



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
*Governor*

TAHESHA L. WAY  
*Lieutenant Governor*

JACQUELYN A. SUÁREZ  
*Commissioner*

### FINAL DECISION

#### June 25, 2024 Government Records Council Meeting

Marc Liebeskind  
Complainant

Complaint No. 2022-569

v.

NJ Department of Transportation  
Custodian of Record

At the June 25, 2024 public meeting, the Government Records Council (“Council”) considered the June 18, 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 the Custodian did not bear his burden of proof that he 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).

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 25<sup>th</sup> Day of June 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: June 27, 2024**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 25, 2024 Council Meeting**

**Marc Liebeskind<sup>1</sup>  
Complainant**

**GRC Complaint No. 2022-569**

v.

**N.J. Department of Transportation<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of the following inclusive of a list of agencies and individual senders/recipients:

1. All communications between the Borough of Highland Park (“Borough”) and New Jersey Department of Transportation (“DOT”) regarding temporary and permanent closures of North 4<sup>th</sup> Avenue and South 3<sup>rd</sup> Avenue in the Borough between April 1, 2022 and present.
2. All communications sent or received by DOT regarding the closures in the Borough between April 1, 2022 and present.
3. “[A]ll internal [DOT records]” regarding the closures in the Borough from June 1, 2022 to present.
4. All permits and applications for permits regarding the closures in the Borough from April 1, 2022 to present.

**Custodian of Record:** Joshua Joseph

**Request Received by Custodian:** August 30, 2022

**Response Made by Custodian:** September 12, 2022

**GRC Complaint Received:** October 17, 2022

**Background<sup>3</sup>**

**Request and Response:**

On August 30, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 31, 2022, the Custodian responded in writing acknowledging receipt of the OPRA request. On September 12, 2022, the eighth (8<sup>th</sup>) business day after receipt of the OPRA request, the Custodian responded in writing stating that an extension of time until September 26, 2022 was necessary to continue searching for

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Brad M. Reiter.

<sup>3</sup> 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.

and reviewing responsive records. On September 27, 2022, the Custodian responded in writing obtaining an additional extension of time until October 11, 2022 to continue searching for and reviewing responsive records.

On October 11, 2022, the Custodian responded in writing obtaining another extension of time until October 25, 2022 to continue searching for and reviewing responsive records. On the same day, the Complainant responded taking issue with the extensions as “unreasonable.”

#### Denial of Access Complaint:

On October 17, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s failure to initially respond within the statutorily mandated time frame resulted in a “deemed” denial of access. The Complainant further asserted that the Custodian’s failure to respond within the self-imposed September 25, 2022 extension resulted in an additional “deemed” denial of access. The Complainant also asserted that the repeated extensions constitute an unreasonable denial of access.

#### Supplemental Responses:

On October 25, 2022, the Custodian responded in writing obtaining another extension of time until November 1, 2022 to continue searching for and reviewing responsive records. On November 1, 2022, the Custodian responded in writing obtaining another extension of time until November 9, 2022 to continue searching for and reviewing responsive records. On November 9, 2022, the Custodian responded in writing obtaining another extension of time until November 17, 2022 to continue searching for and reviewing responsive records.

On November 17, 2022, the Custodian responded in writing stating that DOT has identified responsive records but are still reviewing same. The Custodian noted that requests seeking “e-mail correspondence records are among the most time-consuming records requests” that DOT processes. The Custodian explained the process DOT engages in to respond to such requests and reiterated that same takes significant time. The Custodian thus obtained another extension of time until December 2, 2022 to continue searching for and reviewing responsive records. On December 1, 2022, the Custodian responded in writing disclosing 111 pages e-mails and attachments. The Custodian noted that personally identifying information, as well as some content falling within the “inter-agency or intra-agency advisory, consultative, and deliberative [(“ACD”)] material” exemption, has been redacted from the disclosed records.

#### Statement of Information:

On January 9, 2024, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 30, 2022. The Custodian certified that his search included DOT employees conducting e-mail database searches of the employee accounts listed by the Complainant. The Custodian certified that those current employees were also contacted to conduct additional searches. The Custodian averred that the search produced over 1,200 potentially responsive records that required individual review for relevancy and redaction, where applicable. The Custodian noted that the subject matter identified

in the OPRA request required the records to go through “several layers” of internal review. The Custodian affirmed that the final responsive, redacted e-mails were organized and converted into a .pdf for disclosure to the Complainant.

The Custodian certified that he initially responded in writing on September 12, 2022 extending the response time frame through September 26, 2022. The Custodian noted that he subsequently extended the response time frame several more times, acknowledging that the September 27, 2022 response was late. The Custodian certified that he ultimately responded on December 1, 2022 disclosing 111 pages of responsive e-mails and attachments with redactions for personal and ACD information. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1.

The Custodian contended that no unlawful denial of access occurred because all responses, except the second extension request, were timely and included a specific extension date. N.J.S.A. 47:1A-5(i); See also Starkey v. N.J. Dep’t of Transp., GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010) and O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010). See also Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011) and Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010).

The Custodian also argued that the amount and length of the extensions were reasonable given the scope of the subject OPRA request. The Custodian contended that the OPRA request sought correspondence between numerous senders and recipients over a period of five (5) months that resulted in 1,200 potentially responsive e-mails. The Custodian asserted that the extensions required the necessary review previously described above.

The Custodian finally contended his actions were not knowing and willful in nature. N.J.S.A. 47:1A-11; Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). The Custodian argued that while his September 27, 2022 response was untimely by one (1) day, it was unintentional and due to an oversight.<sup>4</sup>

## 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).<sup>5</sup> 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

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<sup>4</sup> The Complainant submitted a sur-reply to the SOI; however, same is not being considered because it was filed beyond the five (5) business days allowed under N.J.A.C. 5:105-2.4(n).

<sup>5</sup> 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.

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 asserted that the Custodian committed a “deemed” denial on two (2) occasions: the first coming after the expiration of the initial seven (7) business days and the second coming after the expiration of the first deadline. In the SOI, the Custodian certified that he received the Complainant’s OPRA request on August 30, 2022, but did not initially respond until September 12, 2022. Taking into account the Labor Day holiday, September 12, 2022 represented the eighth (8<sup>th</sup>) business day after receipt of the subject OPRA request. Based on this, the evidence of record supports that the Custodian’s initial response was beyond the statutorily mandated time frame and thus a “deemed” denial of access occurred.

Therefore, the Custodian did not bear his burden of proof that he 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.

Finally, the GRC notes that it does not reach the extension issue, both the “deemed” denial of the first extension and the overall reasonableness of the extended time frame, because the Complainant’s OPRA request was already considered “deemed” denied at the time that the Custodian responded thereto on September 12, 2022.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian did not bear his burden of proof that he 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).

Prepared By: Frank F. Caruso  
Executive Director

June 18, 2024