



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 29, 2014 Government Records Council Meeting

James R. Smith
Complainant

Complaint No. 2013-337

v.

NJ Department of Corrections
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 his burden of proof that he timely responded to the Complainant’s OPRA Request No. 1. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to seek an extension of time to respond 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). However, the evidence of record demonstrates that the Custodian timely responded to the Complainant’s OPRA Request No. 2. N.J.S.A. 47:1A-5(i).
2. Notwithstanding the Custodian’s “deemed” denial, he has borne his burden of proving he lawfully denied access to the IMP manual. N.J.S.A. 47:1A-6. The Custodian certified that disclosure of said manual would compromise the safety and security of the New Jersey State Prison, and “emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein” does not constitute a government record subject to disclosure. N.J.S.A. 47:1A-1.1. See also Fischer v. Dep’t of Corrections, GRC Complaint No. 2005-171 (February 2006).
3. The Custodian bore his burden of proving he lawfully denied access to the Complainant’s OPRA Request No. 2, since it was an invalid request for information, and does not seek identifiable government records. N.J.S.A. 47:1A-6. See also MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546, 549 (App. Div. 2005), Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166,



180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). A request for the amount of time allotted to inmates to access various forms of legal assistance constitutes a request for information. *See* LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).

4. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) regarding the Complainant's OPRA Request No. 1. The Custodian however, lawfully denied access to said record since it contains emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein. N.J.S.A. 47:1A-1.1. Additionally, the Custodian lawfully denied access to the Complainant's OPRA Request No. 2, as the request was an invalid request for information. *See* MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546, 549 (App. Div. 2005). Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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 29th Day of July, 2014

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: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**James R. Smith¹
Complainant**

GRC Complaint No. 2013-337

v.

**NJ Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

OPRA Request No. 1:

“Administrative Plan Manual policy (or IMP #) 13.108 titled ‘Inmate Legal Access House of Operation.’”

OPRA Request No. 2:

“Pursuant to [OPRA Request No. 1] – Would specifically like to know if policy 13.108 (IMP #446 Legal Access) state [sic] how many hours a week must an inmate be given access to the law library/legal access [sic]?”

Custodian of Record: John Falvey

Request Received by Custodian: August 30, 2013; November 6, 2013

Response Made by Custodian: September 16, 2013; September 23, 2013; November 6, 2013

GRC Complaint Received: November 21, 2013

Background³

Request and Response:

On August 30, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the records identified above as OPRA Request No. 1. On September 16, 2013, ten (10) business days later, the Custodian, in writing, sought an additional ten (10) business days to respond. On September 23, 2013, the Custodian responded, in writing, denying the request as deemed confidential by the Commissioner of Corrections pursuant to N.J.S.A. 47:1A-9(b). The Custodian also denied the request pursuant to N.J.S.A. 47:1A-1.1, as it contained security measures, information, or procedures that could jeopardize safety if disclosed.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

On November 6, 2013, the Complainant submitted another OPRA request to the Custodian seeking the records identified above as OPRA Request Item No. 2. That same day, the Custodian responded, in writing, denying the request as an invalid request for information, and does not seek a government record.

Denial of Access Complaint:

On November 21, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that inmates at New Jersey State Prison (“NJSP”) are not given adequate access to the prison’s law library as required by statute. The Complainant also argued that the records sought are not exempt from disclosure under OPRA, and that he has a right to know how much access he has to legal resources.

Statement of Information:

On January 29, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that although his response to the Complainant’s OPRA Request No. 1 was untimely, his denial of access was lawful.

Regarding OPRA Request No. 1, the Custodian certified that while no document entitled “Inmate Legal Access House of Operation,” was found, a record identified as IMP #446, titled “Legal Access” (“IMP manual”) was located at NJSP. The Custodian certified that the record consisted of 13 pages and each page had been stamped “Confidential.” The Custodian further certified that the first page of the record contained a sentence stating that “[a]s a confidential N.J.D.O.C. document, this document is to be released by authorized personnel only.”

The Custodian argued that the IMP manual is exempt from disclosure pursuant to N.J.S.A. 47:1A-9(b), which states that OPRA: “shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” In conjunction with N.J.S.A. 47:1A-9(b), the Custodian asserted that N.J.S.A. 30:1B-6(g) grants the Commissioner of Corrections the power to designate certain records as confidential, and therefore exempt from disclosure under OPRA.

Additionally, the Custodian asserted that the IMP manual is exempt from disclosure pursuant to N.J.S.A. 47:1-1.1, which states in relevant part that records pertaining to “emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein” and “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property” are not government records subject to disclosure.

Regarding OPRA Request No. 2, the Custodian argued that the Complainant’s request does not seek an identifiable government record, but rather the answer to a question. Therefore, the Complainant asserted that the request is an invalid request for information.

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).⁴ 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).

OPRA Request No. 1

On September 16, 2013, the Custodian sought an extension of time to respond to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i). The Custodian however, admitted that his response was made ten (10) business days after receipt of the Complainant's OPRA request. Thus, the Custodian failed to respond in writing within the statutorily mandated seven (7) business days. N.J.S.A. 47:1A-5(i).

