



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

March 26, 2024 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2022-546

v.

County of Essex
Custodian of Record

At the March 26, 2024 public meeting, the Government Records Council (“Council”) considered the March 19, 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 current 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 26th Day of March 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: April 1, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 26, 2024 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2022-546

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “[D]ocuments delineating” findings made by the County of Essex (“County”) Inspector General (“IG”) regarding a Medicaid issue raised in the Complainant’s August 16, 2022 letter.
2. “[D]ocuments delineating” findings made by the County IG regarding a separate Medicaid issue raised in the Complainant’s August 18, 2022 letter.

Custodian of Record: Olivia Schumann, Esq.³
Request Received by Custodian: September 12, 2022
Response Made by Custodian: October 18, 2022
GRC Complaint Received: October 6, 2022

Background⁴

Request:

On September 2, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 12, 2022, the Custodian e-mailed the Complainant acknowledging receipt of the subject OPRA request and stating that the County’s response was due by September 21, 2022.

Denial of Access Complaint:

On October 6, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to

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.

respond to the subject OPRA request.

Response:

On October 18, 2022, the twenty-fifth (25th) business day after receipt of the OPRA request, the Custodian responded in writing stating that IG Frank Egan indicated that the Division of Family Assistance and Benefits (“DFAB”) were still under investigating the issues and that no findings or final determinations have been made.

Statement of Information⁵:

On May 30, 2023, the current Custodian filed a Statement of Information (“SOI”) attaching certifications from IG Egan of DFAB. The current Custodian certified that the Custodian received the Complainant’s OPRA request on September 12, 2022. The current Custodian certified that the Custodian’s search included contacting IG Egan to assist in locating responsive records. The current Custodian certified that IG Egan responded to the Custodian on October 18, 2022 stating that DFAB was still investigating the matters at issue and no final decisions or determinations were made. The current Custodian certified that the Custodian responded in writing on same day advising the Complainant that no responsive records existed.

The current Custodian certified that in the process of completing the SOI, he contacted IG Egan to verify his prior response. The Custodian affirmed that IG Egan contacted Dominic Scaglione on May 10, 2023, who advised that the matters were still under review. Egan Cert. ¶ 4. The current Custodian certified that Mr. Scaglione then called him to confirm the forgoing and that no response could be provided until the investigation was complete. Id.

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 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 IG Egan has confirmed that no records exist because DFAB’s investigation remains ongoing. The Custodian further argued that the Complainant has not provided any competent, credible evidence exists to refute said certification.

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

⁵ On November 3, 2022, this complaint was referred to mediation. On May 12, 2023, this complaint was referred back to the GRC for adjudication.

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).

Here, the Complainant submitted his OPRA request on September 2, 2022 and subsequently filed this complaint asserting that the Custodian failed to respond to it. On October 18, 2022, the twenty-fifth (25th) business day after receipt of the OPRA request, the Custodian responded stating that no records existed. In the SOI, the current Custodian certified that the Custodian received the subject OPRA request on September 12, 2022 but did not respond to it until October 18, 2022. The evidence clearly supports that a “deemed” denial of access occurred.⁷

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” final determinations by DFAB on issues raised in two (2) letters he sent thereto. The Custodian responded stating that IG Egan advised that no final determinations were made by DFAB at that time. Following the filing of this complaint, the current Custodian certified in the SOI that no records existed and included supporting certifications from IG Egan reaffirming that as of May 10, 2023, DFAB had yet to issue a determination.

Upon review, the GRC is persuaded that no unlawful denial of access has occurred. The evidence of record supports the Custodian’s initial response and current Custodian’s certification that no responsive records exist. That is, the current Custodian has certified that no records exist. Further, IG Egan certified that DFAB was still investigating the issued raised by the Complainant and that no final determinations were made as of May 10, 2023, several months after the

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.

⁷ The GRC notes that the current Custodian did not address the ten (10) day delay between submission and receipt.

submission of the subject OPRA request. Further, 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.

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 current 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).
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Prepared By: Frank F. Caruso
Executive Director

March 19, 2024