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Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 26, 2016 Government Records Council Meeting

Richard F. Lane
Complainant

Complaint No. 2015-320

v.

NJ Department of Corrections
Custodian of Record

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 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:

1. The Custodian’s initial response incorrectly informed the Complainant that no records existed because a subsequent search conducted post-Complaint actually produced responsive records that the Custodian claimed were exempt. Therefore, the Custodian’s initial response constituted an insufficient search and unlawful response. N.J.S.A. 47:1A-6. Schneble, GRC 2007-220.
2. There was no unlawful denial of access to Item No. 1, because the Custodian made the record available, and there is no evidence that the copying cost charge was ever paid. Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), Coulson v. Town of Kearny, GRC Complaint No. 2014-270 (June 2015).
3. There was no unlawful denial of Items No. 2 and 3 because the requested treatment evaluation and discharge summary from a residential therapeutic program are not government records subject to access under OPRA. N.J.A.C. 10A:22-2.3(a)(4); N.J.S.A. 47:1A-9. Therefore, the Custodian lawfully denied access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-6. Groelly v. NJ Dep’t of Corr., GRC Complaint No. 2010-294 (June 2012); McLawhorn v. New Jersey Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013); Riley v. NJ Dep’t of Corr., GRC Complaint No. 2013-345 (July 2014).
4. The Custodian violated OPRA because his initial response incorrectly informed the Complainant that no records existed when a subsequent search conducted post-Complaint actually produced responsive records that were exempt from disclosure. However, the Custodian did offer the non-exempt responsive records, for which the Complainant did not pay. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the



level of a knowing and willful violation of OPRA and an 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 July 26th Day of July, 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: July 29, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Richard F. Lane¹
Complainant**

GRC Complaint No. 2015-320

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint:

1. “The Treatment Rights Agreement form I signed when I entered the [Gateway Therapeutic Community] program”
2. Treatment Plan Review
3. Residential Discharge Summary

Custodian of Record: John Falvey

Request Received by Custodian: June 29, 2015, and August 31, 2015

Response Made by Custodian: July 9 and July 10, 2015, September 2, and November 5, 2015

GRC Complaint Received: October 13, 2015

Background³

Request and Response:

On June 20, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking Item No. 1 above. The Custodian received the request on June 29, 2015. On July 9, 2015, the seventh (7th) business day following the receipt of the request,⁴ the Custodian responded in writing by requesting an extension of ten (10) business days in order to locate records. On July 10, 2015, the Custodian advised the Complainant that he had obtained a two-page responsive record and would provide it once the Complainant authorized a payment of ten cents from his inmate account to cover the copying charge. On August 18, 2015, the Complainant submitted a second OPRA request, received by the Custodian on August 31, 2015,

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.

⁴ Independence Day was observed on July 3, 2015.

for Items Nos. 2 and 3 above. The Custodian responded in writing on September 2, 2015, by stating that his search revealed no responsive records.⁵

Denial of Access Complaint:

On October 13, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he filled out the required form to authorize payment for Item No. 1 but did not receive the records. Moreover, he stated that because a two-page record had been located, he did not understand why the Custodian later advised that no records were found. Further, the Complainant stated that he needed the requested records to appeal his current classification at South Woods State Prison (“SWOP”).

Supplemental Response:

On November 5, 2015, the Custodian again responded in writing to the Complainant, stating that his office was still waiting for the Complainant’s payment for the copying charge before they could release Item No. 1. For Item Nos. 2 and 3, the Custodian advised the Complainant that while he had a nine page responsive record for Item No. 2 and a three page responsive record for Item No. 3, neither record could be released. As reasons for his denial, he referred to N.J.A.C. 10A:22-2.3(a)(3), which provides that any records that consist of alcohol, drug, or other substance abuse information, testing, assessment, evaluation, report, summary, history, recommendation, including any assessment instruments, are precluded from release. Also, he said N.J.A.C. 10A:22-2.3(a)(4) precluded the release of any information relating to medical history, psychiatric or psychological history, diagnosis, treatment, or evaluation.

Statement of Information:

On November 10, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA requests on June 29, and August 31, 2015. Regarding requested Item No. 1, the Custodian certified that he offered the two page responsive record to the Complainant, but the Complainant had not made any payment as of the date of the SOI. However, he would release the record as soon as he received the ten cents payment. Because no copy fee had been paid, he argued that he had not denied access. *Citing Reid v. NJDOC and Harris v. NJDOC* (full citations omitted).

