



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**November 18, 2014 Government Records Council Meeting**

Kevin Conley  
Complainant

Complaint No. 2014-88

v.

NJ Department of Corrections  
Custodian of Record

At the November 18, 2014 public meeting, the Government Records Council (“Council”) considered the November 10, 2014 Supplemental 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 complied with the Council’s October 28, 2014 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant the records responsive to the request in unredacted form.
2. Although the Custodian failed to provide a specific legal basis for denying the requested records and failed to prove that the denial of access to the requested records was authorized by law; the Custodian did comply with the terms of the Council’s October 28, 2014 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 18<sup>th</sup> Day of November, 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: November 20, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 18, 2014 Council Meeting**

**Kevin Conley<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-88**

v.

**New Jersey Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of all PA-36 Forms used to pay for update to New Jersey State Prison Law Library Lexis database from June 1, 2013 to November 6, 2013 and all relevant paperwork/documents regarding update to Lexis database occurring on or about October 18, 2013.<sup>3</sup>

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** December 9, 2013  
**Response Made by Custodian:** December 18, 2013  
**GRC Complaint Received:** February 26, 2014

**Background<sup>4</sup>**

October 28, 2014 Council Meeting:

At its October 28, 2014 public meeting, the Government Records Council (“Council”) considered the October 21, 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, found that:

1. Although the Custodian responded in writing within the statutorily mandated time frame under OPRA, the Custodian’s response is insufficient because he failed to provide a specific lawful basis for denying access to the requested records. N.J.S.A. 47:1A-5(g). *See also DeAppolonio v. Borough of Deal (Monmouth)*, GRC Complaint No. 2008-62 (September 2009).

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> 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.

Kevin Conley v. New Jersey Department of Corrections, 2014-88 – Supplemental Findings and Recommendations of the Executive Director

2. Because the Custodian failed to provide a specific lawful basis for denying access to the requested records, he must disclose the records responsive to the request. N.J.S.A. 47:1A-1.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. However, if agency operations remain disrupted because the requested records are still being held in the office which continues to be off limits as a crime scene, the Custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency pursuant to N.J.S.A. 47:1A-5(g).**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On October 29, 2014, the Council distributed its October 28, 2014 Interim Order to all parties. On October 29, 2014, the Custodian responded to the Council's Interim Order by providing certified confirmation of compliance to the Executive Director. The Custodian certifies that on October 29, 2014, he learned that the requested records could now be retrieved from a previously sealed-off area. The Custodian further certifies that he obtained and disclosed to the Complainant the records in compliance with the Order. The Custodian certifies that the records were disclosed in unredacted form.

#### Analysis

#### Compliance

On October 28, 2014, the Council ordered the above-referenced compliance. On October 29, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On October 29, 2014, the Custodian forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant the records responsive to the request in unredacted form.

Accordingly, the Custodian complied with the Council's October 28, 2014 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant the records responsive to the request in unredacted form.

## **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 (Berg); 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 provide a specific legal basis for denying the requested records and failed to prove that the denial of access to the requested records was authorized by law; the Custodian did comply with the terms of the Council’s October 28, 2014 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 complied with the Council’s October 28, 2014 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director wherein he stated that he disclosed to the Complainant the records responsive to the request in unredacted form.
2. Although the Custodian failed to provide a specific legal basis for denying the requested records and failed to prove that the denial of access to the requested records was authorized by law; the Custodian did comply with the terms of the Council’s October 28, 2014 Interim Order. Moreover, the evidence of record does not indicate

that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: John E. Stewart, Esq.

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

November 10, 2014



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

October 28, 2014 Government Records Council Meeting

Kevin Conley  
Complainant

Complaint No. 2014-88

v.

