



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Antonne Henshaw
Complainant

Complaint No. 2017-235

v.

NJ Department of Corrections
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 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 November 12, 2019 Interim Order because he responded in the prescribed time frame providing the Complainant copies of his work history and Judgement of Conviction and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the Complainant’s November 3, 2017 OPRA request item No. 1 seeking his work history and item No. 5 seeking a JOC, the Custodian timely complied with the Council’s November 12, 2019 Interim Order providing the responsive records. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do 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 7th Day of January 2020

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: January 9, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Antonne Henshaw¹
Complainant**

GRC Complaint No. 2017-235

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Copies via U.S. mail or on-site inspection of “all non-confidential documents” within inmate classification folder to include:

1. Entire work history
2. Record(s) of all institutional infractions
3. All non-confidential psychiatric and/or psychological reports
4. Educational history
5. Judgement of conviction
6. Housing history
7. Entire disciplinary history and relevant special reports used therein
8. Program history
9. Any and all non-confidential custody incident reports
10. Social service reports

Custodian of Record: John Falvey

Request Received by Custodian: November 3, 2017

Response Made by Custodian: November 13, 2017

GRC Complaint Received: December 11, 2017

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 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. Item Nos. 2, 4, 6, 7, 8, and 10 are invalid, blanket requests that require the Custodian to conduct research as opposed to request a specific record. MAG Entm't v. Div. of

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Tasha Bradt.

Alcoholic Beverage Control, 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 Ass'n 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) N.J.A.C. 10A: 22-2.3(a).

2. The Custodian unlawfully denied access to the Complainant's OPRA request item No. 1 seeking his work history. N.J.S.A. 47:1A-6; Catrell v. N.J. Dep't of Corr., GRC Complaint No. 2006-121 (February 2007). The Custodian shall either: 1) disclose these responsive records, with redactions where applicable; or 2) certify to whether no records existed.
3. The reports sought in the Complainant's OPRA item No. 3, which are medical, psychiatric or psychological records, are exempt from disclosure under Executive Order No. 26 (Gov. McGreevey, 2002), N.J.S.A. 47:1A-9(a) and N.J.A.C. 10A:71-2.2(a)(1). N.J.S.A. 47:1A-6; Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017). See also McLawhorn v. N.J. Dep't of Corr., GRC Complaint No. 2012-292 (July 2013); Riley v. N.J. Dep't of Corr., GRC Complaint No. 2013-345 (July 2014); Brunson v. N.J. Dep't of Corr., GRC Complaint No. 2015-357 (February 2017). Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
4. The Custodian unlawfully denied access to the Complainant's OPRA request item No. 5 seeking a judgment of conviction. N.J.S.A. 47:1A-6; See also Lewis v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (April 2018). The Custodian shall either: 1) disclose these responsive records, with redactions where applicable; 2) certify to whether no records existed.
5. **The Custodian shall comply with conclusion Nos. 2 and 4 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, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
6. The requested custody incident reports sought in the Complainant's OPRA request item No. 9 are exempt from access under OPRA because disclosure would compromise the safety and security of East Jersey State Prison. N.J.S.A. 47:1A-1.1; Perry v. N.J. Dep't

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "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."

⁵ 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.

of Corr., GRC Complaint No. 2012-237 (June 2013). See also Fischer v. N.J. Dep't of Corr., GRC Complaint No. 2005-171 (February 2006). Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.

7. 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 November 14, 2019, the Council distributed its Interim Order to all parties. On November 19, 2019, the Custodian responded to the Council's Interim Order. The Custodian certified that on the previous day, he provided the Complainant with a true and correct copy of the portion of his progress notes detailing his work history as well as a true and correct copy of his Judgement of Conviction ("JOC") via regular mail dispatched to the address on file with the Department. Additionally, the Custodian provided a certification of compliance to the Executive Director of the GRC.

Analysis

Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian to disclose to the Complainant copies of his work history as well as his JOC and to submit certified confirmation of compliance, in accordance with N.J. Court Rules R. 1:4-4, to the Executive Director. On November 14, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 21, 2019.

On November 18, 2019, the second (2nd) business day after receipt of the Council's Order, the Custodian certified that he provided the Complainant with true and correct hardcopies of his progress notes detailing his work history as well as a true and correct copy of his JOC via regular mail. The Custodian provided a certified confirmation of compliance.

