



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 13, 2022 Government Records Council Meeting

PBA 400
Complainant

v.

County of Salem
Custodian of Record

Complaint No. 2019-156

At the December 13, 2022 public meeting, the Government Records Council (“Council”) considered the December 6, 2022 Supplemental 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 the Council dismiss the complaint because the Complainant’s Counsel withdrew the matter via letter to the Office of Administrative Law on November 1, 2022. Therefore, no further adjudication is required.

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 December 2022

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 15, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 13, 2022 Council Meeting**

**PBA 400¹
Complainant**

GRC Complaint No. 2019-156

v.

**County of Salem²
Custodial Agency**

Records Relevant to Complaint: The Complainant submitted fourteen (14) separate OPRA requests, all dated January 17, 2019, for the following records:

2019-178³

“PBA 400 Requests copies of the daily itineraries for Deputy Warden (formerly Captain) Reilly from 1/1/19 through 1/17/19.”

2019-179

“PBA 400 Requests copies of the daily itineraries for Warden Cuzzupe from 1/1/19 through 1/17/19.”

2019-180

“PBA 400 Requests the records of overtime worked by each employee of the Salem County Correctional facility from 1/1/19 through 1/17/19.”

2019-181

“PBA 400 Requests a record of time off for all employees at the Salem County Correctional facility from 1/1/19 through 1/17/19.”

2019-182

“PBA 400 Requests a report of all Sheriff’s Officers hired from 1/1/17 through 1/17/19.”

2019-183

“PBA 400 Requests a report of all daily itineraries for Sheriff Miller from 6/1/18 through 1/17/19.”

2019-184

“PBA 400 Requests a report of all daily itineraries for Warden Cuzzupe from 6/1/18 through 1/17/19.”

¹ Represented by Christopher A. Gray, Esq., of Sciarra & Catrambone, L.L.C. (Mount Laurel, NJ).

² Represented by Karin Wood, Esq. (Salem, NJ).

³ For purposes of clarity, the OPRA requests are each identified by the agency-assigned control numbers.

2019-185

“PBA 400 Requests a report of all daily itineraries for Deputy Warden (formerly Captain) Reilly from 6/1/18 through 1/17/19.”

2019-186

“PBA 400 Requests all e-mails, text messages, or phone records of Sheriff Miller from 6/1/18 through 1/17/19 concerning any and all Federal Contracts and The County of Salem.”

2019-187

“PBA 400 Requests all e-mails, text messages, or phone records of Warden Cuzzupe from 6/1/18 through 1/17/19 involving discussion of any and all changes concerning the Salem County Correctional Facility’s responsibility for transportation of inmates.”

2019-188

“PBA 400 Requests all e-mails, text messages, or phone records of Warden Cuzzupe from 6/1/18 through 1/17/19 concerning any and all Federal Contracts.”

2019-189

“PBA 400 Requests all e-mails, text messages, or phone records of Sheriff Miller from 6/1/18 through 1/17/19 discussing any and all changes concerning the Salem County Correctional Facility’s responsibility for transportation of inmates.”

2019-190

“PBA 400 Requests all e-mails, text messages, or phone records of Warden Cuzzupe from 6/1/18 through 1/17/19 concerning any and all changes concerning the Salem County Correctional Facility’s responsibility for inmates on the Home Detention/Electronic Monitoring program.”

2019-191

“PBA 400 Requests all e-mails, text messages, or phone records of Sheriff Miller from 6/1/18 through 1/17/19 concerning any and all changes concerning the Salem County Correctional Facility’s responsibility for inmates on the Home Detention/Electronic Monitoring program.”

Custodian of Record: Stacy Pennington

Request Received by Custodian: January 17, 2019

Response Made by Custodian: February 26, 2019

GRC Complaint Received: August 9, 2019

Background

November 9, 2021 Council Meeting:

At its November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 2021 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, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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 requests 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. Based on the inadequate evidence in this matter, and notwithstanding the Custodian's "deemed" denial, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. See Semprevivo v. Pinelands Reg'l Sch. Dist. Bd. of Educ. (Burlington), GRC Complaint No. 2007-135 (October 2008). Also, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Procedural History:

On November 10, 2021, the Council distributed its Interim Order to all parties. On April 19, 2022, the complaint was transmitted to the Office of Administrative Law ("OAL"). On November 1, 2022, Complainant's Counsel Christopher A. Gray, Esq., submitted a letter to the Honorable Kathleen Calemme, Administrative Law Judge, withdrawing the complaint. On November 4, 2022, the OAL transmitted the complaint back to the GRC marked "WITHDRAWAL."

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss the complaint because the Complainant's Counsel withdrew the matter via letter to the Office of Administrative Law on November 1, 2022. Therefore, no further adjudication is required.

Prepared By: John E. Stewart

December 6, 2022



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 9, 2021 Government Records Council Meeting

PBA 400

Complaint No. 2020-156

Complainant

v.

