



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

March 28, 2017 Government Records Council Meeting

Oderi Yaan Caldwell
Complainant

Complaint No. 2015-272

v.

Cape May County Correctional Center
Custodian of Record

At the March 28, 2017 public meeting, the Government Records Council (“Council”) considered the March 21, 2017 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 Warden failed to respond timely to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Warden’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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Notwithstanding the Warden’s “deemed denial,” there was no unlawful denial of access to the Complainant’s June 8, 2015 OPRA request. N.J.S.A. 47:1A-6. The Custodian certified that no responsive records exist, and the Complainant provided no competent, credible evidence to rebut the Custodian’s certification. Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Warden failed to respond timely to the Complainant’s OPRA request, resulting in a “deemed denial” of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. Further, the evidence of record does not indicate the Warden’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Warden’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 28th Day of March, 2017

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: March 31, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting**

**Oderi Yaan Caldwell¹
Complainant**

GRC Complaint No. 2015-272

v.

**Cape May County Correctional Center²
Custodial Agency**

Records Relevant to Complaint:

1. “The ‘professional sign in log’ on May 29th, 2015 for [T.W.] #47202. This request is namely for the Attorney whom [*sic*] visited same on that date; and is in compliance with N.J.A.C. 10A:31-6.6 et seq.’ and not in friction with N.J.A.C. 10A:31-6.10(b) ‘document’ prohibition, as a ‘signature’ is not a document per N.J.S.A. 47:1A-1.1 et seq.”
2. “The ‘professional sign-in log’ for Terry Walker #47202, currently removed from the CMCCC, on the 30th, 31st, of May and the 1st of June; all signatures thereon. See id. (1) for authority.”

Custodian of Record: Elizabeth Bozzelli
Request Received by Custodian: June 8, 2015
Response Made by Custodian: June 22, 2015
GRC Complaint Received: August 26, 2015

Background³

Request and Response:

On June 7, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 22, 2015, the tenth (10th) business day after receipt of the OPRA request, the Warden for Cape May County Correctional Center (“CMCCC”) responded in writing, stating that N.J.A.C. 10A:31-6.10(b) prohibits inmates from inspecting, examining, or obtaining copies of documents concerning any other inmate.

¹ No legal representation listed on record.

² Represented by James B. Arsenault, Jr., Esq., County Counsel (Cape May Courthouse, NJ).

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 August 26, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant is an inmate currently housed in South Woods State Prison. He asserted that at the time of his request, he was representing or assisting the identified inmate with filing a request for administrative remedies pertaining to an alleged sexual assault that occurred during incarceration.

The Complainant referred to regulation 28 CFR 115.52(e)(1) and (2) of the Prison Rape Elimination Act, which states that an inmate or other third party can assist another inmate in filing a request for administrative remedies pertaining to an alleged sexual assault, or file one on their behalf. The Complainant claimed that the Custodial Agency was aware that he was assisting the inmate in question prior to filing his OPRA request.

Therefore, the Complainant stated that because he was the representative of the inmate and because federal regulations supersede N.J.A.C. 10A:31-6.10(b), the Custodian’s denial of access was unreasonable, unconstitutional, or in the alternative, inapplicable to the matter at hand. The Complainant requested that the GRC declare that his OPRA rights were violated, order disclosure of the sought records, award attorney’s fees, and order other relief that the GRC deems just and equitable.

Statement of Information:

On November 2, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the Warden for CMCCC received the Complainant’s OPRA request on June 8, 2015. The Custodian then certified that the Warden contacted the Cape May County Counsel’s Office for guidance on June 15, 2015, and was told to deny the request pursuant to N.J.A.C. 10A:31-6.10(b). The Custodian certified that the Warden responded in writing on June 22, 2015, denying the request on that basis.

The Custodian stated that the Complainant’s request for another inmate’s visitor log falls under the prohibition set forth under N.J.A.C. 10A:31-6.10(b). The Custodian argued that inmates have a reasonable expectation of privacy to their own records. Additionally, the Custodian argued that public disclosure of inmate records by fellow inmates can pose a risk of harm to that inmate and/or be used for unlawful purposes. Nevertheless, the Custodian certified that no responsive records exist to the Complainant’s OPRA request but would have been withheld under N.J.A.C. 10A:31-6.10(b) if they did exist.

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).⁴ 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).

The Custodian certified that the Warden for CMCCC received the Complainant's OPRA request on June 8, 2015. It is unclear when the Warden forwarded the OPRA request to the Custodian, but she certified that the Warden responded to the Complainant on June 22, 2015, ten (10) business days after receiving the request.

Therefore, the Warden failed to respond timely to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Warden'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, GRC 2007-11.

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 v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified that, notwithstanding her claim that disclosure is prohibited under N.J.A.C. 10A:31-6.10(b), no actual responsive records exist. Furthermore, the Complainant failed to provide any evidence to rebut the Custodian's certification.

Therefore, notwithstanding the Warden's "deemed denial," there was no unlawful denial of access to the Complainant's June 8, 2015 OPRA request. N.J.S.A. 47:1A-6. The Custodian certified that no responsive records exist, and the Complainant provided no competent, credible evidence to rebut the Custodian's certification. Pusterhofer, GRC 2005-47. Thus, the Council need not address the outstanding issues raised in the Complainant's Denial of Access Complaint.

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

⁴ 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.

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, the Warden failed to respond timely to the Complainant’s OPRA request, resulting in a “deemed denial” of access. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). However, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. Further, the evidence of record does not indicate the Warden’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Warden’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 Warden failed to respond timely to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Warden’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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Notwithstanding the Warden’s “deemed denial,” there was no unlawful denial of access to the Complainant’s June 8, 2015 OPRA request. N.J.S.A. 47:1A-6. The Custodian certified that no responsive records exist, and the Complainant provided no

competent, credible evidence to rebut the Custodian's certification. Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

3. The Warden failed to respond timely to the Complainant's OPRA request, resulting in a "deemed denial" of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. Further, the evidence of record does not indicate the Warden's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Warden'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: Samuel A. Rosado
Staff Attorney

March 21, 2017