



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

June 28, 2011 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2011-179

v.

County of Essex
Custodian of Record

At the June 28, 2011 public meeting, the Government Records Council (“Council”) considered the June 21, 2011 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 because the Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant’s April 19, 2011 OPRA request, because the Custodian did not receive the Complainant’s request until May 19, 2011. Thus, the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; the instant complaint is materially defective and therefore should be dismissed. See *Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007- 226 (April 2009).

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 28th Day of June, 2011

Robin Berg Tabakin, Chair
Government Records Council



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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 12, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2011 Council Meeting**

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2011-179

v.

**County of Essex²
Custodian of Records**

Records Relevant to Complaint: Copy of a 911 recording of homicide committed at 601 Broad Street in Newark, New Jersey on January 16, 1993 at 3:00 a.m.

Request Made: April 19, 2011

Response Made: May 19, 2011

Custodian: Al Fusco

GRC Complaint Filed: May 20, 2011³

Background

April 19, 2011

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.

May 19, 2011

Custodian's response to the OPRA request. The Custodian responds in writing on the same business day as receipt of such request. The Custodian states that since this criminal matter occurred over eighteen (18) years ago, if the record exists, it is likely stored off site and requires extra time to be retrieved. The Custodian states that he will need an additional seven (7) business days to locate and review the file, if the record the Complainant requested exists. The Custodian states that the response is currently due on May 31, 2011 and will now be due on June 9, 2011.

May 20, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:⁴

- Complainant's OPRA request dated April 19, 2011⁵

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Complainant did not indicate if he wanted to mediate his Denial of Access Complaint.

The Complainant states that he mailed an OPRA request to the Custodian on the County of Essex's standard OPRA form. The Complainant states that he did not receive a response from the Custodian within seven (7) business days.

May 24, 2011

Offer of Mediation sent to the Custodian.

May 24, 2011

E-mail from the Custodian to the GRC. The Custodian states that he received the Complainant's OPRA request on May 19, 2011. The Custodian also states that he immediately sent out a response on the same business day, asking for an extension until June 9, 2011. The Custodian states that although the Complainant's OPRA request form is dated April 19, 2011, the envelope was postmarked May 15, 2011.⁶ The Custodian further states that he plans on responding to the Complainant by the requested extension date of June 9, 2011. The Custodian does not agree to mediate this complaint.

May 24, 2011

E-mail from the GRC to the Custodian. The GRC requests the Custodian to provide a legal certification as to when the Custodian received the Complainant's OPRA request and when the Custodian responded to the Complainant's OPRA request.

May 25, 2011

E-mail from the Custodian to the GRC. The Custodian attaches the requested legal certification. The Custodian certifies that that he received the Complainant's OPRA request on May 19, 2011. The Custodian also certifies that he responded to the Complainant's OPRA request on May 19, 2011. Lastly, the Custodian certifies that he requested an extension of time to respond to the Complainant's OPRA request by June 9, 2011.

Analysis

Whether the Complainant's Denial of Access Complaint should be dismissed as not ripe for adjudication?

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,

⁵ The Complainant did not include a copy of the Custodian's letter dated May 20, 2011 because he did not receive the Custodian's letter.

⁶ The Custodian includes a copy of the envelope postmarked May 15, 2011 and a copy of Custodian's response letter dated May 19, 2011.

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 ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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. 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.

As one means of challenging denials of access to a government record, OPRA provides for the filing of a complaint with the GRC. N.J.S.A. 47:1A-6. In order for such a complaint to be ripe, a complainant must have been denied access to a government record. In the instant matter, however, the Complainant filed a complaint with the GRC prior to being denied access to any records responsive to his request and before the statutorily mandated seven (7) business day time frame for the Custodian to respond expired.

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. As also prescribed under 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. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the present complaint, the Custodian certified to the GRC on May 25, 2011 that he received the Complainant’s OPRA request on May 19, 2011. The Custodian also certifies that he responded to the Complainant’s OPRA request on the same business day as receipt of such request. Furthermore, the Custodian submitted evidence to support this certification. The Custodian included the envelope in which the Complainant mailed his OPRA request. It appears from the evidence of record that the envelope was postmarked May 15, 2011, although the Complainant’s request was dated April 19, 2011. The Custodian received the Complainant’s OPRA request one (1) day prior to the Complainant’s filing of his Denial of Access Complaint with the GRC.

In Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-226 (April 2009), the Complainant forwarded a complaint to the GRC asserting that he had not received a response from the Custodian and seven (7) business days would have passed by the time the GRC received the Denial of Access Complaint. The Custodian argued in the SOI that the Complainant filed the complaint prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5.i. The Council held that:

“...because the Complainant’s cause of action was not ripe at the time he verified his Denial of Access Complaint; to wit, the Custodian had not at that time denied the Complainant access to a government record, the complaint is materially defective and therefore should be dismissed.”

In the matter currently before the Council, the Complainant acted in the same manner as the Complainant in Sallie, supra, by filing a Denial of Access Complaint with the GRC prior to a denial of access to the requested records by the Custodian. Additionally, as in Sallie, supra, the Complainant filed his complaint with the GRC prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5.i.

Therefore, because the Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant’s April 19, 2011 OPRA request, because the Custodian did not receive the Complainant’s request until May 19, 2011. Thus, the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; the instant complaint is materially defective and therefore should be dismissed. *See Sallie, supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant’s April 19, 2011 OPRA request, because the Custodian did not receive the Complainant’s request until May 19, 2011. Thus, the statutorily mandated seven (7) business day time frame for the Custodian to respond had not expired; the instant complaint is materially defective and therefore should be dismissed. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007- 226 (April 2009).

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 21, 2011