



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 24, 2019 Government Records Council Meeting

Ronald Williams
Complainant

Complaint No. 2017-141

v.

NJ Department of Corrections
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 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 response was insufficient because he failed to respond in writing to each individual item contained in the OPRA request. Accordingly, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). However, the Council should decline to order disclosure as the Custodian provided evidence that the omitted personnel rosters for East Jersey State Prison and Northern State Prison were mailed to the Complainant on August 1, 2017.
2. The Custodian lawfully denied access to the portion of the Complainant’s request seeking the first and last names of staff at New Jersey State Prison. N.J.S.A. 47:1A-6. Specifically, the Special Investigations Division and the Custodian sufficiently demonstrated the risk posed to the safety and security of a facility when such information is provided to an individual who is incarcerated at the same facility. N.J.S.A. 47:1A-1.1
3. The Custodian failed to provide a complete response to the Complainant’s January 6, 2017 OPRA request. N.J.S.A. 47:1A-5(g). However, the Custodian provided the requested facility rosters to the Complainant at the time he filed his Statement of Information. Additionally, the portion of the Complainant’s request seeking the facility roster for New Jersey State Prison was lawfully denied to protect the security and safety of the facility. N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’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 24th Day of September 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: September 27, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**Ronald Williams¹
Complainant**

GRC Complaint No. 2017-141

v.

**N.J. Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: A copy of the first and last names of all staff members employed at East Jersey State Prison (“EJSP”), Northern State Prison (“NSP”), and New Jersey State Prison (“NJSP”).

Custodian of Record: John Falvey

Request Received by Custodian: January 6, 2017

Response Made by Custodian: January 9, 2017

GRC Complaint Received: June 26, 2017

Background³

Request and Response:

On or around December 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 9, 2017, the Custodian responded in writing stating that his office had been provided with a twenty-three (23) page record containing the first and last name of all staff at NJSP. The Custodian also stated that a charge of \$1.15 has been incurred for copying costs and asked the Complainant to fill out the included payment authorization form.

On February 14, 2017, the Complainant sent a letter to the Custodian, stating that NJSP failed to deduct the requisite funds from his account and requested a new authorization form. On February 22, 2017, the Custodian responded, providing said authorization form to the Complainant.

On March 20, 2017, the Complainant sent a letter to the Custodian, stating that NJSP had finally deducted the funds from his account on March 3, 2017. The Complainant then stated that as of the date of the letter he had not received the requested records. The Complainant also noted potential issues involving inmate correspondence. On March 23, 2017, the Custodian responded, stating that they mailed

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Tasha Bradt.

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.

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the responsive record to the Complainant on March 6, 2017. The Custodian added that the Complainant should contact the mail-room or submit a lost property claim.

On March 30, 2017, the Complainant sent another letter to the Custodian. The Complainant stated that an e-mail was sent to the NJSP mail-room inquiring about his record. The Complainant noted that the mail-room opens correspondence originating from the Custodian's office, which he believed to be improper. The Complainant stated that in order to alleviate issues in the mail-room, the Custodian should forward the record to the OPRA liaison, who in turn would deliver it to the Complainant.

On April 6, 2017, the Custodian responded to the Complainant, stating that if the record was lost in the mail, he would refund the copy charge. The Custodian added that since OPRA mail is not considered legal, it may be opened in accordance with the provisions under N.J.A.C. 10A, et seq. The Custodian also stated that his office provides OPRA responses through the mail and would not honor special requests for staff to hand deliver mail.

On April 11, 2017, the Complainant sent a letter to the Custodian, stating that if he does not receive the responsive record within seven (7) business days, he would submit a complaint with the Government Records Council ("GRC") or New Jersey Superior Court.

On April 17, 2017, the Custodian responded to the Complainant, stating that he was informed by the Special Investigations Division ("SID") that it would not allow a roster of NJSP employees into the facility due to safety and security concerns. The Custodian added that his office was unable to override the decision and asked the Complainant whether he wished to contact SID or seek a refund of the copying cost.

On May 1, 2017, the Complainant sent a letter to the Custodian, requesting that he forward the responsive record to a third party's address. On May 3, 2017, the Custodian responded to the Complainant, stating that he should contact NJSP staff regarding his property, and that his office cannot send another copy of the responsive record to a third party.

Denial of Access Complaint:

On June 26, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted initially that the Custodian failed to respond to his request for the first and last names of staff at EJSP and NSP, instead only responding to his request pertaining to NJSP.

