



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 17, 2015 Government Records Council Meeting

Tim McGeachy
Complainant

Complaint No. 2015-27

v.

NJ Department of Corrections
Custodian of Record

At the November 17, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 2015 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 initially failed to bear his burden, pursuant to N.J.S.A. 47:1A-6, of proving a lawful denial of access to Complainant’s September 8, 2014, and December 30, 2014 requests because he cited to the incorrect legal authority and thus gave insufficient responses to each request. Nevertheless, the Custodian on his SOI correctly cited to Executive Order 26 (McGreevey 2002), as made applicable to OPRA under N.J.S.A. 47:1A-9.a, as the reason for denial of access, as making the records exempt from disclosure. Accordingly, the Custodian did not unlawfully deny access. EO 26; N.J.S.A. 47:1A-9.a. Farra’D v. Dep’t of Corr., GRC Complaint No. 2010-47 (October 2011).

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 17th Day of November, 2015

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 19, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 17, 2015 Council Meeting**

**Tim McGeachy¹
Complainant**

GRC Complaint No. 2015-27

v.

**NJ Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Paper copies of:

September 8, 2014 OPRA Request:

“Funeral trip charging documents...support[ing] the charging of amount of funeral trip from Bayside State Prison on March 1, 2009...[a]nd ...the financial records used for said charging of the trip”

December 30, 2014 OPRA Request:

“[F]inancial records for a funeral trip in 2009 by Bayside State prison on or about March 1, 2009, being that the money said to be owed is not owed.”

Custodian of Record: John Falvey

Request Received by Custodian: September 8, 2014, and December 30, 2014

Response Made by Custodian: September 16, 2014, and December 30, 2014

GRC Complaint Received: February 5, 2015

Background³

Request and Response:

On September 8, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 16, 2014, the Custodian responded in writing, stating that the records are not in the possession of the Custodian. The Custodian advised the Complainant that the records were past their three (3) year retention schedule and had been destroyed.

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 December 30, 2014, the Complainant submitted a second OPRA request seeking the above-mentioned records. On the same day, the Custodian replied in writing by denying the request on the basis that information describing a “natural person’s finances, income, assets, liabilities, net worth, bank balances financial history or activities, or creditworthiness except as otherwise provided by law are exempt from disclosure.”⁴ *Citing N.J.S.A. 47:1A-1 et. seq.*

Denial of Access Complaint:

On February 5, 2015 the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Department of Corrections (“DOC”) was charging him for a funeral trip that he never took. He alleged that he needed the records to prove his account was being unlawfully debited \$1,000.00 based on this alleged funeral trip.

Statement of Information:

On February 25, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that regarding the September 8, 2014 request, all records regarding a trip made in 2009 would have been in the possession of Bay Side State Prison, where the Complainant was located at that time. Further, the Custodian stated that the Bay State OPRA liaison advised him that such records are only kept for three (3) years. Accordingly, there was no denial of access as no responsive records existed. *Citing Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No, 2005-49 (July 2005).*

Regarding the December 30, 2014 request, the Custodian certified that financial records concerning the March 2009 funeral would have been maintained in the Complainant’s Inmate Trust Account.⁵ The Custodian, however, denied disclosure of the records, pursuant to N.J.S.A. 47:1A-9 and Executive Order 26, (McGreevey 2002) (“EO 26”) which exempts “information describing a natural person’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities or creditworthiness.” The Custodian argued the Inmate Trust Account Statement is such a financial transaction, which is exempt pursuant to EO 26 as made applicable by N.J.S.A. 47:1A-9. Further, the Custodian argued that this was recognized in Farra’D v. NJ Dep’t of Corr., GRC Complaint No. 2010-47 (October 2011), where the GRC held that inmate financial records are exempt from disclosure pursuant to N.J.S.A 47:1A-9 and EO 26.

Analysis

Unlawful Denial of Access

⁴ While denying the request under OPRA, the Custodian also advised the Complainant that the Complainant might obtain the information he sought from the inmates’ Business Manager, who is “responsible with providing an inmate with a monthly statement containing each financial transaction processed.” *Citing N.J.A.C. 10A:2-2.1(b).*

⁵ When responding to the December 30, 2014 request, the Custodian determined that the Inmate Trust Account Statement was possibly responsive to the Complainant’s September 8, 2014 request. However, in that request the Complainant had characterized the records as “financial records for...charging a trip,” which the OPRA liaison at the East Jersey State Prison, where the Complainant is now located, interpreted to mean actual bills or invoices from the funeral trip. Those records would have been destroyed. However, whether responsive to that request or not, the Custodian argued that the same exemption under N.J.S.A.47:1A-9 applies equally to the earlier request.

