



State of New Jersey

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JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

August 27, 2024 Government Records Council Meeting

Vincent Lepore
Complainant

Complaint No. 2022-157

v.

City of Long Branch (Monmouth)
Custodian of Record

At the August 27, 2024, public meeting, the Government Records Council (“Council”) considered the August 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 has borne her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. The Custodian’s extensions of time to respond to the Complainant’s request were reasonable and not unduly excessive based upon the totality of the circumstances. See Rodriguez v. Kean Univ., GRC Complaint No. 2016-87 (April 2018).
2. The Custodian did not violate OPRA when assessing a fee for the actual cost of the flash drives required to load the requested records. N.J.S.A. 47:1A-5(b). See Kelley v. Rockaway Twp. (Morris), 2010-269 (March 2012). Further, the Custodian is not required to disclose the responsive records until the Complainant is apprised of the current actual cost to provide the records on flash drives and remits payment. Further, no unlawful denial of access occurred. N.J.S.A. 47:1A-6; Santos v. N.J. State Parole Bd., GRC Complaint No. 2004-74 (August 2004); Cuba v. N. State Prison, GRC Complaint No. 2004-146 (February 2005). See Renna v. Twp. of Warren (Somerset), GRC Complaint No. 2008-40 (Interim Order November 19, 2008).

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 27th Day of August 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: August 29, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Vincent Lepore¹
Complainant**

GRC Complaint No. 2022-157

v.

**City of Long Branch (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: “[A]ll videos & audios, from both body cams & dash cams, covering the June 19, 2021 Riot, (sic) at Pier Village, extending to the train station.”

Custodian of Record: Heather Capone

Request Received by Custodian: January 10, 2022

Responses Made by Custodian: January 20, 2022, February 3, 2022, March 7, 2022, and March 15, 2022

GRC Complaint Received: April 27, 2022

Background³

Request and Responses:

On January 10, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 20, 2022, the seventh (7th) business day following receipt of said request,⁴ the Custodian responded in writing to the Complainant’s request obtaining an extension of time until February 3, 2022. On February 3, 2022, the Custodian e-mailed the Complainant, informing him that an extension of time was needed until March 7, 2022. On March 7, 2022, the Custodian e-mailed the Complainant, informing him that another extension of time was needed until March 15, 2022, to compile the requested records.

On March 15, 2022, the Custodian e-mailed the Complainant, informing him that there are fifty-seven (57) videos responsive to the request. The Custodian further informed the Complainant that the records cannot be delivered via e-mail because the file size exceeds the maximum e-mail attachment size allowed. The Custodian informed the Complainant that she could provide the requested records on nine (9) flash drives, and the actual cost of each flash drive is ten (10) dollars;

¹ No legal representation listed on record.

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello LLC (Iselin, 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.

⁴ January 17, 2022 was a state holiday.

therefore, the total amount for the flash drives would be \$90.00. The Custodian further informed the Complainant that upon receipt of payment she would deliver to him the flash drives containing the responsive records.

Denial of Access Complaint:

On April 27, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that as of March 7, 2022, the Custodian was out of time to respond to his request.

The Complainant stated that on April 11, 2022,⁵ the Custodian requested a \$90.00 fee so the requested videos can be processed and sent to the Custodian’s Counsel for review. The Complainant asserted that the videos are available to the court for criminal prosecution and the Custodian’s Counsel deceived the GRC by claiming he needed extensions of time to compile/review the videos. The Complainant stated that he refuses to pay the \$90.00 fee for the Custodian’s Counsel to review the videos.

Statement of Information:

On May 4, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 10, 2022, and responded on January 20, 2022, informing the Complainant that an extension of time was needed until February 3, 2022. The Custodian certified that, on February 3, 2022, she e-mailed the Complainant, informing him that another extension of time was needed until March 7, 2022. The Custodian certified that on February 16, 2022, the Complainant filed Lepore v. City of Long Branch (Monmouth), GRC Complaint No. 2022-33 (March 2022).⁶ The Custodian certified that, on March 7, 2022, during the pendency of GRC 2022-33, she notified the Complainant that another extension of time was needed until March 15, 2022, to compile the responsive records.

