



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

September 30, 2014 Government Records Council Meeting

Rene Edwards
Complainant

Complaint No. 2014-8

v.

NJ Department of Corrections
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 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. N.J.S.A. 47:1A-6. As such, 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian lawfully denied access to copies of R. Boyd’s records that were responsive to the Complainant’s OPRA request because N.J.A.C. 10A:22-2.3(b) prohibits the Complainant of either inspecting or obtaining records pertaining to another inmate. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a). *See also* Werner v. NJ Dep’t of Corrections, GRC Complaint No. 2011-153 (September 2012).
3. The responsive health chart notes, which can be categorized as medical, psychiatric or psychological record, are exempt from disclosure as records which contain “. . . information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation . . .” N.J.A.C. 10A:22-2.3(a)(4), applicable to OPRA under N.J.S.A. 47:1A-9(a). As such, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6; Riley v. NJ Dep’t of Corrections, GRC Complaint No. 2013-345 (July 29, 2014).



4. The Custodian has borne his burden of proving that the responsive 3rd shift schedule is exempt from disclosure as “. . . 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; N.J.S.A. 47:1A-6; Durham v. NJ Dep’t of Corrections, GRC Complaint No. 2012-35 (March 2013).
5. Although the Custodian failed to timely respond to the Complainant’s OPRA request, he lawfully denied access to all requested records. N.J.S.A. 47:1A-6. 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 untimely response does not rise to the level of a knowing and willful violation of OPRA and 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 30th Day of September, 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: October 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Rene Edwards¹
Complainant**

GRC Complaint No. 2014-8

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of records of assault at South Woods State Prison on December 28, 2011, per the attached "Official Legal Complaint:"

1. Complete report of incident.
2. Court-line hearing results.
3. Complete full names of all staff on scene of 3rd shift.

Custodian of Record: John Falvey, Esq.

Request Received by Custodian: October 16, 2013

Response Made by Custodian: October 30, 2013

GRC Complaint Received: January 13, 2014

Background³

Request and Response:

On September 2, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On October 30, 2013, the tenth (10th) business day after receipt of the OPRA request, the Custodian responded in writing denying access to 27 pages of responsive records under the following:

- N.J.S.A. 47:1A-1.1 – “. . . security information or procedures for any facility which, if disclosed, would jeopardize security of the facility or persons therein.”
- N.J.A.C. 10A:22-2.3(a)(4) – “. . . any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.”
- N.J.A.C. 10A:22-2.3(a)(5) – “A record relating to an individual, which, if disclosed, would jeopardize the safety and security of any person or the safe and secure operation of the correctional facility.”

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.

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- N.J.A.C. 10A:22-2.3(b) – “. . . an inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate.”

Denial of Access Complaint:

On January 13, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he needed the requested records and information in order to file appropriate court actions for an assault in which he was the victim.

Statement of Information:

On February 21, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 16, 2013 and responded in writing on October 30, 2013. The Custodian acknowledged that his response was three (3) business days late.

The Custodian certified that the following responsive disciplinary records were located at Northern State Prison:

1. Inmate R. Boyd disciplinary appeal paperwork (6 pages).
2. Inmate R. Boyd disciplinary charge and adjudication (5 pages).
3. Evidence used in Inmate R. Boyd’s disciplinary hearing (11 pages).
4. Inmate R. Boyd medical chart note (1 page).
5. Inmate R. Boyd institutional summary (3 pages).
6. Complainant’s medical chart note (1 page).

The Custodian argued that the records referring to R. Boyd (responsive items 1-5) deal specifically with his disciplinary charges, appeal and are stored in his inmate file. The Custodian asserted the Complainant cannot have access to records concerning another inmate per New Jersey Department of Corrections’ (“DOC”) regulations. N.J.A.C. 10A:22-2.3(b). The Custodian further noted that the records detail how staff responds to an altercation within a prison. The Custodian asserted that disclosure of this information would jeopardize the safe and secure operation of DOC’s facilities by allowing inmates to understand how staff responds to disturbances and plan a countermeasure. Also, the Custodian contended that the Complainant’s medical chart note (responsive item 6) is exempt from disclosure per DOC’s regulations. N.J.A.C. 10A:22-2.3(a)(4).

