



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 13, 2018 Government Records Council Meeting

Shaun Clifton-Short
Complainant

Complaint No. 2017-72

v.

Essex County Prosecutor's Office
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council ("Council") considered the November 7, 2018 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 the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

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 13th Day of November, 2018

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: November 15, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

**Shaun Clifton-Short¹
Complainant**

GRC Complaint No. 2017-72

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Hard copy via U.S. mail of the Appendix the Complainant filed concerning his petition for post-conviction relief regarding Indictment No. 08-03-0985

Custodian of Record: Cheryl M. Cucinello³
Request Received by Custodian: March 13, 2017
Response Made by Custodian: March 22, 2017
GRC Complaint Received: April 5, 2017

Background⁴

Request and Response:

On March 3, 2017, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On March 22, 2017, the seventh (7th) business day after receipt of the OPRA request, the Custodian responded in writing advising that an extension was necessary due to the nature of the request and voluminous records sought.

Denial of Access Complaint:

On April 5, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian "deliberately ignored" his OPRA request. The Complainant contended that the Custodian did not bear her burden of proving a lawful denial of access to the Appendix.

¹ No legal representation listed on record.

² Represented by Maite Gaeta, Esq. (Newark, NJ).

³ The current Custodian of Record is LeeAnn Cunningham, Esq.

⁴ 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Statement of Information:

On May 11, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 13, 2017. The Custodian certified that her search involved determining when the case was addressed and ordering the proper file from storage. The Custodian certified that she responded in writing on March 22, 2017 extending the time frame to respond through April 20, 2017. The Custodian affirmed that she reviewed the file and conducted research regarding the case history of Indictment No. 08-03-0985. The Custodian affirmed that she subsequently received this complaint via e-mail from the GRC on April 13, 2017, still within the extended time frame to respond.

The Custodian stated that the Complainant was charged and later convicted of murder. The Custodian averred that following his conviction and sentencing, the Complainant appealed both. The Custodian stated that the Appellate Division affirmed the conviction and sentence but remanded for a correction to the parole ineligibility language. The Custodian stated that the Complainant then filed a petition for post-conviction relief (“PCR”), which the Assistant Prosecutor handled: it was denied by the Superior Court. The Custodian averred that the Complainant appealed that decision, at which point the matter was referred to the New Jersey Dep’t of Law & Pub. Safety, Office of the Attorney General. The Custodian averred that the Appellate Division affirmed in an unpublished decision. State v. Clifton-Short, 2017 N.J. Super. Unpub. LEXIS 511 (App. Div. 2017).

The Custodian affirmed that she extensively searched her files for the record sought by the Complainant. The Custodian certified that the Appendix was not contained within the homicide file. The Custodian averred that she believed the Complainant needed to file his OPRA request with the Office of the Attorney General. The Custodian further asserted that had she been given a chance to respond, she would have suggested the forgoing in her response.

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).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).

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.

Here, the Complainant submitted his Denial of Access Complaint arguing that the Custodian failed to respond to his March 3, 2017 OPRA request. In the SOI, the Custodian certified that she received the OPRA request on March 13, 2017. The Custodian further affirmed that she responded in writing on March 22, 2017, the seventh (7th) business day after receipt, extending the time frame to respond through April 20, 2017. The Custodian included in the SOI supporting documentation of her response. That documentation comprised of the date-stamped OPRA request (indicating a receipt date of March 13, 2017) and her March 22, 2017 letter to the Complainant extending the time frame.

A review of the evidence of record here supports a finding that the Custodian did not violate OPRA's response time provisions. Specifically, the Custodian received the request and responded within the seven (7) business day time frame obtaining an extension of time until a date certain. N.J.S.A. 47:1A-5(i). It was during the extended time frame that the Complainant his Denial of Access Complaint asserting that he had not received a response.⁶

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).⁷

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

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

November 7, 2018

⁶ The Complainant may not have received the Custodian's response at the time that he filed his complaint. The GRC arrives at this conclusion from the fact that it took ten (10) calendar days for the original request to get to the Custodian. It is likely it took just as long for her response to reach the Complainant.

⁷ The GRC does not address the non-existence of the record at issue because it was not raised by the Complainant at any point during the pendency of this complaint.