



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 25, 2022 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2020-196

v.

County of Essex
Custodian of Record

At the January 25, 2022 public meeting, the Government Records Council (“Council”) considered the January 18, 2022, 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 lawfully denied access to the Complainant’s OPRA request. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; 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 25th Day of January 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: January 27, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2020-196

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: “[A]ny documents within the possession of the Essex County Sheriff’s Office [(“ECSO”)] delineating the purported provision of . . . furniture and fixtures which were left behind within the privately owned 18 Rector Street” and not transported to 320-321 University Avenue.

Custodian of Record: Olivia Schumann
Request Received by Custodian: September 3, 2020
Response Made by Custodian: September 3, 2020
GRC Complaint Received: October 1, 2020

Background³

Request and Response:

On September 2, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 3, 2020, the Custodian responded in writing stating that an extension of time to respond through September 24, 2020 was necessary due to the lack of in-office County of Essex (“County”) staff due to the ongoing COVID-19 public health emergency. On September 24, 2020, the Custodian responded in writing denying the subject OPRA request because “all relevant Departments have indicated that they do not have responsive records.”

Denial of Access Complaint:

On October 1, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian responded stating that no records existed and included a previous OPRA request seeking similar furniture

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

records resulting in the same response on July 1, 2020. The Complainant did not include any additional arguments supporting his dispute.

Statement of Information:⁴

On June 15, 2021, the Custodian filed a Statement of Information (“SOI”) attaching a legal certification from DFAB employee Albert Fusco. The Custodian certified that she received the Complainant’s OPRA request on September 3, 2020. The Custodian certified that her search included contacting the Division of Family Assistance and Benefits (“DFAB”). The Custodian certified that following an extension of time, she responded in writing on September 24, 2020 denying the subject OPRA request because no records existed.

The Custodian and Mr. Fusco certified that they advised the Custodian that no responsive records existed on September 21, 2020 and June 11, 2021. The Custodian included a discussion of events occurring in mediation and a mediation communication as part of the SOI.⁵

Analysis

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.

Initially, the GRC notes that the Custodian substantially addressed discussions and actions, with accompanying communications, occurring while this complaint was in mediation. The Uniform Mediation Act prohibits the use of mediation communications in administrative proceedings absent all parties waiving the privilege, which has not occurred here. N.J.S.A. 2A:23C-4. For this reason, the GRC cannot consider a majority of the SOI as part of this adjudication and must instead address the complaint on its original merits and the extremely limited attestations contained in the SOI that do not address mediation communications.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant’s OPRA request sought “. . . documents . . . delineating the purported provision of . . . furniture and fixtures which were left behind within the privately owned 18 Rector Street” and not transported to 320-321 University

⁴ On October 29, 2020, this complaint was referred to mediation. On June 9, 2021, this complaint was referred back to the GRC for adjudication.

⁵ The GRC notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

Avenue.⁶ Following a brief extension, the Custodian responded in writing stating that no records responsive to the subject OPRA request existed. This complaint followed, wherein the Complainant attached a similar OPRA request garnering the same response from the Custodian. In the limited reviewable portion of the SOI, the Custodian and DFAB employee Al Fusco both certified that no records responsive to the subject OPRA request existed.

A review of the facts available to the GRC in this case support that the Custodian lawfully denied access to the subject OPRA request on the basis that no records existed. Specifically, both the Custodian and Mr. Fusco have certified to this fact. Additionally, the Complainant provided evidence to support that the County had already denied an OPRA request seeking similar furniture records on July 1, 2020. Thus, in the absence of any competent, credible evidence to the contrary, a finding that no records existed is appropriate here.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

January 18, 2022

⁶ The GRC notes that the Complainant's OPRA request is invalid on its face because it sought "any documents . . . delineating" furniture assignments in a particular building and fails to identify specific records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). See also Weiner v. Cnty. of Essex, GRC Complaint No. 2020-145 (September 2021).