



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 30, 2019 Government Records Council Meeting

Michael Nathaniel Bright
Complainant

Complaint No. 2017-138

v.

NJ Department of Corrections
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 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:

1. The Custodian’s failure to locate responsive records until after a second search was conducted following receipt of the Denial of Access Complaint and a GRC inquiry, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6; Schnebel v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013). However, the GRC declines to order disclosure of the requested records because the Custodian certified that he disclosed to the Complainant all non-exempt responsive records on or about June 26, 2019.
2. Although the Custodian’s search was insufficient resulting in an unlawful denial of access to the requested records, the Custodian conducted another search, located responsive records, and provided to the Complainant all responsive records subject to disclosure under OPRA. 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 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 30th Day of July 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: August 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

Michael Nathaniel Bright¹
Complainant

GRC Complaint No. 2017-138

v.

New Jersey Department of Corrections²
Custodial Agency

Records Relevant to Complaint: Copies of “Any and All documents related to the disciplinary proceeding of ‘Michael Bright’ for the infractions of *.004 fighting with another and *.306 conduct which disrupts or interferes with the security of orderly running of the correctional facility, adjudicated on (10/29/2014), including, but not limited to all documents, exhibits, photographs, video and any and all other evidence used in the disciplinary proceedings. The matter having been adjudicated on October 29, 2014, respectively, in front of Disciplinary Hearing Officer Jack Osvalt, at Northern State Prison.”

Custodian of Record: John Falvey
Request Received by Custodian: May 23, 2017
Response Made by Custodian: May 31, 2017
GRC Complaint Received: June 16, 2017

Background³

Request and Response:

On May 12, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The request was received by the Custodian on May 23, 2017. On May 31, 2017, the fifth (5th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the requested records could not be located.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Adam Robert Gibbons.

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

Denial of Access Complaint:

On June 16, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the Custodian denied his request for disciplinary hearing records on May 31, 2017.

The Complainant asserted that he spoke several times with Mario Viera, the Northern State Prison OPRA Liaison, regarding OPRA request ID No. 14136. The Complainant stated that his OPRA request was for “Documents, Exhibits, Photographs, and any and all other evidence, statements and reports, used and not used in the disciplinary proceedings conducted by Disciplinary Hearing Officer ‘Jack Osvalt’ at Northern State Prison on October 29, 2014,” and “[t]he Video Recordings of the incident that occurred on C-100-West on the Date of October 24, 2014 during the morning mess movement and the subject of a Code 33 and Code 53, resulted (sic) in the disciplinary charges given to ‘Michael Bright’ and ‘Shariff St. Clair’ in October 2014.” The Complainant stated that he was informed that the request could not be fulfilled because the alleged records could not be located. The Complainant referred the GRC to “See Attached Documents.”

The Complainant attached to the complaint as Exhibit A the response to OPRA request #14136, dated May 31, 2017. The Complainant also attached as Exhibit B a NJDOC INMATE INQUIRY FORM (Form IRSF-101).⁴

Statement of Information:

On July 11, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on May 23, 2017, and responded in writing on May 31, 2017. The Custodian certified that the Complainant’s request was referred to the OPRA Liaison at Northern State Prison because any responsive records would be located at that facility. The Custodian certified that a search was made for the requested records but none were found. The Custodian stated that he checked the agency’s internal database to determine if the Complainant had a disciplinary charge for the time frame indicated by the Complainant with negative results. The Custodian stated that if a video was located it would have been denied pursuant to Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016), N.J.S.A. 47:1A-1.1, and N.J.A.C. 10A:22-2.3(a)(14).

The Custodian attached a copy of Request ID No. 13887.⁵ The Custodian also attached a copy of the response for Request ID No. 14136.

Additional Submissions:

On June 6, 2019, the GRC e-mailed the Custodian’s Counsel. The GRC informed Counsel that in the SOI there appeared to be confusion between Request ID No. 14136 and Request ID No. 13887. The GRC informed Counsel that the Complainant did not submit a copy of the request which he stated formed the basis of the complaint. However, twice the Complainant referenced

⁴ The Complainant’s Exhibit B is not relevant to this complaint.

⁵ This was a request filed on March 17, 2017, for records different than but similar to, those sought in the May 12, 2017 request, which was the request that formed the basis of the instant complaint.

Request ID No. 14136. The GRC further informed Counsel that on the Records Denied List the Complainant referenced two items: (1) records used in a disciplinary hearing on October 29, 2014, and (2) a video recording of an incident which occurred on October 24, 2014. The GRC advised Counsel that in the SOI, as the “copy of the OPRA request at issue” the Custodian attached a request dated March 17, 2017, which was identified as Request ID No. 13887 and appeared to seek records different than those at issue in the instant complaint. The GRC asked for clarification.

On June 6, 2019, the Custodian’s Counsel acknowledged the discrepancy. Counsel stated that he would look into the matter and get back to the GRC.

