



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 28, 2023 Government Records Council Meeting

Thomas M. Riche
Complainant

Complaint No. 2021-94

v.

Borough of Allendale (Bergen)
Custodian of Record

At the March 28, 2023 public meeting, the Government Records Council (“Council”) considered the March 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 although the Custodian did not timely respond to the Complainant’s OPRA request within the extended time frame, she adhered to N.J.S.A. 47:1A-5(i)(2) in making a “reasonable effort” to comply with same. Furthermore, the Custodian’s explanation justifies the need for additional time to properly respond to the subject OPRA request. Thus, due to the extenuating extreme circumstances, the Custodian’s failure to timely respond within the extended time frame does not constitute a “deemed” denial. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i)(2).

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 March 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: April 3, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Thomas M. Riche¹
Complainant**

GRC Complaint No. 2021-94

v.

**Borough of Allendale (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of “all documentation including proposals, e-mails, invoices, purchase orders, and any and all documentation that may be applicable” to the solicitation and award of a new contract for telephone services for the Borough of Allendale (“Borough”) from January 1, 2021 to present (omitting documentation from EXTEL Communications, Inc.).

Custodian of Record: Michelle Ryan

Request Received by Custodian: March 29, 2021

Response Made by Custodian: April 8, 2021

GRC Complaint Received: May 4, 2021

Background³

Request and Response:

On March 29, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 31, 2021, the Complainant resubmitted his OPRA request seeking acknowledgement of receipt. On April 2, 2021, the Complainant again resubmitted his OPRA request seeking acknowledge of receipt.

On April 8, 2021, the Custodian responded in writing seeking an extension of time through April 12, 2021 due to a recent exposure to the COVID-19 Public Health Emergency (“PHE”) and the “complex nature” of the subject OPRA request. On April 12, 2021, the Custodian responded to the Complainant’s second submission of the subject OPRA request seeking an extension of time to respond through April 16, 2021 due to the “complex nature” of the OPRA request. On the same day, the Complainant responded confirming the extension request.

¹ No legal representation listed on record.

² Represented by Raymond R. Wiss, Esq., of Wiss & Bouregy, P.C. (Westwood, 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.

On April 22, 2021, the Complainant e-mailed the Custodian seeking a status update on the subject OPRA request. On April 23, 2021, the Complainant e-mailed the Custodian again seeking a status update. On April 26, 2021, the Complainant e-mailed the Custodian a third (3rd) time seeking a status update on the pending OPRA request.

Denial of Access Complaint:

On May 4, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his OPRA request in a timely manner.

Supplemental Response:

On May 21, 2021, the Custodian responded in writing stating that the delayed response was the result of the “complex and overly broad nature of [the Complainant’s] request as well as COVID-19 closures at Borough Hall and employees being out of the office, working remotely and some working part-time . . .” The Custodian granted access to 179 pages of responsive records. The Custodian also denied access to the portion of the request seeking “any and all” records which “may be applicable” to the contract. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Gannett N.J. Partners v. Middlesex Cnty., 379 N.J. Super. 205 (App. Div. 2005); Reda v. Twp. of West Milford, GRC Complaint No. 2002-58 (January 2003).

Statement of Information:

On May 21, 2021, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA request on March 29, and 31, 2021. The Custodian certified that she began seeking responsive records but was advised by Borough employees that the new system was not yet set up and implementation of such was delayed due to technical issues. The Custodian certified that she responded in writing on April 8, and 12, 2021 extending the response time frame due to the complexity of the subject request and COVID-19 complications. The Custodian certified that she immediately resumed her search for responsive records, which included contacting Coban Computers to obtain responsive e-mails. The Custodian certified that she encountered additional complications in the form of COVID-19 outbreaks and the need to achieve a basic understanding of the new system to assist in locating additional records. The Custodian certified that she subsequently responded on May 21, 2021 disclosing 179 pages of records and proffering a partial denial to the portion of the request seeking “any and all records . . . applicable” to the telephone services contract.

The Custodian initially argued that significant COVID-19 issues, including exposures requiring quarantine and office closures, impacted the Borough’s ability to locate and disclose responsive records. The Custodian noted that delays of this nature were contemplated by the Legislature “when it passed N.J.S.A. 47:1A-5(a).” The Custodian further asserted that the above-described complications directly related to the new telephone system caused additional delays in locating responsive records. The Custodian noted that she also received fifty-two (52) OPRA requests in April 2021. The Custodian contended that given all issues encountered while trying to locate records responsive to the subject OPRA request, she did not seek additional extensions of

time. The Custodian argued that based on the above, this complaint should now be dismissed because she made a “reasonable effort” to respond, and all records have been disclosed to the Complainant.