The Complainant then contended that the Custodian failed to provide the roster of NJSP staff. The Complainant asserted that although the Custodian claimed to have sent the record, he failed to ensure that the record would be delivered. Additionally, the Complainant asserted that NJSP staff did not confirm that prison authorities intervened and prevented the Complainant from receiving the responsive record.

Statement of Information:

On August 1, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on January 3, 2017. The Custodian certified

that a search was conducted for a roster of correctional staff at each requested facility. The Custodian certified that he responded in writing on January 9, 2017, stating that he had located a roster for staff at NJSP, and would deliver the record upon payment for the copying cost. The Custodian then certified that upon receiving payment, he mailed the record to the Complainant on March 6, 2017.

The Custodian argued that he inadvertently excluded the rosters for staff at EJSP and NSP, however upon realizing the mistake, the Custodian dispatched the located records to the Complainant, rendering that portion of the request as moot. See Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286 (App. Div. 2017); Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660, *7 (App. Div. 2008) (affirming dismissal of OPRA complaint as moot after Hoboken provided response to OPRA request). The Custodian noted that the courts have held that they “will not decide cases in which . . . a judgement cannot grant effective relief.” Cinque v. N.J. Dep’t of Corr., 261 N.J. Super. 242, 243 (App. Div. 1993). See also N.J. Div. of Youth & Family Serv. v. W.F., 434 N.J. Super. 288, 297 (App. Div. 2014).

The Custodian next argued that he did not unlawfully deny access to the record of NJSP staff. The Custodian asserted that he mailed the record to the Complainant, but it was intercepted by SID for safety and security reasons. The Custodian asserted that notwithstanding the actions by SID, he fulfilled his obligations under OPRA. The Custodian contended that he timely responded to the Complainant’s request and mailed the responsive record after payment for the copying costs had cleared.

The Custodian asserted that neither he nor the GRC have the authority to override SID’s prison security determinations. Therefore, the Custodian contended that the Complainant’s claim in the matter was against NJSP, and not the Custodian. The Custodian also argued that the matter falls out of the GRC’s limited jurisdiction. See Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 146 (App. Div. 2012) (the court upheld the GRC’s decision not to address complainant’s common law issues, though he included them in his complaint, and noted that the GRC’s jurisdiction is “limited to OPRA issues”).

Additional Submissions

On August 11, 2017, the Complainant submitted a response to the SOI. The Complainant asserted that has not received any responsive records to his request, and therefore asserted that the matter is not moot. The Complainant contended that he was never sent an estimated charge for copying costs for the EJSP and NSP rosters, nor a request to authorize the release of funds to pay for said charge. The Complainant contended that the only record he paid for was for the NJSP roster and maintained that he still has not received the record.

The Complainant asserted that NJSP, SID, and the mail-room denied confiscating any mail from him. The Complainant contended that if mail was confiscated from him, he would have been notified in accordance with the rules set forth under N.J.A.C. 10A, *et seq.* The Complainant also asserted that confiscation forms would have been signed by himself and the staff who confiscated the item but claimed this never took place.

On August 9, 2019, the GRC requested additional information from the Custodian. Specifically, the GRC made the following inquiries:

1. Are the identities of the security personnel at these facilities available online?

2. If the roster for the N.J. State Prison was confiscated for security and safety concerns, why were rosters for the other facilities sent to the Complainant?
3. Please provide evidence that the other rosters were sent to the Complainant.

The Custodian was given until the end of business on August 15, 2019 to respond. On August 15, 2019, the Custodian requested and was granted an extension of time to until September 5, 2019 to respond to the GRC's request. On September 4, 2019, the Custodian responded to the GRC, providing a certification and attachment.

In response to the first inquiry, the Custodian certified that the identities of security personnel at the relevant facilities are publicly available online. Regarding the second inquiry, the Custodian certified that he was unable to override the security determinations made by SID. Additionally, the Custodian certified that he was told by SID that the NJSP roster was confiscated to prevent the Complainant from obtaining information on staff capabilities of the facility as well as information that could be used to create an improper familiarity with staff at that particular facility.⁴ Lastly, the Custodian provided a copy of the cover letter sent to the Complainant on August 1, 2017, which accompanied the lists of staff members from EJSP and NSP. The Custodian certified to the letter's truth and accuracy.

Analysis

Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "...[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually." Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).

Here, the Custodian responded to the Complainant's OPRA request on January 9, 2017, stating that a twenty-three (23) page record had been located for employees at NJSP. There was no mention of locating a roster of employees for the other institutions referenced by the Complainant. Moreover, the Custodian acknowledged this omission by asserting that rosters for those institutions were located and sent to the Complainant at the time he submitted his SOI.