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.

OPRA further provides that:

“[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...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.

EO 26 provides that:

“...[t]he following records shall not be considered to be government records subject to public access pursuant to N.J.S.A. 47:1A-1. et seq., as amended and supplemented...Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed.”

In Farra’D v. NJ Dep’t of Corr., GRC Complaint No. 2010-47 (October 2011) the Custodian, based upon N.J.S.A. 47:1A-1 of OPRA, denied the Complainant’s request. In so doing, the Custodian cited to certain language namely:

“information describing a natural person’s finances, income assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law are exempt from disclosure”

In Farra’D, the GRC found that the purported language cited by the custodian did not appear in N.J.S.A. 47:1A-1 et seq., and thus the custodian had misstated the law. The GRC advised the Farra’D custodian that the legal basis for the denial was invalid and requested a citation to the same. Neither the custodian nor custodian’s counsel provided the GRC with the correct citation. The GRC *sua sponte* researched the language cited by the custodian and found the referenced language appeared in EO 26. Therefore, the GRC determined that the records were lawfully denied as being exempt from disclosure pursuant to EO 26 as made applicable to OPRA by operation of N.J.S.A. 47:1A-9a.

Here, the Custodian responded to the Complainant’s September 8, 2014 request by advising the Complainant that the Department and its prisons did not have the records because the date of request was past the three (3) year retention period. This proved to be an erroneous response. After the Complainant made his second request, the Custodian discovered the existence of an Inmate Trust Account Statement which was a responsive record to the request,

The Custodian now argues that the error is inconsequential because the record is exempt from access. However, the original response given to the Complainant's September 8, 2014 request was erroneous because responsive records—namely—the Complainant's Inmate Trust Account, did exist.

Regarding the December 30, 2014 request, which was a slightly reworded request for the same records sought in the September 8, 2014 request, the Custodian again denied the access citing to the language of EO 26, namely, that personal finances of a natural person were not disclosable. However, as in Farra'D, GRC 2010-47 the Custodian incorrectly attributed that language to OPRA, citing only to N.J.S.A. 47:1A-1 et seq. As Farra'D, GRC 2010-47 instructs, no such provision exists in OPRA, rather, it is found in EO 26. Therefore, the reason for denial given to the Complainant was inaccurate and the response insufficient in that the Custodian failed to give a correct legal reason for the denial. *See also* Herron v. NJ Dep't of Educ., GRC Complaint No. 2011-056 (April 2012) *citing* Verry v. Borough of S. Bound Brook, (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009).

Accordingly, the Custodian initially failed to bear his burden, pursuant to N.J.S.A. 47:1A-6, of proving a lawful denial of access to Complainant's September 8, 2014, and December 30, 2014 requests because he cited to the incorrect legal authority and thus gave insufficient responses to each request. Nevertheless, the Custodian on his SOI correctly cited to EO 26, as made applicable to OPRA under N.J.S.A. 47:1A-9.a, as the reason for denial of access, as making the records exempt from disclosure. Accordingly, the Custodian did not unlawfully deny access. EO 26; N.J.S.A. 47:1A-9.a; Farra'D, GRC 2010-47.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian initially failed to bear his burden, pursuant to N.J.S.A. 47:1A-6, of proving a lawful denial of access to Complainant's September 8, 2014, and December 30, 2014 requests because he cited to the incorrect legal authority and thus gave insufficient responses to each request. Nevertheless, the Custodian on his SOI correctly cited to Executive Order 26 (McGreevey 2002), as made applicable to OPRA under N.J.S.A. 47:1A-9.a, as the reason for denial of access, as making the records exempt from disclosure. Accordingly, the Custodian did not unlawfully deny access. EO 26; N.J.S.A. 47:1A-9.a. Farra'D v. Dep't of Corr., GRC Complaint No. 2010-47 (October 2011).

Prepared By: Ernest Bongiovanni
Staff Attorney

Reviewed By: Dawn R. SanFilippo
Deputy Executive Director

November 10, 2015