



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 30, 2022 Government Records Council Meeting

Linda a. Evans
Complainant

Complaint No. 2021-109

v.

NJ Department of Community Affairs,
Bureau of Housing Inspection
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 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 this complaint is materially defective and shall be dismissed because the Complainant verified her complaint before the statutory time period for the Custodian to respond had expired and immediate access records are not at issue. See Sallie v. N.J. Dep’t of Banking and Ins., GRC Complaint No. 2007-226 (April 2009) and Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-325 (Final Decision dated October 27, 2015).

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 30th Day of August 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: September 1, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting**

**Linda A. Evans¹
Complainant**

GRC Complaint No. 2021-109

v.

**N.J. Department of Community Affairs,
Bureau of Housing Inspection²
Custodial Agency**

Records Relevant to Complaint: Hard copy via U.S. mail of

1. "Housing Inspection Report" ("Report") for Inspection Label No. 1309-02-0301 performed on February 16, 2021 by Inspector Neal Costanzo.
2. Notes pertaining to the phone conversation between Inspector Costanzo and Colts Neck Township's ("Township") attorney.³

Custodian of Record: Joseph DeBronzo
Request Received by Custodian: May 14, 2021
Response Made by Custodian: May 25, 2021
GRC Complaint Received: May 20, 2021

Background⁴

Request:

On May 2, 2021, the Complainant submitted an Open Public Records Act ("OPRA") request meant for the Bureau of Housing Inspection ("BHI") to the Office of the Governor Constituent Relations ("OGCR") e-mail address seeking the above-mentioned record. On May 13, 2021, the Complainant sent a follow-up e-mail to OGCR seeking a status update and stating that the seven (7) business days had passed without a response. On May 14, 2021, OGCR forwarded the Complainant's e-mail to the N.J. Department of Community Affairs ("DCA") and the Custodian.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General ("DAG") Craig Keiser. Previously represented by DAG Beau Wilson.

³ The Complainant sought additional records that she did not identify as at issue in this complaint.

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.

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Denial of Access Complaint:

On May 21, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she tried multiple times to obtain access to the Report with no success and ultimately decided to file the subject OPRA request on May 2, 2021. The Complainant stated that after receiving no response, she attempted to obtain a status update on May 14, 2021 and still did not receive a response.

Response:

On May 25, 2021, the seventh (7th) business day after receipt of the OPRA request, the Custodian responded in writing denying access to the Report because it “has not yet been served on the owner . . .” The Custodian further stated that he inquired about a conversation between Inspector Costanzo and the Township attorney and was informed that none occurred; thus, no notes exist.

Statement of Information:

On June 25, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on May 14, 2021. The Custodian certified that he responded in writing on May 25, 2021 denying access to OPRA request item No. 1 because the Report had not yet been sent to the property owner. N.J.A.C. 5:3-2.2(a)(3). The Custodian further certified that he denied access to OPRA request item No. 2 because no records existed.

The Custodian first argued that he timely responded to the subject OPRA request. The Custodian affirmed that the Complainant originally submitted her OPRA request to the wrong agency. The Custodian noted that correct mailing and e-mail address for DCA was located on DCA’s website.⁵ The Custodian certified that because of the Complainant’s error, he did not receive the subject OPRA request until OGCR forwarded same to DCA on May 14, 2021. The Custodian certified that upon receipt, he began evaluating the subject OPRA request and determined that BHI made multiple attempts to serve the Report on the owner without success. The Custodian affirmed that based on this, he responded on the seventh (7th) business day after receipt denying the subject OPRA request.

The Custodian next argued that he lawfully denied access to the Report sought in OPRA request item No. 1 based on DCA’s regulations, which contains an exemption for “reports . . . not yet served upon person(s) to whom they are addressed.” N.J.S.A. 47:1A-9(a); N.J.A.C. 5:3-2.2(a)(3). The Custodian argued that at the time of the subject OPRA request, the Report had not yet been served to the property owner and was thus exempt under DCA’s regulations. The Custodian notes that on May 28, 2021, BHI was able to successfully serve the property owner. The Custodian noted that due to this fact, a copy of the Report is attached and being provided to the Complainant as a courtesy. The Custodian further argued that because the Report has now been

⁵ <https://www.nj.gov/dca/services/opra.html> (accessed June 7, 2022).

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disclosed, the instant complaint should be dismissed as moot. Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 291-292 (App. Div. 2017).

The Custodian further argued that no records responsive to OPRA request item No. 2 existed because no notes could be located. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian further argued that the Complainant failed to provide any evidence to refute that notes existed; thus, he lawfully denied access to this item as well.

