



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

March 27, 2012 Government Records Council Meeting

Shawn Smith
Complainant

Complaint No. 2010-278

v.

New Jersey Department of Corrections
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 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 although the New Jersey Department of Corrections has already submitted a Statement of Information, in order to prevent the unnecessary expenditure of administrative resources by the GRC to process this matter for the benefit of the parties, said complaint should be dismissed pursuant to Swindell v. New Jersey Department of Environmental Protection and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993) because the GRC cannot contact the Complainant and because the Complainant has made no attempt to contact the GRC regarding this complaint. *See also* Siddeeq v. New Jersey Department of Corrections, GRC Complaint No. 2009-182 and 2009-183 (November 2009) and Smith v. New Jersey Department of Treasury, GRC Complaint No. 2010-263 (February 2012).

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, 2012



Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: April 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

**Shawn Smith¹
Complainant**

GRC Complaint No. 2010-278

v.

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

Records Relevant to Complaint:

1. Copy of Southern State Correctional Facility Administrator's report setting forth the reason for placement of inmate Sean Smith #486699-696540B within Temporary Closed Custody in February 2005.³
2. Copy of the agency report directed to the administrator which facilitated the placement of inmate Sean Smith #486699-696540B within Temporary Closed Custody in February 2005.
3. Copy of inmate appeal of disciplinary charges from February 2005 for inmate Sean Smith #486699-696540B.
4. Copy of the records of Administrator Greg Bartowski's demotion to Mountainview Correctional Facility in 2005.
5. Copy of Form 255-I authorizing Prehearing detention of Sean Smith #486699-696540B.
6. Copy of the Director of Custody Operations report kept on file with regard to Sean Smith #486699-696540B in February 2005.
7. Copy of the records kept by Thomas P. Sullivan, Associate Administrator of Southern State Correctional Facility regarding the complaints made and/or received by inmate Sean Smith #486699-696540B.
8. Copy of the records kept by Nurse Tara Walton in February 2005 regarding inmate Sean Smith #486699-696540B.
9. Copy of the record of Special Investigation Division Investigator Poling and Investigator Mancuso relating to inmate Sean Smith #486699-696540B regarding the inmate's allegation of assault by prison guards on January 1, 2005 at Bayside State Prison.

Request Made: September 17, 2010

Response Made: October 6, 2010

Custodian: Deirdre Fedkenheuer

GRC Complaint Filed: October 25, 2010⁴

¹ No legal representation listed on record.

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

³ This is the Complainant's spelling for "Sean" so he may be requesting records for a person other than himself. Moreover, the Complainant is an inmate but has a different SBI number than the one he provided for Sean Smith.

Background

September 17, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA.

October 6, 2010

Custodian's response to the OPRA request.⁵ The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that she will need ten (10) additional business days to determine which records are responsive to the Complainant's request and to calculate the total amount for copying charges.

October 14, 2010

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that the records responsive to request Items No. 1, 2, 3, 5 and 8 may be archived and that she requested a search of the inmate archives for said records. The Custodian informs the Complainant that after she receives a response from the records archive unit, she will inform the Complainant if the records exist. The Custodian further informs the Complainant that request item number 4 is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10. The Custodian also informs the Complainant that request Items No. 6 and 7 are nonexistent. The Custodian informs the Complainant that request Item No. 9 is a record relating to "an identified individual which, if disclosed, would jeopardize the safety of a person or the safe and secure operation of the correctional facility or other designated place of confinement" and is exempt from disclosure pursuant to Executive Order No. 26 (McGreevey, 2002) and N.J.S.A. 47:1A-9.a.

