



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Keith A. Werner
Complainant

Complaint No. 2011-206

v.

New Jersey Department of Corrections
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 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 because the Custodian has certified that no records responsive to the Complainant’s OPRA request exist and because there is no competent, credible evidence in the record to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

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 31st Day of July, 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: August 6, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**Keith A. Werner¹
Complainant**

GRC Complaint No. 2011-206

v.

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

Records Relevant to Complaint: Copies of:

1. Form 980-I that was submitted to the Director of Office Policy and Planning for review,
2. Form 980-I dated and signed by the Commissioner,
3. Form 980-I that was returned to the New Jersey State Prison (“Prison”) administration,
4. All “Inmate Research Participation Consent forms” (980-II) signed by Keith A. Werner.

Request Made: April 4, 2011³

Response Made: April 25, 2011

Custodian: Deirdre Fedkenheuer

GRC Complaint Filed: May 16, 2011⁴

Background

April 4, 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. The Complainant states that his request relates to the New Jersey Department of Corrections (“NJDOC”) giving permission for Dr. Tina Maschi of Fordham University Graduate School of Social Services to conduct a study of inmates in New Jersey prisons.

April 25, 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 there are no records of any study or

¹ No legal representation listed on record.

² No legal representation listed on record.

³ While the Complainant’s Denial of Access Complaint states that the request was filed on April 2, 2011, the evidence in the record indicates that the request was dated April 4, 2011.

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 20, 2011.

research being conducted by Dr. Tina Maschi that are responsive to the Complainant's request. The Custodian asserts that there is no record of a Form 980-I or 980-II that corresponds to the Complainant's request, as they have not been in use.

The Custodian further states that per research protocol, any consent forms are maintained by the principal investigator subject to the data storage and disposition limitations defined in 980-I and/or the Data Protection Plan.

June 10, 2011

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

- Letter from the Custodian to the Complainant dated April 25, 2011
- A copy of an undated memorandum from Fordham University's Risk and Resilience Project

The Complainant states that although the NJDOC alleges that Form 980-II is not in use, such a statement contradicts N.J.A.C. 10A:1-10.3, as this regulation requires the usage of Form 980-II before research of the inmate population can be conducted. The Complainant asserts that documentation he has obtained from Fordham University indicates that the NJDOC is aware that Dr. Maschi is doing research there. The Complainant asserts that the NJDOC routinely ignores OPRA.

In addition, the Complainant attaches an undated memorandum from Fordham University's Risk and Resilience Project. The memorandum states that the NJDOC has given permission to Dr. Tina Maschi from the Fordham University Graduate School of Social Service to conduct a research study of inmates in New Jersey Prisons.

The Complainant contends that the NJDOC has acted in bad faith and requests that the GRC penalize the Custodian. The Complainant does not agree to mediate this complaint.

May 25, 2011

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

May 31, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 4, 2011
- Letter from the Custodian to the Complainant dated April 25, 2011⁶

The Custodian certifies that a search for the requested records throughout the NJDOC's various offices did not yield any records because there are no records responsive to the Complainant's request and accordingly, there is no applicable retention schedule. The Custodian certifies that no records were destroyed. In addition, the Custodian certifies that she contacted the NJDOC's OPRA liaison, the NJDOC's

⁶ The Custodian attached additional documentation that is not relevant to the adjudication this complaint.
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Supervisor of Resource Review and Study Unit, and the NJDOC's Director of Policy and Planning to confirm there that are no responsive records. The Custodian certifies that there has been no unlawful denial of access.

August 2, 2011

Letter from Doyle McCarthy, Fordham University Chair of the Institutional Review Board, to the Complainant. Mr. McCarthy informs the Complainant that they are looking into the Complainant's claim that the NJDOC has no record of Dr. Maschi's research.

August 8, 2011

Letter from Mr. McCarthy to the Complainant. Mr. McCarthy informs the Complainant that Dr. Maschi has done several studies approved by the University and the University has several of her studies on file. Ms. McCarthy states that the NJDOC approved the study but the University is unaware of the status of any NJDOC records concerning the study.

September 12, 2011

The Complainant's response to the Custodian's SOI with the following attachments:

- Letter from Mr. McCarthy to the Complainant dated August 2, 2011
- Letter from Mr. McCarthy to the Complainant dated August 8, 2011

The Complainant asserts that the Custodian has misrepresented herself and also misrepresented material facts by denying the existence of any study or research records related to Dr. Maschi's time spent in the prison. The Complainant states that the fact that Fordham University said the research was approved and the fact that Fordham University has studies on file means that the requested records must exist.

Analysis

Whether the Custodian unlawfully denied the Complainant 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 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 the instant complaint, the Complainant argues that the Custodian falsely asserted that there are no records responsive to the Complainant’s request because it is a routine practice of the NJDOC to ignore OPRA requests. However, the Custodian certified in the Statement of Information that there are no records responsive to the Complainant’s request. In an attempt to refute the Custodian’s certification, the Complainant supplied two letters dated August 2, 2011 and August 8, 2011 from Mr. McCarthy of Fordham University which state that Fordham University is in possession of records responsive to the Complainant’s request. However, such evidence does not rise to the level of competent, credible evidence sufficient to establish that records responsive to the request exist at the NJDOC. Accordingly, the Complainant has failed to submit sufficient competent, credible evidence to refute the Custodian’s certification that the NJDOC does not possess any records responsive to the Complainant’s request.

The Council has consistently held that no denial of access occurs when a custodian has demonstrated that no records responsive to a complainant’s request exist. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant’s request existed and the complainant submitted no evidence to refute said certification. The GRC held the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian has certified that no records responsive to the Complainant’s OPRA request exist and because there is no competent, credible evidence in the record sufficient to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian has certified that no records responsive to the Complainant's OPRA request exist and because there is no competent, credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012