Therefore, the Custodian complied with the Council's November 12, 2019 Interim Order because he responded in the prescribed time frame providing the Complainant copies of his work history and JOC. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 unlawfully denied access to the Complainant’s November 3, 2017 OPRA request item No. 1 seeking his work history and item No. 5 seeking a JOC, the Custodian timely complied with the Council’s November 12, 2019 Interim Order providing the responsive records. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do 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 November 12, 2019 Interim Order because he responded in the prescribed time frame providing the Complainant copies of his work history and Judgement of Conviction and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the Complainant’s November 3, 2017 OPRA request item No. 1 seeking his work history and item No. 5 seeking a JOC, the Custodian timely complied with the Council’s November 12, 2019 Interim Order providing the responsive records. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do 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: Brandon Garcia
Case Manager

December 10, 2019



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DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Antonne Henshaw
Complainant

Complaint No. 2017-235

v.

NJ Department of Corrections
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 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. Item Nos. 2, 4, 6, 7, 8, and 10 are invalid, blanket requests that require the Custodian to conduct research as opposed to request a specific record. MAG Entm’t v. Div. of Alcoholic Beverage Control, 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 Ass’n 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) N.J.A.C. 10A: 22-2.3(a).
2. The Custodian unlawfully denied access to the Complainant’s OPRA request item No. 1 seeking his work history. N.J.S.A. 47:1A-6; Catrell v. N.J. Dep’t of Corr., GRC Complaint No. 2006-121 (February 2007). The Custodian shall either: 1) disclose these responsive records, with redactions where applicable; or 2) certify to whether no records existed.
3. The reports sought in the Complainant’s OPRA item No. 3, which are medical, psychiatric or psychological records, are exempt from disclosure under Executive Order No. 26 (Gov. McGreevey, 2002), N.J.S.A. 47:1A-9(a) and N.J.A.C. 10A:71-2.2(a)(1). N.J.S.A. 47:1A-6; Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017). See also McLawhorn v. N.J. Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013); Riley v. N.J. Dep’t of Corr., GRC Complaint No. 2013-345 (July 2014); Brunson v. N.J. Dep’t of Corr., GRC Complaint No. 2015-357 (February 2017). Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
4. The Custodian unlawfully denied access to the Complainant’s OPRA request item No. 5 seeking a judgment of conviction. N.J.S.A. 47:1A-6; See also Lewis v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2016-131 (April 2018). The Custodian shall



either: 1) disclose these responsive records, with redactions where applicable; 2) certify to whether no records existed.

5. **The Custodian shall comply with conclusion Nos. 2 and 4 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, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
6. The requested custody incident reports sought in the Complainant's OPRA request item No. 9 are exempt from access under OPRA because disclosure would compromise the safety and security of East Jersey State Prison. N.J.S.A. 47:1A-1.1; Perry v. N.J. Dep't of Corr., GRC Complaint No. 2012-237 (June 2013). See also Fischer v. N.J. Dep't of Corr., GRC Complaint No. 2005-171 (February 2006). Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
7. 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 12th Day of November 2019

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 14, 2019

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Antonne Henshaw¹
Complainant**

GRC Complaint No. 2017-235

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Copies via U.S. mail or on-site inspection of “all non-confidential documents” within inmate classification folder to include:

1. Entire work history
2. Record(s) of all institutional infractions
3. All non-confidential psychiatric and/or psychological reports
4. Educational history
5. Judgement of conviction
6. Housing history
7. Entire disciplinary history and relevant special reports used therein
8. Program history
9. Any and all non-confidential custody incident reports
10. Social service reports

Custodian of Record: John Falvey
Request Received by Custodian: November 3, 2017
Response Made by Custodian: November 13, 2017
GRC Complaint Received: December 11, 2017

Background³

Request and Response:

On November 3, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 13, 2017, the Custodian denied the Complainant’s request for failure to identify a specific government record,

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Tasha Bradt.

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.

citing MAG Entm't v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bragg v. Dep't of Corr., GRC Complaint No. 2010-145 (March 2011).

Denial of Access Complaint:

On December 2, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant included an itemized list of the records he requested. The Complainant asserted that the Custodian denied his OPRA request because it “[f]ailed to identify specific government records sought.” The Complainant contended that the requested records should be disclosed to him under OPRA. The Complainant provided no additional arguments against the Custodian’s denial of access.

Statement of Information:

On January 8, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that on November 3, 2017, the Complainant filed an OPRA request for “all non-confidential documents” within his inmate classification folder. The Custodian asserted that on November 13, 2017, he denied the request for failure to identify a specific record sought, citing MAG, 375 N.J. Super. at 546 and Bragg, GRC 2010-145.

