



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

Lyle David Nance
Complainant

Complaint No. 2018-100

v.

NJ Department of Corrections
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 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 because the Custodian certified in the Statement of Information that no records responsive to the Complainant’s OPRA request exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and 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 26th Day of February 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: March 3, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Lyle David Nance¹
Complainant**

GRC Complaint No. 2018-100

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of the most recent Constitution and bylaws governing the operations of the Inmate Liaison Committee (“ILC”) at South Woods State Prison (“SWSP”).

Custodian of Record: John Falvey
Request Received by Custodian: April 18, 2018
Response Made by Custodian: May 1, 2018
GRC Complaint Received: June 6, 2018

Background³

Request and Response:

On April 18, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 1, 2018, the Custodian responded in writing stating that no responsive records were found.

Denial of Access Complaint:

On June 6, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the above-mentioned records were mandated to be kept at each correctional facility under N.J.A.C. 10A:12-3.3(a), and N.J.A.C. 10A:12-3.3(d). The Complainant further asserted that the ILC has existed within New Jersey’s correctional facilities for years up to and including present time. The Complainant argued that the Custodian’s response showed that he was disingenuous in his search and the above-mentioned record existed. The Complainant further argued that the Custodian’s response signified his non-compliance with “lawful standards as enacted by the Office of the Commissioner of the New Jersey

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Suzanne Davies.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Department of Corrections [(“DOC”).]” The Complainant further argued that he believed the responsive records existed because SWSP was not “arbitrarily selective toward adhering to departmental rules and regulations.”

Statement of Information:

On June 28, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 18, 2018. The Custodian certified that he contacted SWSP “who advised that no responsive records were found and that inmate committees are comprised of inmates rather than staff.” The Custodian certified that he responded in writing on May 1, 2018, stating that no records were found.

The Custodian certified that SWSP staff did not make or maintain any Constitution or bylaws governing the ILC and “any responsive documents would be in the possession of the inmate committee.” The Custodian certified that no responsive records existed, and the Complainant failed to provide any evidence to contradict his certification. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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.

In Pusterhofer, GRC 2005-49, 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.

In the matter before the Council, the Complainant requested the Constitution and bylaws of the ILC, an inmate-based organization within SWSP. The Custodian denied access to the subject OPRA request stating that no records existed. In the Denial of Access Complaint, the Complainant asserted that the ILC’s Constitution and bylaws were required to be maintained by SWSP pursuant to N.J.A.C. 10A:12-3.3(a) and N.J.A.C. 10A:12-3.3(d). The Complainant further asserted that the Custodian’s denial was disingenuous, and the requested record exists. In the SOI, the Custodian certified that he contacted SWSP and was told that no records existed. The Custodian certified that SWSP was not responsible for maintaining said records. Further, the Custodian certified that the Complainant failed to provide any evidence to contradict the Custodian’s certification.

A review of the evidence of record before the GRC supports a finding that no records exist. Specifically, the Custodian certified to his contact with SWSP regarding the existence of the requested records. Further, the Custodian certified that the ILC was comprised entirely of inmates and not SWSP staff. Also, the Complainant's assertion that N.J.A.C. 10A:12-3.3 requires that a facility maintain the requested records is incorrect. That regulation, while providing that an administrator must approve a draft of the constitution and bylaws (as well as amendments), does not contain any requirement regarding retention of the records. N.J.A.C. 10A:12-3.3(c). Thus, the evidence of record supports that no records existed, and no unlawful denial of access occurred.

Therefore, because the Custodian certified in the SOI that no records responsive to the Complainant's OPRA request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, GRC Complaint No. 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Brandon Garcia
Case Manager

January 21, 2020⁴

⁴ This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.