



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

August 24, 2010 Government Records Council Meeting

Maximino Castro
Complainant

Complaint No. 2009-290

v.

New Jersey Department of Corrections
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 17, 2010 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. Mr. Rodriguez’s failure to respond in writing to the 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because Mr. Rodriguez certified that he provided the requested incident report to the Complainant on August 27, 2009, Mr. Rodriguez has not unlawfully denied access to the requested record.
3. Although Mr. Rodriguez, the OPRA Liaison, violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by not responding within the mandated seven (7) business days, as noted by the Custodian in her letter to the Complainant dated June 22, 2009, Mr. Rodriguez certified that he provided the Complainant with a copy of the requested incident report on August 27, 2009. Therefore, it is concluded that Mr. Rodriguez’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 24th Day of August, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: August 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 24, 2010 Council Meeting**

**Maximino Castro¹
Complainant**

GRC Complaint No. 2009-290

v.

**New Jersey Department of Corrections²
Custodian of Records**

Records Relevant to Complaint: Correction Officer Kennedy's incident report pertaining to the Complainant's assault on July 17, 2007 at the Albert C. Wagner Youth Facility.³

Request Made: June 9, 2009⁴

Response Made: June 22, 2009

Custodian: Deirdre Fedkenheuer⁵

GRC Complaint Filed: October 22, 2009⁶

Background

June 9, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.⁷

June 22, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day as receipt of such request. The Custodian states that the OPRA request will be forwarded to Mr. Cris Rodriguez, OPRA Liaison at the Albert C. Wagner Youth Correctional Facility, and he will advise the Complainant within seven (7) business days of any costs attendant on the provision of any records that are releasable and responsive to the Complainant's OPRA request.

¹ No legal representation listed on record.

² Represented by DAG Ellen M. Hale, on behalf of the NJ Attorney General.

³ The Complainant requested other documents not relevant to this complaint.

⁴ The Custodian received the OPRA request on June 22, 2009.

⁵ The Custodian at the time of the Complainant's OPRA request and the response thereto was Michelle Hammel.

⁶ The GRC received the Denial of Access Complaint on said date.

⁷ The Complainant did not attach a copy of the OPRA request to his Denial of Access Complaint.

July 12, 2009

Letter from the Complainant to the Custodian. The Complainant states that he did not receive a response from the OPRA Liaison at the Correctional Facility. The Complainant notes that more than seven (7) business days have elapsed since the Custodian's previous letter to the Complainant. The Complainant asks the Custodian to contact the OPRA Liaison so the Complainant can receive any responsive documents.

July 20, 2009

Letter from the Custodian to the Complainant. The Custodian apologizes for the delay in response from the OPRA Liaison. The Custodian states that she has contacted the OPRA Liaison at the Albert C. Wagner Youth Correctional Facility and that the Complainant's request will be handled immediately.

September 24, 2009

Letter from Cris Rodriguez, OPRA Liaison, to the Complainant. Mr. Rodriguez states that the Complainant's request for Corrections Officer Kennedy's incident report pertaining to the Complainant's assault on July 17, 2007 cannot be fulfilled because all documents pertaining to this OPRA request have been previously sent to the Complainant in response to this OPRA request.

October 22, 2009

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

- Letter from the Custodian to the Complainant dated June 22, 2009
- Letter from Cris Rodriguez, OPRA Liaison, to the Complainant dated September 24, 2009.

The Complainant agrees to mediate this complaint.

The Complainant argues that he received a letter from the original Custodian dated June 22, 2009. The Complainant states that he attempted multiple times to contact Mr. Rodriguez. On September 24, 2009 Mr. Rodriguez sent a letter to the Complainant stating that he could not fulfill the Complainant's OPRA request because all documents pertaining to this OPRA request were already sent to the Complainant. The Complainant argues that he never received the incident report.

October 23, 2009

Offer of Mediation sent to the Custodian.

October 26, 2009

The Custodian does not agree to mediate this complaint.

April 23, 2010

Request for the Statement of Information ("SOI") sent to the Custodian.

April 30, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel requests a five (5) business day extension of time to submit the Custodian's SOI to the GRC.

May 7, 2010

Custodian's⁸ SOI with the following attachments:

- Complainant's OPRA request dated June 9, 2009
- Letter from the Custodian to the Complainant dated June 22, 2009
- Letter from the Complainant to the Custodian dated July 12, 2009
- Letter from the Custodian to the Complainant dated July 20, 2009
- Letter from Cris Rodriguez, OPRA Liaison, to the Complainant dated September 24, 2009

The Custodian certifies that the DOC received the Complainant's OPRA request on June 22, 2009 and assigned a request number to the request. The Custodian further certifies that the former Custodian, Michelle Hammel, informed the Complainant in writing on the same day as receipt of the OPRA request that the OPRA Liaison from Albert C. Wagner Youth Correctional Facility would shortly contact the Complainant regarding his request for an incident report from Correction Officer Kennedy concerning the Complainant's assault. The Custodian also certifies that in a letter dated July 12, 2009, the Complainant notified Ms. Hammel that he had not received a response from the OPRA Liaison. The Custodian further certifies that Ms. Hammel responded to the Complainant on July 20, 2009, stating that she spoke with Mr. Rodriguez and that the Complainant should hear from him shortly.

The Custodian certifies that on September 24, 2009 Mr. Rodriguez informed the Complainant by letter that there was no incident report from Correction Officer Kennedy for the July 17, 2007 incident and that all other records responsive to the Complainant's request had already been provided.

