



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 28, 2023 Government Records Council Meeting

Maria Montalbano
Complainant

Complaint No. 2021-217

v.

NJ Division of Consumer Affairs
Custodian of Record

At the February 28, 2023 public meeting, the Government Records Council (“Council”) considered the February 21, 2023 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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). However, the Council should decline to order disclosure because Ms. Moreira provided a complete response over multiple dates.

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 28th Day of February 2023

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: March 6, 2023



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2023 Council Meeting**

**Maria Montalbano¹
Complainant**

GRC Complaint No. 2021-217

v.

**N.J. Division of Consumer Affairs²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Complete initial home improvement contractor application for Liberty Renovations, LLC approved by the Division of Consumer Affairs (“DCA”) on March 24, 2021, and the status of any complaints filed against that entity.
2. Complete initial and renewal applications submitted by Liberty Enterprises, LLC from 2014 through 2021, the status of any filed complaints, and any consent orders between that entity and DCA.

Custodian of Record: Francine Widrich

Request Received by Custodian: August 23, 2021

Response Made by Custodian: September 17, 2021

GRC Complaint Received: September 7, 2021

Background³

Request:

On August 13, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to hicapplications@dca.njoag.gov seeking the above-mentioned records. On August 22, 2021, a Sunday, the Complainant resent her OPRA request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On September 7, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that a few years earlier, she

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Delia Delisi.

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.

submitted OPRA requests to DCA related to Liberty Enterprises, LLC after an unsatisfactory interaction and hearing about that entity’s potential “litany of litigation,” past criminal offenses, and a 2016 consent order. The Complainant noted that she did not receive every record sought at that time, but she discontinued trying to obtain records for a period. The Complainant stated that she recently began looking further into Liberty Enterprises, LLC again, and reviewed her prior OPRA requests and DCA’s responses to determine those records she had not received.

The Complainant stated that she submitted a new OPRA request on August 13, 2021 to hicapplications@dca.njoag.gov. The Complainant stated that she anticipated DCA seeking extensions of time; however, she received no response at all.

Response:

On September 17, 2021, the eighteenth (18th) business day after receipt of the OPRA request, Ms. Moreira responded in writing on the Custodian’s behalf stating that after receipt of the Denial of Access Complaint, she was able to locate the Complainant’s August 22, 2021 e-mail and attached OPRA request in DCA’s dedicated OPRA request e-mail account. Ms. Moreira stated that she contacted the Home Improvement Contractor Unit (“HICU”) to locate responsive records and will disclose same as soon as they are available. On the same day, the Complainant acknowledged receipt of Ms. Moreira’s e-mail.

On September 27, 2021, Ms. Moreira responded in writing disclosing nine (9) pages of records for Liberty Renovations, LLC. (with personal information redactions); thirty-six (36) pages of records for Liberty Enterprises, LLC. (with personal information redactions); and a twenty-four (24) page consent order. Ms. Moreira noted that consumer complaints are under review and a final response will be provided by October 4, 2021.

On October 4, 2021, Ms. Moreira responded in writing disclosing complaints (with redactions. The Custodian further noted that additional records remained under review and that an extension of time to respond through October 14, 2021 was necessary. On October 8, 2021, Ms. Moreira again responded in writing disclosing additional records with redactions for personal information through an online dropbox. Ms. Moreira also advised that she was denying access to an open complaint currently in mediation under N.J.S.A. 47:1A-3(a) and N.J.S.A. 2A:23C-4 through 6 and “Disclosure Statement” pages under N.J.S.A. 47:1A-1.1, et seq. and N.J.A.C. 13:1E-3.2(a)(1). Ms. Moreira advised that the OPRA request was “now closed.”

Statement of Information:⁴

On March 8, 2022, the Custodian filed a Statement of Information (“SOI”) attaching a legal certification from Ms. Moreira. The Custodian certified that the Complainant’s OPRA request was sent to DCA’s OPRA e-mail address on August 22, 2021; however, it was “overlooked” until receipt of this complaint on September 9, 2021. Moreira Cert. ¶ 3. The Custodian certified that upon locating the OPRA request, Ms. Moreira sent same to the HICU and the Alternate Dispute Resolution Unit to conduct a search. Id. ¶ 4 The Custodian certified that Ms. Moreira responded

⁴ On September 13, 2021, this complaint was referred to mediation. On February 23, 2022, this complaint was referred back to the GRC for adjudication.

in writing on September 27, October 4, and October 8, 2021 disclosing multiple records, some with redactions, and denying access to records related to one (1) open matter and “Disclosure Statement” pages. The Custodian noted that on January 21, 2022, she disclosed to the Complainant records related to last complaint in response to an unrelated OPRA request because the matter had been closed. Id. ¶ 7.

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).

Here, the Complainant first submitted her OPRA request to DCA through hicapplications@dca.njoag.gov on August 13, 2021. Although not noted in the Denial of Access Complaint, the Complainant subsequently resubmitted her OPRA request to DCA’s OPRA-dedicated e-mail account on August 22, 2021. After not receiving a response, the Complainant filed the instant complaint. Upon receipt of the complaint, DCA endeavored to locate the OPRA request and respond to it. Ms. Moreira sent the first of those written responses on September 17, 2021, eighteen (18) business days after the Complainant sent her OPRA request to the appropriate e-mail address. Ms. Moreira subsequently sent multiple responses disclosing records over the next month, with a final response on October 7, 2021. In the SOI, the Custodian and Ms. Moreira admitted that the subject OPRA request was “overlooked” until receipt of the Denial of Access Complaint.

Based on the forgoing, the evidence of record supports that OPRA request was received in the Custodian’s OPRA-dedicated e-mail account on August 22, 2021. Because the Custodian failed to respond to it until September 17, 2021, a “deemed” denial of access has occurred. That it was not located or addressed until after the complaint was filed is of no moment here because the Custodian and Ms. Moreira admitted that the e-mail was simply “overlooked.”

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

5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the Council should decline to order disclosure because Ms. Moreira provided a complete response over multiple dates.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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). However, the Council should decline to order disclosure because Ms. Moreira provided a complete response over multiple dates.

Prepared By: Frank F. Caruso
Executive Director

February 21, 2023