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).⁴ 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).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant’s March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

However, on March 20, 2020, in response to the COVID-19 PHE, P.L. 2020, c.10 amended N.J.S.A. 47:1A-5(i) to hold in abeyance the statutory response time frame during “a state of emergency, public health emergency, or state of local disaster emergency,” but requiring custodians to adhere to the time frame “as the circumstance permit . . .” Id. However, Governor Murphy signed P.L. 2021 c.104 on June 4, 2021 providing that:

While the state of emergency declared in Executive Order No. 103 of 2020 shall remain in effect, the deadlines in paragraph (1) of subsection i. of section 6 of P.L.

⁴ 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.

2001, c.404 (C.47:1A-5) shall apply to any request made under [OPRA] after the effective date of this act, with the exception of requests made for records related to the COVID-19 response, which shall continue to be governed by paragraph (2) of subsection i. of section 6 of P.L. 2001, c.404 (C.47:1A-5).

[Id. at 4.]

In the matter before the Council, the Complainant submitted his OPRA request first on March 29, 2021 and proceeded to resubmit it two (2) additional times seeking acknowledgment of receipt from the Custodian. The Custodian's initial responses on April 8, and 12, 2021 both fell within the seven (7) business days and extended the time frame through April 16, 2021 due to the complexity of the request and complications from COVID-19. Following the expiration of the extension time frame, the Complainant attempted to obtain a status update on three (3) occasions and filing this complaint after not receiving a response. Thereafter, the Custodian responded on May 21, 2021 disclosing 179 pages of records and partially denying the request as invalid.⁵ In that response, the Custodian noted the difficulties endured by the Borough related to COVID-19. In the SOI, the Custodian certified to these COVID-19 complications and other mitigating issues facing this request, which included the delayed implementation of the new telephone system and the amount of OPRA requests received during that time.

The GRC finds that sufficient evidence exists in the record to support that the Custodian's failure to respond within the extended time frame is covered by the March 20, 2020 amendment to N.J.S.A. 47:1A-5(i) and that Kohn, GRC 2007-124 does not apply here. The evidence of record shows that the Custodian made a "reasonable effort" by responding in a timely manner extending the response time frame and later disclosing records as soon as reasonably possible thereafter. The Custodian included an explanation of the Borough's COVID-19 issues in her responses to the Complainant on April 8, 2021 and May 21, 2021. In the SOI, the Custodian detailed the COVID-19 complications and other issues that the Borough experienced while trying to respond to the subject OPRA request. Further, the evidence shows that the Custodian was required to conduct an extensive search based on the Borough's delayed implementation of the new telephone services contract and was dealing with significant work disruptions in attempting to execute that search. Slightly less compelling is the additional OPRA requests received in April 2021; however, fifty-two (52) additional OPRA requests certainly could not have relieved the Borough's COVID-19 inflicted burden. As noted by the Custodian, the March 20, 2020 amendment was meant to address exactly the type of situation the Borough encountered during the pendency of the subject OPRA request. Thus, the GRC cannot apply Kohn, GRC 2007-124 to the facts here and must rely directly on the amended language within N.J.S.A. 47:1A-5(i)(2) in finding that no "deemed" denial occurred here.

Therefore, although the Custodian did not timely respond to the Complainant's OPRA request within the extended time frame, she adhered to N.J.S.A. 47:1A-5(i)(2) in making a "reasonable effort" to comply with same. Furthermore, the Custodian's explanation justifies the

⁵ The GRC does not reach the validity issue because the Complainant did not raise it at any point during this adjudication. However, the GRC should note that requests that seek "any and all" records or documents have been deemed to be invalid in prior court and GRC decisions. MAG, 375 N.J. Super. at 546; Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008).

need for additional time to properly respond to the subject OPRA request. Thus, due to the extenuating extreme circumstances, the Custodian's failure to timely respond within the extended time frame does not constitute a "deemed" denial. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i)(2).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that although the Custodian did not timely respond to the Complainant's OPRA request within the extended time frame, she adhered to N.J.S.A. 47:1A-5(i)(2) in making a "reasonable effort" to comply with same. Furthermore, the Custodian's explanation justifies the need for additional time to properly respond to the subject OPRA request. Thus, due to the extenuating extreme circumstances, the Custodian's failure to timely respond within the extended time frame does not constitute a "deemed" denial. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i)(2).

Prepared By: Frank F. Caruso
Executive Director

March 21, 2023