NJ Department of Corrections  
Custodian of Record

At the October 28, 2014 public meeting, the Government Records Council ("Council") considered the October 21, 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. Although the Custodian responded in writing within the statutorily mandated time frame under OPRA, the Custodian's response is insufficient because he failed to provide a specific lawful basis for denying access to the requested records. N.J.S.A. 47:1A-5(g). See also DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. Because the Custodian failed to provide a specific lawful basis for denying access to the requested records, he must disclose the records responsive to the request. N.J.S.A. 47:1A-1.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup> However, if agency operations remain disrupted because the requested records are still being held in the office which continues to be off limits as a crime scene, the Custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency pursuant to N.J.S.A. 47:1A-5(g).**

<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of October, 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 29, 2014**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 28, 2014 Council Meeting**

**Kevin Conley<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-88**

v.

**New Jersey Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of all PA-36 Forms used to pay for update to New Jersey State Prison Law Library Lexis database from June 1, 2013 to November 6, 2013 and all relevant paperwork/documents regarding update to Lexis database occurring on or about October 18, 2013.<sup>3</sup>

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** December 9, 2013  
**Response Made by Custodian:** December 18, 2013  
**GRC Complaint Received:** February 26, 2014

**Background<sup>4</sup>**

**Request and Response:**

On December 9, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 18, 2013, the seventh (7<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the records responsive to the Complainant’s request are filed in the law library office (“office”) which has been sealed closed by the Special Investigation Division (“SID”) and until the SID deems the area clear, no personnel are able to retrieve any documentation from the area; therefore, the request is denied. The Custodian further informed the Complainant that when the area is reopened the Complainant can resubmit the request.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> 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.

### Denial of Access Complaint:

On February 26, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on December 2, 2013, he mailed the request to the Custodian, and the Custodian responded to the request on January 3, 2014.<sup>5</sup>

The Complainant first provides a short history of the records he is seeking and why he believes those records are relevant to the request. The Complainant further states that he has personal knowledge that the office is closed and was closed since at least November 6, 2013.

The Complainant then makes two arguments: (1) that the Custodian has not conducted a proper search, and (2) that the Custodian failed in his duty to obtain records. The Complainant’s first argument is that the requested records were “merely alleged” by prison officials to be filed in the office, but that the officials could not enter the office to make a physical search for the records because it was “locked and sealed.” The gist of the Complainant’s second argument is that the office was sealed “for no known rational reason” and even if the records were secured in the office the Custodian failed in his duty when he attempted to create “an open-ended infinite exception to the 7 business day rule.”

### Statement of Information:

On March 5, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s request on December 9, 2013, and that he responded to the request on December 18, 2013.

The Custodian certifies that the records responsive to the Complainant’s request are located in an office that had been sealed by the SID. The Custodian certifies that the SID officers were acting in their capacity as law enforcement officers pursuant to N.J.S.A. 2A:154-4 when they sealed the office as a crime scene. The Custodian further certifies that the office was cordoned-off by the SID at the time of the records request, and that if anyone entered the area while it was off-limits, such person would thereby violate N.J.S.A. 2C:29-1, which provides “[a] person commits an offense if he purposely obstructs, impairs or perverts the administration of law.” The Custodian certifies that N.J.S.A. 47:1A-9 “does not allow abrogating other laws to fulfill OPRA requests.” The Custodian concludes that there was no unlawful denial of access.

### Additional Submissions:

The Complainant filed a certification dated March 11, 2014, in opposition to the Custodian’s SOI. The Complainant states that he objects to the Custodian’s reliance on a handwritten communication from prison staff asserting that the office was closed. The Complainant contends that a sworn certification from prison official Wyers or SID personnel

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<sup>5</sup> The date of request and date of response vary significantly from the dates certified by the Custodian; however, it is not unusual for mail to move slowly through the prison system due to security measures.

would prove the office was closed and sealed.<sup>6</sup> The Complainant also asserts that by avoiding the duty to search, the Custodian was in effect placing the burden of proof on the Complainant.

## Analysis

### Sufficiency of Response

OPRA provides that if a "...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." N.J.S.A. 47:1A-5(g). In DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued that the custodian failed to provide a specific lawful basis for denying access to requested records. The GRC held that:

Pursuant to N.J.S.A. 47:1A-5(g), a custodian must indicate the specific basis for a denial of access to government records. Moreover, the Council's decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records (citations omitted). The Council also held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian's denial is authorized by OPRA. See Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008).

