



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 24, 2013 Government Records Council Meeting

Kevin Conley
Complainant

Complaint Nos. 2012-313, 2012-314 and 2012-315

v.

Department of Corrections
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council (“Council”) considered the September 20, 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 provide documents responsive to Complainant’s July 16, 2012 OPRA request for approximately 40 days following payment resulted in a “deemed” denial of the Complainant’s request.
2. The Custodian made the records responsive to the Complainant’s August 30, 2012 and May 14, 2012 OPRA requests available to the Complainant upon payment of the appropriate copying costs, thus his response was appropriate. N.J.S.A. 47:1A-5(b), Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), and Ortiz v. N.J. Dep’t of Corr., GRC Complaint No. 2007-101 (November 2008), *See also Reid v. N.J. Dep’t of Corr.*, GRC Complaint No. 2010-83 (Final Decision dated May 24, 2011). Moreover, the Custodian is not required to provide the requested records until receipt of payment. *See, Paff*, GRC 2006-54. Notwithstanding the Complainant’s failure to pay for the requested documents, the Custodian twice offered the documents to him prior to receiving payment. Thus, there was no denial of access to Complainant’s August 30, 2012 or May 14, 2012 OPRA requests.
3. The Custodian made the records responsive to the Complainant’s July 16, 2012 OPRA request available to the Complainant upon payment of copying costs. On October 22, 2012, the Complainant made payment for the documents set forth in the July 16, 2012 OPRA request. The remit form, however, was not received by the OPRA liaison. Thus, the Custodian unlawfully denied access to the documents.
4. The Custodian unlawfully denied access to Complainant’s July 16, 2012 OPRA request. However, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s unlawful denial of access does



not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. It is unnecessary for the Council to order disclosure of the requested records because the Custodian disclosed, or attempted to disclose, said records to the Complainant on December 12, 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 24th Day of September, 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: September 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting**

**Kevin Conley¹
Complainant**

**GRC Complaint No. 2012-313,
2012-314 and 2012-315²**

v.

**Department of Corrections³
Custodial Agency**

Records Relevant to Complaints:

August 30, 2012 Request⁴: Copies of:

“All relevant documents indication [sic] approval, denial, or exemption from “certification” requirements pursuant to 28 C.F.R. §40.1 et seq. [sic] of inmate grievance system and regulations (10A:1-4, enacted 16JUN08) approved by the NJ Attorney General’s Office and currently used by all State of New Jersey nj [sic] prisons, but excluding 10A:1-4 itself. **(PLEASE NOTE: THE NJ ATTORNEY GENERAL RECORDS CUSTODIAN HAS ADVISED THEY DO NOT HAVE THESE RECORDS THAT ARE PREREQUISITES FOR THE STATE OF NEW JERSEY TO RECEIVED FEDERAL FUNDING).”**

July 16, 2012 Request⁵: Copies of:

1. “INMATE READY SYSTEM STATISTICAL REPORTS FOR THE MONTHS OF FEBRUARY, MARCH, APRIL, MAY AND JUNE OF 2012 FOR NJ STATE PRISON AS REQUIRED TO [BE] MADE BY 10A:1-4.9(A)4.
2. INMATE READY SYSTEM STATISTICAL REPORTS FROM 1JAN07 TO 31DEC07 FOR NJ STATE PRISON AS REQUIRED TO [BE] MADE BY 10A:1-4.9(A)4.”

May 14, 2012 Request⁶: Copies of:

1. “NJ STATE PRISON (NJSP) PA-36 FORMS, NJSP G-34A RECEIVING FORMS, & DOCUMENTS RELEVANT TO NJSP OFFICIALS’ REQUESTS FOR PURCHASE ORDER NUMBERS FROM NJ DEPT. OF TREASURY,

¹ No legal representation listed on record.

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

³ No legal representation listed on record.

⁴ The August 30, 2012 request corresponds to Complaint No. 2012-313.

⁵ The July 16, 2012 request corresponds to Complaint No. 2012-314.

⁶ The May 14, 2012 request corresponds to Complaint No. 2012-315.

