



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

August 11, 2009 Government Records Council Meeting

Arthur Muglia
Complainant

Complaint No. 2008-148

v.

New Jersey Department of Corrections
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 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’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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the record requested is a Special Investigation Division record that cannot be safely redacted and disclosed, the record requested by the Complainant falls within the exemption stated in *N.J.A.C. 10A:1-1.4* through *31-6.13*, PRN 2002-228, July 1, 2002. Therefore, pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26, and *N.J.A.C. 10A:1-1.4* through *31-6.13* of the New Jersey Department of Corrections Proposed Amendments, which contains a clear exemption from disclosure of Special Investigation Division records when redactions alone would be insufficient to ensure the safety of any person or the safe and secure operation of a correctional facility, the Custodian has borne her burden of proving that the requested Special Investigation Division record is exempt from disclosure. Accordingly, the Custodian has not unlawfully denied the Complainant access to the record requested.
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances because the Complainant did not have a lawful right of access to the requested record. However, the Custodian’s unlawful “deemed” denial of



access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 11th Day of August, 2009

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 17, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Arthur Muglia¹
Complainant**

GRC Complaint No. 2008-148

v.

**New Jersey Department of Corrections²
Custodian of Records**

Records Relevant to Complaint: Copy of written statement from civilian complainant, designated A-5 by the Department of Corrections.³

Request Made: April 28, 2008⁴

Response Made: May 8, 2008

Custodian: Michelle Hammel

GRC Complaint Filed: July 21, 2008⁵

Background

April 28, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

May 8, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eighth (8th) business day following receipt of such request. The Custodian states that access to written statement A-5 is denied because the record was gathered by the Special Investigations Division ("SID") and informant and SID investigation documents are not considered government records subject to public access provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility. The Custodian further states that such disclosure would compromise investigative techniques of the SID.

July 21, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

¹ No legal representation listed on record.

² Represented by DAG Ellen Hale, on behalf of the NJ Attorney General.

³ The Complainant requested additional records that are not relevant to this complaint.

⁴ The Complainant's OPRA request is signed April 21, 2008. However, the OPRA request has a time stamp which indicates that the Custodian received the Complainant's OPRA request on April 28, 2008.

⁵ The GRC received the Denial of Access Complaint on said date.

- Adjudication of disciplinary charge sheet dated April 7, 2008;
- Letter from the Custodian to the Complainant dated May 8, 2008.

The Complainant states that the Custodian denied the Complainant access to written statement A-5 under the mistaken belief that it was a statement from a confidential informant. The Complainant states that the record requested is listed on his adjudication of disciplinary charge sheet as non-confidential. The Complainant further states that he viewed the record at his trial. The Complainant states that disclosure of a redacted version of this record does not compromise the SID investigative techniques or place the informant at risk. The Complainant argues that written statement A-5 is a government record subject to disclosure under OPRA because the record is not confidential.

The Complainant agreed to mediate this complaint.

July 28, 2008⁶

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel indicates that she is in receipt of the Complainant's Denial of Access Complaint. The Custodian's Counsel further indicates that she will provide the Statement of Information on July 31, 2008.

July 31, 2008⁷

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated April 28, 2008;
- Letter from the Custodian to the Complainant dated May 8, 2008.

The Custodian states that she responded to the Complainant's OPRA request on May 8, 2008. The Custodian asserts that she correctly determined that the record requested, a civilian statement marked A-5 and stamped confidential, was not subject to disclosure under OPRA. The Custodian argues that pursuant to N.J.S.A. 47:1A-1.1, the definition of a government record does not include confidential information. The Custodian also states that New Jersey Department of Corrections ("DOC") proposed regulations at *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002 state:

"In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., as amended and supplemented, any other law, regulation promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court, or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

1. Informant documents and statements;

⁶ The GRC interprets this letter as a rejection of mediation.

⁷ Additional material was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

6. A report or record relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement.”

The Custodian states that the record the Complainant seeks came into the possession of the DOC when the SID received a written statement from a civilian who indicated that the Complainant was inappropriately contacting the civilian via a contraband cell phone. The Custodian states that this statement was classified as an A-5 statement within the DOC. The Custodian certifies that the SID stamped the A-5 statement “confidential” because it included the civilian’s personal contact information. The Custodian further certifies that the A-5 statement and the information it contains, were part of a SID investigation and therefore was not disclosable.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA further provides:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order of the Governor*; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order...” (Emphasis added.) N.J.S.A. 47:1A-9.a.

Paragraph 4 of Executive Order No. 21 provides in relevant part as follows:

“[i]n light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, *State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order...*”

Paragraph 6 of Executive Order No. 26 provides that:

“[t]he remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order.” Executive Order No. 26 (McGreevey 2002).

The proposed amendments to regulations of the New Jersey Department of Corrections provide in pertinent part that:

“...Special Investigations Division investigations, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility...[are exempt from disclosure]” *N.J.A.C. 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002.*

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.

