



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

May 30, 2023 Government Records Council Meeting

Brigite I. Goncalves
Complainant

Complaint No. 2021-88

v.

Borough of East Newark (Hudson)
Custodian of Record

At the May 30, 2023 public meeting, the Government Records Council (“Council”) considered the May 23, 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 Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Notwithstanding the active public health emergency at the time of the request, the Custodian admitted that the delay in providing the responsive records was due largely to other events that interfered with his ability to process and respond to OPRA requests, rather than circumstances related to the health emergency. N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to timely respond in writing to the Complainant’s clarified request item number 1, either granting access, denying access, seeking additional clarification, or requesting an extension of time resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). See Dittrich v. N.J. Dep’t of Cmty. Affairs, Bureau of Homeowner Prot., GRC Complaint No. 2021-10 (June 2022).
2. Because the requested records are communications between the Borough of East Newark, a public agency, and its insurance carrier, administrative service organization or risk management office, the Custodian has borne his burden of proving that he lawfully denied access to the requested records because said records are not government records subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. See Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005); Fox v. Twp. of Parsippany-Troy Hills, GRC Complaint No. 2005-109 (December 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 30th Day of May 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: June 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 30, 2023 Council Meeting**

Brigite I. Goncalves¹
Complainant

GRC Complaint No. 2021-88

v.

Borough of East Newark (Hudson)²
Custodial Agency

Records Relevant to Complaint: Copies via e- mail of:

1. “[R]elease/termination form(s) for all public officials/surety bonds for Brigitte I. Goncalves from January 1, 2020 – December 14, 2020.”
2. “[E]mail to William H. Connolly & Co (sic) requesting termination of public officials/surety bond(s) for Brigitte I. Goncalves[.]”

Custodian of Record: Kevin D. Harris

Request Received by Custodian: December 16, 2020

Response Made by Custodian: December 28, 2020

GRC Complaint Received: April 26, 2021

Background³

Request and Response:

On December 15, 2020 at 5:55 p.m., the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 28, 2020, the Custodian responded in writing informing the Complainant that the records responsive to request item number 1 are denied because the request failed to specifically identify the record(s) sought. The Custodian also stated that the request item, to the extent it may constitute information which is a communication between the Borough of East Newark (“Borough”) and its insurance carrier/risk management office is denied pursuant to N.J.S.A. 47:1A-1.1. The Custodian informed the Complainant that she should clarify her request for request item number 1 by identifying a specific government record. The Custodian stated that the record responsive to request item number 2 is denied under N.J.S.A. 47:1A-1.1 because the requested record is information which

¹ No legal representation listed on record.

² Represented by Mark A. Tabakin, Esq., of Weiner Law Group, LLP (Parsippany, NJ).

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.

is a communication between the Borough and its insurance carrier, administrative service organization or risk management office.⁴

On January 7, 2021, the Complainant e-mailed a letter to the Custodian to clarify her request for item number 1. The Complainant stated that the request is for a Treasurer Public Official Bond with Travelers that was cancelled at her request effective April 13, 2020.

Denial of Access Complaint:

On April 26, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that she e-mailed an OPRA request to the Custodian for “documents associated with Public Officials Bond for Brigitte I. Goncalves (Complainant).” The Complainant further stated that on December 16, 2020, she received confirmation of receipt of her request from the Custodian, and on December 28, 2020, she received a response from the Custodian denying access and requesting clarification.

The Complainant stated by way of background that she received a notice from Travelers Casualty & Surety Company of America dated June 24, 2020, that her Public Official’s Bond was terminated on April 13, 2020. The Complainant stated that at the time she received the notice she was employed by the Borough. The Complainant stated that on January 7, 2021, she provided clarification of her OPRA request along with supporting documentation evidencing that a responsive document does exist.

The Complainant stated that the Custodian has continued to deny her request. The Complainant stated that the GRC should compel the Custodian to disclose the requested records because she is a “person of interest.”

Statement of Information:

On May 13, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 16, 2020 and acknowledged receipt of the request on the same date. The Custodian certified that he responded to the request on December 28, 2020, informing the Complainant that request item number 1 failed to specifically identify a government record as is required per Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian further certified that he asked for clarification of the request item. The Custodian certified that he denied request item number 2 because it seeks information which is a communication between the Borough and its insurance carrier, administrative service organization or risk management office, and is exempt from disclosure under N.J.S.A. 47:1A-1.1.

The Custodian certified that on January 7, 2021, the Complainant e-mailed a letter to him clarifying her request for item number 1, by informing him that that her request is for a Treasurer Public Official Bond with Travelers that was cancelled at her request effective April 13, 2020. The

⁴The evidence of record reveals that William H. Connolly & Co., LLC is an insurance and risk management organization.

Custodian certified that he understood upon clarification, that the Complainant was seeking her Public Official Bond for the position of Treasurer.

