



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

December 15, 2015 Government Records Council Meeting

Della Moses Walker

Complainant

v.

City of Newark (Essex)

Custodian of Record

Complaint No. 2015-83

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the December 8, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he 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 his burden of proof that he lawfully denied access to the requested report because he certified that no responsive record exists, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ 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 15th Day of December, 2015

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: December 17, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2015 Council Meeting**

**Della Moses Walker¹
Complainant**

GRC Complaint No. 2015-83

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: A copy of the Easement Engineering Report, dated 2011, that was completed for University Estates, running between Richmond St. and Boston St., bookended by 13th Ave. and South Orange Ave.

Custodian of Record: Kenneth Louis
Request Received by Custodian: January 8, 2015
Response Made by Custodian: January 8, 2015
GRC Complaint Received: March 26, 2015

Background³

Request and Response:

On January 8, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian responded in writing, acknowledging receipt of the request and advising her that his office would search for the records and provide a response on or before January 20, 2015. The Custodian then wrote to the Complainant on March 23, 2015, informing her that the Department of Engineering advised that the only report concerning the subject of the request was dated October 1, 2014.

Denial of Access Complaint:

On March 25, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that her initial request was made on January 8, 2015. She stated that she then made telephone and in-person “requests” twice in February 2015 and three times in March 2015, with the most recent in-person request occurring on March 20, 2015. The Complainant stated that she had conversations with “Georgia”

¹ No legal representation listed on record.

² Represented by Vivian Sanks King, Esq.

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.

from the Clerk's Office, and that an individual named "Ruth" was present to witness the conversations. The Complainant stated that "all request[s]" were denied, and she consistently received a response of "Not ready yet" when inquiring as to the status of her request. The Complainant made no other legal arguments, other than to argue that denial of access to the responsive records was improper.

Statement of Information:

On April 29, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on January 8, 2015. The Custodian further certified that he responded to the Complainant in writing on January 8, 2015, acknowledging receipt of the request, noting that a search for the records was being conducted, and advising her that she could anticipate a response on or before January 20, 2015. The Custodian averred that after receipt of the request, it was forwarded to the City's Department of Engineering on January 9, 2015. The Custodian stated that the Department of Engineering contacted the City Clerk's Office on January 12, 2015, and argued that the request should be sent to the City's Law Department. A staff member from the Clerk's office "disagreed" and forwarded the request to the Director of the Department of Engineering on that same date.

The Director's Office of the Department of Engineering responded to the Clerk's Office on March 23, 2015, by stating, "[t]he only report that we have as of today, March 23, 2015, on the University Estate (85 Boston St.) is the report done by Netta Architects, Titled: Emergency Investigation & Report of 85 Boston St.; dated October 1, 2014." The Custodian certified that the Complainant was notified of this information on that same day. The Custodian averred that the only "available and completed" record concerning the subject of the request was a report by the Department of Engineering dated October 1, 2014, previously provided to the Complainant.

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).⁴ 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 record reflects that the Custodian responded in writing on January 8, 2015, and sought an extension of time until January 20, 2015. Following the Custodian's response on

⁴ 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.

January 8, 2015, the Complainant received no written communications concerning her OPRA request until March 23, 2015, although she stated that she corresponded telephonically and in-person regarding the request. The Custodian did not dispute that she sent no written communications regarding the request, apart from the written response on January 8, 2015, and the ultimate March 23, 2015, denial letter.

Therefore, the Custodian did not bear his burden of proof that he 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 extended time frame, 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, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's certification, no unlawful denial of access occurred. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified that the Department of Engineering, who would have knowledge of such records, found no such report from 2011 concerning the subject of the request. Rather, the Department of Engineering informed the Custodian that the only report concerning the subject of the request was dated October 1, 2014, and was previously provided to the Complainant.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested report because he certified that no responsive record exists, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he 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 his burden of proof that he lawfully denied access to the requested report because he certified that no responsive record exists, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Husna Kazmir
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

December 8, 2015⁵

⁵ This complaint was prepared for adjudication at the Council's November 17, 2015 meeting, but could not be adjudicated at that time due to lack of quorum.