Further, the Custodian certified that the responsive 3rd shift duty roster for December 28, 2011, was located at South Woods State Prison. The Custodian contended that he lawfully denied access to this record under N.J.S.A. 47:1A-1.1 and N.J.A.C. 10A:22-2.3(a)(5). The Custodian also noted that his denial was consistent with the Council’s decision in Durham v. NJ Dep’t of Corrections, GRC Complaint No. 2012-35 (March 2013). The Custodian asserted that the Courts have long deferred to DOC when making safety and security decisions. The Custodian argued that DOC has “broad discretionary power” to promulgate regulations aimed at maintaining security and order inside correctional facilities. Jenkins v. Fauver, 108 N.J. 239, 252 (1987). The Custodian noted that “[p]risons are dangerous places, and the courts must afford

appropriate deference and flexibility to administrators trying to manage this volatile environment.” Russo v. NJ Dep’t of Corrections, 324 N.J. Super. 576, 584 (App. Div. 1999).

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).

Here, the Custodian certified in the SOI that he received the Complainant’s OPRA request on October 16, 2013 and responded on October 30, 2013, the tenth (10th) business day after receipt of the OPRA request. Further, the Custodian acknowledged that his response was three (3) business days beyond the statutorily mandated time frame. Thus, by the Custodian’s own admission, his untimely response resulted in a “deemed” denial of access.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, 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, GRC 2007-11.

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.

R Boyd’s records

OPRA provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or

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.

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.

N.J.S.A. 47:1A-9(a).

Further, DOC regulations provide that “[a]n inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate.” N.J.A.C. 10A:22-2.3(b).

Here, several of the responsive records refer to another inmate alleged to have assaulted the Complainant. The DOC’s regulations are clear in that the Complainant, who is an inmate currently housed in New Jersey State Prison, is not permitted to either inspect or obtain copies of records concerning other inmates. Id.

Therefore, the Custodian lawfully denied access to copies of R. Boyd’s records that were responsive to the Complainant’s OPRA request because N.J.A.C. 10A:22-2.3(b) prohibits the Complainant of either inspecting or obtaining records pertaining to another inmate. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a). *See also* Werner v. NJ Dep’t of Corrections, GRC Complaint No. 2011-153 (September 2012).

R Boyd and Complainant’s medical chart notes

As noted above, OPRA allows for exemptions contained in regulations to be recognized as valid exemptions under OPRA. To this end, DOC’s regulations prohibit access to “[a]ny information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation . . .” N.J.A.C. 10A:22-2.3(a)(4).

Medical records are not government records subject to disclosure pursuant to N.J.A.C. 10A:22-2.3(a)(4). Additionally, the language contained in N.J.A.C. 10A:22-2.3(a)(4), although a DOC regulation, is consistent with longstanding language contained in paragraph 4 of Executive Order 26 (Gov. McGreevey, 2002)(“EO 26”), which provides in relevant part that “[t]he following records shall not be . . . subject to public access pursuant to [OPRA] . . . [i]nformation relating to medical, psychiatric, or psychological history, diagnosis, treatment or evaluation.” Id.

Further, the Council has held that mental health records are exempt from disclosure pursuant to EO 26, even when complainants sought their own records. In Riley v. NJ Dep’t of Corrections, GRC Complaint No. 2013-345 (July 2014), the complainant sought access to his personal medical, psychiatric and psychological reports on multiple occasions. The Council held that:

[T]he requested . . . health records, which can be categorized as medical, psychiatric or psychological records, are exempt from disclosure as records which contain “. . . information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation . . .” N.J.A.C. 10A:22-2.3(a)(4), applicable to OPRA under N.J.S.A. 47:1A-9(a). As such, the Custodian lawfully denied access

to said records. N.J.S.A. 47:1A-6; [Groelly v. NJ Dep't of Corrections, GRC Complaint No. 2010-294 (June 2012)]; [McLawhorn v. NJ Dep't of Corrections, GRC Complaint No. 2012-292 (July 2013)].

