



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

October 27, 2015 Government Records Council Meeting

Milton Durham
Complainant

Complaint No. 2015-10

v.

NJ Department of Corrections
Custodian of Record

At the October 27, 2015 public meeting, the Government Records Council (“Council”) considered the October 20, 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:

1. The Custodian’s admitted failure to grant access, deny access, seek clarification, or request a further extension of time within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Council declines to order disclosure because the evidence of record indicates that the requested records were, in fact, made available to the Complainant for inspection, but he refused to participate.
3. The Custodian has borne his burden of proving that he lawfully denied access to the requested forms, from year 2006-2009, described in the Complainant’s May 8, 2014, OPRA request because he certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian conceded that the requested ten day extension expired without offering the records to the Complainant or requesting a further extension, resulting in a “deemed” denial, he certified that the requested inspection was ultimately scheduled two weeks later. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions 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 27th Day of October, 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 29, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 27, 2015 Council Meeting**

**Milton Durham¹
Complainant**

GRC Complaint No. 2015-10

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint:

On-site inspection of:

- 1) Classification files of Milton Durham from 1986 to 1990, 2005 to present
- 2) Inmate Remedy System forms, concerning Milton Durham, from 2006 to present
- 3) All housing unit lots of outgoing legal and/or oversize/over 1st class minimum postage mail and outgoing mail business remits on any of Milton Durham's housing units from November 2013 to present

Custodian of Record: John Falvey
Request Received by Custodian: May 16, 2014
Response Made by Custodian: May 28, 2014
GRC Complaint Received: January 12, 2015

Background³

Request and Response:

On May 8, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On May 28, 2014, the Custodian responded in writing, requesting an additional ten (10) business days to arrange the Complainant's on-site inspection of the records. The Custodian stated that the New Jersey State Prison's ("NJSP") OPRA Liaison would advise the Complainant of his scheduled on-site inspection, which required coordination in accordance with the safety, security, and operational effectiveness of the prison.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ 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.

Denial of Access Complaint:

On January 5, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”).⁴ The Complainant asserted that he received no other response from the Custodian following the May 28, 2014, “approval” letter. The Complainant stated that on June 27, 2014, he met with an NJSP staff member to undertake inspection of the records he requested. The Complainant alleged that the NJSP staff member refused to allow the Complainant to bring paper and pen to take notes and refused to provide same at the inspection. Furthermore, the Complainant alleged that the staff member refused to “guarantee” that Complainant could use the restroom, if needed, prior to completion of the inspection. The Complainant also alleged that the inspection was held on “my holiday” and without prior notice and that he therefore requested a postponement of the inspection.

The Complainant alleged that after making the above requests, he was told by the staff member that the inspection would “reconvene” on July 4, 2014. The Complainant stated that, as of the date of his complaint, “no such inspection has occurred despite written and verbal inquiry.” He further asserted that he has yet to receive a written response to his request for inspection of the classification file or a copy of the housing unit mailing logs.

Statement of Information:

On April 14, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on May 16, 2014. The Custodian certified that the requested records are maintained at NJSP. With respect to item 2 of the request, which sought “inmate remedy forms” from 2006 to present, the Custodian certified that “remedies 2006-2009” were destroyed in the fourth year after creation, as permitted by the Records Destruction Schedule established and approved by the New Jersey Department of State, Division of Archives and Records Management.

The Custodian certified that the Complainant’s OPRA request came into the Department of Corrections’ central headquarters in Trenton. Thereafter, it was sent to the OPRA Liaison at NJSP for completion, because the records requested are maintained at that facility, and the Complainant’s status as an inmate limited the location available for the requested on-site review.

The Custodian certified that the Complainant, at the time of the OPRA request, was an inmate at NJSP in Trenton and classified as a “close custody status” inmate. The Custodian explained that “close custody status” is one of the most restricted classifications an inmate can receive. Pursuant to N.J.A.C. 10A:9-4, inmates so classified must be assigned to selected activities and be under continuous supervision.

The Custodian certified that he responded in writing to the Complainant on May 28, 2014, requesting an additional ten business days to arrange the on-site inspection of the requested records. In that letter, the Custodian informed the Complainant that NJSP’s OPRA Liaison would advise the Complainant as to his scheduled on-site inspection. The Custodian

⁴The complaint was referred to mediation on February 4, 2015. The complaint was referred back from mediation on April 2, 2015. The Complainant did not submit an amendment to the Denial of Access Complaint.

conceded that the ten day extension expired without offering the records to the Complainant or requesting an extension, thereby resulting in a “deemed denial.” The Custodian clarified, however, that the requested on-site inspection was scheduled for two weeks later, therefore not indicating a knowing and willful denial.

