



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

November 8, 2023 Government Records Council Meeting

Alec Ferretti
Complainant

Complaint No. 2021-227

v.

NJ Department of Health
Custodian of Record

At the November 8, 2023 public meeting, the Government Records Council (“Council”) considered the October 31, 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:

1. The State Registrar’s failure to conduct a reasonable search for records responsive to the Complainant’s OPRA requests numbered W169010 and W169102 until after receipt of the Denial of Access Complaint resulted in an insufficient search, causing the Custodian to unlawfully deny access to the records. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Prot., GRC Complaint No. 2007-220 (April 2008). However, the GRC need not order disclosure of the records because the Custodian disclosed same to the Complainant on October 28, 2021.
2. The Custodian did not unlawfully deny access to request W169011 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. 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 8th Day of November 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: November 13, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 8, 2023 Council Meeting**

**Alec Ferretti¹
Complainant**

GRC Complaint No. 2021-227

v.

**New Jersey Department of Health²
Custodial Agency**

Records Relevant to Complaint:

OPRA Request dated February 15, 2021 at 11:39 p.m. “Report of how many vital records orders were received or processed in the years from 2015-2020, ideally broken down by how many were for each type of vital event, and how many were for certifications, certified copies, etc[.]”

OPRA Request dated February 15, 2021 at 11:40 p.m. “Instruction manuals given to staff regarding how to process orders for vital records, including but not limited to how to search for records.”

OPRA Request dated February 17, 2021 “I had previously requested reports detailing how many vital records are issued annually, and [I] was told no such reports exist. Therefore, if this information is not already available in summary format, I instead request an extract from the electronic database storing the vital record order information in CSV or Excel format of all nonexempt fields of data. Namely, I would be interested in the fields that contain the date the order was placed, the type of record ordered, the date (or year) of the vital event, and if the record is certified or a certification. Please note that I am not requesting any personal information and am not requesting the name or address of the applicant nor the name of the person whose birth or death record was ordered.”³

Custodian of Record: Darrin D. Goldman

Requests Received by Custodian: February 16, 2021 and February 17, 2021

Responses Made by Custodian: February 17, 2021

GRC Complaint Received: September 24, 2021

¹ No legal representation listed on record.

² Represented by Deputy Attorney General (“DAG”) Jessica A. Sampoli. On May 4, 2023, DAG Sampoli asked the GRC to include DAG Shane-Held as co-counsel for the Custodian. The GRC asked DAG Sampoli to have DAG Shane-Held submit a letter of representation to the GRC. DAG Sampoli confirmed that such a letter would be submitted to the GRC; however, the GRC never received same.

³ The Complainant’s preferred method of delivery for records responsive to each OPRA request is via e-mail.

Background⁴

Requests and Response:

On February 15, 2021 at 11:39 p.m., the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 17, 2021, the Custodian responded in writing assigning New Jersey Department of Health (“agency”) number W169010 to the Complainant’s request. The Custodian informed the Complainant that the requested records do not exist.

On February 15, 2021 at 11:40 p.m., the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On February 17, 2021, the Custodian responded in writing assigning agency number W169011 to the Complainant’s request. The Custodian informed the Complainant that the requested records do not exist.

On February 17, 2021, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On February 17, 2021, the Custodian responded in writing assigning agency number W169102 to the Complainant’s request. The Custodian informed the Complainant that he confirmed with the registrar that the requested records do not exist.

On March 1, 2021, the Complainant e-mailed the Custodian. The Complainant stated that he recently received in the mail paperwork from the agency containing orders with numerical codes. The Complainant stated that upon seeing the numerical codes it was clear to him the agency has a computer system that processes requests. After reiterating his February 17, 2021 request, the Complainant stated that the request essentially sought an extract of orders maintained in a database. The Complainant asked the Custodian for a reply.

Denial of Access Complaint:

On September 24, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that on February 15, 2021, he submitted two (2) OPRA requests seeking the above-mentioned records. The Complainant stated that two (2) days later, the Custodian responded to his requests, informing him that no responsive records exist. The Complainant asserted that the Custodian’s response to his request (assigned agency number W169011) appears to be incorrect because the agency must have some formal procedures to educate the staff. The Complainant stated that on February 17, 2021, he submitted a follow up request (to his request assigned agency number W169010). The Complainant stated that he essentially asked for the same records in more explicit terms.

