



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

February 29, 2024 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2022-443

v.

County of Essex
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:

1. 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).
2. Notwithstanding the “deemed” denial of access, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no records responsive to the OPRA request exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 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 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**

**David Weiner¹
Complainant**

GRC Complaint No. 2022-443

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “[D]ocuments delineating the number of security cameras located” at 320 and 321 University Avenue in Newark.
2. “[D]ocuments delineating the areas within both buildings [that] the security cameras cover.”
3. “[D]ocuments delineating the presence of said security cameras that are not functional” and the time period for which they have been nonfunctional.
4. “[D]ocuments delineating which, if any, such security cameras face outward from either or both buildings.”
5. “[D]ocuments delineating” whether security cameras are in those garages attached to the buildings.
6. “[D]ocuments delineating what, if any, costs” the County of Essex (“County”) pays for security cameras, including vendor name and “for how long.”

Custodian of Record: Olivia Schumann, Esq.

Request Received by Custodian: August 8, 2022

Response Made by Custodian: November 9, 2022

GRC Complaint Received: August 23, 2022

Background³

Request:

On August 5, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

Denial of Access Complaint:

On August 23, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to the subject OPRA request.

Response:

On November 9, 2022, the sixty-fourth (64th) business day after receipt of the OPRA request, the Custodian responded in writing stating that all relevant County departments performed a search and determined that no responsive records exist.

Statement of Information⁴:

On November 9, 2022, the Custodian filed a Statement of Information (“SOI”) attaching certifications from Al Fusco of the Division of Family Assistance and Benefits and Detective Sergeant Welby Lloyd from the Essex’s County Sheriff’s Office. The Custodian certified that she received the Complainant’s OPRA request on August 8, 2022. The Custodian certified that her search included utilizing Mr. Fusco and Detective Lloyd. The Custodian certified that Detective Lloyd advised her on August 10, 2022 that no records existed but that the Custodian should contact the property’s building manager if she needed actual footage. Lloyd Cert. ¶ 3. The Custodian further affirmed that Mr. Fusco advised her on October 18, 2022 that no records existed. Fusco Cert. ¶ 4. The Custodian certified that Mr. Fusco also contacted the building manager on November 3, 2022, who confirmed that no records existed. Fusco Cert. ¶ 6-7. The Custodian certified that she responded to the Complainant in writing on November 9, 2022 advising that no responsive records existed.

The Custodian contended that no unlawful denial of access occurred here because, first and foremost, no responsive records existed. Pavlenko v. Twp. of Delran (Burlington), GRC Complaint No. 2010-325 (March 2012) (citing Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005)). The Custodian argued that both Mr. Fusco and Detective Lloyd have submitted certifications attesting to the fact that no records exist; the Complainant has not provided any evidence to refute said certifications.

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

⁴ On September 27, 2022, this complaint was referred to mediation. On October 17, 2022, this complaint was referred back to the GRC for adjudication.

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).

Here, the Complainant submitted his OPRA request on August 5, 2022 and subsequently filed this complaint asserting that the Custodian failed to respond to it. On November 9, 2022, the sixty-fourth (64th) business day after receipt of the OPRA request, the Custodian responded stating that no records existed. In the SOI, the Custodian certified that she received the subject OPRA request on August 8, 2022 but did not respond until November 9, 2022. Thus, the evidence clearly supports that a “deemed” denial of access occurred.

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.

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant’s OPRA request sought “documents delineating” information about the security cameras at 320 and 321 University Avenue. The Custodian responded stating that no records existed. Following the filing of this complaint, the Custodian certified in the SOI that no records existed and included supporting certifications from both Mr. Fusco and Detective Lloyd.

Upon review, the GRC is persuaded that no unlawful denial of access has occurred. The evidence of record supports the Custodian’s position that no responsive records exist. That is, the Custodian, Mr. Fusco, and Detective Lloyd have certified that no records exist. Further, Mr. Fusco certified that the building manager also confirmed that no records existed. Additionally, the Complainant has not provided any competent, credible evidence necessary to refute the multiple certifications presented by the Custodian in the SOI. Based on the forgoing, a conclusion in line with Pusterhofer is appropriate here.

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.

Accordingly, notwithstanding the “deemed” denial of access, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request. Specifically, the Custodian certified in the SOI, and the record reflects, that no records responsive to the OPRA request exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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).
2. Notwithstanding the “deemed” denial of access, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no records responsive to the OPRA request exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

February 20, 2024