On June 24, 2014, NJSP’s Office of the Administrator notified the Wing Officers by memorandum that the on-site inspection would be held on June 27, 2014, at 8:30 a.m. On June 27, 2014, the OPRA Liaison e-mailed the Office of the Administrator and indicated that the Complainant refused to attend the on-site inspection for the following reasons: he alleged not to have received prior notice regarding the scheduled onsite, he was not allowed to bring a pad and pen, he objected to being brought down on a Friday as he claimed he does not participate in anything on Fridays, and he finally stated that he should have access to a bathroom during the inspection.

As to the Complainant’s claim that he was told the inspection was rescheduled for July 4, 2014, the Custodian stated that the OPRA Liaison had no record of this conversation or any subsequent communication with the Complainant regarding rescheduling the request. The Custodian noted, “It seems unlikely that an inspection would be scheduled for a State Holiday as the Liaison is off on State Holidays.” The Custodian argued that, in any event, the Department of Corrections had in fact provided access to the records requested, and the Complainant refused to participate.

In considering the totality of the circumstances, the Custodian additionally asked that the GRC consider the Complainant’s past history with on-site inspections. According to the OPRA Liaison, the Complainant has failed to participate in three prior unrelated on-site inspections.

The Custodian acknowledged that while a “deemed” denial occurred in this case, the records were in fact ultimately offered, but the Complainant refused to review them, and therefore no knowing and willful violation of OPRA occurred.

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). 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).⁵ 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

⁵ 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.

Here, the Complainant asserted that, following the May 28, 2014, letter requesting a ten business day extension, he received no other written response, either denying or granting his OPRA request. In fact, the Custodian conceded that the requested ten day extension expired without either offering the records to the Complainant or requesting a further extension, therefore resulting in a “deemed” denial. The Custodian further certified that the requested inspection was ultimately scheduled two weeks later, and per NJSP policy, the Wing Officers assigned to the Complainant’s housing unit were informed on June 24, 2014, of the scheduled date.

Therefore, the Custodian’s admitted failure to grant access, deny access, seek clarification, or request a further extension of time within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Unlawful Denial of Access

Requests 1, and 2 (2010-2014), and 3

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.

In Valdes v. NJ Dep’t of Educ., GRC Complaint No. 2011-372 (December 2012), the GRC found that the custodian timely responded to a request for inspection of records and did not unlawfully deny access, despite the Complainant’s failure to appear to inspect said records. In the instant matter, the Custodian certified that the above noted records were all made available to the Complainant at the requested on-site inspection. The Custodian further certified that following the scheduled inspection, pursuant to NJSP policy, the Wing Officers assigned to the Complainant’s housing unit were informed on June 24, 2014, of the scheduled date. As the June 27, 2014, e-mail from the OPRA Liaison indicated, the Complainant refused to attend the on-site inspection for his own reasons.

Therefore, the Council declines to order disclosure because the evidence of record indicates that the requested records were, in fact, made available to the Complainant for inspection, but he refused to participate.

Request 2 (2006-2009)

The Council has previously found that, in light of a custodian’s certification that no records responsive to the request 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 forms from 2010-2014 were made available at the scheduled inspection. The Custodian further certified that the forms from years 2006-2009 were not provided because they do not exist. To that claim, the Custodian certified that those records were destroyed in the fourth year after

creation, pursuant to the Records Destruction Schedule, established and approved by the New Jersey Department of State, Division of Archives and Records Management.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested forms, from 2006-2009, as described in the Complainant's May 8, 2014, OPRA request, because the Custodian certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

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 “. . . [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, although the Custodian conceded that the requested ten day extension expired without offering the records to the Complainant or requesting a further extension, resulting in a “deemed” denial, he certified that the requested inspection was ultimately scheduled two weeks later. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions 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's admitted failure to grant access, deny access, seek clarification, or request a further extension of time within the extended time frame results in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Council declines to order disclosure because the evidence of record indicates that the requested records were, in fact, made available to the Complainant for inspection, but he refused to participate.
3. The Custodian has borne his burden of proving that he lawfully denied access to the requested forms, from year 2006-2009, described in the Complainant's May 8, 2014, OPRA request because he certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian conceded that the requested ten day extension expired without offering the records to the Complainant or requesting a further extension, resulting in a "deemed" denial, he certified that the requested inspection was ultimately scheduled two weeks later. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions 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: Husna Kazmir
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

October 20, 2015