



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

July 23, 2013 Government Records Council Meeting

Rufus Hudson  
Complainant

Complaint No. 2012-238

v.

Southern State Correctional Facility  
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 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’s failure to respond in writing to the Complainant’s request for the Kintock documents either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), and (i).
2. The evidence before the GRC supports the fact that Item Nos. 2 and 3 were either medical reports or reports regarding another inmate. The Custodian has met his burden that the denial of access to the requested documents was lawful pursuant to OPRA. N.J.S.A. 47:1A-6. See, Little v. New Jersey Department of Corrections GRC Complaint No. 2012-70 (April 2013) (custodian lawfully denied access to records as the request sought medical and psychological records which are exempt from disclosure); and Keith A. Werner v. Department of Corrections, GRC Complaint No. 2011-153(September 2012) (The Complainant, an inmate, is barred from accessing the records concerning any other inmate.)
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated time frame resulted in a “deemed” denial in violation of N.J.S.A. 47:1A-5(g), such violation is a technical violation that lacks the requisite element of conscious wrongdoing which would constitute a knowing and willful denial of access. When new information surfaced, the Custodian immediately conducted another search and located responsive records. The Custodian certified that said records were provided to Complainant the day the records were discovered. 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 23rd Day of July 2013

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: July 26, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 23, 2013 Council Meeting**

**Rufus Hudson<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-238**

v.

**Southern State Correctional Facility<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the following:

1. Report of incident, which occurred on July 1, 2011, regarding an assault on Rufus Hudson at Kintock Treatment Facility in Bridgeton, New Jersey.
2. Report(s) of an incident involving Rufus Hudson, which allegedly occurred on February 23, 2012, at Hope Hall in Camden, New Jersey.
3. "I would like to have the report that the Director Mr. Boshier [sic] told the resident, who was in the weight room when I injured my finger lifting, [sic] weights, to write."

**Custodian of Record:** John Falvey

**Request Received by Custodian:** June 5, 2012

**Response Made by Custodian:** June 14 and June 26, 2012; and June 12, 2013

**GRC Complaint Received:** August 13, 2012

**Background<sup>3</sup>**

**Request and Response:**

On April 13, 2012, Complainant sought documents from Hope Hall<sup>4</sup> in Camden, New Jersey. In response, the Custodian for the Department of Corrections ("DOC") provided a formal Government Records Request Form to the Complainant. On May 29, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian for the above listed documents.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup>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.

<sup>4</sup> Hope Hall is run by a vendor contracted by the DOC to operate a Residential Release Program or Half-Way House.

On June 14, 2012, seven (7) business days after receipt of the request<sup>5</sup>, the Custodian responded to the Complainant seeking a ten (10) business day extension for reply. On June 26, 2012, the Custodian responded by letter to the Complainant's advising that no report regarding the July 1, 2012 incident at Kintock Treatment Facility ("Kintock")<sup>6</sup> could be located and thus denied the request. The Custodian further denied Complainant's requests for medical records, and for information concerning a fellow inmate as exempt under OPRA N.J.S.C. 10A:22-2.3(b)(4) and (b) and 47:1A-9(a).

#### Denial of Access Complaint:

On August 13, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputes the Custodian's denial of access to his OPRA request, however he does not provide any specific supportive arguments.

#### Statement of Information:

On August 24, 2012, the Custodian filed his Statement of Information ("SOI"). The Custodian provides that Southern State Correctional Facility ("Southern State") staff "conducted a search and no responsive records were located" concerning the July 1, 2011 incident at Kintock and thus, initially denied the Complainant's OPRA request.

The Custodian certified that Southern State staff located two (2) records which were responsive to the Complainant's OPRA request. The first was a DOC Special Incident Report dated February 23, 2012 ("Special Incident Report"). The Custodian denied access to the Special Incident Report stating that it contains "information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation." N.J.C.A. 10A:22-2.3(a)(4)<sup>7</sup>. The Custodian further denied the request because DOC regulations provide that "an inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate." N.J.C.A. 10A:22-2.3(b). The Custodian certified that the Special Incident Report "consist[ed] of a description of an injury, treatment and diagnosis of the injury, and the actions of another named inmate."

In response to the Complainant's OPRA request Item No. 3 the Custodian identified another document, to wit: a Disciplinary Discharge Summary dated February 23, 2012 ("Discharge Summary"). The Custodian provides that he denied access to the Discharge Summary because it contains medical information. N.J.C.A. 10A:22-2.3(a)(4). The Custodian further denied the request for the Discharge Summary under the authority of N.J.C.A. 10A:22-2.3(b).

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<sup>5</sup> The Custodian certified in the Statement of Information that he received the Complainant's request on June 5, 2012.

<sup>6</sup> Kintock is managed by a vendor contracted by the DOC to run a Residential Community Release Program or Half-Way House.

<sup>7</sup> This regulation was originally authorized pursuant to Executive Order # 47(Christie) and was codified by N.J.S.A. 47:1A-9(a).

On June 6, 2013, the GRC sought additional information from the Custodian regarding the nature and extent of the search for records, particularly, whether the records at Kintock were searched.

On June 12, 2013, the Custodian submitted a supplemental certification. The Custodian noted that Item No. 1 of the Complainant's request sought records relating to a July 1, 2011 incident at Kintock. The Custodian certified that he conducted an additional search and located four responsive records to Item No. 1 of the Complainant's OPRA request. The Custodian certified that the four responsive records, with some redactions, were mailed to Mr. Hudson at his last known address the same day they were identified.

Furthermore, the Custodian acknowledges that, with respect to the Complainant's first request, there has been an "unlawful denial of access." He explains, however, that "it was not until new information . . . [was] uncovered that the staff was alerted to search the location where the records were ultimately found."