Therefore, the Custodian's response was insufficient because he failed to respond in writing to each individual item contained in the OPRA request. Accordingly, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272. However, the Council should decline to order disclosure as the Custodian provided evidence that the omitted personnel rosters for EJSP and NSP were mailed to the Complainant on August 1, 2017.

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

⁴ At the time of the OPRA request, the Complainant was incarcerated at NJSP.
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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.

Regarding personnel records, OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual’s *name*, title, position, *salary*, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in *information which disclose conformity with specific experiential, educational or medical qualifications required for government employment* or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[N.J.S.A. 47:1A-10 (emphasis added)].

Moreover, in Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010), the Council determined that “name, title, position, salary, payroll record and length of service” is information which is specifically considered to be a government record under N.J.S.A. 47:1A-10, and that “payroll records” must be disclosed pursuant to Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004). The Council thus held that the complainant’s March 25, 2009, request for “[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008, to March 24, 2009” was a valid request pursuant to OPRA. Id. at 5.

In Durham v. N.J. Dep’t of Corr., GRC Complaint No. 2012-35 (March 2013), the complainant sought the “daily schedule” for corrections staff assigned to a particular shift for a specified date. The custodian asserted, and the Council agreed, that release of the daily assignments could pose a significant risk to the safe and secure operation of corrections facilities. The Council noted that the records would provide inmates with intimate knowledge of when and where personnel would be assigned to areas within the facilities, and thereby gain a significant advantage to engage in criminal activity.

Here, the Complainant sought the first and last names of each staff member at three (3) corrections facilities. In the SOI, neither SID nor the Custodian cite any statute, regulation, or policy prohibiting disclosure of employee’s names to inmates. However, in response to the additional information request, the Custodian elaborated on SID’s concerns. SID told the Custodian that the NJSP roster was confiscated to prevent the Complainant from discerning staff capabilities at the facility as well as gain information that could be used to develop an improper level of familiarity with staff.

Based on the additional information provided, the GRC is satisfied that SID lawfully withheld access to the NJSP roster. In the current matter, the Complainant’s request did not seek actual schedules

or assignments for the facility staff, but solely their first and last names. However, at the time of the OPRA request the Complainant was housed at NJSP. Whereas the Complainant would be severely limited in what he could do with rosters of other facilities, the circumstances change when provided a list of personnel he is in direct contact on a daily basis.

Accordingly, the Custodian lawfully denied access to the portion of the Complainant's request seeking the first and last names of staff at NJSP. N.J.S.A. 47:1A-6. Specifically, SID and the Custodian sufficiently demonstrated the risk posed to the safety and security of a facility when such information is provided to an individual who is incarcerated at the same facility. N.J.S.A. 47:1A-1.1

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)).

In the matter before the Council, the Custodian failed to provide a complete response to the Complainant's January 6, 2017 OPRA request. N.J.S.A. 47:1A-5(g). However, the Custodian provided the requested facility rosters to the Complainant at the time he filed his SOI. Additionally, the portion of the Complainant's request seeking the facility roster for NJSP was lawfully denied to protect the security and safety of the facility. N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian'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 Custodian's response was insufficient because he failed to respond in writing to each individual item contained in the OPRA request. Accordingly, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). However, the Council should decline to order disclosure as the Custodian provided evidence that the omitted personnel rosters for East Jersey State Prison and Northern State Prison were mailed to the Complainant on August 1, 2017.
2. The Custodian lawfully denied access to the portion of the Complainant's request seeking the first and last names of staff at New Jersey State Prison. N.J.S.A. 47:1A-6. Specifically, the Special Investigations Division and the Custodian sufficiently demonstrated the risk posed to the safety and security of a facility when such information is provided to an individual who is incarcerated at the same facility. N.J.S.A. 47:1A-1.1
3. The Custodian failed to provide a complete response to the Complainant's January 6, 2017 OPRA request. N.J.S.A. 47:1A-5(g). However, the Custodian provided the requested facility rosters to the Complainant at the time he filed his Statement of Information. Additionally, the portion of the Complainant's request seeking the facility roster for New Jersey State Prison was lawfully denied to protect the security and safety of the facility. N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian'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

July 23, 2019⁵

⁵ The matter was prepared for adjudication at the Council's July 30, 2019 meeting, but was tabled pending receipt of additional information from the Custodian.