



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 27, 2018 Government Records Council Meeting

Alonzo Lugo
Complainant

Complaint No. 2017-08

v.

NJ Department of Corrections
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Findings and Recommendations of the Council Staff 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 unlawfully deny access to request item numbers 1 and 2 because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer v. N.J. Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).
2. The Custodian has borne his burden of proof that he lawfully denied access to the February 3, 2016 telephone recordings. N.J.S.A. 47:1A-6. Such denial is lawful pursuant to N.J.A.C. 10A:22-2.3 (a)(12), which provides in relevant part that “[r]ecords and/or content related to inmate phone ... information” shall not be considered a government record subject to access under OPRA. And N.J.A.C. 10A:22-2.3 (a)(12) is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a).

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 March, 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: March 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
March 27, 2018 Council Meeting**

**Alonzo Lugo¹
Complainant**

GRC Complaint No. 2017-8

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to the Complaint: Copies of:

1. “. . . [T]he video surveillance of the visit at East Jersey State Prison in the afternoon of December 20, 2015 . . . ”
2. “. . . COR Laluz wrote me a charge for refusing to obey a direct order for not staying on count where I worked at the Inmates’ Program Center the time is unknown it should be in the datebook which I would also like a copy of to get the exact day of the incident.”
3. “Phone recordings on the day of Feb. 3rd 2016 in the a.m.”

Custodian of Record: John Falvey
Request Received by Custodian: December 1, 2016
Response Made by Custodian: December 9, 2016
GRC Complaint Received: December 22, 2016³

Background⁴

Request and Response:

On December 1, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 9, 2016, the sixth (6th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that request item number 1 no longer exists, request item number 2 could not be located, therefore the Custodian needed clarification of said request item, and that the records responsive to request item number 3 are exempt from access pursuant to 28 C.F.R. 23.20(e) and N.J.S.A. 47:1A-9.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Adam Robert Gibbons.

³ This is the date the complaint was received by the GRC. Although the Complainant verified the complaint on December 15, 2016, he was an inmate at the time and the mail was delayed because it had to be processed through the prison system.

⁴ 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 December 22, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that the Custodian denied his request on December 9, 2016.

The Complainant further states that he does not have some of the dates because “most or all of the documents are in the Appellate Division.” The Complainant states that he wrote S.I.D. on the JPAY kiosk, as well as OPRA and the NJDOC around March or April. The Complainant states that he also wrote to the Ombudsman’s Office requesting the records and that he was informed that “since the issue was resolved they also opted a decision that there is no reason to look any further into the decision of obtaining the records requested.”

Statement of Information:

On January 26, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 1, 2016, and responded in writing on December 9, 2016, December 23, 2016 and January 4, 2017.

The Custodian certifies that the record responsive to request item number 1 is video surveillance footage, and that the record responsive to request item number 2 is a disciplinary charge form. The Custodian states that, based on information provided by the Complainant in response to the Custodian’s request for clarification, the disciplinary charge was dismissed sometime between February and April of 2016. The Custodian states that he provided such information to East Jersey State Prison in order to facilitate a search for the record. The Custodian certifies that, after conducting a search of the Department of Corrections’ (“DOC”) records, he determined the video surveillance footage no longer exists and that no specific disciplinary record could be located. The Custodian certifies that the telephone records responsive to request item number 3 are confidential, and that such confidentiality is applicable to OPRA through N.J.S.A. 47:1-9 (sic).

The Custodian’s Counsel states that pursuant to N.J.S.A. 30:1B-6(g), the Commissioner of the DOC has broad discretionary powers to determine matters of public policy and regulate the institutions under his jurisdiction. Counsel asserts that the Commissioner’s powers include the formulation and adoption of policies and procedures related to the security and maintenance of order within the institutions. Counsel references Jenkins v. Fauver, 108 N.J. 239, 252 (1987) and Russo v. NJ Dep’t of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999). Counsel further contends that the GRC previously denied access to recorded telephone conversations under a similar fact pattern in Pavlyik v. NJ Dep’t of Corr., GRC Complaint No. 2014-94 (October 2014), wherein the Council held that the DOC Commissioner’s decision to regulate the dissemination of requested telephone recordings pursuant to Attorney General Guidelines and 28 C.F.R. 23 served as grounds for the custodian to deny access. Counsel argues that the instant complaint is no different than Pavlyik, warranting the same outcome.

Additional Submissions:

On December 16, 2016, a day after the Complainant verified his complaint on December 15, 2016, the Complainant submitted a clarification of request item number 2 as was requested by the Custodian on December 9, 2016. On December 23, 2016 and on January 4, 2017, the Custodian provided progress reports to the Complainant in reply to his December 16, 2016 clarification. None of the aforementioned communications are relevant to this complaint, however, because they were made after the Complainant verified and filed the complaint.