County of Salem

Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 2021 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests 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 requests 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. Based on the inadequate evidence in this matter, and notwithstanding the Custodian’s “deemed” denial, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. See Semprevivo v. Pinelands Reg’l Sch. Dist. Bd. of Educ. (Burlington), GRC Complaint No. 2007-135 (October 2008). Also, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 9th Day of November 2021

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 10, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

**PBA 400¹
Complainant**

GRC Complaint No. 2019-156

v.

**County of Salem²
Custodial Agency**

Records Relevant to Complaint: The Complainant submitted fourteen (14) separate OPRA requests, all dated January 17, 2019, for the following records:

2019-178³

“PBA 400 Requests copies of the daily itineraries for Deputy Warden (formerly Captain) Reilly from 1/1/19 through 1/17/19.”

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2019-180

“PBA 400 Requests the records of overtime worked by each employee of the Salem County Correctional facility from 1/1/19 through 1/17/19.”

2019-181

“PBA 400 Requests a record of time off for all employees at the Salem County Correctional facility from 1/1/19 through 1/17/19.”

2019-182

“PBA 400 Requests a report of all Sheriff’s Officers hired from 1/1/17 through 1/17/19.”

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“PBA 400 Requests a report of all daily itineraries for Sheriff Miller from 6/1/18 through 1/17/19.”

2019-184

“PBA 400 Requests a report of all daily itineraries for Warden Cuzzupe from 6/1/18 through 1/17/19.”

¹ No legal representation listed on record.

² Represented by Karin Wood, Esq. (Salem, NJ).

³ For purposes of clarity, the OPRA requests are each identified by the agency-assigned control numbers.

2019-185

“PBA 400 Requests a report of all daily itineraries for Deputy Warden (formerly Captain) Reilly from 6/1/18 through 1/17/19.”

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“PBA 400 Requests all e-mails, text messages, or phone records of Sheriff Miller from 6/1/18 through 1/17/19 concerning any and all Federal Contracts and The County of Salem.”

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“PBA 400 Requests all e-mails, text messages, or phone records of Sheriff Miller from 6/1/18 through 1/17/19 concerning any and all changes concerning the Salem County Correctional Facility’s responsibility for inmates on the Home Detention/Electronic Monitoring program.”

Custodian of Record: Stacy Pennington

Request Received by Custodian: January 17, 2019

Response Made by Custodian: February 26, 2019

GRC Complaint Received: August 9, 2019

Background⁴

Requests and Responses:

On January 17, 2019, the Complainant submitted fourteen (14) separate Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

On January 30, 2019, the Complainant e-mailed the Custodian seeking the status of his OPRA requests.

On February 7, 2019, the Complainant e-mailed the Custodian seeking the status of his OPRA requests.

On February 8, 2019, the Complainant e-mailed Ashley Crist seeking the status of his OPRA requests.⁵

On February 25, 2019, the Complainant e-mailed the Custodian to inform her that he understood his requests were denied and that he would file “appropriate paperwork.”

On February 26, 2019, the twenty-sixth (26th) business day following receipt of the Complainant’s requests, the Custodian responded in writing, and after reciting the Complainant’s requests, informed him of the following for each enumerated OPRA request:

2019-178

“Denied – inter-agency or intra-agency advisory, consultative or deliberative material.”

2019-179

“Denied – inter-agency or intra-agency advisory, consultative or deliberative material.”

2019-180

“Approved 1411 hrs.”

2019-181

“Denied – inter-agency or intra-agency advisory, consultative or deliberative material.”

2019-182

The Custodian disclosed the name, job title, hire date, base rate, and hours for each of four (4) Sheriff’s Officers.

2019-183

“Denied – inter-agency or intra-agency advisory, consultative or deliberative material.”

2019-184

“Denied – inter-agency or intra-agency advisory, consultative or deliberative material.”

⁵ Ms. Crist has a Salem County e-mail address but the Complainant did not explain her involvement with respect to his OPRA requests.

2019-185

“Denied – inter-agency or intra-agency advisory, consultative or deliberative material.”

2019-186

“Partial Denial - text messages and phone records of specific subjects do not exist, only phone numbers and times of texts and calls and length of calls. IT is reviewing emails.”

2019-187

“Partial Denial - text messages and phone records of specific subjects do not exist, only phone numbers and times of texts and calls and length of calls. IT is reviewing emails.”

2019-188

“Partial Denial - text messages and phone records of specific subjects do not exist, only phone numbers and times of texts and calls and length of calls. IT is reviewing emails.”

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2019-190

“Partial Denial - text messages and phone records of specific subjects do not exist, only phone numbers and times of texts and calls and length of calls. IT is reviewing emails.”

2019-191

“Partial Denial - text messages and phone records of specific subjects do not exist, only phone numbers and times of texts and calls and length of calls. IT is reviewing emails.”

On March 12, 2019, the Complainant e-mailed the Custodian and asked, “[d]o we have a time line for the information that was requested?”

On April 9, 2019, the Complainant e-mailed the Custodian stating that he was still awaiting the information that he requested on January 17, 2019. The Complainant asked if the Custodian could provide him with an update, and stated that this e-mail was his second request for an update.

Denial of Access Complaint:

On August 9, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he filed his OPRA

requests with the Custodian via e-mail on January 17, 2019, and that the Custodian responded to his requests via e-mail on February 26, 2019.

