and subsequent correspondence between the parties during the pendency of this complaint.

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).

The Complainant filed the instant complaint contending that the Custodian failed to timely respond to the subject OPRA request.⁶ In the SOI, the Custodian certified that she received the subject OPRA request on September 16, 2022 and that Ms. Monsalve responded in writing on her behalf on October 17, 2022, twenty (20) business days after submission of the subject OPRA request. The evidence of record thus clearly indicates 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 has asserted that the City unlawfully claimed that the requested site plans for 503 Paulison Avenue showing the parking lot and entranceway thereto did not exist. The Complainant argued that he was previously told by Zoning that they did exist and that every building is required to submit plans for approval to a zoning or other board. In the SOI, the Custodian certified that no records existed and included e-mail responses from Code, Zoning, and Engineering confirming said certification.

Upon review of the evidence of record, the GRC is satisfied that a lawful denial of access occurred here. The Custodian has certified that no responsive site plan exists and included

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.

⁶ The Complainant also asserted that he was denied “immediate access” to the requested site plans. The GRC will not address this issue in substance because site plans are plainly not identified as an “immediate access” record under N.J.S.A. 47:1A-5(e).

statements from the relevant departments confirming same. Additionally, the Complainant's assertion that Zoning told him they possessed the responsive plans and argument that all buildings are required to submit plans for approval are hearsay and conjectural statements that do not rise to the level of competent, credible evidence to refute the certification. Thus, the GRC is compelled to find that Pusterhofer applies here.

Accordingly, 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. 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

April 23, 2024