



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

December 15, 2015 Government Records Council Meeting

Ronald Long
Complainant

Complaint No. 2015-116

v.

NJ Department of Corrections
Custodian of Record

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the December 8, 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 NJDOC directive, as described in the Complainant’s clarified OPRA request, because he certified that the records were destroyed pursuant to existing retention schedules, his office was therefore not in possession of any such directives at the time of the Complainant’s request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. Pusterhofer v. NJ 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 15th Day of December, 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: December 17, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2015 Council Meeting**

**Ronald Long¹
Complainant**

GRC Complaint No. 2015-116

v.

**NJ Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Copy of the directive from the NJDOC precluding full minimum custody status to [people] serving life sentences.

Custodian of Record: John Falvey

Request Received by Custodian: April 1, 2015; April 17, 2015

Response Made by Custodian: April 7, 2015; April 22, 2015

GRC Complaint Received: April 20, 2015

Background³

Request and Response:

On March 25, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 7, 2015, the Custodian responded in writing, offering to provide the Complainant with a copy of N.J.A.C. 10A:9, “Classification Process.” The Custodian informed the Complainant that the document consisted of 44 pages and advised that a copying fee of \$2.20 would be required. The Custodian noted that once he had been notified of payment, he would provide the documents to the Complainant.

On April 11, 2015, the Complainant again wrote to the Custodian, clarifying that he was requesting a specific NJDOC directive that pertains to the exclusion of inmates serving life sentences from full minimum custody status. The Custodian responded in writing on April 22, 2015, advising the Complainant that staff members at the Central Office’s Classifications Services confirmed there was no written directive responsive to the request and that the request was therefore denied.

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 April 15, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that “something else was offered” to him instead of what he actually requested. The Complainant made no additional legal arguments.

Statement of Information:

On May 4, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s first OPRA request concerning this matter on April 1, 2015. The Custodian averred that he located responsive records in Chapter 9 of N.J.A.C. 10A and responded in writing on April 7, 2015, offering the Complainant those records. The Custodian certified that “when Mr. Long indicated this is not what he was seeking” by way of his April 11, 2015 letter, the Custodian then contacted Classification Services. The Custodian certified that his office was informed that no such directive exists. The Custodian averred that he then denied the request in writing on April 22, 2015, pursuant to Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Additional Submissions:

On May 7, 2015, the Complainant wrote to the GRC in an effort to respond to the Custodian’s SOI. The Complainant questioned the search undertaken by the Custodian’s office and suggested that an unlawful denial of access had occurred by “subterfuge.” The Complainant attached four “exhibits” as evidence of his claim that an unlawful denial of access occurred. “Exhibit A” is a Directive, dated April 9, 2003, noting that “[p]ending amendment to Administrative Code, all inmates serving life sentences are not to be considered for or placed in Full Minimum Custody Status.” “Exhibit B” is a Memorandum, dated April 18, 2005, reminding DOC Administrators that “all inmates serving life sentences are not to be considered for, or placed in, Full Minimum custody status.” “Exhibit C” is a Memorandum, dated September 6, 2006, concerning the review process for “Full Minimum Eligibility.” “Exhibit D” is a March 19, 2015 letter from Administrative Analyst Dave Levay to Inmate Antoin Anderson, advising that “anyone serving a sentence of Life can not be assigned to Full Minimum custody status in accordance with directives issued by the Office of the Commissioner” (*sic*).

On November 12, 2015, the Custodian submitted an additional certification, responding to the Complainant’s May 7 submission. The Custodian certified that on April 17, 2015, he e-mailed Doreen White, a supervisor at the DOC’s Classification Services, which handles the custody status of inmates for the Department. The Custodian averred that Classification Services is the office that would have information related to the Complainant’s request for “a copy of the directives by the NJDOC precluding full minimum custody status to persons serving life sentences.”

The Custodian certified that he included in his e-mail a copy of Antoin Anderson’s letter, provided as “Exhibit D” in the Complainant’s May 7, 2015 letter. The Custodian asked Ms. White to confirm whether an NJDOC directive precluding full minimum custody status to

persons serving life sentences existed in light of the Anderson letter. Ms. White confirmed that there is no written directive that would be responsive to the Complainant's request.

The Custodian stated that Complainant's "Exhibit A" and "Exhibit B" attachments would appear responsive, had the Department located those records; however, they are dated 2003 and 2005. The Custodian certified that those types of government records would have the following retention schedules, depending on how they were classified: State General Records Schedule: Record Series 1405-002 Internal Correspondence (1 year), 1511-002 Agency Related Regulations (periodic review or as updated). The Custodian averred that "it is not unusual that these records were not located."

The Custodian additionally argued that Complainant's "Exhibit C" is not responsive to the request, as it consists of a memorandum reminding staff to consider factors in N.J.A.C. 10A:9-3.3 and 4.5 when determining custody status. The Custodian argued that this record does not, in fact, pertain to the Complainant's request, as the record states a life sentence may only be a factor and not an absolute bar to receiving full minimum custody.

The Custodian included correspondence with Ms. White, dating from April 22, 2015, discussing whether a written directive existed. Ms. White confirmed "there is no written directive" responsive to the Complainant's request. The Custodian requested that the GRC find that the DOC conducted a good faith search for responsive records and that the custodial agency did not unlawfully deny access to records.

On November 30, 2015, the Custodian submitted an additional certification, clarifying that the 2003 and 2005 directives were destroyed, as they were rescinded by a 2006 directive. He further certified that at the time of the Complainant's request, his office did not have possession of the 2003 and 2005 directives.

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, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's certification, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49 (July 2005). Here, the Custodian certified in his SOI that upon clarification by the Complainant as to what his request sought, the Custodian contacted Classification Services, who informed him that no such directive existed. The Complainant argued in his May 7 additional certification that such records do exist, including four such "exhibits" as attachments. In response, the Custodian noted that his search consisted of e-mailing Ms. White, a supervisor at Classification Services,

who confirmed that no such directive existed. The Custodian noted that the two “exhibits” proffered by the Complainant, resembling such directives, are in fact dated 2003 and 2005 and therefore have the following retention schedules, depending on how they were classified: State General Records Schedule: Record Series 1405-002 Internal Correspondence (1 year), 1511-002 Agency Related Regulations (periodic review or as updated). In his November 30, 2015 certification, the Custodian averred that at the time of the request, his office was not in possession of the 2003 and 2005 directives because the directives were destroyed, as they were rescinded by a 2006 directive.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested NJDOC directive, as described in the Complainant’s clarified OPRA request, because he certified that the records were destroyed pursuant to existing retention schedules, his office was therefore not in possession of any such directives at the time of the Complainant’s request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A- 6; Pusterhofer, GRC 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 NJDOC directive, as described in the Complainant’s clarified OPRA request, because he certified that the records were destroyed pursuant to existing retention schedules, his office was therefore not in possession of any such directives at the time of the Complainant’s request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Husna Kazmir
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

December 8, 2015