



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

September 26, 2007 Government Records Council Meeting

Femaarta Momo
Complainant

Complaint No. 2007-17

v.

NJ Department of Community Affairs,
Division of Community Resources
Custodian of Record

At the September 26, 2007 public meeting, the Government Records Council ("Council") considered the September 19, 2007 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 certified that the Complainant's OPRA request was not forwarded to her until December 4, 2006 and consequently responded in a timely manner on December 8, 2006 informing the Complainant that the requested records are not made, maintained, kept on file or received by the Division of Community Resources. Therefore, the Custodian did not unlawfully deny access to the requested records pursuant to N.J.S.A. 47:1A-5.g. or N.J.S.A. 47:1A-5.i.
2. Because the Division of Housing's Records Custodian, Patricia Fowler determined that the request should have been directed to the Division of Community Resources, the Administrative Assistant (Cathy Cox) forwarded the OPRA request form to the Central Services Supervisor (Roseanne Rizza) within the Division of Community Resources. Therefore, the employees of the Division of Housing did not violate N.J.S.A. 47:1A-5.h.

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 26th Day of September, 2007

Vincent P. Maltese, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records
Council.

Kathryn Forsyth
Government Records Council

Decision Distribution Date: October 10, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 26, 2007 Council Meeting**

**Femaarta Momo¹
Complainant**

GRC Complaint No. 2007-17

v.

**NJ Department of Community Affairs, Division of Community Resources²
Custodian of Records**

Records Relevant to Complaint:

The record that indicates whether or not any New Jersey Department of Community Affairs funds were used in the sexual harassment settlement between the Director of the Somerset Community Action Program, Mr. Isaac Dorsey, and the former Assistant Director thereof, that began in 2003.

Request Made: November 7, 2006

Response Made: December 11, 2006

Custodian: Michele Levy

GRC Complaint Filed: June 8, 2007

Background

November 7, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

December 11, 2006

Custodian's Response to the OPRA request.³ The Custodian responds to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian advises the Complainant that the requested records are not made, maintained, kept on file or have been received by the Division of Community Resources.

December 18, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching a letter addressed to the Office of the Governor and other documentation that is not relevant to adjudication of this complaint.

¹ No legal representation listed on record.

² Represented by Robert E. Landel, Esq. (Franklin Lakes, NJ).

³ The Custodian did not receive the Complainant's OPRA request until December 4, 2006.

The Complainant asserts that she submitted an OPRA request during November, 2006. The Complainant asserts that the Custodian denied her request stating that the records were not in the agency's possession. However, the Complainant attests that within the documentation sent to the Office of the Governor is proof that the records were sent to the NJ Department of Community Affairs. Further, the Complainant asserts that if the Department does not have the records then the Department needs to conduct an audit of the Somerset Community Action Program to obtain the records in order to fulfill the request.

January 9, 2007

Offer of Mediation sent to both parties.

February 8, 2007

Certification from the Custodian to the GRC.⁴ The Custodian certifies that there are currently no documents held by the Division of Community Resources that show that the Somerset Community Acton Program used any federal funds provided by the Department of Human Services and administered by the Department of Community Affairs, Division of Community Resources for any purpose expressed in the Complainant's request. The Custodian states that such expenditures would be disallowed under the Community Development Block Grant Agreement.

The Custodian certifies that the Complainant's OPRA request was submitted by facsimile to the Department on November 7, 2006 and was received on November 8, 2006. The Custodian also certifies that a delay in response occurred because the request was not submitted specifically to the Division of Community Resources from which the information was requested. The Custodian further certifies that the request was not forwarded to the Division of Community Resources until December 4, 2006, and to the best of the Custodian's knowledge a response was mailed to the Complainant on December 8, 2006.

March 12, 2007

E-mail from the GRC to the Custodian copying . The GRC requires that the Custodian provide the name of the individual who forwarded the OPRA request to the Custodian's office.

The GRC states that the Custodian must provide the GRC with the requested information in response to the Denial of Access Complaint filed against the Division of Community Resources.

March 12, 2007

E-mail from the Custodian to the GRC. The Custodian states that Roseanne Rizza of the Division of Community Resources gave the OPRA request to the Custodian after the request had been placed in front of Ms. Rizza's office. The Custodian also states that she believes that Cathy Cox of the Division of Housing was the one who gave the OPRA request to Roseanne Rizza.

⁴ The Custodian also included a copy of the Complainant's OPRA request form and a copy of the Government Records Request Receipt detailing the reason for denial.
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Recommendations of the Executive Director

March 13, 2007

E-mail from the GRC to the Custodian. The GRC states that OPRA requires that “any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5.h. The GRC also states that in its decisions, the GRC names the employee who did not adhere to N.J.S.A. 47:1A-5.h. resulting in an untimely response by the actual custodian of the records. See Jeffrey Mourning v. NJ Department of Corrections, GRC Complaint No. 2006-75 (August 2006).

The GRC states that for this reason the GRC must be informed of the exact employee who received the OPRA request and failed to forward it to the Division of Community Resources until four (4) weeks after receipt.

March 13, 2007

E-mail from Roseanne Rizza to the GRC. Ms. Rizza states that she cannot tell who put the OPRA request in her mailbox. Ms. Rizza also states that she found the ORPA request, which was dated four (4) weeks earlier, in her mailbox, and that she then forwarded the OPRA request to the Custodian. Ms. Rizza also states that it appears that Cathy Cox put the OPRA request in the mailbox.