Id. at 7.

Here, although the Custodian's response to the Complainant's request was timely, his response that the records were in an inaccessible area and that the Complainant would have to resubmit the request later, was not in compliance with OPRA because the response failed to provide a specific basis for denying the Complainant access to the responsive records.

Accordingly, although the Custodian responded in writing within the statutorily mandated time frame under OPRA, the Custodian's response is insufficient because he failed to provide a specific lawful basis for denying access to the requested records. N.J.S.A. 47:1A-5(g). See also DeAppolonio, GRC 2008-62.

### 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.

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<sup>6</sup> The Complainant previously verified in the Denial of Access Complaint that he had personal knowledge the office was locked and sealed during the time of his request. It appears that the gravamen of his present argument is that the cordoned-off office was some sort of ploy on the part of prison staff to avoid searching for the requested records.

OPRA further provides that "...[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." N.J.S.A. 47:1A-5(g).

N.J.S.A. 47:1A-9 provides:

a. [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 [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.

b. [t]he provisions of [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.

The Custodian in the SOI certified that the office was cordoned-off by the SID at the time of the records request and that if anyone entered the area while it was off-limits such person would violate N.J.S.A. 2C:29-1. The Custodian also certified that N.J.S.A. 47:1A-9 "does not allow abrogating other laws to fulfill OPRA requests."

However, N.J.S.A. 47:1A-9 provides that OPRA shall not abrogate any other laws, regulations, and privileges which exempt a government record from access or provide a privilege or grant of confidentiality. The point being that OPRA is not intended to preempt other laws, regulations, and orders that *deny access*. The provision of the criminal code cited by the Custodian is not a law which denies access to records; therefore, that law is not applicable to OPRA by operation of N.J.S.A. 47:1A-9. Nonetheless, the criminal law coupled with the fact that the office was cordoned off would have substantially disrupted agency operations due to the Custodian's inability to direct personnel to search for and retrieve records stored in that location. As such, the Custodian could have lawfully denied access to the requested records due to a substantial disruption of agency operations pursuant to N.J.S.A. 47:1A-5(g). However, under this provision of OPRA the Custodian was obligated to first attempt to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (September 2012), the custodian asserted that the complainant's request substantially disrupted agency operations. The Council found that the custodian's extension of time to a date certain in the future was a reasonable solution under N.J.S.A. 47:1A-5(g).

Here, the Custodian as an agency official was in a better position than the Complainant to obtain an estimated reopening date for the office. As such, the Custodian could have offered the Complainant an extended date for granting access as a reasonable solution. If the Complainant

refused the Custodian's offer, the Custodian could have then lawfully denied access. However, rather than extend the response time, or otherwise attempt to reach a reasonable solution with the Complainant, the Custodian flatly denied the request and told the Complainant to resubmit it at a later date. The Custodian's failure to attempt to reach a reasonable solution with the Complainant, and instead placing the onus on the Complainant to resubmit the OPRA request, resulted in an unreasonable burden on the right of access.

Accordingly, because the Custodian failed to provide a specific lawful basis for denying access to the requested records, he must disclose the records responsive to the request. N.J.S.A. 47:1A-1.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing within the statutorily mandated time frame under OPRA, the Custodian's response is insufficient because he failed to provide a specific lawful basis for denying access to the requested records. N.J.S.A. 47:1A-5(g). *See also DeAppolonio v. Borough of Deal (Monmouth)*, GRC Complaint No. 2008-62 (September 2009).
2. Because the Custodian failed to provide a specific lawful basis for denying access to the requested records, he must disclose the records responsive to the request. N.J.S.A. 47:1A-1.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup> However, if agency operations remain disrupted because the requested records are still being held in the office which continues to be off limits as a crime scene, the Custodian may deny access to the record after attempting to reach a reasonable solution**

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<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>8</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**with the requestor that accommodates the interests of the requestor and the agency pursuant to N.J.S.A. 47:1A-5(g).**

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart, Esq.

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

October 21, 2014