



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

May 21, 2024 Government Records Council Meeting

Brett J. Verbist
Complainant

Complaint No. 2023-1

v.

Morris County Department of
Law & Public Safety
Custodian of Record

At the May 21, 2024 public meeting, the Government Records Council (“Council”) considered the May 14, 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 has borne her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, no “deemed” denial of access occurred here. 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 21st Day of May 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: May 23, 2024



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 21, 2024 Council Meeting**

**Brett J. Verbist¹
Complainant**

GRC Complaint No. 2023-1

v.

**Morris County Department
of Law & Public Safety²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. “[A]ll documents” related to an October 25, 2022 letter to the Complainant, “including but not limited to all diagnostic tool results and specific validated tests used, recommendations regarding disqualification, credentials of examiners [including licenses and certificates/trainings]” as well as “all e-mails, inter-office communication and deliberative notes regarding [the Complainant].”
2. “[A]ny and all policies and procedures relative to appealing a withdrawal of conditional employment.”

Custodian of Record: Sheila M. Leary

Request Received by Custodian: December 13, 2022

Response Made by Custodian: December 15, 2022

GRC Complaint Received: January 5, 2023

Background³

Request and Response:

On December 13, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 15, 2022, the second (2nd) business day after receipt of the OPRA request, the Custodian responded in writing denying the subject OPRA request under the personal privacy interest. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009). The Custodian noted that records may be available through the Civil Service Commission’s (“CSC”) appeal process and provided information on how to pursue same.

¹ No legal representation listed on record.

² Represented by Graham K. Staton, Esq., of Inglesino, Webster, Wyciskala, & Taylor, LLC. (Parsippany, 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.

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 the Custodian failed to respond to his OPRA request.

Statement of Information:

On February 17, 2023, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 13, 2022. The Custodian certified that her search included forwarding the OPRA request to Morris County’s (“County”) Director of Employee Resources to locate any responsive records. The Custodian affirmed that two (2) records totaling fifteen (15) pages was located. The Custodian certified that she responded in writing on December 15, 2022 denying access to the subject OPRA request under N.J.S.A. 47:1A-1.

The Custodian stated that the subject OPRA request resulted from the Complainant’s application for employment as a 911 dispatcher and the County’s rescinding of a conditional offer. The Custodian noted that such a position requires candidates to undergo a pre-employment and psychological screening, which occurred here. The Custodian argued that her response was timely and further that the denial was lawful because the responsive records contained “inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material,” were mental health records containing personal information, and constituted personnel records.

The Custodian argued that regarding the ACD exemption, the County relies upon the responsive records to determine whether to hire the candidate; thus, they are pre-decisional and entitled to the privilege. The Custodian further argued that the requested records were clearly mental health records exempt from disclosure regardless of whether same pertained to the Complainant. Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”); McLawhorn v. N.J. Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013); Riley v. N.J. Dep’t of Corr., GRC Complaint No. 2013-345 (July 2014). The Custodian also argued that the records are part of an employment application that the Council has already determined to be exempt from disclosure under the personnel exemption and EO 26. Toscano v. N.J. Dep’t of Human Servs., Div. of Mental Health Servs., GRC Complaint No. 2010-147 (May 2011).

The Custodian finally noted that the Complainant was apprised of his right to appeal the County’s decision through the CSC. The Custodian asserted that the Complainant could obtain the responsive records through that available administrative remedy but failed to avail himself of the process.

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).⁴ 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).

The Complainant filed his OPRA request with the County on December 13, 2022. On December 15, 2022, the Custodian responded denying access to the records responsive to the subject OPRA request. N.J.S.A. 47:1A-1. However, on January 5, 2023, the Complainant filed the instant complaint asserting that the Custodian failed to respond to his OPRA request. In the SOI, the Custodian certified that she responded via e-mail on December 15, 2022 and included supporting documentation of her response. Upon review, the GRC has confirmed that the response e-mail was sent to the correct e-mail address. Thus, the evidence of record supports that a timely response occurred.

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. As such, no “deemed” denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).⁵

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that 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. As such, no “deemed” denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

Prepared By: Frank F. Caruso
Executive Director

May 14, 2024

⁴ 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.

⁵ Because an alleged “deemed” denial was the only issue before the Council, it will not substantively address the disclosability of the responsive records. However, it should be noted that precedential case law provides that records directly containing “information related to medical, psychiatric, or psychological history, diagnosis, treatment or evaluation . . .” are exempt from disclosure regardless of whether a requestor is the subject of same. See N.J.S.A. 47:1A-9; EO 26; Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017).