OR IF NO P.O.# WAS USED OR IS RELEVANT TO THIS TYPE OF TRANSACTION, ANY OTHER DOCUMENTS SHOWING NAMES OF NJSP OFFICIALS, DATE, COSTS, QUANTITY REQUESTED AND RECEIVED OF 8½IN. BY 14IN. NON CARBON RECORDING PAPER (A/K/A “NCR” PAPER) IN 2 PIECES (YELLOW AND WHITE) USED TO MAKE “IRSF-101” FORMS [NJDOPC INMATE REMEDY/REQUEST FORMS] THAT WERE MADE AND RECEIVED BY NJSP OFFICIALS FORM DEPTCOR [DEPARTMENT COORDINATOR] AND/OR VENDORS SUPPLYING THIS TYPE AND SIZE OF CARBONLESS (“NCR”) PAPER FOR THE PERIOD 1JUL11 TO 31JAN12.”

2. “All documents made, maintained, kept on file, or received in the regular course of government business included in/or relevant to the “Netflix” movie rental service purchased by NJ State Prison (NJSP) officials, including but not limited to the Netflix: Terms of Use; Subscription; Agreement; Contract; or any other written instrument authorizing this service and including & describing all Netflix movie rental prices, procedures and policies; and including the approximate time or advance notice for new movies being released to Netflix; and including all titles of movies rented by NJSP officials from Netflix and dates; and including names of all NJSP officials that have been or are currently assigned to select movies for rental from Netflix; and including all written NJSP policy or procedure for selection criteria from all Netflix available movies since 1JUL11 as made by NJSP officials.

Custodian of Record: John Falvey

Request Received by Custodian on:

Complaint No. 2012-313: August 30, 2012

Complaint No. 2012-314: July 16, 2012

Complaint No. 2012-315: May 14, 2012

Response Made by Custodian to:

Complaint No. 2012-313: September 6, December 11 and 12, 2012

Complaint No. 2012-314: July 25, September 11, December 10 and 12, 2012

Complaint No. 2012-315: May 15 and 23, June 27, August 1, September 11,
and December 12, 2012

GRC Complaints Received:⁷ December 10, 2012

⁷ Complaints are all dated December 10, 2012. The Custodian, in his SOI, acknowledges receipt of the complaints on December 10, 2012, however, it is unclear when the GRC received a copy of the complaints.

Background⁸

Request and Response:

August 30, 2012 Request:

On August 30, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the documents identified above as the August 30, 2012 request. On September 6, 2012, five (5) business days after receipt of the request, the Custodian responded, in writing, to the Complainant that his request (identified by the Department of Corrections (“DOC”) as #8613) was available and that the cost for production was \$1.15. On December 10, 2012, the Complainant filed three Denial of Access Complaints, including Complaint No. 2012-313. On December 11, 2012, the Custodian reviewed the Complainant’s Inmate Trust Account (“Account”) to ascertain if payment for the August 30, 2012 request had been made; no payment had been made. Nevertheless, without having received payment, on December 12, 2012, the Custodian forwarded copies of the documents to the Complainant. The Complainant twice refused to accept the documents.

July 16, 2012 Request:

On July 16, 2012, Complainant submitted an OPRA request seeking the documents identified above as the July 16, 2012 requests. On July 25, seven (7) business days after receipt of the request, the Custodian responded in writing to the Complainant. The Custodian advised the Complainant that documents from December 2007 and February 2012 had been damaged, and were unavailable. However, the balance of Complainant’s request (identified as DOC #8471) was available at a cost of \$.75. The Custodian provided the Complainant a Payment Form (“Payment Form”) to authorize payment. On September 11, 2012, the Custodian sent a letter to the Complainant advising him that request #8471 remained open pending payment. On December 11, 2012, after receiving the Denial of Access Complaints, the Custodian reviewed the Complainant’s Account which indicated payment for OPRA request #8471 had been made on October 22, 2012. On December 12, 2012, the records were offered to the Complainant. The Complainant twice refused to accept the records.