Regarding Items Nos. 2 and 3, the Custodian certified that his search included checking with SWOP’s OPRA Liaison. The Custodian further stated that the Liaison initially reported to him that no responsive records were located because none were included in the Complainant’s Classification folder. However, the Custodian further certified that he chose – after the Denial of Access Complaint had been filed – to check records at Northern State Prison (“NSP”) because the Custodian learned that the Complainant had previously attended a treatment program there. The Custodian stated that the subsequent search alerted him that he had mistakenly denied the records on the grounds that no records existed: both NSP and the DOC’s Central Office held responsive records for Items Nos 2 and 3. However, the Custodian stated that he could not

⁵ The Complainant’s August 18, 2015 request also repeated the request for Item No. 1. The GRC finds no reason to duplicate the adjudication on that requested item.

release said records to the Complainant as they are exempt pursuant to N.J.A.C. 10A:22-2.3(a)(3) and N.J.A.C.10A:22-2.3(a)(4). *Citing* Grollley v. NJDOC; McLawhorn v. NJDOC; and Riley v. NJDOC (full citations omitted). Finally, the Custodian stated that although he initially denied the records for an incorrect reason, there was no OPRA violation, owing to his use of the wrong exemption for the denial. *Citing* Farra'd v. NJDOC (full citation omitted).

Analysis

Insufficient Search

The Council has held that a Custodian must perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the Custodian's response is accurate and has an appropriate basis in law. In Schneble v. NJ Dep't of Env't Prot., GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the complainant's OPRA request by stating that no records responsive existed. The complainant, however, submitted responsive e-mails along with the Denial of Access Complaint. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and located records responsive to the request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied access to the requested records. *See also* Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, as in Schneble, the Custodian denied the request, contending that no records existed. However, a proper search conducted after the Complaint was filed did produce responsive records. On locating the records during the subsequent search, the Custodian refused to release the records, advising the Complainant and the GRC in his SOI that the responsive records are exempt.

In the instant matter, the Custodian's initial response incorrectly informed the Complainant that no records existed because a subsequent search conducted post-Complaint actually produced responsive records that the Custodian claimed were exempt. Therefore, the Custodian's initial response constituted an insufficient search and unlawful response. N.J.S.A. 47:1A-6. Schneble, GRC 2007-220.

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.

OPRA Request Item No. 1

In Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), the custodian responded to the complainant's February 6, 2005 OPRA request by stating that the requested record will be made available upon payment of copying costs. The Council held that:

“the Custodian is . . . not required to release said records until payment is received pursuant to N.J.S.A. 47:1A-5.b., Santos v. NJ State Parole Board, GRC Case No. 2004-74 (August 2004) and Cuba v. Northern State Prison, GRC Case No. 2004-146 (February 2005).”

In Ortiz v. NJ Dep't of Corr., GRC Complaint No. 2007-101 (November 2008), the Council referred to Paff in reaffirming that the custodian was “not required to release the requested records until payment is received. . .” Id. at pg. 8. *See also* Coulson v. Town of Kearny, GRC Complaint No. 2014-270 (June 2015)

Here, the Custodian has certified that that he located the treatment rights summary form, which the Complainant signed when he entered the Gateway Therapeutic Community. Although the Complainant states that he “filed out the form” provided to him, he does not state that his inmate account was charged the ten cents requested as payment for the two page record. The Custodian advised the Complainant in July 2015 that the record would be released upon the receipt of payment. For whatever reason, there is neither evidence showing that the inmate's account had been charged nor evidence showing that the payment was received.

Accordingly, there was no unlawful denial of access to Item No. 1, because the Custodian made the record available, and there is no evidence that the copying cost charge was ever paid. Paff, GRC 2006-54; Coulson, GRC 2014-270.

OPRA Request Items Nos. 2 and 3

OPRA provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

N.J.S.A. 47:1A-9(a)

Additionally, DOC's regulations provide that:

In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., any other law, rule promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq. .

. . (4) Any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation . . .

N.J.A.C. 10A:22-2.3(a)

Mental health records are encompassed within the category of psychiatric or psychological records that are not government records subject to disclosure pursuant to N.J.A.C. 10A:22-2.3(a)(4). Additionally, the language contained in N.J.A.C. 10A:22-2.3(a)(4), although a DOC regulation, is consistent with longstanding language contained in paragraph 4 of Executive Order No. 26 (Gov. McGreevy, 2002)(“EO-26”), which provides in relevant part that “[t]he following records shall not be . . . subject to public access pursuant to [OPRA] . . . [i]nformation relating to medical, psychiatric, or psychological history, diagnosis, treatment or evaluation.” Id. Additionally, Executive Order No. 47 (Christie, 2010) (“EO 47”) specifically cited the pertinent exemption to OPRA that is listed in N.J.A.C. 10A:22-2.3(a)(4).

