



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 27, 2017 Government Records Council Meeting

David Sellow
Complainant

Complaint No. 2016-104

v.

NJ Department of Corrections
Custodian of Record

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 2017 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 has borne his burden of proof that he lawfully denied access to the Complainant’s May 18, 2015 OPRA request because he certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *see Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).
2. The Custodian did not unlawfully deny access to the requested JPay Kiosk user manual the Complainant sought in his undated and November 8, 2015 OPRA requests. N.J.S.A. 47:1A-6; Hittinger v. NJ Transit, GRC Complaint No. 2013-324 (July 2014), Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-142 (March 2015). Specifically, the Custodian was not obligated to contact JPay to obtain the user manual, because it was not created, maintained, or kept on file on behalf the District and thus does not meet the definition of a “government record” under OPRA. N.J.S.A. 47:1A-1.1; *see also Owoh v. West Windsor-Plainsboro Sch. Dist. (Mercer)*, GRC Complaint No. 2014-16, *et seq.* (September 2014).

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 27th Day of June, 2017

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: June 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2017 Council Meeting**

**David Sellow¹
Complainant**

GRC Complaint No. 2016-104

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint:

May 18, 2015 OPRA request: Copies via U.S. mail of procedures for inmates to use e-mail, grievance, and music services at New Jersey State Prison (“NJSP”) through “the Kiosk and/or [t]ablet system.”³

Undated OPRA request: Copies via U.S. mail of the JPay “Kiosk” user manual per its response to the State of Nevada Statewide Master Service Agreement No. 1901⁴ (¶ 3.6 at 63-64).

November 8, 2015 OPRA request: Copies via U.S. mail of the JPay Kiosk training user manual per JPAY’s response to Agreement No. 1901 at 63-64.

Custodian of Record: John Falvey

Request Received by Custodian: May 28, 2015; September 8, 2015; November 20, 2015

Response Made by Custodian: May 29, 2015; September 10, 2015; November 20, 2015

GRC Complaint Received: April 15, 2016

Background⁵

Request and Response:

On May 18, 2015, the Complainant submitted the first (1st) Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 28, 2015, the

¹ No legal representation listed on record.

² No legal representation listed on record.

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

⁴ The State of New Jersey entered into a cooperative contract for JPay’s services in February 2013 through the Multi-State Corrections Procurement Alliance and National Association of State Procurement Officials, acting through the State of Nevada. The contract was bid in manner that allowed the State to participate pursuant to N.J.S.A. 52:34-6.2.

⁵ 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.

Custodian responded in writing, stating that it needed ten (10) additional business days to locate responsive records. On May 29, 2015, the Custodian again responded to the Complainant in writing, advising that no responsive records exist because NJSP has no procedures in effect as of the date of this response.

The Complainant subsequently submitted the second (2nd) OPRA request to the Custodian on an unknown date. On September 10, 2015, the Custodian responded in writing to the Complainant stating that no responsive records exist. The Custodian also noted that the Complainant may access “Help” and “FAQ” sections on the JPay Kiosk, even if he is not a registered user.

On November 8, 2015, the Complainant sent a letter to the Custodian to dispute the response that no records existed. The Complainant argued that the contract required JPay to provide a manual to the New Jersey Department of Corrections (“DOC”) once the contract was awarded. *Citing* JPay’s response to Agreement No. 1901. The Complainant averred that continued denials of access would result in a complaint filed with the Government Records Council (“GRC”).

On November 20, 2015, the Custodian responded in writing, advising the Complainant that he would accept the November 8, 2015 correspondence as a new OPRA request. Additionally, the Custodian stated that, although he previously advised that no records exist, he would need ten (10) additional business days to locate responsive records. On November 23, 2015, the Custodian again responded to the Complainant in writing, advising that he contacted the DOC’s Contract Administrator assigned to the JPay contract, who advised that no records exist. The Custodian noted that the Contract Administrator also advised that the Kiosk FAQ section answers most questions. Finally, the Custodian stated that JPay was preparing to release a training video that would be provided to all inmates upon completion.

Denial of Access Complaint:

On April 15, 2016, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant disputed that no JPay Kiosk manual exists. The Complainant contended that JPay’s response to Agreement No. 1901 indicated that it would provide a user manual to DOC after being awarded a contract to install Kiosk systems in New Jersey prisons between July and August of 2015.