May 14, 2012 Request:

On May 14, 2012 Complainant submitted an OPRA request seeking the documents identified above as the May 14, 2012 requests. On May 15, 2012, one (1) business day after receipt of the request, the Custodian responded, in writing, to the Complainant that his request (identified as #8329) was being processed. On May 23, 2012, the Custodian advised the Complainant that responsive records to #8329 were available and would be released upon payment of \$3.40. The Custodian provided the Complainant with a Records Request Payment Notification and Payment Form. On June 27, 2012, the Custodian sent the Complainant a reminder that

⁸ 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.

request #8329 remained open on account of outstanding fees. On August 1, 2012, the Custodian sent the Complainant another Payment Form. On September 12, 2011, the Custodian again advised the Complainant that payment for request #8329 had not been made.

On December 10, 2012, the Custodian received Complainant's denial of access complaint regarding request #8329. On December 11, 2012, the Complainant's Account was reviewed; no payment had been made on this request. Notwithstanding having not received payment, the Custodian offered the records to the Complainant. The Complainant twice refused to accept the requested documents.

Denial of Access Complaint:

On December 10, 2012, the Complainant filed three (3) Denial of Access Complaints with the Government Records Council ("GRC"). The Complainant asserts in all three complaints that he requested the documents and did not receive them. He further asserts that he has, in the past, requested and paid for production of documents which were not produced. The Complainant alleges a pattern of refusal to acknowledge payment remit forms and, thus, a failure by the Custodian to produce documents.

Statement of Information:

On December 17, 2012, the Custodian filed three Statements of Information ("SOI") in response to Complaint Nos. 2012-313; 314 and 315. In his SOIs the Custodian certifies that all three complaints were received on December 10, 2012. Further, he certifies that following receipt of the Complainant's Denial of Access Complaints, he caused the Complainant's Inmate Trust Account to be reviewed for payment on all of the OPRA requests.

The Custodian certifies that no payments had been made for the August 30, 2012 request or the May 14, 2012 requests.

With respect to the request July 16, 2012 request, the Custodian certifies that while a payment was made on October 22, 2012, the remit form proving payment had not been received by the OPRA liaison. The Custodian certifies that without this form, the OPRA liaison would not have known that payment was made and thus would not have released the records. The Custodian acknowledged that documents responsive to the May 14, 2012 request had not been delivered to the Complainant.

The Custodian further certified that on December 12, 2012, in an effort to resolve the matter, he caused copies of all of the documents responsive to the August 30, 2012, July 16, 2012 and May 14, 2012 requests to be tendered by hand delivery to the Complainant. The Complainant, on two separate occasions, refused to accept the documents.

Analysis⁹

Timeliness

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). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. 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 (Interim Order October 31, 2007).

In the instant matter, the Custodian responded to each of the Complainant's requests within the requisite seven (7) business days. In each case, the Custodian advised the Complainant of the cost of copying the responsive documents and provided the Custodian with a payment form.

For the August 30, 2012 and May 14, 2012 requests, the Complainant failed to provide payment or authorization for payment for the requested documents. As to the July 16, 2012 request, however, the Complainant did authorize payment, and said funds were withdrawn, from his Account on October 22, 2012. Notwithstanding payment having been made, the Custodian did not tender copies of the documents to the Complainant until December 12, 2012, some 37 business days after receipt of the payment.

The Custodian's failure to provide documents responsive to Complainant's July 16, 2012 request for approximately 40 days following payment resulted in a "deemed" denial of the Complainant's request.

Unlawful Denial of Access

August 30, 2012 and May 14, 2012 Requests:

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. OPRA further provides that: "[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation." N.J.S.A. 47:1A-5(b).

In Ortiz v. N.J. Dep't of Corr., GRC Complaint No. 2007-101 (November 2008), the Council referred to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), in

⁹ 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.

¹⁰ 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.

reaffirming that the custodian was “not required to release the requested records until payment is received...” *Id.* at 8. The Council subsequently held in Leak v. Union County Prosecutor’s Office, GRC Complaint No. 2007-148 (June 2009), that the custodian had complied in part with the Council’s February 25, 2009 Interim Order “by advising that the requested records would be provided upon payment of copying costs ... pursuant to N.J.S.A. 47:1A-5(b), Paff, GRC 2006-54, and Mejias v. N.J. Dep’t of Corr., GRC Complaint No. 2007-181 (July 2008).” *Id.* at 4 (Council’s June 11, 2009 Supplemental Findings & Recommendations of the Executive Direction).