OPRA Request No. 2

On November 6, 2013, the Custodian received the Complainant's OPRA Request No. 2. The evidence of record demonstrates that on November 6, 2013, the Custodian responded to the request, in writing.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA Request No. 1. N.J.S.A. 47:1A-6. As such, the Custodian's failure to seek an extension of time to respond within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA Request No. 1 pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC No. 2007-11. However, the evidence of record demonstrates that the Custodian timely responded to the Complainant's OPRA Request No. 2. N.J.S.A. 47:1A-5(i).

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.

⁴ 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.

OPRA Request No. 1

OPRA provides that records pertaining to “emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein” and “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property” are not government records subject to disclosure. N.J.S.A. 47:1A-1.1.

With respect to correctional facilities, the Council has found that where a complainant sought access to policies and post orders for a section of East Jersey State Prison, the custodian properly denied access pursuant to N.J.S.A. 47:1A-1.1. Fischer v. Dep’t of Corrections, GRC Complaint No. 2005-171 (February 2006). The Council determined that because the evidence of record revealed “that the requested information contains procedures for emergencies [and] when doors are opening and closing.” Id.

In the instant matter, the Custodian certified that the IMP manual details the policies and procedures regarding transporting inmates around the NJSP to facilitate access to legal services, including the NJSP’s law library. The Custodian further certified that release of the IMP manual would jeopardize the security of the prison, and may be used to harm NJSP staff or other inmates.

Therefore, notwithstanding the Custodian’s “deemed” denial, he has borne his burden of proving he lawfully denied access to the IMP manual. N.J.S.A. 47:1A-6. The Custodian certified that disclosure of said manual would compromise the safety and security of the NJSP, and “emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein” does not constitute a government record subject to disclosure. N.J.S.A. 47:1A-1.1. *See also* Fischer, GRC No. 2005-171.

Since the requested record is exempt from disclosure as a record that would compromise the safety and security of a correctional facility pursuant to N.J.S.A. 47:1A-1.1, it is unnecessary for the Council to determine whether the requested record is also exempt from disclosure pursuant to N.J.S.A. 47:1A-9(b) and N.J.S.A. 30:1B-6(g), as it is deemed confidential by the Commissioner of Corrections.

Invalid OPRA Request

OPRA Request No. 2

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government

records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.

MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. at 549 (emphasis added). *See also Bent v. Stafford Police Dep’t*, 381 N.J. Super. 30, 37 (App. Div. 2005),⁵ N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant sought the number of Jamesburg residents that hold library cards. The Council found that the complainant’s request was a request for information, holding that “because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to [MAG, 375 N.J. Super. at 549].” Id. at 6. *See also Ohlson v. Twp. of Edison (Middlesex)*, GRC Complaint No. 2007-233 (August 2009).

Here, the Complainant’s OPRA Request No. 2 asked whether the IMP manual identified “how many hours a week an inmate be given access to the law library/legal access [sic][.]” Similar to the request at issue in LaMantia, this request sought information regarding the amount of access inmates have to various forms of legal assistance. GRC No. 2008-140. Regardless of whether this information can be gleaned from a specific government record, the amount of time available to access legal assistance constitutes information.

Therefore, the Custodian bore his burden of proving he lawfully denied access to the Complainant’s OPRA Request No. 2, since it was an invalid request for information, and does not seek identifiable government records. N.J.S.A. 47:1A-6. *See also MAG*, 375 N.J. Super. at 546, 549, Bent, 381 N.J. Super. at 37, N.J. Builders, 390 N.J. Super. at 180, and Schuler, GRC No. 2007-151. A request for the amount of time allotted to inmates to access various forms of legal assistance constitutes a request for information. *See LaMantia*, GRC No. 2008-140.

Knowing & Willful

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 “. . . [i]f 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

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004).

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 (Id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) regarding the Complainant’s OPRA Request No. 1. The Custodian however, lawfully denied access to said record since it contains emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein. N.J.S.A. 47:1A-1.1. Additionally, the Custodian lawfully denied access to the Complainant’s OPRA Request No. 2, as the request was an invalid request for information. *See* MAG, 375 N.J. Super. at 546, 549. Moreover, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA Request No. 1. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to seek an extension of time to respond 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). However, the evidence of record demonstrates that the Custodian timely responded to the Complainant’s OPRA Request No. 2. N.J.S.A. 47:1A-5(i).
2. Notwithstanding the Custodian’s “deemed” denial, he has borne his burden of proving he lawfully denied access to the IMP manual. N.J.S.A. 47:1A-6. The Custodian certified that disclosure of said manual would compromise the safety and security of the New Jersey State Prison, and “emergency or security information or

procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein” does not constitute a government record subject to disclosure. N.J.S.A. 47:1A-1.1. See also Fischer v. Dep’t of Corrections, GRC Complaint No. 2005-171 (February 2006).

3. The Custodian bore his burden of proving he lawfully denied access to the Complainant’s OPRA Request No. 2, since it was an invalid request for information, and does not seek identifiable government records. N.J.S.A. 47:1A-6. See also MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546, 549 (App. Div. 2005), Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). A request for the amount of time allotted to inmates to access various forms of legal assistance constitutes a request for information. See LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).
4. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) regarding the Complainant’s OPRA Request No. 1. The Custodian however, lawfully denied access to said record since it contains emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein. N.J.S.A. 47:1A-1.1. Additionally, the Custodian lawfully denied access to the Complainant’s OPRA Request No. 2, as the request was an invalid request for information. See MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546, 549 (App. Div. 2005). Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014