The Custodian argued that the inmate classification file is a “comprehensive dossier that could contain numerous categories of records” exempt from disclosure under OPRA and the New Jersey Department of Corrections’ (“DOC”) regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3, *et seq.* The Custodian further argued that those categories could include multiple confidential records such as Special Investigation Division reports, medical and mental health records, communication and visitor information. The Custodian asserted that the Complainant could request specific records from his prison classification file using an “Inmate Remedy System Form” through any JPAY kiosk within his facility. The Custodian noted that the Complainant could “articulat[e] the records he would like to view and reasons why” through the kiosk.

The Custodian contended that he lawfully denied access to the Complainant’s OPRA request. The Custodian asserted that the request, similar to the request in Bragg, GRC 2010-145, failed to identify any specific records sought from his classification file, which was comprised of dozens of records. Further, the Custodian contended that the Complainant’s request lists items exempt from disclosure under OPRA citing Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017), and N.J.A.C. 10A: 22- 2.3.

Analysis

Validity of Request

The New Jersey 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. at 546 (emphasis added).]

[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. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁴ N.J. Builders Ass’n 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).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research MAG, 375 N.J. Super. at 546; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Board. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler, GRC 2007-151, the relevant part of the complainant’s request sought:

- Item No. 2: From the Borough Engineer’s files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 3: From the Borough Engineer’s files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
- Item No. 4: From the Borough Attorney’s files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 5: From the Borough Attorney’s files: all documents related to the development or modification to North Street, to the south and east of Wilson St.

In the aforementioned request, for Item Nos. 2-5 the complainant requested “all documents” pertaining to various subjects rather than indicating specific records. The Council found that “[b]ecause the complainant’s OPRA request [Item Nos.] 2-5 are not requests for

⁴ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

identifiable government records, the requests are invalid, and the custodian has not unlawfully denied access to the requested records pursuant to [MAG] and [Bent].”

In matter before Council, the Complainant’s November 3, 2017 OPRA request contained an itemized list of records. The Custodian denied the request collectively stating that the Complainant failed to identify a specific record. The requested items to be examined for validity are as follows. Item No. 2 requested records of all institutional infractions. Item No. 4 requested educational history. Item No. 6 requested housing history. Item No. 8 requested program history. Item No. 10 requested social service reports. The remaining items will be addressed later in the analysis.

The GRC finds that item Nos. 2, 4, 6, 7, 8, and 10 do not identify a specific record sought; rather, they each represent blanket requests that required the Custodian to perform research. Based on the foregoing, the items are invalid. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. 30, 37; N.J. Builders Ass’n, 390 N.J. Super. 166, 180; Schuler, GRC 2007-151.

Therefore, item Nos. 2, 4, 6, 7, 8, and 10 are invalid, blanket requests that require the Custodian to conduct research as opposed to request a specific record. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. 30, 37; N.J. Builders Ass’n, 390 N.J. Super. 166, 180; Schuler, GRC 2007-151. Thus, the Custodian lawfully denied access to these items. 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.

OPRA provides that:

A government record *shall not include* the following information ... emergency or security information or procedures *for any buildings or facility* which, if disclosed, *would jeopardize security* of the building or facility or persons therein

[N.J.S.A. 47:1A-1.1. (emphasis added).]

Further, OPRA provides that:

The 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).]

Executive Order No. 26 (Gov. McGreevey 2002)(“EO 26”) provides that:

The 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, liability, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed.

[Id.]

Additionally, DOC regulations provide that:

In addition to records designated as confidential pursuant to the provisions of [OPRA], any other law, rule promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Rules of Court or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access: (1) *[i]nformation, files, documents, reports, records or other written materials concerning an offender's medical, psychiatric or psychological history, diagnosis, treatment or evaluation.*

[N.J.A.C. 10A:71-2.2(a)(1) (emphasis added).]

Mental health records are encompassed within the category of psychiatric or psychological records that are not government records subject to disclosure pursuant to N.J.A.C. 10A:71-2.2(a)(1). See also N.J.A.C. 10A:22-2.3(a)(4) (similarly exempting medical records from disclosure). Additionally, the language contained in N.J.A.C. 10A:71-2.2(a)(1), although a DOC regulation, is consistent with longstanding language contained in paragraph 4 of EO 26, providing in relevant part that “[t]he following records shall not be . . . subject to public access pursuant to [OPRA] . . . [i]nformation relating to medical, psychiatric, or psychological history, diagnosis, treatment or evaluation.” Id.