The Custodian certified that, on March 15, 2022, she e-mailed the Complainant informing him that fifty-seven (57) videos of body camera footage were determined to be responsive to the request. The Custodian certified that the extensive amount of footage far exceeded the maximum allowable e-mail attachment size. The Custodian certified that she also informed the Complainant that the responsive records could be provided on nine (9) flash drives, and at a cost of \$10.00 each, totaling \$90.00. The Custodian certified that she further informed the Complainant that upon receiving his payment of \$90.00 for the flash drives containing the responsive records, she would deliver them to him. The Custodian certified that she asked the Complainant to let her know how he wished to proceed.

The Custodian certified that, on March 29, 2022, the GRC determined that the Custodian’s extensions had been reasonable and dismissed the Complainant’s February 16, 2022 complaint. The Custodian further certified that the GRC found that complaint to be materially defective.

⁵ The Custodian responded to the Complainant on March 15, 2022, not April 11, 2022.

⁶ That complaint was administratively dismissed on March 29, 2022 because it was procedurally defective (unripe).

The Custodian certified that the Complainant never advised her how he wished to proceed, but instead filed the within complaint. The Custodian certified that the USB flash drives that are utilized by the municipality to produce responsive records were purchased at a cost of \$10.00 each. The Custodian further certified that N.J.S.A. 47:1A-5(b) permits a government agency to charge for actual costs to produce requested records. The Custodian certified that she properly and timely responded to the Complainant's OPRA request, informing the Complainant that the responsive records would be disclosed upon receipt of the actual costs associated with the production of the records.

Additional Submissions:

On July 29, 2024, the GRC e-mailed the Custodian, through Counsel, a request for additional information. The GRC asked the Custodian to certify whether she already loaded the requested records onto the flash drives costing \$10.00 each. The GRC also stated that if the records were loaded onto the flash drives, the Custodian must certify if the flash drives are still being held pending purchase by the Complainant. The GRC informed the Custodian that if the records were not previously loaded onto the flash drives, she must certify how much the municipality presently pays for such flash drives, and the number needed to fulfill the Complainant's request.

On August 14, 2024, the Custodian⁷ responded to the GRC's request for additional information. The Custodian certified that the requested records have not yet been loaded onto the flash drives. The Custodian further certified that the present cost for a 64 GB flash drive is \$8.32, and approximately four (4) drives would be required to produce the requested records.

Analysis

Timeliness

The Complainant asserted as his first issue in the complaint that the Custodian failed to timely respond to his OPRA request. Specifically, the Complainant alleged that, as of March 7, 2022, the Custodian was out of time to respond to his request.

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Dep't of Transportation, GRC

⁷ The present Custodian, Deputy Clerk Amanda Caldwell, prepared the certification requested by the GRC.

Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).”

[Id.]

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant’s OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian’s request for an extension of time [to a specific date] to respond to the Complainant’s OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

[Id.]

Moreover, in Werner v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant’s OPRA request. The Council concluded that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension pursuant to OPRA. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.”

For further guidance, the GRC looks to Rodriguez v. Kean Univ., GRC Complaint No. 2016-87 (April 2018), wherein the Council found that the custodian’s extensions were reasonable. In Rodriguez, the Council held that the Complainant’s request for “Public Access Files” held by Kean warranted an extension of forty-four (44) business days, as the request produced 437 pages

of records that needed to be reviewed for potential redactions. The Council held that the extensions were not unduly excessive based on the totality of the circumstances.

In the instant complaint, following the initial response, the Custodian extended the response time on three (3) occasions for a total of thirty-seven (37) business days. As noted above, a requestor's approval is not required for a valid extension.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.⁸ Id.

The Complainant's request yielded fifty-seven (57) responsive videos of body camera footage. Moreover, the Complainant admitted in his complaint that he knew the Custodian's Counsel needed extensions of time to review the videos.

The Custodian in her initial January 20, 2022 response sought an extension of ten (10) business days to respond, informing the Complainant that the response would be provided by February 3, 2022. On February 3, 2022, the Custodian sought an additional extension of time until March 7, 2022, encompassing twenty-one (21) more business days. The GRC notes that in Lepore, GRC 2022-33 (administratively dismissed on March 29, 2022 as unripe), the Council found that the January 20, 2022 and February 3, 2022 "extensions were reasonable given the nature of the records requested."

On March 7, 2022, the Custodian responded, requiring one more six (6) business day extension of time until March 15, 2022. The Complainant, however, ignored this extension of time, asserting that as of March 7, 2022, the Custodian was out of time to respond. The GRC disagrees with the Complainant's assertion.

