State of New Jersey

GOVERNMENT RECORDS COUNCIL
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FINAL DECISION

May 30, 2007 Government Records Council Meeting

Akbar Na'im
Complainant
v.
Essex County Correctional Facility
Custodian of Record

Complaint No. 2006-170

At the May 30, 2007 public meeting, the Government Records Council ("Council") considered the May 23, 2007 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. Because the Deputy Director of Essex County Correctional Facility failed to grant access, deny access, seek clarification or request and extension of time to respond to the Complainant's request within the statutorily mandated seven (7) business days, Deputy Director "Keith Ali" (now retired) of Essex County Correctional Facility is in violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving that the Complainant's request was not received, no records are responsive to this request and that the Custodian had no prior knowledge of the Complainant's OPRA request or the response by Deputy Director "Keith Ali" (now retired).

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 30th Day of May, 2007

Vincent P. Maltese, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: June 4, 2007

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
May 30, 2007 Council Meeting

Akbar Na'im[1] **GRC Complaint No. 2006-170**
Complainant

v.

Essex County Correctional Facility[2]
Custodian of Records

Records Relevant to Complaint: A copy of the County of Essex Department of Corrections correctional facility uniform intake report verifying that the Complainant was in Cell 11-37 at Essex County Jail on May 2, 1988.

Request Made: February 3, 2005[3]
Response Made: February 17, 2005
Custodian: Tameka Foreman[4]
GRC Complaint Filed: September 5, 2006

Background

February 3, 2005

Complainant's Open Public Records Act ("OPRA") request to the New Jersey Department of Corrections. The Complainant requests the records relevant to this complaint listed above.

February 17, 2005

The New Jersey Department of Correction's ("DOC") response to the OPRA request. The Custodian responds to the Complainant's OPRA request on the ninth (9th) business day after receipt of the Complainant's OPRA request. The Custodian states that the requested record is denied because the DOC does not maintain the records relevant to the request nor did they locate any of the records relevant to the request within the Complainant's file.

February 28, 2005

[1] No legal representation listed.
[2] Represented by Terriann Moore-Abrams, Esq. (Newark, NJ). Ms. Moore-Abrams is also the current Custodian until a replacement is trained.
[3] Another OPRA request dated September 5, 2006 was sent with the Complainant's Denial of Access form. The Complainant later supplied a copy of the February 3, 2005 OPRA request.
[4] Denial of Access Complaint was filed against Essex County Correctional Facility Deputy Director "Keith Ali." However, the request was filed with the New Jersey Department of Corrections.

Letter from the Deputy Director of Essex County Department of Corrections to the Complainant. The Deputy Director states that Records Retention is conducting a manual search because prisoner records were not kept in computerized form in 1988. [5]

September 5, 2006

The Complainant's second OPRA request. The Complainant again requests the records relevant to this complaint listed above.

September 5, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:[6]

- Complainant's OPRA records request dated September 5, 2006
- Letter from the Deputy Director to the Complainant dated February 28, 2005

September 19, 2006

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

September 26, 2006

Request for the Statement of Information sent to the Custodian of Essex County Correctional Facility.

September 26, 2006

Letter from the Custodian of Essex County Correctional Facility to the GRC. The Custodian asserts that no OPRA request was received in February 2005 and there are no records responsive to the request. The Custodian states that Essex County Correctional Facility did not have the record relevant to the request available in the requested medium of computer printout.

September 26, 2006

Letter from the GRC to the Complainant. The GRC states that the OPRA request sent with the Complainant's Denial of Access complaint does not match the date the Complainant provided as the date of request in his Denial of Access Complaint. The GRC requests that the Complainant submit a copy of the correct OPRA request by October 3, 2006.

October 17, 2006

Letter from the Complainant to the GRC with attachments. The Complainant sends a copy of the February 3, 2005 OPRA request form along with two responses dated February 17, 2005 and February 28, 2005. The Complainant also asserts that his initial response to the GRC's September 26, 2006 letter was returned to him by the post office. The Complainant supplies a self-addressed envelope with the letter.

October 30, 2006

[5] Presumably, the DOC forwarded this request to the Custodian of Essex County Correctional Facility.
[6] The Complainant filed his Denial of Access against Essex County Correctional Facility, but his initial request was made to New Jersey Department of Corrections.

E-mail from the GRC to the Custodian. The GRC requests that the Custodian present an itemized list of documents responsive to this request and a legal certification to the GRC. The GRC states that the Custodian must provide the requested document by November 1, 2006.