The Complainant stated that shortly after he submitted the February 17, 2021 request, he received in the mail from the agency a Vital Records Order with an attached packing slip that was printed out from software that tracks orders. The Complainant stated that many of the fields

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.

of data he sought were printed on the attachment, and presumably could be extracted and inserted on a report such as he had requested.

Statement of Information:

On October 29, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received two (2) OPRA requests from the Complainant on February 16, 2021. The Custodian certified that agency numbers W169010 and W169011 were assigned to the requests. The Custodian certified that request W169010 sought vital records orders received or processed from 2015 to 2020, and request W169011 sought instruction manuals. The Custodian certified that the Complainant filed another OPRA request on February 17, 2021, which was a follow up on request W169010, and was assigned agency number W169102.

The Custodian certified that immediately upon receipt of requests W169010 and W169011 on February 16, 2021, he forwarded them to Vincent Arrisi, the State Registrar of Vital Statistics, Office of Vital Statistics, (“Registrar”). The Custodian certified that he knew the Registrar would know if responsive records existed.

The Custodian certified that the Registrar informed him on that same date that no records exist for request W169010. The Custodian further certified that the Complainant sought all requests for vital statistics records, and “no database exists that contains all requests for vital statistics records . . . as a portion of the requests are made in person via paper forms.” (Emphasis in original.) The Custodian also certified that with respect to request W169011, no records exist because the Registrar does not utilize an instruction manual for the training of employees. Rather, the Registrar employs on-the-job training conducted by experienced co-workers. The Custodian certified that for this reason written manuals are not used and do not exist. The Custodian cited Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), which provides that there is no denial of access to records where the request seeks records “that either do not exist or are not in the custodian’s possession.” Id. at 508.

The Custodian certified that on February 17, 2021, he responded to each of the Complainant’s requests. The Custodian certified that he informed the Complainant that he confirmed with the Registrar that no records responsive to the requests exist.

The Custodian certified that on September 21, 2021, the Complainant filed the within complaint.⁵ The Custodian certified that “[i]n the interest of resolving OPRA requests W169010 and W169102,” he disclosed to the Complainant on October 28, 2021, copies of “[a] monthly report of requests for vital statistics information submitted from January 2015 through December 2020.” The Custodian further certified that these reports consisted of online requests. The Custodian certified that, pursuant to Stop & Shop Supermarket Co., LLC v. Cty. Of Bergen, 450 N.J. Super. 286, 291-92 (App. Div. 2017), there is no denial of access to the records because the requestor received the requested records.

⁵ This is the date the Complainant verified the Denial of Access Complaint.

Analysis

Insufficient Search

It is the custodian's responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian's response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant's OPRA request existed. However, the complainant included e-mails responsive to the request with the Denial of Access Complaint. After receipt of the complaint, the custodian conducted a further search and found records responsive to the complainant's request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records.

Here, the Custodian certified in the SOI that the Registrar informed him that there were no records responsive to the Complainant's requests numbered W169010 and W169102, and he notified the Complainant accordingly on February 17, 2021. However, after the Complainant filed a Denial of Access Complaint on September 24, 2021, responsive records were disclosed to him on October 28, 2021.

Therefore, the Registrar's failure to conduct a reasonable search for records responsive to the Complainant's OPRA requests numbered W169010 and W169102 until after receipt of the Denial of Access Complaint resulted in an insufficient search, causing the Custodian to unlawfully deny access to the records. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220. However, the GRC need not order disclosure of the records because the Custodian disclosed same to the Complainant on October 28, 2021.

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.

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the records responsive to request W169011, seeking instruction manuals given to staff regarding how to process orders for vital records, do not exist because the Registrar employs on-the-job training conducted by experienced co-workers which obviates the need for such manuals.

As such, the Custodian did not unlawfully deny access to request W169011 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. 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:

1. The State Registrar's failure to conduct a reasonable search for records responsive to the Complainant's OPRA requests numbered W169010 and W169102 until after receipt of the Denial of Access Complaint resulted in an insufficient search, causing the Custodian to unlawfully deny access to the records. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2007-220 (April 2008). However, the GRC need not order disclosure of the records because the Custodian disclosed same to the Complainant on October 28, 2021.
2. The Custodian did not unlawfully deny access to request W169011 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart

October 31, 2023