



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**September 29, 2015 Government Records Council Meeting**

Kevin Lawrence Conley  
Complainant

Complaint No. 2014-269

v.

NJ Department of Corrections  
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 2015 Supplemental 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 the Complainant has failed to establish in his request for reconsideration of the Council’s April 28, 2015, Final Decision that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake or fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, that the Council’s adjudicatory authority, as set forth in N.J.S.A. 47:1A-7(b) and long-standing precedent, does not include enforcement of federal law or creation and maintenance of records in accordance with other statutes or regulations. Further, the Complainant failed to provide any competent, credible evidence refuting the Custodian’s certification that no records exist. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 29<sup>th</sup> Day of September, 2015

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: October 1, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**September 29, 2015 Council Meeting**

**Kevin Lawrence Conley<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2014-269**

**v.**

**NJ Department of Corrections<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:<sup>3</sup>** Hard copies of:

“Monthly Remedy Form Statistical Report prepared pursuant to 10A:1-4.8(a).4 and N.J.A.C. 10A:1-4.8(b), and as required by Federal Regulations, 28 C.F.R. 40.10(a) for the NJDOC to receive Federal funding, for the months of January, February, March, and April of 2014, for each of the following seven NJ prisons: Northern S.P., East Jersey S.P., New Jersey S.P., Edna Mahon Correctional Facility, Southwoods S.P., Southern State Correctional Facility, and Bayside S.P.”

**Custodian of Records:** John A. Falvey

**Request Received by Custodian:** July 2, 2014; July 22, 2014

**Response Made by Custodian:** July 3, 2014; July 22, 2014; July 30, 2014

**GRC Complaint Received:** July 24, 2014

**Background**

April 28, 2015 Council Meeting:

At its April 28, 2015, public meeting, the Council considered the April 21, 2015, 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, found that:

[T]he Custodian has borne his burden of proof that he lawfully denied access to the requested Monthly Remedy Form Statistical Reports for the months of January-April 2014, because he certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. N.J. Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).

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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 Complainant made other requests for records, but they are not at issue in this matter.

### Procedural History:

On April 30, 2015, the Council distributed its Final Decision to all parties.

On May 12, 2015, the Complainant filed a request for reconsideration of the Council's April 28, 2015 Final Decision based on a mistake and fraud. Therein, the Complainant argued that the GRC erroneously noted that it had no authority to determine whether a custodian was "in compliance with state and federal regulations unrelated to OPRA." *See Conley v. NJ Dep't of Corrections*, GRC Complaint No. 2014-269 (Final Decision dated April 28, 2015) at 3. The Complainant argued that the Council's authority extends to enforcement of any federal regulations requiring the creation of government records. Further, the Complainant alleged that the Council has the authority to determine that an "intentional technological change that clearly is . . . designed to commit an unethical end run around the definition of public record[s] . . ." constitutes a knowing and willful violation. The Complainant contended that the GRC failed to appreciate that he included the State and Federal regulations in his request and Denial of Access Complaint to prove that the requested reports are subject to access.

The Complainant contended that the database is likely only new in name because, in response to a separate OPRA request, the Custodian advised him that no requests for proposals regarding the new database system existed. The Complainant thus alleged that NJDOC committed fraud by changing their database without accepting bids for same. The Complainant asserted that the Custodian provided a materially false response in anticipation that future requestors would simply accept that reports no longer existed.

On June 10, 2015, the Complainant filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. On July 29, 2015, the Complainant requested a stay of his appeal pending the Council's decision on his request for reconsideration. On August 31, 2015, the Appellate Division granted the Complainant's request for a stay until September 30, 2015 to allow the Council to decide on the pending request for reconsideration.

### Analysis

#### Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's April 28, 2015, Final Decision on May 12, 2015, eight (8) business days from receipt of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Complainant’s request for reconsideration amounts to a disagreement with the Council’s adjudicatory authority. However, the Council’s limited authority to adjudicate denial of access complaints is statutorily defined and mandated by N.J.S.A. 47:1A-7(b). Moreover, the Council’s inability to adjudicate an agency’s requirement to create or maintain records in accordance with other statutes or regulations is also based on long-standing precedent. *See* Anonymous v. Twp. of Monroe, GRC Complaint No. 2006-160 (April 2008); Van Pelt v. Edison Twp. Bd. of Educ., GRC Complaint No. 2007-179 (January 2008); LoBosco v. NJ Dep’t of Health & Senior Serv., Div. of Certificate of Need & Healthcare Facility Licensure, GRC Complaint No. 2010-64 (October 2010); Moore v. Twp. of Nutley (Essex), GRC Complaint No. 2010-125 (January 2011). More important, the Complainant failed to present any competent, credible evidence to refute the Custodian’s response and certification that NJDOC can no longer make the requested report; to wit, no records exist.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See* Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on a mistake or fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See* D’Atria, 242 N.J. Super. at 401. Specifically, the Council’s adjudicatory authority, as set forth in N.J.S.A. 47:1A-7(b) and long-standing precedent, does not include enforcement of federal law or creation and maintenance of records in accordance with other statutes or regulations. Further, the Complainant failed to provide any competent, credible evidence refuting the Custodian’s certification that no records exist. Thus, the Complainant request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's April 28, 2015, Final Decision that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake or fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, that the Council's adjudicatory authority, as set forth in N.J.S.A. 47:1A-7(b) and long-standing precedent, does not include enforcement of federal law or creation and maintenance of records in accordance with other statutes or regulations. Further, the Complainant failed to provide any competent, credible evidence refuting the Custodian's certification that no records exist. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover  
Executive Director

