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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 25, 2012 Government Records Council Meeting

Keith A. Werner
Complainant
v.
NJ Department of Corrections
Custodian of Record

Complaint No. 2011-153

At the September 25, 2012 public meeting, the Government Records Council ("Council") considered the September 18, 2012 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. Pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian has timely responded to the Complainant's OPRA request. Specifically, the Custodian certified in her Statement of Information that she received the Complainant's OPRA request on April 21, 2011 and that she provided a written response denying the request on April 26, 2011, three (3) business days following receipt of said request. Further, the Complainant has not provided any evidence to contradict the Custodian's certification.

2. The Custodian has lawfully denied access to the requested records and borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Specifically, the Complainant, an inmate, is barred from accessing the requested records pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 47 (Christie 2010), and *N.J.A.C.* 10A:22-2.3(a)(8)(b) which states that "an inmate shall not be permitted to inspect, examine, or obtain copies of documents concerning any other inmate."

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 September, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 1, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting

Keith A. Werner[1] **GRC Complaint No. 2011-153**
Complainant

v.

NJ Department of Corrections[2]
Custodian of Records

Records Relevant to Complaint: With respect to the NJ Department of Corrections prisoners who have legally changed their names in compliance with N.J.S.A. 2A:52-1 et seq., from January 1, 1990 through the present date:

1. A copy of the court order conveyed to prison authorities (Administrator or designee); and
2. A copy of the requisite newspaper article conveyed to the Classification Department.

Request Made: April 2, 2011
Response Made: April 26, 2011
Custodian: Deirdre Fedkenheuer[3]
GRC Complaint Filed: May 6, 2011[4]

Background

April 2, 2011

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.

April 26, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the third (3rd) business day following receipt of such request.[5] The Custodian states that access to the requested records is denied because the requested records are not maintained in a centralized file or location but are maintained in individual inmate files. The Custodian states that pursuant to

[1] No legal representation listed on record.
[2] No legal representation listed on record.
[3] Ms. Fedkenheuer was the Custodian at the time of the Complainant's OPRA request and Denial of Access Complaint. However, the current custodian is John Falvey. Mr. Falvey has not participated in this complaint.
[4] The GRC received the Denial of Access Complaint on said date.
[5] The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on April 21, 2011.

Executive Order No. 47 (Christie 2010) and Department policy, "inmates shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate."

May 6, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with the Complainant's OPRA request dated April 2, 2011 attached. The Complainant states that he submitted his OPRA request on April 2, 2011 and that he has not received any response from the Custodian.

The Complainant contends that the requested records are subject to public access. The Complainant asserts that the Custodian has not only violated his access rights to public records, but also his state and federal constitutional rights. *See* Press Enter Co. v. Superior Court 478 U.S. 1, 18 (1986); Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 575-76 (1980). The Complainant requests that the Council order the Custodian to disclose the requested records free of charge.

The Complainant does not agree to mediate this complaint.

May 12, 2011

Request for the Statement of Information ("SOI") sent to the Custodian.

May 16, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 2, 2011
- Custodian's response to the Complainant's OPRA request dated April 26, 2011

The Custodian certifies that she received the Complainant's OPRA request on April 21, 2011. The Custodian certifies that she provided a written response to the Complainant's request on April 26, 2011, in which she denied access to the requested records.

The Custodian does not certify to the search for the requested records, but certifies that she did not locate any records responsive. The Custodian also certifies that no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services. The Custodian certifies that inmate Classification files are retained for ten (10) years after completion of a prison sentence.

Further, the Custodian contends that the records requested are exempt from public access pursuant to Executive Order No. 47 (Christie 2010) and *N.J.A.C.* 10A:22-2.3(a)(8)(b) which states that "inmates shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate."

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA provides that:

> "[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof …" N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

> "[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access … or deny a request for access … as soon as possible, but *not later than seven business days after receiving the request* … In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* …" (Emphasis added.) N.J.S.A. 47:1A-5.i.

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.[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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In this instant complaint, the Complainant stated that he submitted his OPRA request on April 2, 2011. Additionally, the Complainant asserted in his Denial of Access Complaint that he has not received any response from the Custodian regarding this request. However, the Custodian certified in her SOI that she received the Complainant's OPRA request on April 21, 2011 and that she provided a written response denying the request on April 26, 2011, three (3) business days following receipt of said request. The Complainant has not provided any evidence to contradict the Custodian's certification indicating that the Custodian received the request on April 21, 2011 and provided a response on April 26, 2011.

