



State of New Jersey
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 22, 2018 Government Records Council Meeting

Demetrius Minor
Complainant

Complaint No. 2016-152

v.

Office of the Corrections Ombudsman
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 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 timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, no “deemed” denial of access occurred. 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 portion of the Complainant’s request seeking “logs,” “actions,” and “records” is invalid. OPRA does not require the Custodian to perform the research necessary to locate responsive records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Further, the portion of the Complainant’s request item Nos. 1 and 2 seeking “letters” is invalid because they did not include all of the Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010) criteria. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Thus, the Custodian did not unlawfully deny access to the subject request seeking the above, where applicable. N.J.S.A. 47:1A-6.
3. The Custodian has borne his burden of proof that he lawfully denied access to the that portion of the Complainant’s OPRA request item No. 4 seeking “policies and procedures” because he certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).



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 22nd Day of May, 2018

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: May 25, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
May 22, 2018 Council Meeting**

**Demetrius Minor¹
Complainant**

GRC Complaint No. 2016-152

v.

**Office of the Corrections Ombudsman²
Custodial Agency**

Records Relevant to Complaint: On-site inspection of:

1. Logs, letters, and “actions taken” regarding the Complainant
2. Letters, logs, and “actions taken” regarding the Complainant from October 8, 2015 to March 15, 2016.
3. “Responsive records” showing calls received from the Complainant.
4. “Responsive records” showing the policy and procedure for investigating harassment claims received by the Office of the Corrections Ombudsman (“Ombudsman”).

Custodian of Record: Dan DiBenedetti

Request Received by Custodian: April 8, 2016

Response Made by Custodian: April 8, 2016

GRC Complaint Received: May 26, 2016

Background³

Request and Response:

On March 15, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 8, 2016, the same business day as receipt of the OPRA request, the Custodian responded in writing stating that all “contacts” received by the Ombudsman were confidential and could only be disclosed through a court order. The Custodian noted that he would only disclose records after receiving “an order from a Judge of competent jurisdiction.”

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Tasha Bradt. Previously represented by Deputy Attorney General Nicole Adams.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On May 26, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he was told by an individual that Ombudsman maintained the records sought. The Complainant asserted that long after the expiration of the statutory time frame, the Custodian responded denying access to his OPRA request.

The Complainant disputed the denial of access, highlighting that one of the request items sought policies and procedures. The Complainant noted that he searched for and could not locate a statute or policy supporting the Ombudsman’s denial of access. The Complainant contended that he submitted his OPRA request because he heard records pertaining to him contained misinformation. The Complainant contended that he had a right to inspect the requested records because they would be of importance to him. However, the Complainant also contended that even if the other responsive records are exempt from disclosure, there is no reason why policies and procedures should be confidential.

Statement of Information:⁴

On December 21, 2017,⁵ the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 8, 2016. The Custodian certified that he responded in writing on the same day advising the Complainant that Ombudsman records were confidential and could not be disclosed without a court order from “a Judge of competent jurisdiction.” The Custodian certified that he could not properly conduct a search because the Complainant’s OPRA request was overly broad. The Custodian noted that his office subsequently attempted to begin gathering records reflecting any contact with the Complainant.

The Custodian stated that the Courts have long deferred to the New Jersey Department of Corrections (“DOC”) when making safety and security decisions. The Custodian states 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 stated that the Courts have 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. N.J. Dep’t of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999). See also Florence v. Bd. of Chosen Freeholders Burlington Cnty., 132 S.Ct. 1510, 1515 (2012) (“[m]aintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face[.]”) The Custodian stated that the Ombudsman protects inmates from abuse, bias, or other improper treatment and provides a mechanism for the resolution of issues, problems, or complaints. The Custodian further stated that the Ombudsman serves as an advocate for inmate concerns.

⁴ On July 18, 2016, this complaint was referred to mediation. On September 21, 2016, this complaint was referred back to the GRC for adjudication.

⁵ On November 24, 2017, the Custodian submitted an incomplete Statement of Information, which the GRC returned on December 21, 2017.

The Custodian contended that he properly denied the Complainant's OPRA request because the records contained "security information" that if disclosed, would jeopardize the safety and security of a facility or the persons therein. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)-(b). The Custodian refuted that the Complainant was entitled to the requested records because they concerned him. The Custodian contended that the Complainant sought records that would reveal an inmate's interaction with the Ombudsman. The Custodian asserted that disclosure could chill DOC employees from providing written responses to complaints and impede the resolution process. The Custodian also argued that inmates may be similarly chilled from filing complaints. The Custodian argued that this chilling affect would manifestly imperil the safety and security of correctional facilities by abrogating the Ombudsman's offered protection. The Custodian also contended that OPRA request item No. 2 appeared to seek all interactions with the Ombudsman from October 8, 2015 to March 15, 2016. The Custodian argued that the Complainant was not entitled to records concerning any other inmate. N.J.A.C. 10A:22-2.3(b).