In the matter currently before the Council, the Complainant included an itemized list of records sought. The items will be addressed by number corresponding with the list above.

Item No. 1: Entire Work History

In Catrell v. N.J. Dep’t of Corr., GRC Complaint No. 2006-121 (February 2007), the Council held that “. . . the Custodian unlawfully denied the Complainant access to the inmate’s work record and type of work. There is no applicable exemption for this information provided in OPRA. Thus, the Custodian did not bear her burden of proof for such denial pursuant to N.J.S.A. 47:1A-6.”

In this complaint, the Complainant's OPRA request item No. 1 sought "work history." In response to this item, the Custodian asserted in the SOI that the Complainant's work history was "designated confidential" by DOC regulations. N.J.A.C. 10A: 22-2.3. The Complainant contended that he should be entitled to view this record under OPRA.

The Council held in Catrell, GRC 2006-121 that no exemption applied to this record under OPRA. DOC regulations do not list the work history of an inmate as part of their records designated confidential. Further, EO 26 exempts from public record the details of a person's finances, income, creditworthiness but does not mention "work history." Therefore, the GRC is satisfied that no exemption applies to the Complainant's inmate work history under OPRA and the record is disclosable. Catrell, GRC 2006-121.

Thus, Custodian unlawfully denied access to the Complainant's OPRA request item No. 1 seeking his work history. N.J.S.A. 47:1A-6; Catrell, GRC 2006-121. The Custodian shall either: 1) disclose these responsive records, with redactions where applicable; or 2) certify to whether no records existed.

Item No. 3: All non-confidential psychiatric and/or psychological reports

In Spillane, 2017 N.J. Super. Unpub. LEXIS 2392, the Superior Court of New Jersey, Appellate Division upheld the Council's determination that the custodian lawfully denied access to complainant's mental health records under OPRA. In reaching its conclusion, the court reasoned that the language of EO 26 and State Parole Board regulations at N.J.A.C. 10A:71-2.2 "rendered the report exempt from disclosure under OPRA." Id. at 6. Further the court dismissed complainant's assertion that he was entitled to access because the report was about him: "OPRA provides a vehicle for public access to government records. OPRA does not afford appellant a right of personal access to government records that are subject to OPRA's exceptions or exemptions." Id. (citations omitted). See also McLawhorn v. N.J. Dep't of Corr., GRC Complaint No. 2012-292 (July 2013); Riley v. N.J. Dep't of Corr., GRC Complaint No. 2013-345 (July 2014); Brunson v. N.J. Dep't of Corr., GRC Complaint No. 2015-357 (February 2017).

In this complaint, the Complainant's OPRA request item No. 3 sought "non-confidential psychiatric and/or psychological reports." In response to this request item, the Custodian asserted in the SOI that he denied access to the responsive records pursuant to Spillane and N.J.A.C. 10A:22-2.3, which exempts from disclosure any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation. The Complainant contended that he should be entitled to view this record under OPRA.

The Council's decision in Spillane, and subsequent affirmation on appeal, supports the Custodian's denial of access to the Complainant's mental health records because same seeks psychiatric or psychological reports that are exempt from disclosure. Spillane is thus applicable to this OPRA request item. See also McLawhorn, GRC 2012-292; Riley, GRC 2013-345; Brunson, GRC 2015-357. The GRC is satisfied that the Custodian lawfully denied access to the requested report(s).

Therefore, the reports sought in the Complainant's OPRA item No. 3, which are medical, psychiatric or psychological records, are exempt from disclosure under EO 26, N.J.S.A. 47:1A-9(a), and N.J.A.C. 10A:71-2.2(a)(1). N.J.S.A. 47:1A-6; Spillane, 2017 N.J. Super Unpub. LEXIS 2392. See also McLawhorn, GRC 2012-292; Riley, GRC 2013-345; Brunson, GRC 2015-357. Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.

Item No. 5: Judgment of Conviction

In Lewis v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2016-131 (April 2018), the Council held that the Custodian may have unlawfully denied access to, among other records, judgment of convictions. N.J.S.A. 47:1A-6; Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009); Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (July 2013).

In this complaint, the Complainant's OPRA request item No. 5 sought a "judgment of conviction." In response to this item, the Custodian argued in the SOI that the Complainant sought files that are "designated confidential pursuant to DOC regulations." N.J.A.C. 10A:22-2.3. The Complainant asserted that he was entitled access to a copy of his judgement of conviction under OPRA.

