



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 15, 2020 Government Records Council Meeting

Frank J. Festa, Jr.
Complainant

Complaint No. 2019-164

v.

Township of Marlboro (Monmouth)
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 2020 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 has borne her burden of proof that she timely responded to the Complainant’s August 3, and 5, 2015 OPRA requests. 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). Further, the Council need not address the whether an unlawful denial of access occurred with respect to August 3 and 5, 2015 OPRA requests because the Custodian certified, and the record reflects, that no responsive records exists. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The evidence of record supports that the Custodian never received the Complainant’s August 4, 2015 OPRA request, and there is no evidence in the record to overcome the Custodian’s certifications. Thus, the Custodian did not unlawfully deny access to this OPRA request. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep’t of Educ., GRC Complaint No. 2012-19 (April 2013).

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 2020

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, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**Frank J. Festa, Jr.¹
Complainant**

GRC Complaint No. 2019-164

v.

**Township of Marlboro (Monmouth)²
Custodial Agency**

Records Relevant to Complaint:

August 3, 2015 OPRA request: Electronic copies via e-mail regarding two (2) stormwater culverts located at Clayton Road and Block 249, Lot 4:

1. “When were the culverts installed?”
2. “Was the stormwater discharges required to have a “NPDES” stormwater permit?”
3. “Was a permit [u]nder the [Environmental Protection Agency] construction [g]eneral permit issued?”
4. Were any permits [i]ssued?”

August 4, 2015 OPRA request: Electronic copies via e-mail regarding two (2) stormwater culverts located at Clayton Road and Block 249, Lot 4:

1. “What measures are in place to control that stormwater runoff?”

August 5, 2015 OPRA request: Electronic copies via e-mail regarding two (2) stormwater culverts located at Clayton Road and Block 249, Lot 4:

1. “Did the [Township of Marlboro (“Township”)] apply for assistance under the [N.J.S.A. 40:55D-99]?”

Custodian of Record: Suzanne Branagan

Request Received by Custodian: August 3, 2015; None; August 10, 2015

Response Made by Custodian: August 6, 2015; None; August 17, 2015

GRC Complaint Received: August 16, 2019

¹ No legal representation listed on record.

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, LLC (Iselin, NJ).

Background³

Request and Response:

On August 3, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 4, 2015, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On August 5, 2015, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records.

On August 6, 2015, the second (2nd) business day after receipt of the August 3, 2015 OPRA request, the Custodian responded in writing stating that the culvert in question is owned and operated by Monmouth County (“County”). The Custodian thus directed the Complainant to contact the County Division of Bridges to obtain the “requested information.”

On August 17, 2015, the fifth (5th) business day after receipt of the August 5, 2015 OPRA request, the Custodian responded in writing stating that she consulted with the Business Administrator and CME Engineering, who advised that the Township did not apply for grants or assistance from the County.

Denial of Access Complaint:

On August 16, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his OPRA requests.

Statement of Information:

On September 26, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s August 3, and 5, 2015 OPRA requests on August 3, and August 10, 2015 respectively. The Custodian certified that the Township never received the Complainant’s August 4, 2015 OPRA request. The Custodian certified that she responded in writing on August 6, and 17, 2015 respectively informing the Complainant that no responsive records existed and suggesting that he contact the County to obtain the records. The Custodian stated that four (4) years later, the Complainant filed this complaint alleging an unlawful denial of access.

The Custodian stated that OPRA “only allows requests for records, not requests for information.” MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian further contended that the OPRA response time frame did not apply where requests failed to identify specific records. N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166,

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.

180 (App. Div. 2007). The Custodian argued that the Complainant's requests were invalid because they sought information and not specific records.

The Custodian contended that despite the invalid nature of the requests, she timely responded to those that the Township received advising that no records existed. The Custodian further affirmed that she also never received the August 4, 2015 OPRA request.

The Custodian argued that the Complainant was "fully aware" of the Township's responses and pursued this action with the intent to harass the Township. The Custodian thus contended that this complaint was frivolous and must be dismissed.

