



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

March 22, 2013 Government Records Council Meeting

Milton P. Durham
Complainant

Complaint No. 2012-35

v.

New Jersey Department of Corrections
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’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 (Interim Order October 31, 2007).
2. Notwithstanding the Custodian’s failure to timely respond, the Custodian has borne his burden of proving that the responsive daily shift schedules are exempt from disclosure as “... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein” pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.
3. Although, the Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian borne his burden of proving that the responsive daily shift schedules were exempt from disclosure and further provided the Complainant with the records responsive to OPRA request Item Nos. 4 and 5. Additionally, 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, it is concluded that the Custodian’s untimely response did 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 22nd Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: March 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Milton P. Durham¹
Complainant**

GRC Complaint No. 2012-35

v.

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

Records Relevant to Complaint: Copies of:³

1. Daily schedule for October 2, 3 and 21, 2008 of all custody staff assigned to shift No. 1 at the New Jersey State Prison (“NJSP”) to include the property room and 1 Wing.
2. Daily schedule for June 17, 2011 of all custody staff and medical personnel assigned to shift No. 1 at NJSP to include 1 Wing and North Compound Clinic.
3. Daily schedule for June 17, July 11, and August 2, 2011 of all custody staff assigned to shift No. 1 and 2 at NJSP to include the property room.
4. Prison disciplinary appeal submitted by Complainant on August 12, 2011 per a July 25, 2011 court decision.
5. Prison disciplinary appeal of Complainant upon which a disposition was rendered on September 2, 2011 by Assistant Superintendent J. Barnes.

Request Made: September 14, 2011

Response Made: October 13, 2011

GRC Complaint Filed: February 6, 2012⁴

Background⁵

The Complainant submitted an OPRA request to the New Jersey Department of Corrections (“DOC”) on September 14, 2011. Mr. George Byrd (“Mr. Byrd”), OPRA Liaison at NJSP, responded in writing on October 13, 2011, the thirteenth (13th) business day after receipt of the subject OPRA request,⁶ stating that access to the daily schedules is denied as “emergency or security information ...” pursuant to N.J.S.A. 47:1A-1.1. Mr. Byrd further advised that

¹ No legal representation listed on record.

² John Falvey, Esq., Custodian of Records. No legal representation listed on record.

³ The Complainant requested additional records that are not at issue in this complaint.

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

⁵ 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.

⁶ The Custodian certifies in the Statement of Information that he received the Complainant’s OPRA request on September 26, 2011.

attached was a Payment Notification and Authorization (“Authorization”) form in the amount of \$0.15. The Complainant authorized a deduction of \$0.15 from his inmate account on October 16, 2011, which was approved on November 9, 2011. Mr. Byrd processed the Authorization form on November 21, 2011 subsequently provided records responsive to the Complainant’s OPRA request Item Nos. 4 and 5 on November 28, 2011.

The Complainant filed his Denial of Access Complaint with the Government Records Council (“GRC”) on February 6, 2012. Therein, the Complainant first argued that the Custodian failed to comply with the statutorily mandated time frame provided for under OPRA. The Complainant further asserts that the records responsive to his OPRA request Item Nos. 4 and 5 were not provided until over 30 days after payment was confirmed.

The Complainant also argues that nothing in OPRA allows an OPRA Liaison to deny access to records; thus, his denial of access to the Complainant’s OPRA request Item Nos. 1, 2 and 3 is unauthorized. The Complainant argues that regardless of Mr. Byrd’s unauthorized denial, daily schedules do not contain any emergency or security information. The Complainant asserts that the schedules identify the employees and their work sites on certain days and were previously disclosed to the Complainant in Durham v. NJ Department of Corrections, GRC Complaint No. 2007-212 (April 2008). The Complainant contends that the U.S. Supreme Court ruled in 2011⁷ that public employees have no expectation of privacy while on official duty unless the activities are covered by Law or Executive Order. The Complainant argues the prisoners in a general population are already privy to daily schedule information simply by observation or general inquiry. The Complainant notes that he is in administrative segregation and cannot conduct such an observation.

The Custodian filed his Statement of Information (“SOI”) on March 8, 2012. The Custodian certified that he received the Complainant’s OPRA request on September 26, 2011. The Custodian certifies that because the responsive records were maintained with Custody Operations and in the Complainant’s Classification file at NJSP, the request was reassigned to Mr. Byrd via the DOC OPRA tracking system. The Custodian certifies that Mr. Byrd responded on October 13, 2011 denying access to the schedules pursuant to N.J.S.A. 47:1A-1.1. and granting access to the disciplinary records pending payment of the copying cost. The Custodian acknowledges that Mr. Byrd’s response was not timely. The Custodian certifies that Mr. Byrd provided the responsive disciplinary records to the Complainant on November 28, 2011 after approval and processing of the Authorization form.

Regarding the Complainant’s OPRA request Item Nos. 1 through 3, The Custodian asserts that the schedules are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. because disclosure of same reveal schedules and staff assignments that would jeopardize the safe and secure running of a correctional facility. The Custodian asserts that even with redactions, the schedules would reveal allocation of staff by time and location that an inmate could use to defeat security measures to conduct criminal actions, disruptive behavior or contraband-related offenses. The Custodian further asserts that in Farra’D v. NJ Department of Corrections, GRC Complaint No. 2010-47 (October 2011), the Council held that although the custodian denied access for an incorrect legal reason, the records were still exempt from disclosure pursuant to an

⁷ The Complainant did not provide a specific citation.

executive order. The Custodian argues that, regardless of the reasons for denying access to the schedules, the Complainant should not be granted access to the records because same are exempt.