As in Rodriguez, GRC 2016-87, the extensions here are not excessive based on the totality of the circumstances. For each of the extensions, the Custodian provided an anticipated deadline date, and responded by that date. The GRC had already concluded that the January 20, 2022 and February 3, 2022 extensions were reasonable. Then on March 7, 2022, the Custodian responded with the need for a final six (6) business day extension of time. Given the voluminous nature of the request, and the time the Custodian's Counsel would need to review fifty seven (57) responsive videos for potential redactions, such final extension is reasonable under the totality of the circumstances.

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian's extensions of time to respond

⁸ "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.

to the Complainant's request were reasonable and not unduly excessive based upon the totality of the circumstances. See Rodriguez, GRC 2016-87.

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.

OPRA further provides that:

A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation . . . Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.

[N.J.S.A. 47:1A-5(b).]

In Kelley v. Rockaway Twp. (Morris), GRC Complaint No. 2010-269 (March 2012), the custodian charged \$1.78 for a CD. The complainant subsequently disputed the fee, arguing that it did not represent the actual cost of the CD. However, the custodian certified in the SOI that \$1.78 was the actual cost for providing the CD, and the complainant failed to submit any evidence to refute the custodian's certification. As such, the Council found that the \$1.78 charge for the CD was appropriate and warranted under OPRA (citing Libertarian Party of Cent. N.J. v. Murphy, 384 N.J. Super. 136 (App. Div. 2006)).

Additionally, the Council has long held that a custodian is not required to disclose requested records until receiving payment for any incurred fees. In Santos v. N.J. State Parole Bd., GRC Complaint No. 2004-74 (August 2004), the Council held that as "the Custodian did not receive payment for the actual duplication cost of the requested records, [he] was not required under OPRA to release said copies." Id. Subsequently, in Cuba v. N. State Prison, GRC Complaint No. 2004-146 (February 2005), the Council held that "the Custodian was proper in withholding the release of the requested record until receiving payment for the copying fee from the Complainant." Id. In addition to payment for copying costs, the Council has held that payment of the actual costs for other types of media needed to duplicate the record is a prerequisite for disclosure of the record. See Renna v. Twp. of Warren (Somerset), GRC Complaint No. 2008-40 (Interim Order November 19, 2008), wherein the Council held that "[t]he Custodian shall disclose the requested records to the Complainant upon payment of the . . . cost of the CD-ROM." Id.

Here, as in Kelly, GRC 2010-269, the Custodian certified in the SOI that the actual cost for the flash drives was \$10.00 each, for a total of \$90.00 for nine (9) flash drives which was the number needed to load the responsive recordings. Furthermore, no evidence exists in the record refuting the Custodian's certification. However, in a subsequent certification dated August 14, 2024, the Custodian certified that the requested records have not yet been loaded onto the nine (9)

flash drives, and the present cost for a 64 GB flash drive is \$8.32. The Custodian further certified that approximately four (4) flash drives would now be needed to provide the requested records; therefore, the present approximate actual cost associated with the production of the records would be \$33.28 if all of the records could be loaded onto four drives.

Accordingly, the Custodian did not violate OPRA when assessing a fee for the actual cost of the flash drives required to load the requested records. N.J.S.A. 47:1A-5(b). See Kelley, GRC 2010-269. Further, the Custodian is not required to disclose the responsive records until the Complainant is apprised of the current actual cost to provide the records on flash drives and remits payment. Further, no unlawful denial of access occurred. N.J.S.A. 47:1A-6; Santos, GRC 2004-74; Cuba, GRC 2004-146. See Renna, GRC 2008-40.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian's extensions of time to respond to the Complainant's request were reasonable and not unduly excessive based upon the totality of the circumstances. See Rodriguez v. Kean Univ., GRC Complaint No. 2016-87 (April 2018).
2. The Custodian did not violate OPRA when assessing a fee for the actual cost of the flash drives required to load the requested records. N.J.S.A. 47:1A-5(b). See Kelley v. Rockaway Twp. (Morris), 2010-269 (March 2012). Further, the Custodian is not required to disclose the responsive records until the Complainant is apprised of the current actual cost to provide the records on flash drives and remits payment. Further, no unlawful denial of access occurred. N.J.S.A. 47:1A-6; Santos v. N.J. State Parole Bd., GRC Complaint No. 2004-74 (August 2004); Cuba v. N. State Prison, GRC Complaint No. 2004-146 (February 2005). See Renna v. Twp. of Warren (Somerset), GRC Complaint No. 2008-40 (Interim Order November 19, 2008).

Prepared By: John E. Stewart

August 20, 2024