The Custodian responded in writing to the Complainant’s OPRA request on the eighth (8th) business day following receipt of such request. The Custodian stated that access to written statement A-5 was denied because the record was gathered by the SID and informant and SID investigation documents are not considered government records subject to public access.

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. As also prescribed under 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. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁸ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA

⁸ It is the GRC’s position that 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, Arthur Muglia v. New Jersey Department of Corrections, 2008-148 – Findings and Recommendations of the Executive Director 4

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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The Custodian did not respond to the Complainant’s OPRA request until the eighth (8th) business day following receipt of the OPRA request. Therefore, 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Although the Custodian’s delay in responding to the Complainant’s OPRA request resulted in a “deemed” denial, the Custodian has not unlawfully denied the Complaint access to the record requested. The DOC proposed regulations remain in effect pursuant to paragraph 4 of Executive Order No. 21 and paragraph 6 of Executive Order No. 26 (McGreevey 2002).

Paragraph 4 of Executive Order No. 21 provides in relevant part as follows:

“In light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order...” Executive Order No. 21 (McGreevey 2002).

Paragraph 6 of Executive Order No. 26 provides that “[t]he remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order.” Paragraph 4 of Executive Order No. 21 was one of its remaining provisions.

The Complainant requested a written statement from a civilian complainant, designated A-5 by the DOC. The Custodian denied the Complainant’s OPRA request stating that the DOC’s proposed regulations at *N.J.A.C. 10A:1-1.4* through 31-6.13, PRN 2002-228, July 1, 2002 exempts informant’s statements and records relating to an identified individual which, if disclosed, would jeopardize the safety of any person from disclosure. The Complainant asserted that disclosure of a redacted version of this record does not compromise SID investigative techniques or place the informant at risk.

even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Although these Orders were issued over six (6) years ago, no rescinding or modifying order has been issued. Accordingly, they are still in full force and effect. The Superior Court in an unpublished opinion examined the continuing effect of these Orders in 2005. In Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005), the court stated “[paragraph 6 of Executive Order No. 26] continues to permit a department or agency within State Government (sic) to adopt rules and regulations and to permit the operation of a proposed rule or regulation prior to its final adoption. Therefore...public ‘agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published...’” *Id.* at 11.

In that case, the court went on to state that “[i]t appears, from the language of both Executive Orders, that these provisions were added to provide sufficient time for departments and agencies within State government to evaluate their records, propose regulations and withhold certain documents from public inspection pending the adoption of the proposed rules. While this process may be at variance with the normal regulatory process, one can only conclude that the Executive Branch, understanding the broad scope of OPRA, felt it was appropriate to have agencies and departments, within State government, undertake a careful review and analysis of its records to determine, for purposes of security and safety, those records to be considered confidential.” *Id.* at 12.

The court further held that “[r]ecognizing the time delay inherent in the normal rule adoption process, Executive Order No. 21 and Executive Order No. 26 included language to permit custodians of records to deny access, based on the proposed rule, pending final adoption. Now, three years after the passage of OPRA, for the court, the continued efficacy of that practice raises some concerns.” *Id.*

The court concluded, however, that “[w]hile [it] does not know the status of this proposed regulation, under Executive Order No. 21, paragraph 4 and Executive Order No. 26, paragraph 6, resolution of that issue is not required. ... the court assumes that the proposed rule change is still pending.” *Id.* at 13.

The proposed regulation at issue here states that “Special Investigations Division investigations, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility...[are exempt from disclosure]” *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002. The Custodian has certified that written statement A-5 is an SID record. The Custodian has stated that disclosure of a redacted version of the record requested would compromise the investigative techniques of the SID.

Because the record requested is a SID record that cannot be safely redacted and disclosed, the record requested by the Complainant falls within the exemption stated in *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002. Therefore, pursuant to N.J.S.A. 47:1A-9.a., E.O. No. 26., and *N.J.A.C.* 10A:1-1.4 through 31-6.13 of the New

Jersey Department of Corrections Proposed Amendments, which contains a clear exemption from disclosure of SID records when redactions alone would be insufficient to ensure the safety of any person or the safe and secure operation of a correctional facility, the Custodian has borne her burden of proving that the requested SID record is exempt from disclosure. Accordingly, the Custodian has not unlawfully denied the Complainant access to the record requested.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances because the Complainant did not have a lawful right of access to the requested record. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the record requested is a Special Investigation Division record that cannot be safely redacted and disclosed, the record requested by the Complainant falls within the exemption stated in *N.J.A.C. 10A:1-1.4 through 31-6.13*, PRN 2002-228, July 1, 2002. Therefore, pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26, and *N.J.A.C. 10A:1-1.4 through 31-6.13* of the New Jersey Department of Corrections Proposed Amendments, which contains a clear exemption from disclosure of Special Investigation Division records when redactions alone would be insufficient to ensure the safety of any person or the safe and secure operation of a correctional facility, the Custodian has borne her burden of proving that the requested Special Investigation Division record is exempt from disclosure. Accordingly, the Custodian has not unlawfully denied the Complainant access to the record requested.
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances because the Complainant did not have a lawful right of access to the requested record. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009