



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**January 31, 2017 Government Records Council Meeting**

Peter Gartner  
Complainant

Complaint No. 2015-336

v.

Borough of Middlesex (Middlesex)  
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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 bore her burden of proof that she timely responded by seeking clarification through Ms. Modica on the first (1<sup>st</sup>) business day after receipt of the subject OPRA request, and the Complainant failed to respond to her request for clarification. N.J.S.A. 47:1A-6. As such, there was no “deemed” denial of the Complainant’s 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 proving a lawful denial of access to the Complainant’s October 2, 2015 OPRA request. Specifically, the Custodian, through Ms. Modica, timely requested clarification of the request in writing, and the Complainant failed to provide such clarification. N.J.S.A. 47:1A-6. See Schilling v. Twp. of Little Egg Harbor (Ocean), GRC Complaint No. 2013-293 (Interim Order Dated March 22, 2013); Herron v. New Jersey Dep’t of Educ., GRC Complaint No. 2011-363 (December 2012); Moore v. Twp. of Old Bridge, GRC Complaint No. 2005-80 (August 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 31<sup>st</sup> Day of January, 2017

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: February 3, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 31, 2017 Council Meeting**

**Peter Gartner<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-336**

v.

**Borough of Middlesex (Middlesex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the following, resulting from an e-mail the Complainant sent to Councilman Stephen Greco on May 21, 2014, which resulted in a letter distributed to the Mayor and Council of the Borough of Middlesex (“Borough”):

1. Information regarding the public notice of “this meeting” as required by law, including identification of where the notice was published and on what dates.
2. Minutes from “this meeting,” including those in attendance and the location.
3. All e-mails in which the letter in question was attached.

**Custodian of Record:** Kathleen Anello  
**Request Received by Custodian:** October 5, 2015  
**Response Made by Custodian:** October 6, 2015  
**GRC Complaint Received:** October 30, 2015

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

**Request and Response:**

On October 2, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 6, 2015, the first (1<sup>st</sup>) business day after receipt of the OPRA request, Carmen Modica responded in writing on behalf of the Custodian, stating that the Complainant’s OPRA request as written was invalid. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian thus sought clarification of the request so that she could process it. The Custodian noted that the Complainant’s failure to provide clarification would result in the Borough closing the subject request.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Aravind Aithal, Esq., of Bob Smith & Associates, LLC (Piscataway, NJ).

<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.

On October 21, 2015, as part of a new OPRA request, the Complainant asserted that the Custodian violated OPRA by “failing to reply to one of my OPRA requests.” On October 22, 2015, Ms. Modica acknowledged receipt of the unrelated OPRA request. Ms. Modica also asked for additional clarification regarding the Complainant’s assertion that the Borough failed to respond to the referenced OPRA request.

On the same day, the Complainant responded via e-mail to Ms. Modica stating that the Borough had an OPRA request to which it failed to respond.<sup>4</sup> The Complainant also questioned the Borough’s inability to track the status of submitted OPRA requests. The Complainant further noted that the request in question was about a week beyond the statutory response time frame.

#### Denial of Access Complaint:

On October 30, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian never responded to his OPRA request. The Complainant asserted that Councilman Greco advised him that he “submitted all his information about this OPRA request” to the Custodian, but she has yet to respond. The Complainant also contended that he has filed several complaints against the Borough because they continuously fail to comply with his OPRA requests.

#### Supplemental Response:

On November 2, 2015, Ms. Modica e-mailed the Complainant, addressing the subject OPRA request (as part of her response to an unrelated OPRA request). Therein, Ms. Modica advised the Complainant that the Borough had no currently pending OPRA requests but noted that the Borough received an OPRA request on October 5, 2015. Ms. Modica stated that she responded on October 6, 2015, seeking clarification. Ms. Modica advised that OPRA guidelines provide that a custodian’s response time frame stops until a requestor provides clarification. Ms. Modica stated that, were this the request to which the Complainant referred, the Borough closed it after the Complainant failed to provide clarification. Ms. Modica attached the Borough’s response e-mail and delivery receipt.