The Custodian certified that before he could respond to the clarified request, other pressing duties intervened. The Custodian certified that the East Newark Board of Education (“Board”) passed a resolution authorizing the Superintendent of Schools and Board Secretary to draft a ballot question, interpretative statement, and resolution to reclassify the school district. The Custodian certified that, as Borough Clerk, he was required to immediately review the submitted documentation and issue a determination as to whether the action was legally sufficient. The Custodian also certified that the Board subsequently filed litigation against him, which required him to participate throughout the litigation process and these other duties interfered with his ability to process and respond to OPRA requests. The Custodian also certified that N.J.S.A. 47:1A-5(i)(2) provides that “[d]uring a period declared according to the laws of this State as a state of emergency . . . the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.” The Complainant certified that given the circumstances surrounding the COVID-19 pandemic and the litigation brought by the Board against him, he made a reasonable effort to respond to the Complainant’s request in a timely manner.

The Custodian certified that on May 7, 2021, the Borough’s attorney telephoned the Complainant to discuss her request more thoroughly. The Custodian certified that as a result of that telephone conversation, he learned that the Complainant was not seeking her Public Official Bond, but rather was seeking documentation evidencing the Borough’s request to cancel said bond. The Custodian certified that, after clarification by the Complainant, he determined the following records were responsive to request item number 1; however, the records are exempt from disclosure in whole or in part under N.J.S.A. 47:1A-1.1 because they constitute communications between the Borough and its insurance carrier, administrative service organization or risk management office:

- An e-mail dated March 5, 2020 from the Mayor to Kathryn Coughlin.
- E-mails and attachments between the Mayor and Christie Anne McNamee dated April 23, 2020 and May 11, 2020.
- E-mails and attachments between the Melanie Mattos and Kathryn Coughlin dated April 23, 2020, May 11, 2020 and May 14, 2020.
- An e-mail and attachments dated July 10, 2020 from Christie Anne McNamee to the Mayor.

The Custodian certified that by letter dated May 13, 2021, he disclosed to the Complainant six (6) pages of redacted records, together with a document/redaction index. The disclosed records, which the Custodian attached to the SOI, are listed in the following table:

Page	Description of Record	Reason for Redactions
1	Cancellation Request/Policy Release between William H. Connolly & Co. and the Borough	<u>N.J.S.A.</u> 47:1A-1.1 deems information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office to be exempt.
2	Cancellation Request/Policy Release between William H. Connolly & Co. and the Borough	Same as record number 1
3	Cancellation Notice between Travelers Casualty and Surety Company and the Complainant dated June 24, 2020	Same as record number 1
4	S-4123 Form between Travelers Casualty and Surety Company and Kathleen Parsons of William H. Connolly & Co. dated June 24, 2020	Same as record number 1
5	Cancellation Notice between Travelers Casualty and Surety Company and Christie Anne McNamee of William H. Connolly & Co. dated June 24, 2020	Same as record number 1
6	Cancellation Notice between Travelers Casualty and Surety Company and the Borough dated June 24, 2020	Same as record number 1

The Custodian certified that his actions in responding to the Complainant’s request did not constitute a knowing and willful violation of OPRA. The Custodian further certified that due to a series of unfortunate events that required his attention, he forgot to request additional time to respond, seeking additional clarification from the Complainant.

Additional Submission:

On May 17, 2021, the Complainant responded to the Custodian’s SOI. The Complainant stated that the Custodian’s “attempt to respond to [her] request for public records, specifically a record that . . . pertains to [her] surety bond was a clear disregard of the requirements of a government agency to disclose records.” The Complainant stated that the content of the SOI reveals it is evident that the Borough is continuing to retaliate against her as a former employee. The Complainant stated that the Custodian asserted that he could not reply to her request in a timely manner because he had to attend to a resolution passed by the Board. The Complainant stated that she is the Board president, and she knows that the Custodian has an obligation to respond to a request for records in a timely manner.

The Complainant acknowledged that the Borough’s attorney contacted her on May 10, 2021 and told her that he would provide her with a blank release/termination form in satisfaction of her request. The Complainant stated that she refused the Borough attorney’s offer and wanted the complaint adjudicated. The Complainant stated that the Custodian, to further insult her and avoid disclosing a copy of the requested release/termination, disclosed a release/termination with

the dates, signatures and reason for cancellation redacted. The Complainant stated that she wants the GRC to compel the Custodian to provide a copy of the release/termination to her with the dates, signatures and reason for cancellation disclosed because she is an “individual of interest.”

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).

The Legislature amended OPRA on March 20, 2020, in response to the global pandemic. P.L. 2020, c.10. Based on that amendment, N.J.S.A. 47:1A-5(i)(2) provides:

During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, *provided, however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.*

[Id. (Emphasis added).]

In Dittrich v. N.J. Dep’t of Cmty. Affairs, Bureau of Homeowner Prot., GRC Complaint No. 2021-10 (June 2022), the complainant’s OPRA request was submitted during the COVID-19 public health emergency. Due to workplace restrictions during the pandemic, the complainant’s request was not fulfilled and prepared for transmission to the complainant until the fifteenth (15th) business day following its submission. However, the response was then inadvertently delayed for an additional seventeen (17) business days. Although the custodian asserted that the existing workplace restrictions delayed the production of the records, the Council held that the delay in providing the responsive records was due to an inadvertent oversight, rather than pandemic related hardships. As such, the Council found that the custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).