Additional Submissions:

On October 28, 2019, the Complainant e-mailed the GRC alleging several communication issues with the Township. The Complainant asserted that the Township was not assisting him to locate specific records and instead denied his OPRA requests as invalid.⁴

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).

In the matter before the Council, the Complainant contended that the Custodian failed to respond to his August 3, and 5, 2015 OPRA requests.⁶ In the SOI, the Custodian certified that she responded to the Complainant's OPRA requests on August 6, and 17, 2015 respectively advising that no records exist and that the Complainant should contact the County to request the records. The Custodian attached as part of the SOI her written responses sent to the Complainant via e-mail on those dates. Thus, the Custodian has provided sufficient evidence to show that she timely responded in writing to the Complainant's two (2) OPRA requests.⁷ Thus, no "deemed" denial of access occurred here.

⁴ The Complainant's e-mail was sent in relation to each of his ten (10) complaints being concurrently adjudicated.

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.

⁶ The Complainant's August 4, 2015 OPRA request will be addressed below.

⁷ The GRC notes that the Complainant's OPRA requests are invalid on their face because they ask questions. Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009); Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant's August 3, and 5, 2015 OPRA requests. 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). Further, the Council need not address the whether an unlawful denial of access occurred with respect to August 3 and 5, 2015 OPRA requests because the Custodian certified, and the record reflects, that no responsive records exists. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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.

OPRA further provides that, "a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian." N.J.S.A. 47:1A-5(g). OPRA further provides that, "the council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or *without any reasonable factual basis*." N.J.S.A. 47:1A-7(e) (emphasis added).

In Martinez v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2014-2 (September 2014), the complainant contended that the custodian should have received his OPRA request and provided a photocopy of the certified mail receipt as evidence. The certified mail receipt identified the date of delivery and confirmed that the address was correct. The Council held that the certified mail receipt was insufficient to show that the custodian received the request.

Furthermore, in Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013), the complainant filed a complaint after not receiving a response to his OPRA request. As part of his Denial of Access Complaint, the complainant included a certified mail receipt stamped "State of NJ – Capital Post Office." The Council determined that the custodian did not unlawfully deny access to the complainant's OPRA request because same was never received. The Council reasoned that "the Custodian did not sign the receipt and there is no indication that [the Department of Education] received the request, only that the State received it . . . it is entirely possible that the Custodian never received the OPRA request." Id. See also Bey v. State of New Jersey, Office of Homeland Security & Preparedness, GRC Complainant No. 2013-237 (February 2014) (complainant's certified mail return receipt sufficient only to show that the State received the request, not the custodian).

In the instant matter, the Complainant contended that he submitted his OPRA request to the Custodian on August 4, 2015 and received no response. The Complainant provided no evidence of submission within the Denial of Access Complaint. In the SOI, the Custodian certified that she did not receive the subject OPRA request.

The facts in this matter are analogous to those in Martinez, GRC 2014-2 and Valdes, GRC 2012-19. Specifically, there is no evidence in the record showing that the Complainant submitted

the subject OPRA request or to refute the Custodian's certification. Thus, it follows that the Custodian has successfully argued that she never received the August 4, 2015 OPRA request.

Therefore, the evidence of record supports that the Custodian never received the Complainant's August 4, 2015 OPRA request, and there is no evidence in the record to overcome the Custodian's certifications. Thus, the Custodian did not unlawfully deny access to this OPRA request. N.J.S.A. 47:1A-6. See Martinez, GRC 2014-2; Valdes, GRC 2012-19.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's August 3, and 5, 2015 OPRA requests. 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). Further, the Council need not address the whether an unlawful denial of access occurred with respect to August 3 and 5, 2015 OPRA requests because the Custodian certified, and the record reflects, that no responsive records exists. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The evidence of record supports that the Custodian never received the Complainant's August 4, 2015 OPRA request, and there is no evidence in the record to overcome the Custodian's certifications. Thus, the Custodian did not unlawfully deny access to this OPRA request. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013).

Prepared By: Frank F. Caruso
Executive Director

December 8, 2020