On March 12, 2018, the GRC asked the Custodian's Counsel to have the Custodian certify that request item number 3, the responsive telephone records, meets the definition of "Criminal Intelligence Information" as defined in 28 CFR 23.3(b)(3). Counsel was also asked to have the Custodian certify that the Department of Corrections is a "Participating Agency" as defined in 28 CFR 23.3(b)(4).

On March 16, 2018, the Custodian submitted a certification to the GRC, wherein the Custodian certified that the DOC is required to comply with the Attorney General Guidelines on the Collection, Handling, Storage, and Dissemination of Intelligence in New Jersey, which requires agencies to abide by 28 CFR 23. The Custodian certified that the Attorney General Guidelines provide that the policies set forth in 28 CFR 23 "are the accepted standard for many intelligence systems, involving thousands of agencies across the country[.]" The Custodian certified that the DOC is "not technically a 'participating agency' as defined in 28 CFR 23.3(b)(4)," but under the Attorney General Guidelines is required to comply with the provisions of the federal regulation. The Custodian further certified that the DOC's Special Investigation Division maintains recorded calls as part of their criminal intelligence system in accordance with the Attorney General Guidelines, which require agencies to be compliant with 28 CFR 23 and only grants access to the recorded calls as set forth in the Attorney General Guidelines.

The Custodian further certified that N.J.A.C. 10A:22-2.3 (a)(12), which became effective on December 19, 2016, provides that "[r]ecords and/or content related to inmate phone, email, or visit information" are not government records subject to disclosure. Due to the promulgation of this regulation, the Custodian certifies that request item number 3 can be denied independently from 28 CFR 23.2(e).

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.

Further, “[t]he provisions of [OPRA] 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.” N.J.S.A. 47:1A-9(a).

Request Item Numbers 1 and 2

In Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the record responsive to request item number 1, the December 20, 2015 video surveillance footage, no longer exists. The Custodian also certified that the record responsive to request item number 2, the requested disciplinary record, could not be located.

As such, the Custodian did not unlawfully deny access to request item numbers 1 and 2 because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer*, GRC 2005-49.

Request Item Number 3

For this request item, the Complainant was seeking telephone recordings at East Jersey State Prison on February 3, 2016, from midnight until noon. The Custodian denied access, asserting that the records responsive to the request item are exempt from disclosure under 28 C.F.R. 23.20(e) and N.J.S.A. 47:1A-9.

The Custodian’s Counsel elaborated on the reason for denial, stating that the fact pattern in the instant complaint is similar to the facts in Pavlyik v. N.J. Dep’t of Corr., GRC Complaint No. 2014-94 (October 2014). Counsel suggested that the GRC should follow its precedent in Pavlyik, thus the outcome should be the same.

In Pavlyik v. N.J. Dep’t of Corr., GRC Complaint No. 2014-94 (October 2014), the Council held that an inmate requestor was not entitled to institutional telephone recordings for safety and security purposes in accordance with the New Jersey Attorney General Guidelines on the Collection, Handling, Storage, and Dissemination of Intelligence in New Jersey, and that the Guidelines required participating agencies to comply with 28 C.F.R. 23, prohibiting dissemination of the information unless “there is a need to know and a right to know the information in the performance of a law enforcement activity.” *Id.* at 28 C.F.R. 23.20(e).

It is not necessary for the Council to follow the same analysis it set forth in Pavlyik, however, because in a March 16, 2018 supplemental certification the Custodian averred that on December 19, 2016, N.J.A.C. 10A:22-2.3 (a)(12) became effective. The regulation provides in relevant part that “. . . the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq. . . . [r]ecords and/or content related to inmate phone, e-mail, or visit information[.]” Thus, this regulation concisely proscribes access to inmate telephone records which constitute the records responsive to request item number 3 here.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the February 3, 2016 telephone recordings. N.J.S.A. 47:1A-6. Such denial is lawful pursuant to N.J.A.C. 10A:22-2.3 (a)(12), which provides in relevant part that “[r]ecords and/or content related to inmate phone . . . information” shall not be considered a government record subject to access under OPRA. And N.J.A.C. 10A:22-2.3 (a)(12) is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a).

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to request item numbers 1 and 2 because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).*
2. The Custodian has borne his burden of proof that he lawfully denied access to the February 3, 2016 telephone recordings. N.J.S.A. 47:1A-6. Such denial is lawful pursuant to N.J.A.C. 10A:22-2.3 (a)(12), which provides in relevant part that “[r]ecords and/or content related to inmate phone . . . information” shall not be considered a government record subject to access under OPRA. And N.J.A.C. 10A:22-2.3 (a)(12) is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a).

Prepared By: John E. Stewart

March 20, 2018