March 13, 2007

E-mail from the GRC to Roseanne Rizza, copying the Acting Director of the Division of Housing and two (2) of its employees. The GRC looks forward to a response from the Division of Housing.

March 21, 2007

Letter from the Acting Director of the Division of Housing, Paul F. Dice, to the GRC. The Acting Director asserts that the request was sent by facsimile to a number that was not being used by the Division of Housing because prior to September 30, 2005 the number was assigned to the Housing Affordability Service, which has since been relocated to the NJ Housing and Mortgage Finance Agency. The Acting Director also asserts that during the last week of November or the first week of December Lorraine Nietos first became aware of the facsimile transmission and immediately brought it to the attention of her superiors. The Acting Director asserts that the request was promptly given to the Administrative Assistant, Cathy Cox. The Acting Director further asserts that the Administrative Assistant consulted with the Division of Housing’s Records Custodian, Patricia Fowler, who determined that the request should have been directed to the Division of Community Resources.

Further, the Acting Director contends that the Administrative Assistant delivered the request to Roseanne Rizza in the Division of Community Resources. The Acting Director also contends that the total time for this process was a few days. The Acting Director further contends that the Division of Housing’s staff met its obligation under N.J.S.A. 47:1A-5.h. requiring the staff to forward OPRA requests to the appropriate custodian of records upon receipt.

July 30, 2007

Letter from the GRC to the Acting Director of the Division of Housing. The GRC requests that the Acting Director provide a legal certification to his letter dated March 21, 2007. The GRC also requests that the Acting Director clarify the positions of two employees, Lorraine Nietos and Roseanne Rizza which he referenced in his letter dated March 21, 2007.

August 8, 2007

Certification from the Acting Director of the Division of Housing to the GRC. The Acting Director certifies that the information contained within his March 21, 2007 letter accurately reflects the results of his investigation into the Division of Housing's handling of the OPRA request in question. The Acting Director also certifies that Lorraine Nietos hold the title of Technical Assistant 1 in the Office of Housing Advocacy of the Division of Housing and that he is unaware of Roseanne Rizza's title because she does not work in the Division of Housing.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides that:

“[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5.h.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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. 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.

In a prior GRC decision, Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006), the Council found that pursuant to the fact that the Custodian certified that she did not receive the Complainant's OPRA request until January 20, 2006 and consequently responded in a timely manner on January 24, 2006, the Custodian was not in violation of N.J.S.A. 47:1A-5.g. or N.J.S.A. 47:1A-5.i.

In the complaint before the Council, the Custodian has certified that the Complainant's OPRA request was not forwarded to her until December 4, 2006 and that the Custodian responded in a timely manner on December 8, 2006 informing the Complainant that the requested records are not made, maintained, kept on file or received by the Division of Community Resources. Therefore, the Custodian did not unlawfully deny access to the requested records pursuant to N.J.S.A. 47:1A-5.g. or N.J.S.A. 47:1A-5.i.

Whether the employees who received the Complainant's OPRA request violated OPRA by failing to forward the request to the Custodian or direct the requestor to the Custodian pursuant to N.J.S.A. 47:1A-5.h.?

The Acting Director of the Division of Housing certifies that during the last week of November or the first week of December Lorraine Nietos first became aware of the facsimile transmission of the Complainant's OPRA request to a functional but unassigned fax machine; she immediately brought it to the attention of her superiors and the request was promptly given to the Administrative Assistant, Cathy Cox. The Acting Director also certifies that the Administrative Assistant consulted with the Division of Housing's Records Custodian, Patricia Fowler, who determined that the request should have been directed to the Division of Community Resources. The Acting Director further certifies that the Administrative Assistant delivered the request to Roseanne Rizza within the Division of Community Resources. Further, the Acting Director contends that the total time for this process was a few days.

In a prior GRC decision, Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007), the Council found that, because the Newark Police Department employee did not forward the Complainant's OPRA request form or direct the Complainant to the proper records custodian, that employee violated N.J.S.A. 47:1A-5.h.

In the complaint before the Council, because the Division of Housing's Records Custodian, Patricia Fowler determined that the request should have been appropriately directed to the Division of Community Resources, the Administrative Assistant (Cathy Cox) forwarded the OPRA request form to the Central Services Supervisor (Roseanne Rizza) within the Division of Community Resources. Therefore, the employees of the Division of Housing did not violate N.J.S.A. 47:1A-5.h.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian certified that the Complainant's OPRA request was not forwarded to her until December 4, 2006 and consequently responded in a timely manner on December 8, 2006 informing the Complainant that the requested records are not made, maintained, kept on file or received by the Division of Community Resources. Therefore, the Custodian did not unlawfully deny access to the requested records pursuant to N.J.S.A. 47:1A-5.g. or N.J.S.A. 47:1A-5.i.
2. Because the Division of Housing's Records Custodian, Patricia Fowler determined that the request should have been directed to the Division of Community Resources, the Administrative Assistant (Cathy Cox) forwarded the OPRA request form to the Central Services Supervisor (Roseanne Rizza) within the Division of Community Resources. Therefore, the employees of the Division of Housing did not violate N.J.S.A. 47:1A-5.h.

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

September 19, 2007