October 25, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Custodian's letter to the Complainant dated October 14, 2010.⁶

The Complainant states that he was denied records on numerous occasions. The Complainant states that the Custodian denied him access to request Items No. 1, 2, 3, 5 and 8. The Complainant states that he is "getting the runaround." The Complainant asserts that the Custodian is not authorized to decide which records may be disclosed and which records may be denied. The Complainant cites to Kuehne Chemical Company v. North Jersey District Water Supply Commission, 300 N.J. Super. 433 (App. Div. 1997), in support of his assertion which the Complainant quotes as holding that "[t]he law does not allow for the custodian to judge what should be disclosed and New Jersey has (sic) tradition of openness and hostility to secrecy in government and public policy favors

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Custodian certified in the Statement of Information that she received the Complainant's OPRA request on September 28, 2010.

⁶ The Complainant also attached a written response to an OPRA request from the New Jersey Department of Treasury to the Complainant dated September 1, 2010, but this written response is not relevant to this complaint.

access to sufficient information to enable (sic) public to understand and evaluate reasonableness of public bodies (sic) action.”

The Complainant next argues that the Custodian unlawfully withheld from disclosure request Item No. 4 under N.J.S.A. 47:1A-10. The Complainant asserts that this section of OPRA has an exception for the date of a person’s separation, as well as the reason for separation. The Complainant contends that Administrator Greg Bartowski was separated from his position at Bayside State Prison and reassigned to Mountainview Correctional Facility; therefore, the Complainant contends that the Custodian should have disclosed the requested records to him.

The Complainant contends that records responsive to request Items No. 6 and 7 do exist, and are government records that should have been disclosed.⁷

The Complainant agrees to mediate this complaint.

November 4, 2010

Offer of Mediation sent to the Custodian. (The Custodian did not respond to the Offer of Mediation.)

November 8, 2010

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that the search of the archives yielded a preliminary incident report dated February 11, 2005 which she believes may be responsive to request Item No. 1, a single record responsive to request Item No. 5, and no records responsive to request Item Nos. 2, 3 or 8. The Custodian attaches a bill for copying charges in the amount of \$0.10 and informs the Complainant that she will disclose the two (2) records located in archives that are responsive to the Complainant’s request as soon as he pays the copying charges.

January 20, 2011

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

January 26, 2011

E-mail from the Custodian to the GRC. The Custodian requests a seven (7) business day extension of time to submit the requested SOI.

January 26, 2011

E-mail from the Custodian to the GRC. The GRC grants the Custodian a seven (7) business day extension of time to submit the requested SOI.

February 4, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated September 17, 2010

⁷ The Complainant does not address the Custodian’s denial of the records in request Item No. 9. The Complainant also argues that his OPRA request made to the New Jersey Department of Treasury (Agency Request No. C52794) was unlawfully denied; however, that OPRA request did not form the basis for the instant complaint, and as such, will not be analyzed herein.

- Custodian's response to the OPRA request dated October 6, 2010
- Letter from the Custodian to the Complainant dated October 14, 2010
- Letter from the Custodian to the Complainant dated November 8, 2010

The Custodian certifies that her search for the requested records involved sending a search request to the record archives unit for the Department of Corrections. The Custodian does not certify whether records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certified that she received the Complainant's OPRA request on September 28, 2010. The Custodian further certified that she sent a written response to the Complainant on October 6, 2010 wherein she informed the Complainant that records responsive to request Item Nos. 1, 2, 3, 5 and 8 may be archived and that she requested a search of the inmate archives for said records. The Custodian certified that she informed the Complainant that when she receives a response from the records archive unit, she will contact the Complainant. The Custodian further certified that she informed the Complainant that request item 4 is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10. and that request Items No. 6 and 7 are nonexistent. The Custodian also certified that request Item No. 9 is a record relating to "an identified individual which, if disclosed, would jeopardize the safety of a person or the safe and secure operation of the correctional facility or other designated place of confinement" and is therefore exempt from disclosure pursuant to Executive Order No. 26 (McGreevey, 2002) and N.J.S.A. 47:1A-9.a.

