



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

December 12, 2023 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2022-340

v.

County of Essex
Custodian of Record

At the December 12, 2023 public meeting, the Government Records Council (“Council”) considered the December 5, 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 GRC declines to order any further action because the Custodian responded on July 25, 2022 disclosing the responsive record.

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 12th Day of December 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: December 14, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 12, 2023 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2022-340

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of the minutes taken by the County of Essex (“County”) Board of Commissioners’ Deputy Clerk Debra Marvel at a March 2, 2022 meeting.

Custodian of Record: Olivia Schumann, Esq.³
Request Received by Custodian: June 30, 2022
Response Made by Custodian: July 25, 2022
GRC Complaint Received: July 14, 2022

Background⁴

Request:

On June 30, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On July 14, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he did not receive a response to the subject OPRA request.

Response:

On July 25, 2022, the sixteenth (16th) business day after receipt of the OPRA request, the Custodian responded in disclosing the requested minutes via e-mail.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The current “Custodian of Record” is George Seylaz.

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.

Statement of Information:⁵

On January 26, 2023, the current Custodian filed a Statement of Information (“SOI”) attaching a legal certification from the Custodian. The current Custodian certified that the Custodian received the Complainant’s OPRA request on June 30, 2022 but did not enter it into the County’s OPRA portal system until being apprised of her error on July 14, 2022 through this complaint. Custodian Cert. ¶ 4-5. The current Custodian certified that Ms. Kathy Brown from the Board conducted a search and located the requested minutes. The current Custodian certified that the Custodian responded in writing via e-mail on July 25, 2022 disclosing the minutes to the Complainant. Custodian Cert. ¶ 7.

The current 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 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 current Custodian argued that the County disclosed the record responsive to the subject OPRA request. The current Custodian further argued that the Complainant has not provided any competent, credible evidence exists to refute said certification.

The current Custodian also contended that the Custodian’s unintentional error in failing to enter the OPRA request into the OPRA Portal system was not knowing and willful in nature. The current Custodian asserted that the Custodian cured the issue as soon as she was made of aware of her error and disclosed the records shortly thereafter.

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).⁶ 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 the matter before the Council, the Complainant submitted his OPRA request to the Custodian on June 30, 2022. The Complainant filed the instant complaint contending that he did not receive a response. Following this complaint filing, the Custodian responded to the

⁵ On August 22, 2022, this complaint was referred to mediation. On January 24, 2023, this complaint was referred back to the GRC for adjudication.

⁶ 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.

Complainant via e-mail on July 25, 2022 disclosing the requested minutes of the March 2, 2022 meeting. In the SOI, the current Custodian certified that the Custodian received the OPRA request on June 30, 2022, but unintentionally failed to enter same into the County's OPRA Portal system. The Custodian contended that upon being made aware of this error on July 14, 2022, she obtained and disclosed the responsive record to the Complainant via e-mail on July 25, 2022. However, the response occurred sixteen (16) business days after receipt of the OPRA request. Thus, the evidence of record supports that the Complainant's OPRA request was "deemed" denied.

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(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the GRC declines to order any further action because the Custodian responded on July 25, 2022 disclosing the responsive record.

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 GRC declines to order any further action because the Custodian responded on July 25, 2022 disclosing the responsive record.

Prepared By: Frank F. Caruso
Executive Director

December 5, 2023