Here, the Complainant failed to authorize and/or make payment for the requested documents.

The Custodian made the records responsive to the Complainant’s August 30, 2012 and May 14, 2012 requests available to the Complainant upon payment of the appropriate copying costs, thus his response was appropriate. N.J.S.A. 47:1A-5(b), Paff, 2006-54 and Ortiz, GRC 2006-54, *See also Reid v. N.J. Dep’t of Corr.*, GRC Complaint No. 2010-83 (Final Decision dated May 24, 2011). Moreover, the Custodian is not required to provide the requested records until receipt of payment. *See, Paff*, GRC 2006-54. Notwithstanding the Complainant’s failure to pay for the requested documents, the Custodian twice offered the documents to him prior to receiving payment. Therefore, there was no denial of access to Complainant’s August 30, 2012 or May 14, 2012 requests.

July 16, 2012 Request:

The Custodian made the records responsive to the Complainant’s July 16, 2012 requests available to the Complainant upon payment of copying costs. On October 22, 2012, the Complainant made payment for the documents set forth in the July 16, 2012 request. Although the remit form was not received by the OPRA liaison, that is an insufficient excuse to deny documents. Thus, the Custodian unlawfully denied access to the documents.

Knowing and Willful Denial of Access

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 “... [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 forbidden with actual, not imputed, knowledge that the actions were forbidden (Id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 July 16, 2012 OPRA requests pursuant to N.J.S.A. 47:1A-5(i). The Custodian advised the Complainant of the cost of the requested documents and provided a payment form for remittance of the funds. On September 11, 2012, the Custodian sent a letter to the Complainant advising him that his July 16, 2012 request remained open pending payment. Payment for the request was ultimately deducted from the Complainant's account on October 22, 2012. The OPRA liaison, however, failed to receive the remittance form and thus the Custodian failed to produce the requested and paid for documents.

The Custodian unlawfully denied access to Complainant's July 16, 2012 request. However, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's unlawful denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

It is unnecessary for the Council to order disclosure of the requested records because the Custodian disclosed, or attempted to disclose, said records to the Complainant on December 12, 2012.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to provide documents responsive to Complainant's July 16, 2012 OPRA request for approximately 40 days following payment resulted in a "deemed" denial of the Complainant's request.
2. The Custodian made the records responsive to the Complainant's August 30, 2012 and May 14, 2012 OPRA requests available to the Complainant upon payment of the appropriate copying costs, thus his response was appropriate. N.J.S.A. 47:1A-5(b), Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), and Ortiz v. N.J. Dep't of Corr., GRC Complaint No. 2007-101 (November 2008), *See also* Reid v. N.J. Dep't of Corr., GRC Complaint No. 2010-83 (Final Decision dated May 24, 2011). Moreover, the Custodian is not required to provide the requested records until receipt of payment. *See, Paff*, GRC 2006-54. Notwithstanding the Complainant's failure to pay for the requested documents, the Custodian twice offered the documents to him prior to receiving payment. Thus, there was no denial of access to Complainant's August 30, 2012 or May 14, 2012 OPRA requests.

3. The Custodian made the records responsive to the Complainant's July 16, 2012 OPRA request available to the Complainant upon payment of copying costs. On October 22, 2012, the Complainant made payment for the documents set forth in the July 16, 2012 OPRA request. The remit form, however, was not received by the OPRA liaison. Thus, the Custodian unlawfully denied access to the documents.
4. The Custodian unlawfully denied access to Complainant's July 16, 2012 OPRA request. However, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's unlawful denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. It is unnecessary for the Council to order disclosure of the requested records because the Custodian disclosed, or attempted to disclose, said records to the Complainant on December 12, 2012.

Prepared By: Dawn R. SanFilippo
Senior Counsel

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

September 20, 2013