Id. at 3.

In this matter, two (2) of the responsive records were medical chart notes. The Custodian denied access to the Complainant medical chart notes under N.J.A.C. 10A:22-2.3(a)(4), but denied access to R. Boyd's medical chart notes under N.J.A.C. 10A:22-2.3(b). Notwithstanding the Custodian's appropriate denial to R. Boyd's notes under N.J.A.C. 10A:22-2.3(b), both records can be categorized as medical records with applicability to N.J.A.C. 10A:22-2.3(a)(4). Further, the facts of this complaint are similar to the facts of Groelly. Specifically, the Custodian denied access to the responsive records because they are medical, psychiatric or psychological records exempt from disclosure.

Therefore, the responsive health chart notes, which can be categorized as medical, psychiatric or psychological record, are exempt from disclosure as records which contain ". . . information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation . . ." N.J.A.C. 10A:22-2.3(a)(4), applicable to OPRA under N.J.S.A. 47:1A-9(a). As such, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6; Riley, GRC 2013-345.

3rd Shift Roster

OPRA provides that:

A government record shall not include the following information which is deemed to be confidential . . . 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.

As noted by the Custodian in his SOI, in Durham, GRC 2012-35, the Council was tasked with determining whether the custodian lawfully denied access to daily shift rosters. There, the custodian argued that disclosure of same would ". . . reveal allocation of staff by time and location that an inmate could use to defeat security measures to conduct criminal actions, disruptive behavior or contraband-related offenses." Id. at 2. The Council agreed, holding that the custodian lawfully denied access to the requested daily shift rosters, and reasoned that "[a]n inmate seeking to conduct criminal actions, disruptive behavior or contraband-related offenses would be given an advantage by having intimate knowledge of the daily assignment of personnel with the NJSP and plan these actions accordingly." Id. at 5.

In this matter, the Complainant sought a 3rd shift roster for a specific date on which the assault took place. The Council's decision in Durham, is on point with the record at issue here. Thus, it is reasonable to conclude that disclosure of this record would pose a significant risk to the safe and secure operation of the relevant facility.

Therefore, the Custodian has borne his burden of proving that the responsive 3rd shift schedule is exempt from disclosure as “. . . 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; N.J.S.A. 47:1A-6; Durham, GRC 2012-35.

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 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)).

Although the Custodian failed to timely respond to the Complainant’s OPRA request, he lawfully denied access to all requested records. N.J.S.A. 47:1A-6. 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 untimely response does not rise to the level of a knowing and willful violation of OPRA and 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. N.J.S.A. 47:1A-6. As such, 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian lawfully denied access to copies of R. Boyd’s records that were responsive to the Complainant’s OPRA request because N.J.A.C. 10A:22-2.3(b) prohibits the Complainant of either inspecting or obtaining records pertaining to another inmate. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a). *See also* Werner v. NJ Dep’t of Corrections, GRC Complaint No. 2011-153 (September 2012).
3. The responsive health chart notes, which can be categorized as medical, psychiatric or psychological record, are exempt from disclosure as records which contain “. . . information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation . . .” N.J.A.C. 10A:22-2.3(a)(4), applicable to OPRA under N.J.S.A. 47:1A-9(a). As such, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6; Riley v. NJ Dep’t of Corrections, GRC Complaint No. 2013-345 (July 29, 2014).
4. The Custodian has borne his burden of proving that the responsive 3rd shift schedule is exempt from disclosure as “. . . 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; N.J.S.A. 47:1A-6; Durham v. NJ Dep’t of Corrections, GRC Complaint No. 2012-35 (March 2013).
5. Although the Custodian failed to timely respond to the Complainant’s OPRA request, he lawfully denied access to all requested records. N.J.S.A. 47:1A-6. 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 untimely response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

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

September 23, 2014