November 6, 2006

Letter from the GRC to the Custodian. The GRC states that the requested itemized list of records provided has not yet been received. The GRC states that the Custodian has an extension until November 13, 2006 to provide the requested reply.

November 9, 2006

Letter from the Custodian to the GRC with attachment. The Custodian submits a legal certification from the OPRA liaison to Essex County Correctional facility asserting that the records could not be found due to insufficient information from both OPRA requests and that the department was not using a computerized system when the record requested was created.

November 16, 2006

Letter from the Complainant to the GRC with attachments. The Complainant provides printouts of records in an attempt to rebut the claims by the Essex County Correctional Facility OPRA liaison that the description of the records provided on the OPRA request was insufficient.

November 21, 2006

Legal Certification from the Assistant Essex County Counsel to the GRC. The Assistant Essex County Counsel certifies that no OPRA request was received by the Custodian and that no records relevant to this request exist.

February 26, 2007

Letter of "No Defense" from the GRC to the Custodian. The GRC requests a completed Statement of Information by the close of business on March 1, 2007.

March 1, 2007

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA records request dated September 5, 2006
- Legal Certification from the Assistant County Council to the GRC dated November 21, 2006
- Letter from the DOC Custodian to the Complainant dated February 17, 2005 (with attachments)
- Letter from the Deputy Director to the Complainant dated February 28, 2005

The Custodian states that no OPRA request was received from the Complainant prior to the Complainant's Denial of Access Complaint on September 19, 2006. The Custodian asserts that not only were the records from 1988 not computerized, but that there were no matches to the information provided by the Complainant.

May 16, 2007

Supplemental Certification from the Assistant County Counsel to the GRC. The Assistant County Counsel certifies that the Complainant's OPRA request was never received by the County Counsel's Office in February of 2005 and that the County Counsel's Office had no prior knowledge of the Complainant's request until receipt of the Denial of Access Complaint. The Assistant County Counsel also certifies that the County Counsel's Office had no prior knowledge of a response dated February 28, 2005 from Deputy Director "Keith Ali", who has since retired, to the Complainant and that no records responsive to this request exist.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

> "…government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*…" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

> "… any 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 …" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

> "[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefore …" N.J.S.A. 47:1A-5.g.

OPRA further provides that:

> "[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access … or deny a request for access … as soon as possible, but *not later than seven business days after receiving the request* … In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* …" (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"…[t]he public agency shall have the burden of proving that the denial of access is authorized by law…" N.J.S.A. 47:1A-6.

The Complainant asserts that he submitted an OPRA request on February 3, 2005. The Complainant states that he received a response dated February 17, 2005 from the DOC advising the Complainant that the DOC does not maintain the records relevant to the request and did not locate any of the records relevant to the request within the Complainant's file. The Complainant further asserts that he received another response dated February 28, 2005 from the Deputy Director of Essex County Department of Corrections. The Complainant asserts that the Deputy Director advised that the Records Retention department was handling the Complainant's request and that any records found would be forwarded to the Complainant.

The Custodian certifies that she received no OPRA request from the Complainant and that she only received the OPRA request upon receipt of the Denial of Access Complaint. The Custodian also certifies that records were not maintained by computer in 1988, the Criminal Records Room held no records relevant to the requestor's personal information and that she had no prior knowledge of a response from the retired Deputy Director of Essex County Correctional Facility. The Assistant County Counsel also certifies reiterating the Custodian's statements and adds that the response letter cannot be verified as the Deputy Director has since departed from Essex County Correctional Facility.

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. 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 this case, the Deputy Director of Essex County Correctional Facility failed to grant access, deny access, seek clarification or request an extension of time to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days. Therefore, the Deputy Director (now retired) has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Paff v. Bergen County Prosecutors Office, GRC Complaint No. 2005-115 (March 2006) and Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March, 2007).

Finally, because the Custodian and Assistant County Counsel certify that there was no prior knowledge of the Complainant's request until receipt of the Denial of Access Complaint, the Custodian has borne her burden of proof that she did not unlawfully deny access to the requested records pursuant to N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Deputy Director of Essex County Correctional Facility failed to grant access, deny access, seek clarification or request and extension of time to respond to the Complainant's request within the statutorily mandated seven (7) business days, Deputy Director "Keith Ali" (now retired) of Essex County Correctional Facility is in violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving that the Complainant's request was not received, no records are responsive to this request and that the Custodian had no prior knowledge of the Complainant's OPRA request or the response by Deputy Director "Keith Ali" (now retired).

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

May 23, 2007