



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

January 26, 2016 Government Records Council Meeting

Charles Merritt
Complainant

Complaint No. 2015-146

v.

NJ Department of Corrections
Custodian of Record

At the January 26, 2016 public meeting, the Government Records Council (“Council”) considered the January 19, 2016 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 record, described in the Complainant’s February 9, 2015 OPRA request, because he certified and the record reflects that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ. (GRC Complaint No. 2005-49).

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 26th Day of January, 2016

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: January 29, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2016 Council Meeting**

**Charles Merritt¹
Complainant**

GRC Complaint No. 2015-146

v.

**NJ Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: “A record of: On 4/20/88, pursuant to docket #4983, serial number 5144, an escape was adjudicated, this escape as a juvenile was cited as though it occurred in custody of a county or state facility. The adjudication was 4/19/1989. I would like the contents of this escape as to the charges, complaints, and dispositions.”

Custodian of Record: John Falvey
Request Received by Custodian: February 23, 2015
Response Made by Custodian: February 25, 2015
GRC Complaint Received: May 26, 2015

Background³

Request and Response:

On February 9, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 25, 2015, the Custodian responded in writing to deny the request, contending that the requested records were court records that are not made, maintained, or kept on file by the NJ Department of Corrections (“DOC”).

Denial of Access Complaint:

On May 20, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s denial of access was unlawful but made no other legal arguments.

Statement of Information:

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.

On June 4, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on February 23, 2015. The Custodian averred that the request was for “the contents of an escape charge that was adjudicated in 1989.” The Custodian certified that his search included a review of the Complainant’s classification folder, where such records would be located. However, the search yielded no responsive records. The Custodian certified that he responded in writing on February 25, 2015, informing the Complainant that no records were located and advising him to check with the appropriate court. The Custodian argued that the denial was proper pursuant to the GRC holding in Pusterhofer v. NJ Dep’t of Educ. (GRC Complaint No. 2005-49), stating there is no unlawful denial of access when there are no records responsive to a request.

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, no unlawful denial of access occurred. *See Pusterhofer* GRC Complaint No. 2005-49 (July 2005). In the instant matter, the Custodian certified that, while the appropriate court may be in possession of the requested records, said records do not exist in the possession of the DOC. Additionally, the Complainant offered no information to refute the Custodian’s certification.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested record, described in the Complainant’s February 9, 2015 OPRA request, because he certified and the record reflects that no responsive record exists. 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 record, described in the Complainant’s February 9, 2015 OPRA request, because he certified and the record reflects that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ. (GRC Complaint No. 2005-49).

Prepared By: Husna Kazmir
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

January 19, 2016