Regarding the Complainant's OPRA request Item Nos. 4 and 5, the Custodian certifies that the Complainant received all responsive records on November 28, 2011. The Custodian asserts that the GRC should consider the steps needed for DOC to comply with an OPRA request in making a determination as to whether the Custodian knowingly and willfully violated OPRA. The Custodian certifies that the process for administering inmate accounts is codified in *N.J.A.C. 10A:2-1 et seq.* to ensure a safe and secure running of New Jersey's penal institutions. The Custodian certifies that the Legislature empowered DOC to create a system to oversee inmates' finances to ensure funds properly. The Custodian certifies that steps need to be taken to ensure that inmates have adequate funds to pay fees, that an inmate authorized a charge, and that an account is properly debited prior to disclosing records. The Custodian notes that in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 184 (App. Div. 2007), the Superior Court held that "... N.J.S.A. 47:1A-5(g) permits consideration of demands on agency operations imposed by the ... request at issue." The Custodian asserts that DOC is confronted with a unique process when transactions involve inmate accounts.

Analysis

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). 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).⁸ 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).

The Complainant argued in the Denial of Access Complaint that the Custodian failed to timely respond to the subject OPRA request. The Custodian acknowledged in the SOI that DOC's response to the Complainant's OPRA request was untimely.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian'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)

⁸ 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.

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, supra.

Regarding the Complainant’s issue of the length of time it took Mr. Byrd to provide the records responsive to OPRA request Item Nos. 4 and 5, the Custodian argued that DOC’s process for administering inmate accounts caused a delay because of the steps needed to obtain the appropriate copying costs. *N.J.A.C. 10A:2-1 et seq.* The Custodian certified that these steps are necessary to ensure that inmates have adequate funds to pay fees, that an inmate authorized a charge, and that an account is properly debited prior to disclosing records.

The GRC as a matter of practice will only address an agency’s internal procedure where it appears that procedure is considered a limitation on access. Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (Interim Order dated April 25, 2007). However, regarding copying costs, the GRC has previously held that a custodian need not provide paper copies of responsive records until payment is received. *See Paff v. City of Plainfield*, GRC Complaint No. 2006-54 (July 2006). Here, the Custodian sets forth a clear reason why access to the records responsive to the Complainant’s OPRA request Item Nos. 4 and 5 took additional time. Also, the steps the Custodian described were the result of legislative empowerment through a State regulation. Thus, the delay was reasonable to ensure that the appropriate copying costs were remitted.

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. 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.

Here, Mr. Byrd denied access to the daily schedules pursuant to N.J.S.A. 47:1A1.1., which provides that:

“[a] government record shall not include the following information which is deemed to be confidential ... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein” *Id.*

The Complainant filed this complaint disputing the denial of access, arguing that he previously received similar records. *See Durham, supra*. The Complainant argued that the U.S. Supreme Court previously ruled in 2011 that public employees have no expectation of privacy while on official duty unless the activities are covered by Law or Executive Order. The Complainant finally argued that most inmates can garner information found on the schedules simply through observation, which the Complainant cannot do because he is in administrative segregation,

Conversely, the Custodian argued in the SOI that the schedules are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. because disclosure of same reveal schedules and staff

assignments that would jeopardize the safe and secure running of a correctional facility. The Custodian further asserted that even with redactions, the schedules would reveal allocation of staff by time and location that an inmate could use to defeat security measures to conduct criminal actions, disruptive behavior or contraband-related offenses.

The GRC first notes that in Durham v. NJ Department of Corrections, GRC Complaint No. 2007-212 (April 2008), the custodian of DOC at that time disclosed daily shift rosters independent of a GRC determination as to whether same were exempt from disclosure. Therefore, DOC's voluntary disclosure of the schedules at that time are no dispositive here. Second, the GRC notes that the Complainant did not cite to the U.S. Supreme Court case, so the GRC cannot check the validity of the Complainant's interpretation of same.

Regarding the disclosability of the schedules, the GRC agrees that disclosure of these records could pose a significant risk to the safe and secure operation of the NJSP for the reasons raised by the Custodian. An inmate seeking to conduct criminal actions, disruptive behavior or contraband-related offenses would be given an advantage by having intimate knowledge of the daily assignment of personnel with the NJSP and plan these actions accordingly. Thus, the records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Therefore, notwithstanding the Custodian's failure to timely respond, the Custodian has borne his burden of proving that the responsive daily shift schedules are exempt from disclosure as "... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein" pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.

Knowing & Willful

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).

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, the Custodian's failure to timely respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian borne his burden of proving that the responsive daily shift schedules were exempt from disclosure and further provided the Complainant with the records responsive to OPRA request Item Nos. 4 and 5. Additionally, 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, it is concluded that the Custodian's untimely response did 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 did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian'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 (Interim Order October 31, 2007).
2. Notwithstanding the Custodian's failure to timely respond, the Custodian has borne his burden of proving that the responsive daily shift schedules are exempt from disclosure as "... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein" pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.
3. Although, the Custodian's failure to timely respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian borne his burden of proving that the responsive daily shift schedules were exempt from disclosure and further provided the Complainant with the records responsive to OPRA request Item Nos. 4 and 5. Additionally, 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, it is concluded that the Custodian's untimely response did 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: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013