



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

December 18, 2012 Government Records Council Meeting

David L. Nash
Complainant

Complaint No. 2011-264

v.

New Jersey Department of Corrections
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 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 the Custodian certified in the Statement of Information that no responsive complaints existed and the Complainant failed to submit any evidence to refute the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to the requested complaints pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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 18th Day of December, 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: December 20, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

David L. Nash¹
Complainant

GRC Complaint No. 2011-264

v.

New Jersey Department of Corrections²
Custodian of Records

Records Relevant to Complaint: Copies of “any and all complaints filed against c/o DiStefano on or about February 25, 2011 and the certification of E. Leyal [sic] Yak Torsch, which [accompanied] the complaint, stating sexual harassment against [the Complainant] also filed with [the Special Investigation Division (“SID”)] and Administrator’s Office...”³

Request Made: March 10, 2011

Response Made: March 24, 2011

Custodian: John Falvey⁴

GRC Complaint Filed: August 10, 2011⁵

Background

March 10, 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.

March 24, 2011

Original 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.⁶ The Custodian states that access to the requested record is denied pursuant to N.J.S.A. 47:1A-1 et seq., which provides that:

“... the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access,

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The original Custodian of Record was Deidre Fedkenheuer.

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

⁶ The Custodian certifies in the SOI that the original Custodian received the Complainant’s OPRA request on March 21, 2011.

except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record ...”
N.J.S.A. 47:1A-10.

The Custodian states that the Complainant’s OPRA request is thus denied.

August 10, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching a letter from the Custodian to the Complainant dated March 24, 2011.⁷

The Complainant states that the original Custodian denied access to his request seeking complaints regarding allegations of sexual harassment against the Complainant pursuant to N.J.S.A. 47:1A-1 et seq.

August 23, 2011⁸

The Custodian agrees to mediate this complaint.

September 1, 2011

The Complainant agrees to mediate this complaint.

September 6, 2011

Complaint referred to mediation.

October 25, 2011

Complaint referred back from mediation.

October 25, 2011

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

October 31, 2011

Custodian’s SOI with the following attachments:⁹

- Complainant’s OPRA request dated March 10, 2011.
- Letter from the Custodian to the Complainant dated March 24, 2011.

The Custodian certifies that his search for the requested records included making inquiries to the SID and Administrator’s Office located New Jersey State Prison (“NJSP”) to ascertain whether any responsive records existed.

The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable because no records responsive exist.

⁷ The Complainant attached additional documents that are not relevant to the instant complaint.

⁸ The evidence of record is unclear as to when the GRC forwarded mediation agreements to the parties.

⁹ The Custodian attached additional documents that are not relevant to the instant complaint.

The Custodian certifies that the New Jersey Department of Corrections (“DOC”) received the Complainant’s OPRA request on March 21, 2011. The Custodian certifies that the original Custodian responded in writing to the Complainant on March 24, 2011 denying access to the request at issue herein pursuant to N.J.S.A. 47:1A-1 et seq.

The Custodian certifies that following the filing of this complaint, he made additional inquiries with the SID and NJSP Administration Office to determine whether any records actually existed. The Custodian certifies that it was determined by both agencies that no records existed or were even similar to those sought in the Complainant’s OPRA request.

The Custodian contends that because records pertaining to sexual harassment complaints filed by or against employees and inmates are exempt from disclosure and further no records exist, the Custodian did not unlawfully deny access to any records.

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 also 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 ...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

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.

The original Custodian initially denied access to the Complainant’s OPRA request seeking complaints filed with the SID and NJSP Administration Office pursuant to N.J.S.A. 47:1A-10. Subsequent to the filing of this complaint, the current Custodian certified in the SOI that after making additional inquiries with the SID and NJSP Administration Office, it was determined that no records responsive existed. The Complainant has submitted no evidence to refute the Custodian’s certification.

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 certified in the SOI that no records responsive to the complainant’s request existed. The complainant submitted no evidence to refute the custodian’s certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified in the SOI that no responsive complaints existed and the Complainant failed to submit any evidence to refute the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to the requested complaints pursuant to Pusterhofer.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian certified in the Statement of Information that no responsive complaints existed and the Complainant failed to submit any evidence to refute the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to the requested complaints pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012¹⁰

¹⁰ This complaint was prepared and scheduled for adjudication at the Council’s October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council’s November 27, 2012 meeting was cancelled due to lack of quorum.