



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

June 25, 2024 Government Records Council Meeting

James M. Janone
Complainant

Complaint No. 2023-42

v.

Borough of Victory Gardens (Morris)
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:

1. 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). See Dittrich v. City of Hoboken, GRC Complaint No. 2008-04 (March 2009).
2. The Custodian unlawfully denied access to Complainant’s OPRA request seeking the 2023 Planning Board Re-organization recording. N.J.S.A. 47:1A-6; Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004); Miller v. Westwood Reg’l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010). Thus, the Custodian must disclose the responsive recording to the Complainant.
3. **The Custodian shall comply with conclusion No. 2 above within twenty (20) 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 25th 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**

**James M. Janone¹
Complainant**

GRC Complaint No. 2023-42

v.

**Borough of Victory Gardens (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail of the audio recording for the 2023 Planning Board Re-Organization meeting.

Custodian of Record: Deborah Evans

Request Received by Custodian: January 25, 2023

Response Made by Custodian: None.

GRC Complaint Received: February 23, 2023

Background³

Request and Response:

On January 25, 2023, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On February 23, 2023, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he was unlawfully denied access to the responsive recording. The Complainant argued that after not receiving a response, he discussed the issue with Custodian’s Counsel at a February 14, 2023 public meeting and was told that he was “not entitled to” the recording. The Complainant asserted that he advised Counsel at that time that such a response was not a valid denial basis. The Complainant asserted that he did not receive a formal denial of access as of the date of this complaint.

¹ No legal representation listed on record.

² Represented by Philip Feintuch, Esq., of Feintuch, Porwich & Feintuch (Jersey City, 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.

Statement of Information:⁴

On August 3, 2023, the Custodian filed a Statement of Information (“SOI”).⁵ The Custodian certified that she received the Complainant’s OPRA request on January 25, 2023. The Custodian certified that on January 25, and 27, 2023 respectively, the Planning Board Clerk and Custodian’s Counsel denied the Complainant access because the relevant minutes were not approved. The Custodian affirmed that Counsel reiterated this response at a February 14, 2023 Council meeting.

The Custodian contended that she attempted to offer the Complainant a copy of draft meeting minutes in lieu of the recording, but he refused to accept them. The Custodian asserted that she subsequently gave the Complainant a copy of the draft minutes when he visited her office and in advance of the February 23, 2023 Planning Board meeting. The Custodian asserted that the Complainant made no further contact with her until the filing of this complaint. The Custodian noted that the 2023 Re-organization minutes were finally approved at the April 19, 2023 Planning Board meeting.

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).⁶ 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 on January 25, 2023. In the Denial of Access Complaint, the Complainant asserted that he was told multiple times that he could not have access to the responsive recording. The Complainant also noted that he never received a formal denial. In the SOI, the Custodian corroborated that the Complainant was advised the record could not be disclosed. However, there is no evidence in the record evidencing that the Custodian or Custodian’s Counsel ever sent the Complainant a written response, as required under N.J.S.A. 47:1A-5(g). See also Dittrich v. City of Hoboken, GRC Complaint No. 2008-04 (March 2009) (holding that a verbal response did not constitute a proper response under OPRA).

⁴ On March 30, 2023, the GRC referred this complaint to mediation. On July 20, 2023, this complaint was referred back to the GRC for adjudication.

⁵ The Custodian originally submitted the SOI on August 2, 2023; however, the GRC rejected submission because the Complainant was not copied thereon. N.J.A.C. 5:105-2.4(b), (h). The Custodian rectified this issue on August 3, 2023.

⁶ 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. See Dittrich, GRC 2008-04.

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.

In Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004) and Miller v. Westwood Reg'l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010), the Council held that audio recordings of public session meetings were disclosable because they represented a verbatim account of the meeting. This is regardless of whether minutes had been approved for accuracy and content. See also Brennan v. Borough of Bay Head (Ocean), GRC Complaint No. 2020-166 (Interim Order dated September 28, 2021).

Here, the Complainant argued that he believed the denial verbally espoused to him was unlawful. In the SOI, the Custodian asserted that she did not disclose the responsive recording because the underlying minutes had not been approved. The Custodian asserted that she offered to, and eventually did provide, draft meeting minutes as an alternative to the actual recording.

The GRC finds that its past case law on the disclosability of meeting audio recordings regardless of the approval status of minutes to be directly on point here. See Burlett, GRC 2004-75; Miller, GRC 2009-49. Further, it should be noted that offering and disclosing draft, unapproved minutes as an accommodation belies the Custodian's sole reason for denying the former in the first place. This is especially true given longstanding precedent holding that draft meeting minutes are exempt from disclosure OPRA. See Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018) (certif. denied 233 N.J. 484 (2018)); Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006).

Accordingly, the Custodian unlawfully denied access to Complainant's OPRA request seeking the 2023 Planning Board Re-organization recording. N.J.S.A. 47:1A-6; Burlett, GRC 2004-75; Miller, GRC 2009-49. Thus, the Custodian must disclose the responsive recording to the Complainant.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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). See Dittrich v. City of Hoboken, GRC Complaint No. 2008-04 (March 2009).

2. The Custodian unlawfully denied access to Complainant's OPRA request seeking the 2023 Planning Board Re-organization recording. N.J.S.A. 47:1A-6; Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004); Miller v. Westwood Reg'l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010). Thus, the Custodian must disclose the responsive recording to the Complainant.
3. **The Custodian shall comply with conclusion No. 2 above within twenty (20) 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: Frank F. Caruso
Executive Director

June 18, 2024