#### Statement of Information:

On November 20, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 5, 2015. The Custodian certified that Ms. Modica responded in writing on her behalf on October 6, 2015, seeking clarification of the subject request. The Custodian certified that the Complainant did not provide a response.

The Custodian argued that the Borough did not unlawfully deny access to any records because the Complainant failed to provide clarification as requested on October 6, 2015. The Custodian noted that the Complainant later asserted in an unrelated OPRA request that the Borough failed to respond to the subject OPRA request. The Custodian certified that on

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<sup>4</sup> The Complainant did not specifically identify his October 2, 2015 OPRA request as the request to which he referred.

November 2, 2015 Ms. Modica advised the Complainant in writing that it did respond to the subject OPRA request. The Custodian also certified that Ms. Modica attached a copy of the Borough's response and a delivery receipt to her November 2, 2015 correspondence.

## 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).

In the instant matter, the Complainant contended that the Custodian never responded. However, in the SOI, the Custodian certified that the Borough responded in writing on the first (1<sup>st</sup>) business day after receipt, via Ms. Modica, seeking clarification of the Complainant's OPRA request. Further, the Custodian supported this certification by attaching to the SOI the October 6, 2015 e-mail and a delivery receipt.

Therefore, the Custodian bore her burden of proof that she timely responded by seeking clarification through Ms. Modica on the first (1<sup>st</sup>) business day after receipt of the subject OPRA request, and the Complainant failed to respond to her request for clarification. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial of the Complainant's 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.

In Schilling v. Twp. of Little Egg Harbor (Ocean), GRC Complaint No. 2013-293 (Interim Order Dated March 22, 2013), the Council determined that the custodian bore her burden of proving a lawful denial of access to the requested records because she sought clarification of the complainant's request and the complainant provided no clarification. *See also*

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<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.

Herron v. New Jersey Dep't of Educ., GRC Complaint No. 2011-363 (December 2012); Moore v. Twp. of Old Bridge, GRC Complaint No. 2005-80 (August 2005).

As previously stated above, the evidence in the record demonstrates that on October 6, 2015, Ms. Modica responded in writing on behalf of the Custodian, stating that the Complainant's October 2, 2015 OPRA request was invalid as written pursuant to Bent, 381 N.J. Super. at 37. Ms. Modica therefore requested clarification of the OPRA request. The evidence of record clearly supports that the Complainant did not submit clarification. Specifically, the Complainant subsequently asserted in an unrelated OPRA request and in the Denial of Access Complaint that the Borough never responded to his request. However, Ms. Modica advised the Complainant in writing on November 2, 2015, that the Borough closed the OPRA request after he failed to provide the requested clarification. Further, the Custodian certified to these facts in the SOI.

Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the Complainant's October 2, 2015 OPRA request. Specifically, the Custodian, through Ms. Modica, timely requested clarification of the request in writing, and the Complainant failed to provide such clarification. N.J.S.A. 47:1A-6. See Schilling, GRC 2013-293; Herron, GRC 2011-363; Moore, GRC 2005-80.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian bore her burden of proof that she timely responded by seeking clarification through Ms. Modica on the first (1<sup>st</sup>) business day after receipt of the subject OPRA request, and the Complainant failed to respond to her request for clarification. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial of the Complainant's 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 proving a lawful denial of access to the Complainant's October 2, 2015 OPRA request. Specifically, the Custodian, through Ms. Modica, timely requested clarification of the request in writing, and the Complainant failed to provide such clarification. N.J.S.A. 47:1A-6. See Schilling v. Twp. of Little Egg Harbor (Ocean), GRC Complaint No. 2013-293 (Interim Order Dated March 22, 2013); Herron v. New Jersey Dep't of Educ., GRC Complaint No. 2011-363 (December 2012); Moore v. Twp. of Old Bridge, GRC Complaint No. 2005-80 (August 2005).

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

January 24, 2017