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.

With respect to clarification of OPRA requests, the Council has held that after receiving clarification of a request, the statutorily mandated seven business day period for a custodian to respond to the request begins anew. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-363 (July 2014), in which the Council determined that “[u]pon receipt of th[e] clarification, the [c]ustodian again had seven (7) business days to either grant access, deny access, seek clarification or request an extension of time.” In the instant complaint, the Complainant provided the requested clarification of request item number 1 on January 7, 2021; therefore, the Custodian had to respond no later than January 19, 2021.⁶

Although the OPRA request was made while a public health emergency was in effect, and thus the language under N.J.S.A. 47:1A-5(i)(2) applied, the statute still required a “reasonable effort” to provide a response to an OPRA request within the allotted period. The Custodian asserted that circumstances surrounding the COVID-19 pandemic affected the timeliness of the response; he also admitted that the response to request item number 1 was not sent in a timely manner because other “unfortunate events” interfered with his ability to process and respond to OPRA requests. However, the GRC disagrees that the Custodian’s explanation resulted in a reasonable effort to respond to the Complainant’s clarified OPRA request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Notwithstanding the active public health emergency at the time of the request, the Custodian admitted that the delay in providing the responsive records was due largely to other events that interfered with his ability to process and respond to OPRA requests, rather than circumstances related to the health emergency. N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to timely respond in writing to the Complainant’s clarified request item number 1, either granting access, denying access, seeking additional clarification, or requesting an extension of time resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Kelley, GRC 2007-11. See Dittrich, GRC 2021-10.

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.

OPRA further provides that “[a] government record shall not include . . . information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office. N.J.S.A. 47:1A-1.1.

In Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005), the plaintiff requested information concerning the health insurance benefits of certain employees. The court looked to a few express provisions of OPRA before finding that the information sought by the plaintiff was not subject to disclosure under OPRA, specifically the court stated that “[i]nformation that is

⁶ January 18, 2021 was a State holiday.

deemed confidential is not considered a government record. N.J.S.A. 47:1A-1.1. One such category is ‘information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.’” Id. at 619.

Subsequently, in Fox v. Twp. of Parsippany-Troy Hills, GRC Complaint No. 2005-109 (December 2005), the complainant sought several records, including employee healthcare benefits. The Council, in concluding that the custodian lawfully denied access to the requested records, cited the court’s decision in Michelson, 379 N.J. Super. 611, and in particular, the court’s reference to N.J.S.A. 47:1A-10, and N.J.S.A. 47:1A-1.1 (with respect to communications between the agency and its insurance carrier).

Here, the Complainant in request item number 1 is seeking unredacted copies of the release/termination records that she asserted should be provided to her in unredacted form because she is an individual of interest. The evidence of record reveals that the requested records were between the Borough (as insured) and William H. Connolly & Co. (as producer) regarding a policy issued by Travelers Casualty & Surety Company of America. As such, the records are clearly a communication between a public agency and its insurance carrier or risk management office. Being such a communication, the records are not government records subject to disclosure per N.J.S.A. 47:1A-1.1 and could have been denied in their entirety. Moreover, there is no provision within N.J.S.A. 47:1A-1.1 which provides an exception for an “individual of interest.”

In request item number 2, the request *as worded* is seeking a communication between the Borough and William H. Connolly & Co., which is an insurance and risk management organization. As such, the Custodian properly denied the record as a communication between a public agency and its insurance carrier or risk management office pursuant to N.J.S.A. 47:1A-1.1.

Therefore, because the requested records are communications between the Borough, a public agency, and its insurance carrier, administrative service organization or risk management office, the Custodian has borne his burden of proving that he lawfully denied access to the requested records because said records are not government records subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. See Michelson, 379 N.J. Super. 611; Fox, GRC 2005-109.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Notwithstanding the active public health emergency at the time of the request, the Custodian admitted that the delay in providing the responsive records was due largely to other events that interfered with his ability to process and respond to OPRA requests, rather than circumstances related to the health emergency. N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to timely respond in writing to the Complainant’s clarified request item number 1, either granting access, denying access, seeking additional clarification, or requesting an extension of time resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-

11 (Interim Order October 31, 2007). See Dittrich v. N.J. Dep't of Cmty. Affairs, Bureau of Homeowner Prot., GRC Complaint No. 2021-10 (June 2022).

2. Because the requested records are communications between the Borough of East Newark, a public agency, and its insurance carrier, administrative service organization or risk management office, the Custodian has borne his burden of proving that he lawfully denied access to the requested records because said records are not government records subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. See Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005); Fox v. Twp. of Parsippany-Troy Hills, GRC Complaint No. 2005-109 (December 2005).

Prepared By: John E. Stewart

May 23, 2023