The Complainant argued that, if it is assumed to be true that DOC is not maintaining the user manual, it has an obligation to obtain and disclose the record regardless of location. Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (Final Decision dated December 8, 2005); Paff v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2006-158 (May 2007); Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). The Complainant asserted that the Custodian had an affirmative obligation to obtain the request manual from any DOC location, JPay, or another State agency.

The Complainant alleged that he had “seen” other OPRA request responses from the Custodian to inmates providing access to “otherwise unknown details about the JPay Kiosk

policy, procedure, and technical specifications.” The Complainant further alleged that NJSP administrators have provided “access to some information about JPay services and [the] Kiosk but do not cite any specific source.” The Complainant contended that the foregoing strongly suggests that NJSP staff is maintaining a user manual and that Custodian must identify its location. The Complainant contended that the Custodian’s continued denial of access going forward would constitute a knowing and willful violation of OPRA. N.J.S.A. 47:1A-11.

Statement of Information:

On May 4, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s first (1st) OPRA request on May 28, 2015. The Custodian affirmed that on the same day, he responded in writing, seeking an extension of time. Further, the Custodian certified that he contacted NJSP to locate responsive records and was advised that none existed. The Custodian certified that he responded in writing on May 29, 2015, advising the Complainant that no records existed.

The Custodian certified that he received the Complainant’s second (2nd) OPRA request on September 8, 2015. The Custodian certified that he contacted the Contract Administrator, who again informed him that no records existed. The Custodian affirmed that he responded in writing to the Complainant on September 10, 2015, again advising that no user manual existed.

The Custodian certified that he received a follow-up letter from the Complainant on November 20, 2015, that included a portion of JPay’s response to Agreement No. 1901. The Custodian certified that he immediately wrote to the Complainant, advising that this letter would be re-evaluated as an OPRA request with the new information. The Custodian affirmed that he again contacted the Contract Administrator, who advised that no record existed regardless of JPay’s response to Agreement No. 1901.

The Custodian certified that no records responsive to the Complainant’s repeated OPRA request for a JPay user manual exist. The Custodian thus asserted that the complaint should be dismissed in accordance with Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Additional Submissions:

On May 11, 2016, the Complainant submitted a response to the SOI. Therein, the Complainant contended that the Custodian erred by not contacting JPay to obtain a user manual. The Complainant reiterated from his Denial of Access Complaint that JPay’s response to Agreement No. 1901 proves that they are maintaining the records in the course of official business on behalf of DOC: the Custodian should have contacted JPay for the records. Burnett, 415 N.J. Super. 506. The Complainant contended that, instead, the Custodian sought the responsive records in places he knew they did not exist. The Complainant thus contended that the Custodian’s SOI responses support that he knowingly and willfully violated OPRA.

Analysis

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.

May 18, 2015 OPRA request

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See Pusterhofer*, GRC 2005-49. Here, the Complainant’s May 18, 2015 OPRA request sought policies and procedures for features available through the JPay system at NJSP. The Custodian responded in a timely manner, advising that no policies and procedures existed. In the Denial of Access Complaint, the Complainant asserted that he had “seen” other OPRA request responses from the Custodian to inmates providing access to “otherwise unknown details about the JPay Kiosk policy, procedure, and technical specifications.” The Custodian subsequently certified in the SOI that no policies or procedures existed. Additionally, the Complainant’s Denial of Access Complaint assertions were unsubstantiated and do not constitute competent, credible evidence to refute the Custodian’s SOI

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s May 18, 2015 OPRA request because he certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *see Pusterhofer*, GRC 2005-49.

Undated and November 8, 2015 OPRA requests

OPRA defines a “government record” as:

“[A]ny 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 by any officer[.]”

In Burnett, 415 N.J. Super. 506, the custodian claimed that records in possession of a third-party contractor executed on behalf of an agency are not subject to access. The Appellate Division reviewed the Law Division’s ruling, interpreting Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005) and holding that the defendant did not have to disclose the records responsive to the plaintiff’s OPRA request because the records were not in the defendant’s possession. The Appellate Division found that the motion judge interpreted Bent, *supra*, too broadly. The Appellate Division held:

We find the circumstances in Bent, *supra*, to be far removed from those existing in the present matter because . . . the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply . . . relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA . . . We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.

Id. at 517.

