



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 28, 2023 Government Records Council Meeting

Dale E. Parichuk
Complainant

Complaint No. 2022-57

v.

Washington Borough Business
Improvement District (Warren)
Custodian of Record

At the March 28, 2023 public meeting, the Government Records Council (“Council”) considered the March 21, 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 that no “deemed” denial of access occurred here because the Custodian timely responded in writing within the statutory time frame applicable to the instant OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

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 28th Day of March 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: April 3, 2023



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2023 Council Meeting**

**Dale E. Parichuk¹
Complainant**

GRC Complaint No. 2022-57

v.

**Washington Borough Business
Improvement District (Warren)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Original “posting picture” and text identifying Ethel Conry as mayor.
2. “[E]very person who has authorization to change or edit the” Washington Business Improvement District (“WBID”) Facebook page.
3. The person who accessed the Facebook page as administrator, moderator, or other on February 12, 2022 between 7:20 p.m. and 8:10 p.m.
4. Any and all communications, including e-mails and text messages, regarding the above Facebook post on February 12, 2022 between 7:20 p.m. and 8:10 p.m.

Custodian of Record: Melanie Thiel

Request Received by Custodian: February 16, 2022

Response Made by Custodian: February 16, 2022

GRC Complaint Received: March 15, 2022

Background³

Request and Response:

On February 13, 2022, a Sunday, the Complainant submitted an Open Public Records Act (“OPRA”) request to Administrative Assistant Mary Ann Raimond seeking the above-mentioned records. The Complainant noted that he could not determine the identity of WBID’s custodian of record from its website.

On February 16, 2022, Ms. Raimond forwarded the subject OPRA request to the Custodian. On the same day, the Custodian e-mailed the Complainant advising that she did not receive it until

¹ legal representation listed on record.

² Represented by Thomas P. Fischer, Esq. of Broscius, Fischer, & Zaiter (Washington, NJ).

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.

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that day because Ms. Raimond just saw it. Less than an hour later, the Custodian responded in writing responding the Complainant's OPRA request as follows:

1. The Custodian did not possess a copy of the original post.
2. Herself and publicist Dan Hirshberg are the Facebook account administrators and only individuals authorized to post.
3. During the hours in question, only herself and Mr. Hirshberg had access to WBID's Facebook page.
4. There were no communications concerning the post in question between the hours listed in the request, or at any other time.

Denial of Access Complaint:

On March 15, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated recently, the Borough's mayor stepped down and Ms. Conry was elected by the Council to serve as deputy mayor. The Complainant stated that following a recent grand opening, WBID released a Facebook post including a picture that identified Ms. Conry as the "Borough Deputy Mayor." The Complainant stated that he commented on that post that Ms. Conry was not the mayor and another user responded advising that the post did not say she was the mayor.

The Complainant stated that following the above interaction, he submitted the subject OPRA request. The Complainant asserted although the Custodian acknowledged receipt of his OPRA request, she failed to respond to it in violation of OPRA. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). The Complainant further contended that Ms. Raimond violated N.J.S.A. 47:1A-5(h) by failing to forward his OPRA request to the Custodian or directing him to her.⁴

Statement of Information:

On April 13, 2022, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on February 16, 2022. The Custodian certified that her search included reviewing the WBID Facebook page for the original post, which she could not access because it was edited due to a misspelling. The Custodian thus averred that she could not retrieve the original post. The Custodian also certified that she knew no communications existed because she was the one who identified the issue and edited the post. The Custodian certified that she responded in writing via e-mail on same day acknowledging receipt of the OPRA request. The Custodian certified that she responded again shortly thereafter responding to each request item.

The Custodian stated that on February 12, 2022, she organized a grand opening for a new business in Washington Borough. The Custodian stated that WBID always posts pictures and

⁴ The Complainant also alleged that the Custodian violated common law by failing to disclose the names of those individuals with authorized to access and make changes to WBID's Facebook page. However, the GRC is compelled to note that it has no authority over the common law right of access. N.J.S.A. 47:1A-7(b); see also Rowan, Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013). Thus, this issue is not properly before the GRC.

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information on its Facebook page. The Custodian certified that on this occasion, Mr. Hirschberg took photos and posted them to Facebook. The Custodian affirmed that later that day, she noticed that Ms. Conry was identified as the Borough Mayor and corrected the post to include the word “Deputy.”

The Custodian argued that she believed the Complainant filed the instant complaint in bad faith. The Custodian certified that she timely responded providing answers to OPRA request item Nos. 2 and 3 and stating that no records responsive exist to OPRA request item Nos. 1 and 4. The Custodian affirmed that once a Facebook post is edited, the previous post is overwritten and thus no longer exists. The Custodian further certified that no correspondence responsive to OPRA request item No. 4 existed.

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 the matter before the Council, the Complainant submitted his OPRA request to the Ms. Raimond on February 13, 2022, a Sunday. The Custodian responded via e-mail on February 16, 2022 acknowledging receipt of the subject OPRA request forwarded by Ms. Raimond. Less than an hour later, the Custodian again responded in writing to the Complainant’s OPRA request item by item. In his Denial of Access Complaint, the Complainant argued that the Custodian failed to respond to his OPRA request after the acknowledgement e-mail. However, the Custodian certified in the SOI that she responded in writing on February 16, 2022 and attached a copy of it.

In reviewing the evidence of record here, the GRC is persuaded that no “deemed” denial occurred. Specifically, the Custodian has certified that she responded via e-mail on February 16, 2022 and provided supporting documentation to support her certification. Further, the GRC confirms that the e-mail address used was the same contained within the subject OPRA request⁶ form. Thus, evidence supports that a timely response was proffered 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.

⁶ The GRC notes that the Complainant’s OPRA request item Nos. 2 and 3 are invalid on their face because they seek information. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

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Therefore, no “deemed” denial of access occurred here because the Custodian timely responded in writing within the statutory time frame applicable to the instant OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

In closing, the GRC will not address the Complainant’s assertion that Ms. Raimond violated N.J.S.A. 47:1A-5(h) because the evidence of record supports that she complied with said provision. Thus, no further analysis on this issue is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that no “deemed” denial of access occurred here because the Custodian timely responded in writing within the statutory time frame applicable to the instant OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Prepared By: Frank F. Caruso
Executive Director

March 21, 2023