



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 30, 2023 Government Records Council Meeting

Scott Madlinger
Complainant

Complaint No. 2023-2

v.

Absecon Police Department
Custodian of Record

At the May 30, 2023 public meeting, the Government Records Council (“Council”) considered the May 23, 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:

1. Because the GRC attempted on several occasions to obtain a completed Statement of Information from the Custodian, the Custodian’s failure to provide a completed SOI to the GRC hindered the GRC’s obligation to “receive, hear, review and adjudicate [the] complaint” pursuant to N.J.S.A. 47:1A-7(b), and resulted in a violation of N.J.A.C. 5:105-2.4(g). See Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015).
2. 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).
3. Because the Custodian failed to assert a legal explanation and/or statutory citation for the denial of access to the records relevant to the complaint, the Custodian shall disclose said records to the Complainant, advise if a valid lawful basis exists for withholding them, or advise that said records do not exist. N.J.S.A. 47:1A-6.
4. **The Custodian shall comply with Conclusion Number 3 above within ten (10) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council’s Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

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 30th Day of May 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: June 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 30, 2023 Council Meeting**

**Scott Madlinger¹
Complainant**

GRC Complaint No. 2023-2

v.

**Absecon Police Department (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “[A]ll information available pursuant to NJSA 47:1A-3(b) regarding the arrest of Jay Vyas, on or about November 24, 2022.”
2. “[P]olice CAD report(s) with narrative(s), preliminary law enforcement incident report(s), arrest report(s), global subject activity reports, criminal charge complaint(s), all use of force reports, affidavit(s) of probable cause, CDR-1 or CDR-2 involving Jay Vyas.”
3. “All police bodycam footage involving the arrest of Jay Vyas on or about November 24, 2022.”³

Custodian of Record: Carie Crone

Requests Received by Custodian: December 8, 2022

Response Made by Custodian: December 12, 2022

GRC Complaint Received: January 5, 2023

Background⁴

Request and Response:

On November 25, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 8, 2022, the Complainant submitted a follow up e-mail to his November 25, 2022 OPRA request, stating that he had not received a response. On December 12, 2022, the Custodian replied to the

¹ No legal representation listed on record.

² Represented by Frank Guaracini, III, Esq., of Blaney Donohue & Weinberg, P.C. (Avalon, NJ).

³ The Complainant did not specify a preferred method of delivery.

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.

Complainant's follow-up e-mail, informing him that neither the Clerk's Office nor the Police Records Department have a record of receiving the first (November 25, 2022) request. The Custodian stated that she forwarded the follow up request to the Police Records Department.

Denial of Access Complaint:

On January 5, 2023, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that on November 25, 2022, he submitted his OPRA request to the Custodian. The Complainant further asserted that on December 8, 2022, he sent a follow up e-mail to the Custodian, informing her that the response to his request was "past due." The Complainant stated that on December 12, 2022, the Custodian replied to his request, "[c]laim[ing] no record of [his] OPRA request. Will forward to police." The Complainant stated that as of January 4, 2023, he had not received a response to his request.

Statement of Information:

On March 27, 2023, the GRC sent the Custodian a request for the Statement of Information ("SOI"). The Custodian failed to submit the SOI to the GRC.

On April 13, 2023, the GRC sent the Custodian a notice that if the GRC did not receive the SOI within three (3) business days, the complaint would proceed to adjudication based only upon the information contained within the complaint.

On April 17, 2023, the Custodian's Counsel notified the GRC via e-mail that he was representing the Custodian in this matter. Counsel advised the GRC to provide an additional two-week extension of time for preparation of the SOI. On that same date, the GRC, via reply e-mail to the Custodian's Counsel, asked him to send a representation letter to the GRC. The GRC also informed Counsel that the GRC would allow the additional two-week extension of time for the Custodian to prepare/submit the SOI, which would be due on or before May 1, 2023. The GRC informed Counsel that because the SOI was due by April 11, 2023, the GRC would allow no additional extensions. On May 1, 2023, the Custodian's Counsel sent a representation letter to the GRC; however, the GRC received no further communications from the Custodian or Custodian's Counsel.