However, in Hittinger v. NJ Transit, GRC Complaint No. 2013-324 (July 2014), the complainant sought, among other records, contracts and agreements between an advertising agency under contract with NJ Transit and vendors who contracted with said agency. The Council distinguished the relationship between the advertising agency and NJ Transit, finding that unlike the custodian in Burnett, 415 N.J. Super. 506, NJ Transit was not bound by, nor has any discretion over, contracts made between the advertising agency and client vendors. Hittinger, GRC 2013-324. The terms of the agreement between NJ Transit and the advertising agency provided that the agency accepted full responsibility for the procurement of advertising. Id. at 3. The Council therefore held that NJ Transit was not obligated to obtain responsive records pertaining to agreements and communications between the advertising agency and client vendors. Id. at 7.

In Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-142 (March 2015), the Council applied its decision in Hittinger, GRC 2013-324, in determining that the custodian did not unlawfully deny access to a software manual cover page maintained by Network Blade, its information technology (“IT”) vendor. The Council reasoned that the relationship between the vendor and the agency was similar to that in Hittinger, and that the vendor had control of all IT decisions and software choices. For those reasons, the Council found that the custodian was not obligated to obtain the requested software manual cover from Network Blade. Id. at 3. *See also* Owoh v. West Windsor-Plainsboro Sch. Dist. (Mercer), GRC Complaint No. 2014-16, *et seq.* (September 2014) (providing that a contract between a private entity and a public agency does not require the agency to obtain and disclose the entity’s personnel records because same are not created and maintained on behalf of the custodian).

Here, the Complainant sought access to a JPay Kiosk manual on three (3) occasions. Each time, the Custodian denied the Complainant, advising that no records existed. Prior to filing the instant complaint, the Complainant disputed the Custodian’s response by arguing that Agreement No. 1901 required JPay to submit a user manual. In the Denial of Access Complaint, the Complainant reiterated that JPay was required to submit a manual to DOC. Further, the Complainant argued that the Custodian had an obligation to obtain it and disclose same if JPay had not already provided it to DOC. In the SOI, the Custodian’s response remained steadfast: DOC did not maintain a responsive record regardless of Agreement No. 1901 and that the Complainant could address questions directly through the Kiosk FAQ. The Complainant rebutted the SOI by arguing that the Custodian was required to contact JPay and obtain the manual because they were maintaining it on DOC’s behalf.

In reviewing the evidence submitted herein, the GRC finds the facts to be similar to those in Hittinger, GRC 2013-324 and Verry, GRC 2014-142. JPay contracted with multiple state corrections agencies through Agreement No. 1901 (Nevada being the lead contracting State) to provide Kiosk services to those applicable correctional facilities. That JPay created a user manual for the Kiosk system does not automatically classify the manual as a “government record.” Further, unlike the settlement agreements at issue in Burnett, it is obvious that JPay would have created the user manual for its Kiosks regardless of whether it contracted with DOC. Thus, like the contracts at issue in Hittinger and the software manual in Verry, the manual could not classify as a record created for or “on behalf of” DOC. For those reasons, the Custodian was not required to obtain a copy of the manual from JPay in the instance that it did not already provide one to DOC.

Accordingly, the Custodian did not unlawfully deny access to the requested JPay Kiosk user manual the Complainant sought in his undated and November 8, 2015 OPRA requests. N.J.S.A. 47:1A-6; Hittinger, GRC No. 2013-324, Verry, GRC 2014-142. Specifically, the Custodian was not obligated to contact JPay to obtain the user manual, because it was not created, maintained, or kept on file on behalf the District and thus does not meet the definition of a “government record” under OPRA. N.J.S.A. 47:1A-1.1; *see also* Owoh, GRC No. 2014-16, 2014-62 & 2014-81.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s May 18, 2015 OPRA request because he certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *see* Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian did not unlawfully deny access to the requested JPay Kiosk user manual the Complainant sought in his undated and November 8, 2015 OPRA requests. N.J.S.A. 47:1A-6; Hittinger v. NJ Transit, GRC Complaint No. 2013-324 (July 2014), Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-142 (March 2015). Specifically, the Custodian was not obligated to contact JPay to obtain the user manual, because it was not created, maintained, or kept on file on behalf the District and thus does not meet the definition of a “government record” under OPRA. N.J.S.A. 47:1A-1.1; *see also* Owoh v. West Windsor-Plainsboro Sch. Dist. (Mercer), GRC Complaint No. 2014-16, *et seq.* (September 2014).

Prepared By: Frank F. Caruso
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June 20, 2017