Finally, the Custodian certifies that no records responsive to the Complainant's request for Correction Officer Kennedy's incident report regarding the Complainant's assault on July 17, 2007 exist. In addition, the Custodian asserts that the Complainant misunderstood Ms. Hammel's letter dated June 22, 2009 when he assumed that all documents he requested existed and would be provided. The Custodian certifies that Ms. Hammel was unaware whether records responsive to the Complainant's request existed. The Custodian certifies that Mr. Rodriguez stated that there was no incident report from Correction Officer Kennedy and sent the Complainant records responsive to the rest of the request once the Complainant paid for them. Lastly, the Custodian certifies that on September 24, 2009 Mr. Rodriguez informed the Complainant that the report from Correction Officer Kennedy does not exist.

June 3, 2010

E-mail from the GRC to Mr. Rodriguez. The GRC requests a legal certification from Mr. Rodriguez certifying that he did provide all the records requested pertaining to the assault incident that occurred on July 17, 2007 to the Complainant.⁹

⁸ Deirdre Fedkenheuer completed the SOI on behalf of the NJ DOC as the new Custodian.
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June 3, 2010

Certification from Mr. Rodriguez to the GRC. Mr. Rodriguez certifies that he provided all the records requested pertaining to the Complainant's assault incident to the Complainant in response to this OPRA request.

June 23, 2010

E-mail from the GRC to Mr. Rodriguez. The GRC asks Mr. Rodriguez to certify to what date he sent the assault incident report to the Complainant and whether said report was provided in response to this OPRA request or any other OPRA request.

June 25, 2010

Certification from Mr. Rodriguez to the GRC. Mr. Rodriguez certifies that he provided the incident report to the Complainant on August 27, 2009 pursuant to the Complainant's OPRA request herein.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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 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.

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

⁹ Notwithstanding the assertions made by the current Custodian regarding the existence of the requested incident report in the SOI dated May 7, 2010, the evidence of record indicates that Mr. Rodriguez had control over the responsive document as OPRA Liaison for the Albert C. Wagner Youth Facility. Mr. Rodriguez certified twice to the GRC that the incident report existed and that he did provide the incident report to the Complainant on August 27, 2009.

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 Complainant’s OPRA request sought Correction Officer Kennedy’s incident report pertaining to the Complainant’s July 17, 2007 assault at the Albert C. Wagner Youth Correctional Facility. Ms. Hammel responded to the Complainant’s request on the same day as receipt thereof stating that the Complainant’s OPRA request would be forwarded to the Correctional Facility and the OPRA Liaison would contact the complainant within seven (7) business days. By letter dated September 24, 2009, Cris Rodriguez, OPRA Liaison at the Youth Correctional Facility, stated that all records pertaining to this request were already sent to the Complainant. Mr. Rodriguez also certified that on August 27, 2009, he supplied the Complainant with all the requested records pertaining to the assault incident that occurred on July 17, 2007.

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. As also prescribed under 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. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the instant complaint, the original Custodian stated that the Youth Correctional Facility OPRA Liaison would respond to the request within seven (7) business days. However, Mr. Rodriguez did not respond within the statutorily mandated seven (7) business days. Mr. Rodriguez responded to the Complainant’s OPRA request almost two (2) months after the request was made. Moreover, Mr. Rodriguez failed to seek an extension of time to grant access, deny access, or to seek clarification.

Therefore, Mr. Rodriguez’s failure to respond in writing to the 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the present complaint, the current Custodian asserted in her Statement of Information that the requested records do not exist. The current Custodian based this assertion upon Mr. Rodriguez’s letter to the Complainant dated September 24, 2009.

¹⁰ It is the GRC’s position that 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.

However, the evidence of record indicates that the current Custodian misinterpreted Mr. Rodriguez's response to the Complainant's OPRA request. The GRC's review of Mr. Rodriguez's response shows that Mr. Rodriguez did not state that no records responsive to the request existed; instead, Mr. Rodriguez stated that all records had already been provided to the Complainant in response to this OPRA request. Mr. Rodriguez further certified that he provided all records responsive to the Complainant on August 27, 2009 in two (2) different certifications sent to the GRC on June 3, 2010 and June 25, 2010. The Complainant has submitted no evidence to refute Mr. Rodriguez's certification in this regard.

Therefore, because Mr. Rodriguez submitted a legal certification that he provided the requested incident report to the Complainant on August 27, 2009, Mr. Rodriguez has not unlawfully denied access to the requested record.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

"... If 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.

The Custodian received the Complainant's OPRA request on June 22, 2009. The Custodian responded on the same day as receipt thereof, stating that the OPRA Liaison at the Albert C. Wagner Youth Facility would provide an answer to the Complainant within seven (7) business days. Mr. Rodriguez provided a copy of the requested incident report to the Complainant on August 27, 2009.

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 (Berg); 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 Mr. Rodriguez, the OPRA Liaison, violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not responding within the mandated seven (7) business days, as noted by the Custodian in her letter to the Complainant dated June 22, 2009, Mr. Rodriguez certified that he provided the Complainant with a copy of the requested incident report on August 27, 2009. Therefore, it is concluded that Mr. Rodriguez'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. Mr. Rodriguez's failure to respond in writing to the 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because Mr. Rodriguez certified that he provided the requested incident report to the Complainant on August 27, 2009, Mr. Rodriguez has not unlawfully denied access to the requested record.
3. Although Mr. Rodriguez, the OPRA Liaison, violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by not responding within the mandated seven (7) business days, as noted by the Custodian in her letter to the Complainant dated June 22, 2009, Mr. Rodriguez certified that he provided the Complainant with a copy of the requested incident report on August 27, 2009. Therefore, it is concluded that Mr. Rodriguez'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: Harlyne A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 17, 2010