The Council has held that mental health records are exempt from disclosure pursuant to EO-26, even when complainants seek their own records. In Groelly v. NJ Dep’t of Corr., GRC Complaint No. 2010-294 (June 2012), the complainant sought access to his personal medical, psychiatric, and psychological reports. The Council held that:

[T]he [records] requested by the Complainant are exempt from disclosure pursuant to N.J.S.A. 47:1A-9(a) and [EO 26] as “information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.” As such, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6.

Id. at 7.

The Council similarly held in McLawhorn v. New Jersey Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013), that the custodian lawfully denied access to the responsive mental health records under N.J.S.A. 47:1A-9(a) and N.J.A.C. 10A:22-2.3(a)(4). *See also* Spillane v. NJ Parole Bd., GRC Complaint No. 2014-159 (March 2015).

In Riley v. NJ Dep’t of Corr., GRC Complaint No. 2013-345 (July 2014), the Complainant had requested his personal medical, psychiatric, and psychological reports on multiple occasions. The Custodian responded to each request by timely denying access to the responsive records because Executive Order 47 and N.J.A.C. 10A:22-2.3(a)(4) both exempt from disclosure any information relating to medical history, psychiatric or psychological history, diagnosis, treatment, or evaluation. Thus, similar to the facts of Groelly, the custodian in Riley also lawfully denied access to the requested records because they are medical, psychiatric, or psychological reports and thus exempt from disclosure. *See also* McLawhorn, GRC 2012-292.

Here, the Custodian properly denied the Complainant’s request for his treatment plan review and discharge summary from a residential therapeutic program by correctly citing to N.J.A.C. 10A:22-2.3(a)(4), which declares “any information relating to medical, psychiatric, psychological history, treatment or evaluation” as not being government records and thus not

accessible under OPRA. As was the case in Sheridan v. NJ Dep't of Corr., GRC Complaint No. 2013-122 (December 2013), where the Custodian denied an inmate's request for complete medical/dental records, this Complainant's request "falls squarely within the exemption outlined for '[a]ny information relating to medical . . . diagnosis, treatment or evaluation.'" Sheridan, at 4 citing N.J.A.C. 10A:22-2.3(a)(4).

Accordingly, the GRC finds no unlawful denial of Items No. 2 and 3 because the requested treatment evaluation and discharge summary from a residential therapeutic program are not government records subject to access under OPRA. N.J.A.C. 10A:22-2.3(a)(4); N.J.S.A. 47:1A-9. Therefore, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6; Groelly, GRC 2010-294; McLawhorn, GRC 2012-292; Sheridan, GRC 2013-122; Riley, GRC 2013-345; Spillane, GRC 2014-159.

Knowing and 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)).

The Custodian violated OPRA because his initial response incorrectly informed the Complainant that no records existed when a subsequent search conducted post-Complaint actually produced responsive records that were exempt from disclosure. However, the Custodian did offer the non-exempt responsive records, for which the Complainant did not pay. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the

Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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 initial response incorrectly informed the Complainant that no records existed because a subsequent search conducted post-Complaint actually produced responsive records that the Custodian claimed were exempt. Therefore, the Custodian's initial response constituted an insufficient search and unlawful response. N.J.S.A. 47:1A-6. Schneble, GRC 2007-220.
2. There was no unlawful denial of access to Item No. 1, because the Custodian made the record available, and there is no evidence that the copying cost charge was ever paid. Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), Coulson v. Town of Kearny, GRC Complaint No. 2014-270 (June 2015).
3. There was no unlawful denial of Items No. 2 and 3 because the requested treatment evaluation and discharge summary from a residential therapeutic program are not government records subject to access under OPRA. N.J.A.C. 10A:22-2.3(a)(4); N.J.S.A. 47:1A-9. Therefore, the Custodian lawfully denied access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-6. Groelly v. NJ Dep't of Corr., GRC Complaint No. 2010-294 (June 2012); McLawhorn v. New Jersey Dep't of Corr., GRC Complaint No. 2012-292 (July 2013); Riley v. NJ Dep't of Corr., GRC Complaint No. 2013-345 (July 2014).
4. The Custodian violated OPRA because his initial response incorrectly informed the Complainant that no records existed when a subsequent search conducted post-Complaint actually produced responsive records that were exempt from disclosure. However, the Custodian did offer the non-exempt responsive records, for which the Complainant did not pay. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Ernest Bongiovanni
Staff Attorney

July 19, 2016