### Analysis<sup>8</sup>

#### 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. *See e.g.* "[A]ll government records shall be subject to public access unless exempt." Bent v. Township of Stafford, 381 N.J. Super. 30, 36 (App. Div. 2005) (*citations omitted*). Although expansive, OPRA's definition of "government record" is not without limitation. OPRA excludes from the definition of government record certain categories of information. Id. at 36 (*citing*, N.J.S.A. 47:1A-1.1).

#### Request Item No. 1

OPRA provides specific time periods within which a custodian must respond to the requestor. N.J.S.A. 47:1A-5(i). Here the Custodian responded within the requisite seven (7) day period by requesting a ten (10) day extension. Id. In a timely fashion, the Custodian advised the Complainant that there were no records responsive to the Complaint's request. In his SOI the Custodian certified that, following a search of their records, there were no documents responsive to the Complainant's request for an incident report at Kintock.

However, on June 12, 2013, following a request for clarification by the GRC, the Custodian conducted an additional search. In his supplemental SOI the Custodian, without identifying them, certified that he provided four responsive documents to the Complainant on June 12, 2013. The Custodian acknowledged that there was an unlawful denial of access.

The public agency has the burden of proving that the denial of access was authorized by law. N.J.S.A. 47:1A-6. Here, because the Custodian acknowledged that an inadequate search

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<sup>8</sup> There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

was conducted, and that a subsequent search produced responsive documents, the Custodian unlawfully denied access to the requested records in his June 26, 2012 response. N.J.S.A. 47:1A-6; Schneble v. NJ Department of Environmental Protection, GRC 2007-220.

Request Items No. 2 and 3:

A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. OPRA provides in relevant part that:

[This Act] shall not abrogate any exemption of a public record or government record from public access heretofore made . . . 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[.]

N.J.S.A. 47:1A-9(a).

The New Jersey Administrative Code further provides that:

(a) In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq. . . . the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq.: . . .

\* \* \*

(4) Any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.

N.J.A.C. 10A:22-2.3.

Here, Complainant requested report(s) of an incident which allegedly occurred on February 23, 2012, at Hope Hall that included a fellow resident’s report regarding the Complainant’s injury. The Custodian identified two documents which were responsive to the Complainant’s requests. The Custodian denied production of the first document, the Special Incident Report, as it relates to “medical, psychiatric or psychological history, diagnosis, treatment or evaluation” pursuant to N.J.S.A. 47:1A-9(a) and N.J.A.C. 10A:22-2.3(a)(4). The Custodian lawfully denied access to the Special Incident Report.

In addition, the Custodian denied access to the Discharge Summary pursuant to N.J.S.A. 47:1A-9(a) and N.J.A.C. 10A:22-2.3(a)(4), as it too was a medical report. The Custodian further denied access to the Discharge Summary pursuant to N.J.A.C. 10A:22-2.3(b) which states “an inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate.”

The evidence before the GRC supports the fact that Item Nos. 2 and 3 were either medical reports or reports regarding another inmate. The Custodian has met his burden to that the denial of access to the requested documents was lawful pursuant to OPRA. N.J.S.A. 47:1A-6. See Little v. New Jersey Department of Corrections GRC Complaint No. 2012-70 (April 2013)

(Custodian lawfully denied access to records as the request sought medical and psychological records which are exempt from disclosure); and Keith A. Werner v. Department of Corrections, GRC Complaint No. 2011-153 (September 2012) (The Complainant, an inmate, is barred from accessing the records concerning any other inmate.)

### **Knowing and Willful Denial of Access**

OPRA provides that: “[a] public official, officer, employee or custodian who knowing or willfully violates [ORPA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to 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 provides: “. . . [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 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)).

Here, the Custodian properly responded to the Complainant’s OPRA request pursuant N.J.S.A. 47:1A-5(i). The Custodian requested a ten (10) day extension, in writing, within the statutorily mandated seven (7) business days. The Custodian initially denied access to the Complainant’s request for the Kintock documents on the basis that no responsive records existed. However, the Custodian’s search for the requested records was inadequate because the Custodian lacked certain information, which once discovered, caused the Custodian to conduct an additional search at a separate location. Following the second search, the Custodian located and immediately forwarded responsive records to the Complainant.

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated time frame resulted in a “deemed” denial in violation of N.J.S.A. 47:1A-5(g), such violation is a technical violation that lacks the requisite element of conscious wrongdoing which would constitute a knowing and willful denial of access. When new information surfaced, the Custodian immediately conducted another search and located responsive records. The Custodian certified that said records were provided to Complainant the day the records were discovered. 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's failure to respond in writing to the Complainant's request for the Kintock documents either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), and (i).
2. The evidence before the GRC supports the fact that Item Nos. 2 and 3 were either medical reports or reports regarding another inmate. The Custodian has met his burden that the denial of access to the requested documents was lawful pursuant to OPRA. N.J.S.A. 47:1A-6. *See, Little v. New Jersey Department of Corrections* GRC Complaint No. 2012-70 (April 2013) (custodian lawfully denied access to records as the request sought medical and psychological records which are exempt from disclosure); and Keith A. Werner v. Department of Corrections, GRC Complaint No. 2011-153 (September 2012) (The Complainant, an inmate, is barred from accessing the records concerning any other inmate.)
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated time frame resulted in a "deemed" denial in violation of N.J.S.A. 47:1A-5(g), such violation is a technical violation that lacks the requisite element of conscious wrongdoing which would constitute a knowing and willful denial of access. When new information surfaced, the Custodian immediately conducted another search and located responsive records. The Custodian certified that said records were provided to Complainant the day the records were discovered. 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: Dawn R. SanFilippo  
Senior Counsel

Approved By: Brandon D. Minde, Esq.  
Executive Director

July 16, 2013