Analysis

Failure to Submit SOI

In furtherance of the GRC's obligation to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to government records[,] pursuant to N.J.S.A. 47:1A-7(b), the GRC requires a custodian to submit a completed SOI. The New Jersey Administrative Code provides:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than 10 business days from the date of receipt of the SOI from the Council's staff . . . Failure to comply with this time

period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(g).]

In Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015), the GRC sent two requests to the custodian seeking submission of the SOI; however, the custodian never submitted the SOI. The Council subsequently determined that the custodian violated N.J.A.C. 5:105-2.4(a).

In the instant complaint, the GRC sent the Custodian a request for the SOI on March 27, 2023. Although the SOI was due on April 11, 2023, the SOI was still not received by the GRC as of April 13, 2023, at which time the GRC sent a second request for the SOI to the Custodian. Thereafter, on April 17, 2023, the Custodian, through Counsel, requested an additional two-week extension of time to prepare and submit the SOI, which additional time was granted by the GRC. As such, the SOI was due on or before May 1, 2023; however, the Custodian never submitted a completed SOI to the GRC.

Therefore, because the GRC attempted on several occasions to obtain a completed SOI from the Custodian, the Custodian's failure to provide a completed SOI to the GRC hindered the GRC's obligation to "receive, hear, review and adjudicate [the] complaint" pursuant to N.J.S.A. 47:1A-7(b), and resulted in a violation of N.J.A.C. 5:105-2.4(g). See Kovacs, GRC 2014-196.

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).

Here, the Custodian e-mailed the Complainant on December 12, 2022, in reply to his December 8, 2022 follow up e-mail. The Custodian informed the Complainant that the municipality did not receive his OPRA request dated November 25, 2022, but upon receiving his follow up e-mail, they would proceed to address his request. Although the seventh (7th) business day following the Custodian's receipt of the Complainant's December 8, 2022 e-mail was December 19, 2022, the Complainant stated that as of January 4, 2023, he still had not received a response to his request

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.

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.

Here, the Complainant requested N.J.S.A. 47:1A-3(b) information regarding the arrest of Jay Vyas on or about November 24, 2022. The GRC notes that when an arrest has been made, N.J.S.A. 47:1A-3(b) provides, with certain exceptions, for disclosure of victim identification, defendant's name, age, residence, occupation, marital status and similar background information, the identity of the complaining party, the text of any charges, the identity of the investigating and arresting personnel and agency, the length of the investigation, the circumstances immediately surrounding the arrest, and details regarding bail. The Complainant also requested other specific records concerning the arrest of Jay Vyas, specifically: police bodycam recordings, CAD reports with narratives, incident and arrest reports, global subject activity reports, use of force reports, affidavits of probable cause, and criminal charge complaints, to include CDR-1 or CDR-2 forms.

It is clear from the evidence of record that the Custodian did not provide the Complainant with a legal explanation and/or statutory citation for the denial of access to the requested records.

Therefore, because the Custodian failed to assert a legal explanation and/or statutory citation for the denial of access to the records relevant to the complaint, the Custodian shall disclose said records to the Complainant, advise if a valid lawful basis exists for withholding them, or advise that said records do not exist. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the GRC attempted on several occasions to obtain a completed Statement of Information from the Custodian, the Custodian's failure to provide a completed SOI to the GRC hindered the GRC's obligation to "receive, hear, review and adjudicate [the] complaint" pursuant to N.J.S.A. 47:1A-7(b), and resulted in a violation of N.J.A.C. 5:105-2.4(g). See Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015).

2. 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).
3. Because the Custodian failed to assert a legal explanation and/or statutory citation for the denial of access to the records relevant to the complaint, the Custodian shall disclose said records to the Complainant, advise if a valid lawful basis exists for withholding them, or advise that said records do not exist. N.J.S.A. 47:1A-6.
4. **The Custodian shall comply with Conclusion Number 3 above within ten (10) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

Prepared By: John E. Stewart

May 23, 2023