



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. 2019-169 and 2019-172

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 the Custodian has borne her burden of proof that she timely responded to the Complainant’s two (2) 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 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).

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 Nos. 2019-169
and 2019-172²**

v.

**Township of Marlboro (Monmouth)³
Custodial Agency**

Records Relevant to Complaint:

July 25, 2017 OPRA request: Electronic copies via e-mail of the “Application for Street Opening Permit” (“Application”) from “the 2014 Road, Drainage and Sidewalk Program back for the past 50 years” for Block 249, Lot 4:

April 9, 2019 OPRA request: Electronic copies via e-mail regarding the July 25, 2017 OPRA request:

1. “Did the Township make an application for the Culvert under and/or the bridge in Clayton Road?”
2. If yes, “all documents relating to the application.”

Custodian of Record: Suzanne Branagan

Request Received by Custodian: July 27, 2017; April 11, 2019

Response Made by Custodian: August 3, 2017; April 17, 2019

GRC Complaint Received: August 19, 2019; August 20, 2019

Background⁴

Request and Response:

On July 25, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 3, 2017, the fifth (5th) business day after receipt of the OPRA request, the Custodian responded in writing stating that no

¹ No legal representation listed on record.

² These complaints have been consolidated because of the commonality of parties and issues.

³ Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, LLC (Iselin, NJ).

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.

road opening was located for either Clayton Road or the 2014 Road Program project. The Custodian also noted that the request time frame was not clear.

On April 9, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 17, 2019, the sixth (6th) business day after receipt of the OPRA request, the Custodian responded in writing stating that the Construction, Engineering, and Land Use departments did not identify any responsive records. The Custodian further stated that the Complainant may wish to contact Monmouth County (“County”) or the State of New Jersey (“State”) for responsive records.

Denial of Access Complaint:

On August 19, 2019, the Complainant filed a Denial of Access Complaint relevant to GRC 2019-169 with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his July 25, 2017 OPRA request.

On August 20, 2019, the Complainant filed a Denial of Access Complaint relevant to GRC 2019-172 with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his April 9, 2019 OPRA request.

Statement of Information:

On October 4, 2019, the Custodian filed two (2) Statements of Information (“SOI”). The Custodian certified that she received the Complainant’s July 25, 2017 OPRA request on July 27, 2017. The Custodian certified that she responded in writing on August 3, 2017 advising that no records existed. The Custodian stated that now, more than two (2) years after her response, the Complainant filed a complaint alleging a “deemed” denial.

The Custodian certified that she received the Complainant’s April 9, 2019 OPRA request on April 11, 2019. The Custodian certified that she responded in writing on April 17, 2019 advising that no records existed. The Custodian reiterated that notwithstanding her timely response, the Complainant filed a complaint alleging a “deemed” denial.

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, 180 (App. Div. 2007). The Custodian contended that the evidence of record is clear that she timely responded to both OPRA requests at issue in this consolidated complaint.

The Custodian argued that the Complainant was “fully aware” of the Township’s responses and pursued this action with 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.⁵

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).⁶ 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 consolidated matter before the Council, the Complainant contended that the Custodian failed to respond to his two (2) OPRA requests. In the SOI, the Custodian certified that she responded to the Complainant's July 25, 2017 OPRA request on August 3, 2017 advising that no records existed. The Custodian further certified that she responded to the Complainant's April 9, 2019 OPRA request on April 17, 2019 again advising that no records existed and adding that the Complainant may want to contact either the County or the State. The Custodian attached as part of the SOI her written responses sent to the Complainant via e-mail on those dates.

The Complainant's contention in the instant complaint is that he received no response to the subject OPRA requests. However, the Custodian provided sufficient evidence in the SOI to show that she timely responded in writing to the subject OPRA requests.⁷ Further, the Custodian's evidence is persuasive that she reasonably refuted the Complainant's allegations. Based on this, no "deemed" denial of access occurred here.

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant's two (2) 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 because the Custodian certified, and the record

⁵ The Complainant's e-mail was sent in relation to each of his ten (10) complaints being concurrently adjudicated.

⁶ 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.

⁷ The GRC notes that the Complainant's April 9, 2019 OPRA request is invalid on its face because it asks a question and seek "any documents" depending on the answer to said question. MAG, 375 N.J. Super. at 546; Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008); 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).

reflects, that no responsive records exists. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that she timely responded to the Complainant's two (2) 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 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).

Prepared By: Frank F. Caruso
Executive Director

December 8, 2020