The Custodian contended that this complaint should be dismissed because he timely responded to the Complainant's OPRA request lawfully denying access to the records sought. The Custodian further argued that the complaint is also moot because BHI has provided the Report to the Complainant.

Additional Submissions:

On July 16, 2021, the Complainant e-mailed the GRC confirming receipt of the SOI and Report. The Complainant noted that she sent her OPRA request to OGCR because a "friend" who works for the State advised her to do so. The Complainant also stated that she was attaching an e-mail from the Colts Neck Township ("Township") administrator confirming that a conversation between the Township attorney and Inspector Costanzo occurred. The Complainant argued that either the Township or Inspector Costanzo is lying about whether such a conversation occurred; this complaint should not be dismissed until she receives "details" about that "phone conversation."⁶

On September 6, 2021, the Complainant again e-mailed the GRC again seeking "details of the conversation between Inspector Costanzo and our Township attorney." The Complainant noted that it has been months since she submitted her OPRA request, and she still has not received a record despite submitting evidence to refute that no conversation took place.⁷

Analysis

Unripe Cause of Action

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007), *certif. denied* by Paff v. Twp. of Plainsboro, 193 N.J. 292 (2007).⁸ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted

⁶ The Complainant included additional commentary on the underlying issues at her residence that spawned the inspection.

⁷ The Complainant again included additional commentary on the underlying issue that precipitated the inspection and appears to ask the GRC to advise of BHI's current status on same. The GRC notes that it has no authority over another agency's investigation of an issue outside of whether they properly complied with OPRA. N.J.S.A. 47:1A-7. Thus, any information or status updates regarding BHI's inspection process should be obtained directly from that agency.

⁸ On appeal from Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

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portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

[t]he GRC has an independent obligation to 'render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct.

[Id.]

The court further stated that:

[a]side from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. Of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957).

[Id.]

In Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007-226 (April 2009), the complainant forwarded a complaint to the GRC asserting that he had not received a response from the custodian and by the time the GRC received his complaint seven business days would have passed. The Council held that ". . . the Complainant's cause of action was not ripe at the time he verified his Denial of Access Complaint." The Council reasoned that because the complainant filed the complaint before the statutorily mandated seven business day period had expired, the custodian had not yet denied the complainant access to a government record. As such, the Council dismissed the complaint.

Further, in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-325 (Final Decision dated October 27, 2015), the complainant argued that the custodian failed to timely respond to his OPRA request. However, the custodian certified in the SOI that he did not receive it until September 15, 2014, five (5) calendar days after submission, upon his return from being away at a conference. The Council held that the complaint was unripe for adjudication because the complainant filed it during the statutory response time frame.

Here, the Complainant submitted her OPRA request to OGCR on May 2, 2021, notwithstanding that same was to BHI within DCA and sought records maintained by that agency.

Although OGCR was under no obligation to forward the OPRA request to DCA, it did so on May 14, 2021. See Avila v. N.J. Dep't of Corr., GRC Complaint No. 2010-36 (May 2011). The Custodian received the subject OPRA request at that time. However, three (3) business days later, on May 19, 2021, the Complainant verified the instant complaint against BHI arguing that the Custodian failed to respond to the subject OPRA request. In the SOI, the Custodian certified that he received the OPRA request, which was filed to the wrong agency, on May 14, 2021 and subsequently responded on May 25, 2021.

N.J.S.A. 47:1A-6 provides that “[a] person who is denied access to a government record by the custodian of the record . . . may institute a proceeding to challenge the custodian’s decision by filing . . . a complaint with the Government Records Council . . .” For such a complaint to be ripe, however, the complainant must have been denied access to a government record. Here, like in Verry, GRC 2014-325, the Complainant verified her complaint on May 19, 2021, which was well within the initial statutory time frame to respond. The delay in receiving the subject OPRA request was obviously due to the fact that the Complainant filed her original OPRA request to the wrong agency and the Custodian did not receive it until May 14, 2021. Thus, the Complainant here acted in a similar manner as the complainants in Sallie, GRC 2007-226 and Verry, GRC 2014-325, by filing a Denial of Access Complaint with the GRC prior to expiration of the valid time period for the Custodian to respond, and therefore prior to any denial of access to the requested records. As such, the complaint is not ripe for adjudication.

Accordingly, this complaint is materially defective and shall be dismissed because the Complainant verified her complaint before the statutory time period for the Custodian to respond had expired and immediate access records are not at issue. See Sallie, GRC 2007-226 and Verry, GRC 2014-325.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint is materially defective and shall be dismissed because the Complainant verified her complaint before the statutory time period for the Custodian to respond had expired and immediate access records are not at issue. See Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007-226 (April 2009) and Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-325 (Final Decision dated October 27, 2015).

Prepared By: Frank F. Caruso
Executive Director

August 23, 2022