The Complainant stated that the complaint was being filed due to “multiple OPRA denials.” The Complainant attached to the Complaint the e-mails exchanged between him and the Custodian from January 30, 2019 to April 9, 2019, and stated, “[t]his is the email thread from last correspondence to the original OPRA request.”⁶ In the Records Denied List, the Complainant listed each OPRA request by its agency-assigned control number, and restated the Custodian’s responses. For OPRA requests 2019-180 and 2019-182 the Complainant stated that the Custodian’s response was “inaccurate/incomplete.” The Complainant did not explain the manner in which the response was inaccurate or incomplete. The Complainant attached copies of the OPRA requests to the complaint.

Statement of Information:

On August 26, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 17, 2019, and responded in writing on February 26, 2019. The Custodian certified that the Complainant “was provided with the information requested, if allowable or if it existed, but didn’t reach [out] again if there were additional issues. Instead he waited five months until he was terminated to file a complaint.”

The Custodian certified that she denied in their entirety the Complainant’s OPRA requests numbered 2019-178, 2019-179, 2019-183, 2019-184, and 2019-185. The Custodian’s legal explanation and statutory citation for the denial was “NJSA 47:1A-1.1.” The Custodian also certified that she denied in its entirety the Complainant’s OPRA request number 2019-181. The Custodian’s legal explanation and statutory citation for the denial was “NJSA 47:A-10” (sic). The Custodian further certified that she denied in their entirety the Complainant’s OPRA requests numbered 2019-186, 2019-187, 2019-188, 2019-189, 2019-190 and 2019-191. The Custodian’s legal explanation and statutory citation for the denial was “Pusterhofer v NJ Dept of Education GRC Complaint No., 2005-49 July 2005.”

The Custodian certified that she provided all records responsive to the Complainant’s OPRA requests numbered 2019-180 and 2019-182

Additional Submissions:

On August 27, 2019, the Complainant replied to the Custodian’s SOI. The Complainant stated that the Custodian offered no explanation for the reason why, after more than seven (7) months, this matter has not been resolved. The Complainant stated that he sent five (5) e-mails requesting updates on his OPRA requests, but those e-mails were ignored by the Custodian.

⁶ The content of the e-mails is set forth in the Requests and Responses section above.

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).⁷ 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, it is undisputed that the Complainant filed his OPRA requests on January 17, 2019. It is also undisputed that the Custodian did not respond until February 26, 2019, despite repeated e-mail inquiries from the Complainant regarding the status of the responses. The Custodian offered no explanation or excuse for the twenty-six (26) business day delay in responding to the requests.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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 requests 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.

Here, both the complaint and the SOI were woefully inadequate for the GRC to thoroughly analyze the complaint. The Complainant in his complaint failed to provide a detailed summary. Rather, he just cut and pasted the e-mail string between him and the Custodian. Moreover, where the Custodian certified that she did provide responsive records, the Complainant stated that the Custodian's response was "inaccurate/incomplete" but did not elaborate further to explain the manner in which the response was inaccurate or incomplete.

⁷ 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.

The Custodian's SOI contained no facts and/or legal argument in support of her actions, other than referencing Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005) for denying records in their entirety for six (6) of the requests. In the cited GRC decision a custodian certified that no records responsive to the OPRA request existed and there was no evidence in the record to refute the custodian's certification. However, citing to Pusterhofer as a reason for denying access to the requested records in their *entirety* was confusing for the GRC because the Custodian in her responses to the same requests stated that the requested records were only *partially denied* and that e-mails were in the process of being reviewed.

For five (5) of the OPRA requests, the Custodian stated in the responses that the requested records were denied as inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material. In the SOI, the Custodian only certified that the reason for denial was N.J.S.A. 47:1A-1.1. The Custodian did not explain in the SOI why the records were determined to be exempt as ACD or cite to any legal precedent in support of the ACD denial. The Custodian had an obligation to *prove* that her denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. Here, the GRC can only surmise why the records were denied.

In Semprevivo v. Pinelands Reg'l Sch. Dist. Bd. of Educ. (Burlington), GRC Complaint No. 2007-135 (October 2008), the GRC requested that the custodian provide information to the GRC which was missing from the custodian's SOI. In reply, the custodian forwarded to the GRC three Board policies that the custodian said would provide the legal basis for the custodian to deny the complainant access to requested Board records. The GRC found that because there was inadequate evidence for the Council to render a meaningful decision in the matter, the complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts

Therefore, based on the inadequate evidence in this matter, and notwithstanding the Custodian's "deemed" denial, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law ("OAL") for a hearing to resolve the facts. See Semprevivo, GRC 2007-135. Also, this complaint should be referred to the OAL for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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 requests 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. Based on the inadequate evidence in this matter, and notwithstanding the Custodian's "deemed" denial, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. See Semprevivo v. Pinelands Reg'l Sch. Dist. Bd. of Educ. (Burlington), GRC Complaint No. 2007-135 (October 2008). Also, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart
Staff Attorney

October 26, 2021