September 22, 2015



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Acting Commissioner*

**FINAL DECISION**

**April 28, 2015 Government Records Council Meeting**

Kevin Lawrence Conley  
Complainant

Complaint No. 2014-269

v.

NJ Department of Corrections  
Custodian of Record

At the April 28, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 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 the Custodian has borne his burden of proof that he lawfully denied access to the requested Monthly Remedy Form Statistical Reports for the months of January-April 2014, because he certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. N.J. Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).

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 28<sup>th</sup> Day of April, 2015

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: April 30, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2015 Council Meeting**

**Kevin Lawrence Conley<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-269**

v.

**NJ Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:<sup>3</sup>** Hard copies of:

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**Custodian of Records:** John A. Falvey

**Request Received by Custodian:** July 2, 2014; July 22, 2014

**Response Made by Custodian:** July 3, 2014; July 22, 2014; July 30, 2014

**GRC Complaint Received:** July 24, 2014

**Background<sup>4</sup>**

**Request and Response:**

On June 25, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-mentioned records. On July 3, 2014, the day after receipt, the Custodian responded in writing, stating that there were no responsive records for that request since the Department of Corrections (“DOC”) moved to a new database system. The Custodian further stated that as a result of the database change, he could no longer generate said records, and thus the records no longer exist.

On July 14, 2014, the Complainant sent a letter to the Custodian, accusing him of wrongfully denying access to his request. On July 22, 2014, the Custodian responded in writing,

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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 Complainant made other requests for records, but they are not at issue in this matter.

<sup>4</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.



restating that responsive records no longer exist and are not thus available to the Complainant. The Custodian added that OPRA does not require him to create any document in response to a request and therefore denied the Complainant's request.

#### Denial of Access Complaint:

On July 24, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant argued that the Custodian provided him with responsive records in previous requests for the same type of records but that in some of those previous requests, the Custodian failed to provide access to "25% of these records over a 4 year period." The Complainant highlighted these allegations as evidence of a knowing and willful violation on the part of the Custodian. Further, the Complainant contended that he and the other inmates should have received notice of the database change and its effect in producing responsive records. The Complainant insisted that the DOC's database change is a ruse to avoid having to provide public records and comply with state and federal regulations.

The Complainant urged the Council to find that the Custodian unlawfully denied access to the requested records and to find that the Custodian's denial rises to the level of a knowing and willful violation of OPRA.

#### Statement of Information:

On August 5, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that as of January 2014, the DOC was no longer preparing Monthly Remedy Form Statistical Reports as they previously could. The Custodian further certified that as an alternative, he provided the Complainant with the relevant data from the database within his July 3, 2014, response.

### Analysis

#### 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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified that while Monthly Remedy Form Statistical Reports were produced in previous OPRA requests, internal database changes no longer grant the ability to create the records. Therefore, the records no longer exist.

Additionally, the Complainant failed to provide any evidence to rebut the Custodian's certification.<sup>5</sup>

The Custodian has borne his burden of proof that he lawfully denied access to the requested Monthly Remedy Form Statistical Reports for the months of January-April 2014, because he certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer*, GRC No. 2005-49.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proof that he lawfully denied access to the requested Monthly Remedy Form Statistical Reports for the months of January-April 2014, because he certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado  
Staff Attorney

Reviewed By: Joseph D. Glover  
Executive Director

April 21, 2015

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<sup>5</sup> The Complainant insists that the Custodian's failure to create these Monthly Remedy Form Statistical Reports constitutes a violation of N.J.A.C. 10A:1-4.8(a) and 28 C.F.R. 40.10(a). However, it is not within the GRC's statutory authority to determine whether the Custodian is in compliance with state and federal regulations unrelated to OPRA.