The Custodian also contended that he properly denied access because the request was overly broad. The Custodian argued that the Complainant's request sought all documentation regarding his communications with the Ombudsman. The Custodian contended that this request would have necessarily required an open-ended search of the Ombudsman's files; custodians are not required to conduct research and create records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005).

Finally, the Custodian certified that no record responsive to the Complainant's OPRA request item No. 4 existed. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint 2005-49 (July 2005). The Custodian affirmed that this is because all contacts with the Ombudsman are handled on a case-by-case basis depending on allegations, concerns, or questions. The Custodian further averred that the Complainant failed to provide any evidence to contradict this statement.

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).⁶ 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 Complainant contended that the Custodian responded to him well beyond the seven (7) business day time frame. In the SOI, the Custodian certified that he received the OPRA

⁶ 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.

request on April 8, 2016 and responded on the same day. The Custodian supported his certification by including a date-stamped copy of the OPRA request in the SOI. The GRC should note that the date stamp appears to read April 7, 2016, but it is unclear whether the stamp came from a general mailroom or the Ombudsman direct.

Therefore, the Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Validity of Request

The New Jersey Superior Court, 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, 375 N.J. Super. 534 (emphasis added).]

The court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (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). Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);⁷ N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Regarding generic requests for "record," the request at issue in MAG sought "all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor

⁷ Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-540. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the complainant’s request item No. 2 seeking “[p]roof of submission” was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012) (accepting the Administrative Law Judge’s finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request) Id. at 12-13.

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in [MAG], [Bent] and the Council’s decisions in [Asarnow, GRC 2006-24] and Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008).

[Id. See also Schulz v. NJ State Police, GRC Complaint No. 2014-390 (Interim Order dated July 28, 2015) (holding that the portion of the request seeking “all documents” was overly broad and thus invalid).]

Further, the GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that, to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See Elcavage, GRC 2009-07; Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council later applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

Here, the Complainant’s request sought “logs,” “letters,” “actions,” and “records” regarding himself. The Custodian responded initially denying access for certain reasons, but in the SOI argued that the OPRA request was invalid. The Custodian argued that the request sought any documentation regarding Complainant’s communication with the Ombudsman; responding to the request would have required an open-ended search of all of the agency’s files.

Regarding the portions of the requests seeking “actions” and “records” in request item Nos. 1 through 4, precedential case law supports that these terms did not sufficiently identify the records sought. It is also unclear whether “actions” can qualify as an identifiable “government record” in the first place. Further, “records” would necessarily have required the Custodian to search every record in possession of the Ombudsman to determine whether it referred to the Complainant. MAG, 375 N.J. Super. 534; Bent, 381 N.J. Super. at 37; Steinhauer-Kula, GRC 2010-198. Additionally, the portion of the item seeking generic “logs” would similarly require the Custodian to review the Ombudsman’s entire universe of records, identify which could reasonably be considered a “log,” and then research each to see if the Complainant were included thereon.

Regarding the portions of the request seeking “letters,” the Complainant failed to include all required criteria as prescribed in Elcavage, GRC 2009-07 and Armenti, GRC 2009-154. Specifically, request No. 1 only includes the subject or content. As for request item No. 2, it appears to be a rehashing of request No. 1 with the addition of a time frame. However, the Complainant did not identify a sender and/or recipient in either item.

Accordingly, the portion of the Complainant’s request seeking “logs,” “actions,” and “records” is invalid. OPRA does not require the Custodian to perform the research necessary to locate responsive records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Feiler-Jampel, GRC 2007-190. Further, the portion of the Complainant’s request item Nos. 1 and 2 seeking “letters” is invalid because they did not include all of the Elcavage criteria. See Armenti, GRC 2009-154. Thus, the Custodian did not unlawfully deny access to the subject request seeking the above, where applicable. N.J.S.A. 47:1A-6.

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, a portion of the Complainant’s OPRA request item No. 4 sought “policies and procedures” for investigating harassment complaints filed with the Ombudsman. The Custodian initially denied access to the Complainant’s OPRA request for certain reasons. However, in the SOI, the Custodian certified that the Ombudsman did not maintain policies or procedures regarding harassment investigations. The Custodian elaborated on this statement in an attached certification. Therein, he affirmed that the Ombudsman handled all contacts on a case-by-case basis predicated on the allegations, concerns, and questions received. Additionally, there is no evidence in the record to refute that the Custodian did not possess the responsive records.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the that portion of the Complainant's OPRA request item No. 4 seeking "policies and procedures" 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.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred. 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 portion of the Complainant's request seeking "logs," "actions," and "records" is invalid. OPRA does not require the Custodian to perform the research necessary to locate responsive records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Further, the portion of the Complainant's request item Nos. 1 and 2 seeking "letters" is invalid because they did not include all of the Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010) criteria. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Thus, the Custodian did not unlawfully deny access to the subject request seeking the above, where applicable. N.J.S.A. 47:1A-6.
3. The Custodian has borne his burden of proof that he lawfully denied access to the that portion of the Complainant's OPRA request item No. 4 seeking "policies and procedures" because he certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
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May 15, 2018