



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

February 29, 2024 Government Records Council Meeting

Peter Gartner
Complainant

Complaint No. 2022-359

v.

Borough of Middlesex (Middlesex)
Custodian of Record

At the February 29, 2024 public meeting, the Government Records Council (“Council”) considered the February 20, 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 this complaint should be dismissed because it was moot at the time of the filing. Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 291 (App. Div. 2017); N.J.S.A. 47:1A-6. Specifically, contrary to his complaint arguments, the Complainant provided clarification and received the responsive records based thereon on July 13, 2022, twelve (12) days before filing the instant complaint. Thus, no further action is required.

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 29th Day of February 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: March 4, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 27, 2024 Council Meeting**

**Peter Gartner¹
Complainant**

GRC Complaint No. 2022-359

v.

**Borough of Middlesex (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies of “all e-mails” between the Borough of Middlesex (“Borough”) and Middlesex County Improvement Authority (“MCIA”) regarding recycling.³

Custodian of Record: Linda Chismar
Request Received by Custodian: July 11, 2022
Response Made by Custodian: July 11, 2022
GRC Complaint Received: July 25, 2022

Background⁴

Request and Response:

On July 10, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 11, 2022, Ms. Carmen Modica responded in writing on behalf of the Custodian stating that the request was presently invalid because it failed to identify specific government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). Ms. Modica asked the Complainant to provide specific employee names of both the Borough and MCIA and a date range. On the same day, the Complainant responded providing an MCIA e-mail address and two (2) individuals by name, as well as a date range of 2022.

On July 13, 2022, Ms. Modica responded advising that e-mails responsive to the OPRA request would be provided over several e-mails. Ms. Modica sent six (6) separate e-mails to the Complainant attaching records responsive to the subject OPRA request over the next nine (9) minutes.

¹ No legal representation listed on record.

² Represented by Christopher Corsini, Esq., of Savo, Schalk, Corsini, Warner, Gillespie, O’Grodnick & Fisher, P.A. (Somerville, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

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.

Denial of Access Complaint:

On July 25, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted he was told by the Borough that he needed to include individual names of senders and recipients; however, MCIA has not been responsive in giving him that information. The Complainant also asserted that he did not know exactly who the Borough would have communicated with at the MCIA. The Complainant contended that both entities’ failure to provide the very information they assert will result in a valid OPRA request effectively barred him from obtaining the records sought and “gut[s] OPRA laws.”

Statement of Information:

On August 5, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 11, 2022. The Custodian certified that on the same day, Ms. Modica responded in writing on her behalf seeking and obtaining clarification. The Custodian certified that her search included contacting the Borough’s Information Technology Department and obtaining responsive e-mails therefrom. The Custodian certified that Ms. Modica responded in writing on her behalf on July 13, 2022, disclosing forty-five (45) responsive records to the Complainant through individual six (6) e-mails.

The Custodian contended that the Borough properly sought clarification of the subject OPRA request because it was invalid pursuant to Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Custodian noted that the request lacked a date range and senders/recipients; thus, Ms. Modica sought same through clarification to locate and disclose responsive records in a timely manner. The Custodian thus argued that she could not have unlawfully denied access because the request for clarification was reasonable. Leibel v. Manalapan Englishtown Reg’l Bd. of Educ., GRC Complaint No. 2004-51 (September 2004); Herron v. N.J. Dep’t of Educ., GRC Complaint No. 2011-364 (December 2012).

Additional Submissions:

On August 5, 2022, the Complainant e-mailed the GRC stating that this complaint stemmed from the Borough’s initial denial of the request on the basis that it was overly broad.

Analysis

Mootness

OPRA provides that “[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may . . . file a complaint with the [GRC] . . .” N.J.S.A. 47:1A-6. Further, OPRA requires that “[t]he council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or without any reasonable factual basis. If the council shall conclude that the complaint is outside its jurisdiction, frivolous, or without factual basis, it shall reduce that conclusion to writing and transmit a copy thereof to the complainant and to the records custodian against whom the complaint was filed.” N.J.S.A. 47:1A-7(e) (emphasis added).

In Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286 (App. Div. 2017), the Appellate Division was tasked with determining whether the trial court properly dismissed plaintiff’s action based on mootness. There, plaintiff first submitted an OPRA request in 2011 to which the defendant responded disclosing records. However, in response to a new OPRA request submitted by plaintiff in 2014, defendant disclosed multiple records that plaintiff argued were responsive to the 2011 OPRA request. The 2014 disclosure prompted plaintiff to file a complaint seeking declaratory judgement that an unlawful denial occurred and seeking prevailing party attorney fees. Defendants filed a motion to dismiss, which the trial court granted on the grounds of mootness.

The court affirmed, holding that plaintiff’s litigation “was moot before it filed its complaint because it already received the documents it sought.” Id. at 291. In reaching this conclusion, the court reasoned that while N.J.S.A. 47:1A-6 allows only those individuals “denied access” to file a complaint, “access was allowed even before [plaintiffs] filed suit.” Id. Further, the court rejected plaintiff’s argument that the action was not moot because of the prevailing party fee issue:

Here, the OPRA defendants voluntarily produced the records *before* Stop & Shop filed suit. Such voluntary disclosure would be discouraged if Stop & Shop is allowed to file suit to obtain counsel fees for records it has already received. In any event, Stop & Shop did not obtain a judgment or enforceable consent decree granting it access to the records, and its filing of its lawsuit did not cause the production of the already-produced records. The Law Division properly found Stop & Shop not entitled to attorneys' fees as “Stop & Shop is not the prevailing party and this lawsuit was not the catalyst for its receipt of the requested documents.”

[Id. at 293 (emphasis in original).]

In the matter before the Council, the Complainant submitted his OPRA request, received and responded to Ms. Modica’s request for clarification, and obtained responsive records on July 13, 2022. Twelve (12) days later, the Complainant filed the instant complaint arguing that the Custodian failed to respond to his OPRA request after repeated attempts to obtain assistance from both the Borough and MCIA. However, the Complainant surreptitiously omitted any discussion of the fact that he provided clarification and received responsive records on July 13, 2022. In the SOI, the Custodian certified that on the same day as receipt of the OPRA request, Ms. Modica sought and received clarification from the Complainant. The Custodian further certified that on July 13, 2022, Ms. Modica disclosed records through several e-mails. The Custodian included documentation to support her recitation of the facts set forth in the SOI. It was not until after the SOI that the Complainant asserted the basis for his complaint was the Borough’s initial assertion that the request was invalid.⁵

While noting that the Complainant’s Denial of Access Complaint, replete with misleading and false facts, borders on a “bad faith” filing, same is moot for all the reasons advanced by the Stop & Shop court. Specifically, N.J.S.A. 47:1A-6 allows a person who is “denied access” to file a complaint; the facts presented here indicate that no such denial occurred. Instead, the

⁵ The GRC notes that based on Elcavage, GRC 2009-7, the original OPRA request would be considered invalid because it did not contain all criteria required, and specifically a range of dates, to be a valid request for e-mails.

Complainant received Ms. Modica's denial based on validity and request for clarification. Rather than filing a complaint at that time challenging the initial response, the Complainant provided clarification in the form of an e-mail address, two (2) additional persons, and a time frame. Based on this clarification, Ms. Modica disclosed multiple records twelve (12) days prior to the filing of the instant complaint. Thus, at the time of this complaint and despite significant omitted facts therein, the Complainant provided clarification, the Borough disclosed records based on that clarification, and the Complainant is in possession of the records he specifically sought. For these reasons, the complaint was moot before it was filed because access was not denied. Stop & Shop, 450 N.J. Super. at 291; N.J.S.A. 47:1A-6.

Accordingly, this complaint should be dismissed because it was moot at the time of the filing. Stop & Shop, 450 N.J. Super. 286, 291; N.J.S.A. 47:1A-6. Specifically, contrary to his complaint arguments, the Complainant provided clarification and received the responsive records based thereon on July 13, 2022, twelve (12) days before filing the instant complaint. Thus, no further action is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because it was moot at the time of the filing. Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 291 (App. Div. 2017); N.J.S.A. 47:1A-6. Specifically, contrary to his complaint arguments, the Complainant provided clarification and received the responsive records based thereon on July 13, 2022, twelve (12) days before filing the instant complaint. Thus, no further action is required.

Prepared By: Frank F. Caruso
Executive Director

February 20, 2024