



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

January 30, 2024 Government Records Council Meeting

David Weiner
Complainant

v.

County of Essex
Custodian of Record

Complaint No. 2022-217

At the January 30, 2024 public meeting, the Government Records Council (“Council”) considered the January 23, 2024 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 extended time frame results in a “deemed” denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order any further action because the Custodian responded on April 19, 2022 disclosing eighteen (18) pages of records with minor redactions and denying access to 285 pages of records under the N.J.S.A. 47:1A-9 and N.J.S.A. 47:1A-10.

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 January 2024

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: February 5, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2024 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2022-217

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Undated “Reassignment opportunity Position Announcement” for the Administrative Analyst title issued by Division of Family Assistance and Benefits (“DFAB”) Director Valentina Green-Richardson with a closing date of July 16, 2021.
2. Memorandum dated August 27, 2021 issued by Director Green-Richardson entitled “Provisional Administrative Analyst Interview.”
3. Memorandum of August 2021 issued by Director Green-Richardson entitled “Interview Provisional Administrative Analyst.”
4. Letter of November 2021 sent to DFAB employees who applied for, were interviewed for, and took the test that resulted in Director Green-Richardson’s assertion that “. . . you were not selected at this time.”
5. “[A]ll of the above cited documents respectively completed and submitted by” six (6) specific employees.
6. “[A]ll of the above cited documents respectively completed and submitted by” the individual assigned to the position on March 21, 2022.
7. “[D]ocuments denoting the scoring system utilized” by Director Green-Richardson and those selected to assist her in choosing the successful candidate, including the titles of those who assisted her.
8. “[D]ocument(s) denoting” how many Administrative Analyst positions are currently open in addition to those provisional positions currently filled.
9. “[T]he document” sent by the County of Essex (“County”) to the New Jersey Civil Service Commission (“CSC”) requesting promulgation of a test for the Administrative Analyst position.

Custodian of Record: Olivia Schumann, Esq.
Request Received by Custodian: March 22, 2022
Response Made by Custodian: March 31, 2022
GRC Complaint Received: May 19, 2022

¹ No legal representation listed on record.

² No legal representation listed on record.

Background³

Request and Response:

On March 21, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 31, 2022, the Custodian responded in writing extending the response time frame through April 11, 2022. On April 19, 2022, the Custodian responded in writing disclosing eighteen (18) pages of records, with minor redactions under N.J.S.A. 47:1A-1, procured from DFAB. The Custodian also denied access to 285 pages of records comprising individual employee interview submissions, score sheets, and exam applications. N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9; Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”); N.J.A.C. 4A:4-2.16(b)(1); N. Jersey media Grp., Inc. v. State Dep’t of Personnel, 389 N.J. Super. 527 (July 21, 2006).

Denial of Access Complaint:

On May 19, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant checked “yes” to the question “[d]id you receive a reply to your request” on page 2 of the Denial of Access Complaint form but did not include a date of said response. The Complainant further inputted “[n]one” under the “Response to request” column on page 4 of the form. The Complainant provided no additional statements or arguments identifying the reasons for his dispute.

Supplemental Response:

On May 19, 2022, the Custodian e-mailed the Complainant resending her April 19, 2022 response.

Statement of Information:⁴

On December 12, 2022, the Custodian filed a Statement of Information (“SOF”) attaching a certification from Al Fusco of DFAB. The Custodian certified that she received the Complainant’s OPRA request on March 22, 2022. The Custodian affirmed that she responded on March 31, 2022 extending the response time frame through April 11, 2022. The Custodian certified that her search included contacting Mr. Fusco, who sent her 303 pages between April 12, and 14, 2022. See Fusco Cert. ¶ 5. The Custodian certified that she responded in writing on April 19, 2022 disclosing eighteen (18) pages of records with minor redactions and denying access to 285 pages of records under the N.J.S.A. 47:1A-9 and N.J.S.A. 47:1A-10.

The Custodian argued that the Council has consistently held that no unlawful denial of access could have occurred where a custodian certifies that all responsive records that existed were

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.

⁴ On June 14, 2022, this complaint was referred to mediation. On December 7, 2022, this complaint was referred back to the GRC for adjudication.

provided to a complainant. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Owens v. Mt. Holly Twp. (Burlington), GRC Complaint No. 2013-233 (February 2014). The Custodian argued that the County disclosed the records responsive to the subject OPRA request required to be disclosed. The Custodian further argued that the Complainant has not provided any competent, credible evidence exists to refute said certification.

The Custodian further contended that she lawfully denied access to 285 pages of employee interview submissions, interview score sheets, and applications for employment exams. The Custodian first contended that all records fell under the personnel exemption. N.J.S.A. 47:1A-10. The Custodian further argued that portions of the 285 pages of records contain questions for applicants, responses to the detailed questions, and scoring parameters applied in evaluations for the Administrative Analyst title. The Custodian argued that because the forgoing laid the foundation for the County's hiring process, same is akin to "examination data" deemed to be exempt under EO 26. The Custodian finally argued that employment exam applications have already been found to be exempt from disclosure under OPRA pursuant to N.J.A.C. 4A:4-2.16(b)(1). N. Jersey Media Grp., Inc., 389 N.J. Super. at 536.

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).

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

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.

the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

In this matter, the Complainant here submitted his OPRA request on March 21, 2022. The Custodian responded on March 31, 2022 extending the response time frame through April 11, 2022. The Custodian subsequently responded on April 19, 2022, five (5) business days after the expiration of the extended deadline, disclosing eighteen (18) pages of records and denying access to 285 additional pages. This complaint followed on May 19, 2022, where it was unclear whether the Complainant was challenging the delayed response or the Custodian’s denial.⁶

The Complainant’s reason for filing the instant complaint appears to be based in the Custodian’s failure to respond within the extended time frame. The GRC reaches this conclusion based on the Complainant’s acknowledgement in the Denial of Access Complaint that he received a response. However, the Complainant does not acknowledge that the Custodian responded on April 19, 2022, a month prior to the filing, disclosing responsive records. Instead, the Complainant asserted that he did not receive any records. Notwithstanding this assertion, the evidence of record supports that the Custodian failed to follow up before the expiration of the first extension. Instead, the Custodian did not respond again until five (5) business days after the expiration of the extended time frame. Thus, and like Kohn, GRC 2007-124, the Custodian’s failure to conform with the April 11, 2022 extended deadline results in a “deemed” denial of access.

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 extended time frame results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124. However, the GRC declines to order any further action because the Custodian responded on April 19, 2022 disclosing eighteen (18) pages of records with minor redactions and denying access to 285 pages of records under the N.J.S.A. 47:1A-9 and N.J.S.A. 47:1A-10.

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 extended time frame results in a “deemed” denial of said 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). See also Kohn v. Twp. of Livingston

⁶ The GRC notes that the Complainant’s Denial of Access Complaint borders on failing to state a claim: the Council has previously dismissed such complaints based on this procedural issue. See e.g., Loigman v. Monmouth Cnty. Prosecutor’s Office, GRC Complaint No. 2013-342 (July 2014); Georges v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2021-268 (February 2023).

Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order any further action because the Custodian responded on April 19, 2022 disclosing eighteen (18) pages of records with minor redactions and denying access to 285 pages of records under the N.J.S.A. 47:1A-9 and N.J.S.A. 47:1A-10.

Prepared By: Frank F. Caruso
Executive Director

January 23, 2024.