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

Therefore, pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian has timely responded to the Complainant's OPRA request. Specifically, the Custodian certified in her SOI that she received the Complainant's OPRA request on April 21, 2011 and that she provided a written response denying the request on April 26, 2011, three (3) business days following receipt of said request. Further, the Complainant has not provided any evidence to contradict the Custodian's certification.

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 mandates that:

> "[t]he provisions of this act… shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to…regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor…" N.J.S.A. 47:1A-9.a.

Executive Order No. 47 (Christie 2010) provides that:

> "[t]he exemptions from public access that have been proposed by the Departments of Law and Public Safety, Corrections, Military and Veterans Affairs, Environmental Protection, and Community Affairs, set forth in Appendix A attached hereto, shall be and *shall remain in full force and effect* pending their adoption as final rules pursuant to the provisions of the Administrative Procedure Act." (Emphasis added).

N.J.A.C. 10A:22-2.3(a)(8)(b) states that:

> "an inmate shall not be permitted to inspect, examine, or obtain copies of documents concerning any other inmate."

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.

Here, the Complainant, an inmate, requested court orders and newspaper articles regarding all New Jersey Department of Corrections prisoners who legally changed their names in compliance with N.J.S.A. 2A:52-1 et seq., from January 1, 1990 through the date of the request. The Custodian denied the Complainant access to said records pursuant to Executive Order No. 47 (Christie 2010) and *N.J.A.C.* 10A:22-2.3(a)(8)(b) which states that "an inmate shall not be permitted to inspect, examine, or obtain copies of documents concerning any other inmate." In support of her denial, the Custodian certified that the requested records are not maintained in any centralized file, but rather are maintained in each inmate's individual file.

OPRA at N.J.S.A. 47:1A-9.a. mandates that OPRA's provisions do not supersede any exemption contained in an Executive Order of the Governor, or any regulation promulgated pursuant to an Executive Order of the Governor. The Custodian in this matter alleged that Executive Order No. 47 (Christie 2010) exempts the requested records from public access.

Governor Christie signed Executive Order No. 47 on November 3, 2010, on which date the Order became effective. Said Order provided that "[t]he exemptions from public access that have been proposed by the Departments of… Corrections… set forth in Appendix A attached hereto, shall be and shall remain in full force and effect pending their adoption as final rules pursuant to the provisions of the Administrative Procedure Act." Said Order expired on November 15, 2011. Thus, EO 47 was in full effect from November 3, 2010 to November 15, 2011, during which time the Complainant submitted the OPRA request which is the subject of this complaint.

"Appendix A" as referred to in Executive Order No. 47 includes *N.J.A.C.* 10A:22-2.3, which contains confidentiality of records provisions applicable to the New Jersey Department of Corrections. Specifically, *N.J.A.C.* 10A:22-2.3(a)(8)(b) states that "an inmate shall not be permitted to inspect, examine, or obtain copies of documents concerning any other inmate."

Therefore, the Custodian has lawfully denied access to the requested records and borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Specifically, the Complainant, an inmate, is barred from accessing the requested records pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 47 (Christie 2010), and *N.J.A.C.*

10A:22-2.3(a)(8)(b) which states that "an inmate shall not be permitted to inspect, examine, or obtain copies of documents concerning any other inmate."

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian has timely responded to the Complainant's OPRA request. Specifically, the Custodian certified in her Statement of Information that she received the Complainant's OPRA request on April 21, 2011 and that she provided a written response denying the request on April 26, 2011, three (3) business days following receipt of said request. Further, the Complainant has not provided any evidence to contradict the Custodian's certification.

2. The Custodian has lawfully denied access to the requested records and borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Specifically, the Complainant, an inmate, is barred from accessing the requested records pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 47 (Christie 2010), and *N.J.A.C.* 10A:22-2.3(a)(8)(b) which states that "an inmate shall not be permitted to inspect, examine, or obtain copies of documents concerning any other inmate."

Prepared By: Dara L. Barry
Communications Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

September 18, 2012