The Custodian certified that she sent the Complainant a letter dated November 8, 2010, wherein she informed the Complainant that a search of the archives yielded a preliminary incident report dated February 11, 2005 which she believes may be responsive to request Item No. 1, a single record responsive to request Item No. 5 and no records responsive to request Item Nos. 2, 3 or 8. The Custodian also certified that she included a bill for copying charges as an attachment to the letter dated November 8, 2010. The Custodian further certified that the Complainant remitted payment for the copying charges on November 15, 2010, at which time she disclosed the records for request Items No. 1 and 5 to the Complainant.

December 9, 2011⁸

Letter from the GRC to the Complainant. The GRC states that it recently sent the Complainant correspondence that was returned to the GRC as undeliverable. The GRC states that according to DOC's records, the Complainant was released from Southwoods State Prison on April 21, 2011.

The GRC requests that the Complainant advise whether the GRC can continue to contact him at his previous address. The GRC states that as an alternative, the Complainant may provide a new current address.

⁸ See Smith v. New Jersey Department of Treasury, GRC Complaint No. 2010-263 (February 2012).
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December 28, 2011⁹

The GRC's letter to the Complainant dated December 9, 2011 is returned for insufficient address and failure to forward.

Analysis

Whether the Council should dismiss this complaint?

OPRA provides that:

“[t]he Government Records Council shall...receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian...” N.J.S.A. 47:1A-7.b.

The GRC has attempted to contact the Complainant with no success at the only two (2) addresses known by the GRC and the Department of Corrections.

In Swindell v. New Jersey Department of Environmental Protection and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993), the petitioner appealed the assessment of a penalty pursuant to the Waterfront Development Statute. In response to said appeal, the Office of Administrative Law scheduled a mandatory early settlement conference at which the petitioner failed to appear. In the Administrative Law Judge's ("ALJ") Initial Decision, the ALJ found that:

“[a]fter having given petitioner Swindell every opportunity to contact either the deputy attorney general or this tribunal to afford an explanation for his nonappearance and noncontact regarding this matter subsequent to the filing of his appeal, I **FIND** that petitioner Swindell has unilaterally disregarded his obligations in this matter even though it was he who initiated the process in the first instance. In the process, I **FIND** that petitioner Swindell has, for reasons unknown to this tribunal, caused the expenditure of unnecessary funds in order to prepare for a defense of his appeal, as well as the administrative costs generated at the Office of Administrative Law in order to process this matter for the benefit of the parties.” *Id.*

Similarly in this complaint, the GRC has made several attempts to contact the Complainant with no success and the Complainant has failed to make any attempt to contact the GRC as requested.

Therefore, although the Department of Corrections has already submitted an SOI, in order to prevent the unnecessary expenditure of administrative resources by the GRC to process this matter for the benefit of the parties, said complaint should be dismissed pursuant to Swindell, *supra*, because the GRC cannot contact the Complainant and because the Complainant has made no attempt to contact the GRC regarding this complaint. *See also* Siddeeq v. New Jersey Department of Corrections, GRC Complaint

⁹ See Smith v. New Jersey Department of Treasury, GRC Complaint No. 2010-263 (February 2012).
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No. 2009-182 and 2009-183 (November 2009) and Smith v. New Jersey Department of Treasury, GRC Complaint No. 2010-263 (February 2012).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that, although the New Jersey Department of Corrections has already submitted a Statement of Information, in order to prevent the unnecessary expenditure of administrative resources by the GRC to process this matter for the benefit of the parties, said complaint should be dismissed pursuant to Swindell v. New Jersey Department of Environmental Protection and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993) because the GRC cannot contact the Complainant and because the Complainant has made no attempt to contact the GRC regarding this complaint. *See also* Siddeeq v. New Jersey Department of Corrections, GRC Complaint No. 2009-182 and 2009-183 (November 2009) and Smith v. New Jersey Department of Treasury, GRC Complaint No. 2010-263 (February 2012).

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 2012