On June 19, 2019, having not heard back from the Custodian’s Counsel, the GRC e-mailed Counsel and stated that the GRC would need a certification from the Custodian clarifying the statements made in the SOI. Thereafter, on June 26, 2019, the Custodian’s Counsel forwarded to the GRC a certification from the Custodian supplementing/clarifying the SOI. The Custodian certified that, although the SOI referenced the proper response for Request ID No. 14136, it mistakenly referenced the request as Request ID No. 13887 instead of Request ID No. 14136. The Custodian corrected the error by attaching Request ID No. 14136 to the certification. The Custodian certified that the request was denied because the records could not be located. However, the Custodian stated that after receiving the GRC’s June 6, 2019 e-mail, the Custodian’s Counsel was able to locate the requested records. The Custodian certified that he directed the OPRA Liaison at Northern State Prison to disclose to the Complainant the portions of the requested records that are subject to disclosure under OPRA.

The Custodian’s Counsel attached a letter dated June 26, 2019, to the Custodian’s certification. Counsel stated that, after receiving the GRC’s request for a supplemental submission, an investigation of the Complainant’s OPRA request was undertaken and it was learned that the Complainant was found “not guilty” of the disciplinary charges referenced in the Complainant’s OPRA request. The Custodian’s Counsel stated that this information helped aid in the location of the requested records. Counsel explained that when an inmate is found “guilty” of a disciplinary infraction, the records are kept in the inmate’s classification file; however, when an inmate is found “not guilty” of the infraction, the records are kept in a different location. Counsel stated that the records were subsequently located in a different location than the one initially searched, and the following records were disclosed to the Complainant:

- The October 29, 2014 disciplinary reports.
- “Bright GRC (2017-138) Bates labeled 001 to 027.” Bates pages 001, 003, 008, 010, 014, 017, 019, 021 and 024 were redacted to remove another inmate’s name pursuant to N.J.A.C. 10A:22-2.3(b). Bates page 012 was redacted pursuant to N.J.A.C. 10A:22-2.3(a)(4) because it contained medical information of an inmate.

The Custodian’s Counsel stated that if the Complainant mentioned in his OPRA request that he was found “not guilty” of the disciplinary charges, the Custodian would have conducted a more thorough search in the alternative locations. However, Counsel stated that the Complainant’s failure to include such information directly contributed to the Custodian’s inability to locate the records in the first instance.

Analysis

Insufficient Search

It is the custodian's responsibility to 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 Schnebel v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant's OPRA request existed. The custodian certified that after receipt of the complainant's denial of access complaint, which contained e-mails responsive to the complainant's request, the custodian conducted a second search and found records responsive to the complainant's request. Id. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. Id. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Moreover, in Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013), the custodian initially responded producing records responsive to the request and stating that no other records existed. However, after receiving the denial of access complaint, the custodian performed another search and discovered several other records. Id. In accordance with Schnebel, the Council held that the custodian failed to perform an adequate initial search and unlawfully denied access to those additional records. Weiner, GRC 2013-52.

Here, the Complainant was seeking records related to his October 2014 disciplinary proceeding. The Custodian's Counsel stated that such records would be kept in one of two areas, depending upon the findings of the hearing officer. Counsel stated that if an inmate was found "guilty" of a disciplinary infraction, the records would be kept in the inmate's classification file, but if the inmate was found "not guilty" of the infraction, the records would be kept in a different location. Counsel stated that the Complainant's failure to state in his OPRA request that he was found "not guilty" of the disciplinary charges hindered the Custodian's search for the records. This statement implies that the initial search was limited to the Complainant's classification file where no responsive records were located. However, since records are stored in different locations based upon a determination of an inmate's culpability, when the records were not located in the Complainant's classification file (where they would have been stored if he was found "guilty" of an infraction), the Custodian, by process of elimination, should have directed that a search be conducted in the area or areas where records are stored for inmates found to be "not guilty." By not conducting a search of both areas where disciplinary hearing records would have been stored, the Custodian failed to perform an adequate search to locate records responsive to the request.

Accordingly, the Custodian's failure to locate responsive records until after a second search was conducted following receipt of the Denial of Access Complaint and a GRC inquiry, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6; Schnebel, GRC 2007-220; Weiner, GRC 2013-52. However, the GRC declines to order disclosure of the requested records because the Custodian certified that he disclosed to the Complainant all non-exempt responsive records on or about June 26, 2019.

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 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, although the Custodian’s search was insufficient resulting in an unlawful denial of access to the requested records, the Custodian conducted another search, located responsive records, and provided to the Complainant all responsive records subject to disclosure under OPRA. 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 unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian’s failure to locate responsive records until after a second search was conducted following receipt of the Denial of Access Complaint and a GRC inquiry, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6; Schnebel v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013). However, the GRC declines to order disclosure of the requested records because the Custodian certified that he disclosed to the Complainant all non-exempt responsive records on or about June 26, 2019.

2. Although the Custodian's search was insufficient resulting in an unlawful denial of access to the requested records, the Custodian conducted another search, located responsive records, and provided to the Complainant all responsive records subject to disclosure under OPRA. 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart
Staff Attorney

July 23, 2019