Although decided during the pendency of this complaint, the Council's decision in Lewis, GRC 2016-131 is instructive here. Specifically, the Complainant sought a judgment of conviction and the Custodian failed to assert that same was exempt from disclosure under OPRA. Thus, it follows that the GRC should reach a similar conclusion here.

Therefore, the Custodian unlawfully denied access to the Complainant's OPRA request item No. 5 seeking a judgment of conviction. N.J.S.A. 47:1A-6. See also Lewis, GRC 2016-131. The Custodian shall either: 1) disclose these responsive records, with redactions where applicable; or 2) certify to whether no records exist.

Item No. 9: Any and all non-confidential custody incident reports

In Perry v. N.J. Dep't of Corr., GRC Complaint No. 2012-237 (June 2013), the custodian certified that access to four (4) Special Custody reports was denied because the reports were exempt under N.J.S.A. 47:1A-1.1. The custodian certified that the reports contained, inter alia, how the Northern State Prison staff responds to a security gate malfunction, where the controls for the gate are located, and how a security gate could be defeated. The custodian also certified that if the reports were disclosed to the complainant, such disclosure would compromise the safety and security of the correctional facility. The Council found that the custodian properly denied the complainant access to special custody reports under N.J.S.A. 47:1A-1.1. See also Fischer v. N.J. Dep't of Corr., GRC Complaint No. 2005-171 (February 2006).

In this complaint, the Complainant's OPRA request item No. 9 sought "non-confidential custody incident reports." The Custodian asserted in the SOI that the Complainant sought files that are "designated confidential pursuant to N.J.S.A. 47:1A-1 and N.J.A.C. 10A:22-2.3." The Complainant asserted that he was entitled access to the record under OPRA.

Based on its prior decision in Perry, GRC 2012-237, the GRC is satisfied that the Custodian properly denied the Complainant access to the requested custody reports. Specifically, disclosure of said reports would compromise the safety and security of East Jersey State Prison (“EJSP”). N.J.S.A. 47:1A-1.1; Perry, GRC 2012-237. See also Fischer, GRC 2005-171.

Therefore, the requested custody incident reports sought in the Complainant’s OPRA request item No. 9 are exempt from access under OPRA because disclosure would compromise the safety and security of EJSP. Perry, GRC 2012-237. N.J.S.A. 47:1A-1.1. See also Fischer, GRC 2005-171. Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.

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. Item Nos. 2, 4, 6, 7, 8, and 10 are invalid, blanket requests that require the Custodian to conduct research as opposed to request a specific record. MAG Entm’t v. Div. of Alcoholic Beverage Control, 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 Ass’n 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) N.J.A.C. 10A: 22-2.3(a).
2. The Custodian unlawfully denied access to the Complainant’s OPRA request item No. 1 seeking his work history. N.J.S.A. 47:1A-6; Catrell v. N.J. Dep’t of Corr., GRC Complaint No. 2006-121 (February 2007). The Custodian shall either: 1) disclose these responsive records, with redactions where applicable; or 2) certify to whether no records existed.
3. The reports sought in the Complainant’s OPRA item No. 3, which are medical, psychiatric or psychological records, are exempt from disclosure under Executive Order No. 26 (Gov. McGreevey, 2002), N.J.S.A. 47:1A-9(a) and N.J.A.C. 10A:71-2.2(a)(1). N.J.S.A. 47:1A-6; Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017). See also McLawhorn v. N.J. Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013); Riley v. N.J. Dep’t of Corr., GRC Complaint No. 2013-345 (July 2014); Brunson v. N.J. Dep’t of Corr., GRC Complaint No. 2015-357 (February 2017). Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
4. The Custodian unlawfully denied access to the Complainant’s OPRA request item No. 5 seeking a judgment of conviction. N.J.S.A. 47:1A-6; See also Lewis v. Union Cnty.

Prosecutor's Office, GRC Complaint No. 2016-131 (April 2018). The Custodian shall either: 1) disclose these responsive records, with redactions where applicable; 2) certify to whether no records existed.

5. **The Custodian shall comply with conclusion Nos. 2 and 4 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, if applicable. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
6. The requested custody incident reports sought in the Complainant's OPRA request item No. 9 are exempt from access under OPRA because disclosure would compromise the safety and security of East Jersey State Prison. N.J.S.A. 47:1A-1.1; Perry v. N.J. Dep't of Corr., GRC Complaint No. 2012-237 (June 2013). See also Fischer v. N.J. Dep't of Corr., GRC Complaint No. 2005-171 (February 2006). Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
7. 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: Brandon Garcia
Case Manager

October 30, 2019

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁶ "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."

⁷ 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.