



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 25, 2019 Government Records Council Meeting

Misael Cordero
Complainant

Complaint No. 2017-117

v.

NJ State Library
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 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 Complainant’s request for a legal brief filed by the State in a criminal matter sought material from the New Jersey State Library’s inventory, which are not government records subject to access under OPRA. N.J.S.A. 47:1A-1.1; Schwarz v. N.J. State Library, GRC Complaint No. 2004-123 (March 2005). Therefore, the original Custodian lawfully denied access to the request. N.J.S.A. 47:1A-6.

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 25th Day of June 2019

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: June 28, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Misael Cordero¹
Complainant**

GRC Complaint No. 2017-117

v.

**New Jersey State Library²
Custodial Agency**

Records Relevant to Complaint: “A copy of the brief filed by the State in State v. Cordero, A-6175-93. This information is on reel #SR12743.”

Custodian of Record: Margaret Nizolek³
Request Received by Custodian: April 28, 2017
Response Made by Custodian: April 28, 2017
GRC Complaint Received: May 17, 2017

Background⁴

Request and Response:

On April 20, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the original Custodian seeking the above-mentioned records. On April 28, 2017, the original Custodian responded in writing, denying access by stating that the New Jersey State Library (“NJSL”) does not provide materials to inmates of correctional facilities. The original Custodian attached a copy of NJSL’s policy regarding prison libraries to the response.

Denial of Access Complaint:

On May 17, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the original Custodian failed to comply with OPRA with his denial of access. The Complainant contended that inmates are not precluded from requesting records through OPRA except under the circumstances expressed under N.J.S.A. 47:1A-2.2, which the Complainant argued was inapplicable to his request. The Complainant asserted that the original Custodian failed to cite any OPRA statute in

¹ No representation listed on record.

² Represented by Barbara M. Kleva, Esq. (Trenton, NJ).

³ The original Custodian of Record was James Lonergan and will be referred to as the “original Custodian” where applicable.

⁴ 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

support of his denial, but instead cited a policy document containing statutes the Complainant contended was irrelevant to OPRA requests.

The Complainant asserted that he contacted the local institutional librarian regarding his request, who claimed that they could not provide assistance because the records aren't being held nor controlled by them, and to refer to N.J.A.C. 10A:22-2.2(a).

Statement of Information:⁵

On August 25, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that the original Custodian received the Complainant's OPRA request on April 28, 2017. The Custodian certified that the original Custodian responded that same day denying access to the record by asserting that NJSL policy prohibits providing materials to inmates.

The Custodian certified that it has been a long-standing policy that the New Jersey Department of Corrections ("DOC") is responsible for providing library materials for inmates. The Custodian certified that the original Custodian included a copy of the NJSL's policy and included the relevant code sections which highlight what DOC offers to inmates. See N.J.A.C. 10A:6-2.2, 10A:6-2.4, 10A:6-2.5, 10A:6-2.6, and 10A:6-2.7.

The Custodian argued that the Complainant was provided with information on how to access the requested records, and that there was no denial of access to records subject to OPRA. The Custodian noted that the GRC has held that "[NJSL's] inventory shall not be considered part of the body of administrative records." Schwarz v. N.J. State Library, GRC Complaint No. 2004-123 (March 2005).

The Custodian contended that the Complainant's request was not denied because he was an inmate, but that the request was for a record considered part of NJSL's inventory. The Custodian asserted that because the Complainant's request was for a legal brief unrelated to the administration of NJSL, it was considered a request for inventory material. The Custodian argued that NJSL's inventory are not made, maintained, or kept on file in the course of its official business, and therefore not subject to access.

The Custodian also contended that allowing requestors to obtain access to NJSL inventory via OPRA would place a substantial burden on the agency's resources. The Custodian also argued that the Legislature only intended records related to NJSL's administration would be subject to access under OPRA.

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

⁵ The Complaint was referred to mediation on June 14, 2017. The matter was referred back from mediation on August 7, 2017.

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 Schwarz, the complainant sought records pertaining to herself and other individuals. GRC No. 2004-123. Therein the Council addressed the issue on OPRA’s applicability towards NJSL inventory. The Council stated that NJSL’s inventory is defined as “textbooks, copyrighted materials . . . including but not limited to books, periodicals, newspapers, documents, pamphlets, photographs, reproductions, microfilms, pictorial or graphic works . . . [and/or] other printed or published matter . . .” Id. (quoting N.J.A.C. 15:21-12.3). In contrast, OPRA defines a government record as “any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer . . .” Id. (quoting N.J.S.A.47:1A-1.1).

The Council found that the above-mentioned definitions demonstrated a “clear distinction” between government records and NJSL’s inventory. Id. The Council held that government records are those materials which are “utilized or relied upon by the government agency in the court carrying out the duties and services they provide to the public,” and that NJSL’s inventory do not serve that function. Id. Therefore, the Council held that NJSL’s inventory are not considered government records subject to access under OPRA. Id.

In the current matter, the Complainant sought a legal brief pertaining to a criminal matter. In NJSL’s April 28, 2017 response, the original Custodian argued that NJSL does not provide materials to inmates. However in the SOI, the Custodian argued that the request was properly denied because the records sought were NJSL inventory materials and not administrative records disclosable under OPRA.

In applying the foregoing facts to current precedent, the GRC is satisfied that the original Custodian lawfully denied access to the requested record. The description of the record as a legal brief where NJSL is not a party to the matter clearly identifies it as inventory material, and not material that is used by NJSL to carry out its duties and services to the public. Thus, in accordance with Schwarz, the record is not subject to access under OPRA.

Accordingly, the Complainant’s request for a legal brief filed by the State in a criminal matter sought material from NJSL’s inventory, which are not government records subject to access under OPRA. N.J.S.A. 47:1A-1.1; Schwarz, GRC 2004-123. Therefore, the original Custodian lawfully denied access to the request. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Complainant’s request for a legal brief filed by the State in a criminal matter sought material from the New Jersey State Library’s inventory, which are not government records subject to access under OPRA.

N.J.S.A. 47:1A-1.1; Schwarz v. N.J. State Library, GRC Complaint No. 2004-123 (March 2005).
Therefore, the original Custodian lawfully denied access to the request. N.J.S.A. 47:1A-6.

Prepared By: Samuel A. Rosado
Staff Attorney

June 18, 2019