



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 25, 2020 Government Records Council Meeting

U'Bay Lumumba
Complainant

Complaint No. 2018-261

v.

NJ Department of Corrections
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 Supplemental 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:

1. The Custodian complied with the Council’s July 28, 2020 Interim Order because he responded in the extended time frame providing three (3) pages of records responsive to the Complainant’s OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to records responsive to the Complainant’s OPRA request, he ultimately provided them to the Complainant as part of his timely compliance with the Council’s July 28, 2020 Interim Order. 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 25th Day of August 2020

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 27, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**U'Bay Lumumba¹
Complainant**

GRC Complaint No. 2018-261

v.

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

Records Relevant to Complaint: Hardcopies via U.S. mail of:

1. “[F]ormal notice or request of who recommended and who signed off on designating [the Complainant] “high risk.”
2. “[T]he formal notice date [the Complainant] was designated “high risk.”
3. “[T]he formal notice of reasons why [the Complainant] was designated “high risk.”

Custodian of Record: John Falvey
Request Received by Custodian: September 11, 2018
Response Made by Custodian: September 19, 2018
GRC Complaint Received: November 1, 2018

Background

July 28, 2020 Council Meeting:

At its July 28, 2020 public meeting, the Council considered the July 21, 2020 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, found that:

1. The Custodian may have unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff’s Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). The Custodian must locate and disclose the responsive records to the Complainant. Should the Custodian determine that the responsive records are exempt from disclosure, he must provide a specific lawful basis for that denial. Should a sufficient search result in no responsive records, the Custodian and those who conducted the search at New Jersey State Prison are required to certify to this fact, inclusive of a search description.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Suzanne Davies.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On July 29, 2020, the Council distributed its Interim Order to all parties. On August 5, 2020, Custodian's Counsel e-mailed the Government Records Council ("GRC") seeking a five (5) business day extension to respond to the Council's Order.⁶ On the same day, the GRC responded granting an extension through August 12, 2020.

On August 11, 2020, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that he received the Council's Order on July 29, 2020 and obtained a five (5) business day extension of time to respond. The Custodian certified that he was able to locate three (3) additional pages of records comprising an "Authorization for Placement" and two (2) memorandum sent to the Complainant advising him of his placement.⁷ The Custodian certified that he sent these records to the Complainant via regular mail without redactions.

The Custodian certified upon searching for additional records, he found that the Complainant was automatically designated as "high risk" on May 31, 1991 when he was placed in the Management Risk Unit ("MCU"). The Custodian noted that at the time he responded to the Complainant's OPRA request, he was unaware that an inmate's placement in the MCU resulted in an automatic "high risk" designation. The Custodian thus affirmed that the records of "formal notice, and date of when [the Complainant] was designated [h]igh [r]isk, are the records placing [the Complainant] in MCU."

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁶ Counsel also asked a procedural question related to the Order, which the GRC addressed when responding to the extension request.

⁷ The Custodian noted that at the time of incarceration, the Complainant's name was Michael Chavis. This is the name contained in the three (3) pages of additional records.

Analysis

Compliance

At its July 28, 2020 meeting, the Council ordered the Custodian to locate and disclose responsive records or provide a specific lawful basis for denying access to them. The Council further ordered that should the Custodian fail to locate a responsive record; he must certify that none exist and provide a detailed explanation of his search. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On July 29, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 5, 2020.

On August 5, 2020, the fifth (5th) business day after receipt of the Council's Order, Custodian's Counsel sought and obtained a five (5) business day extension to respond. On August 11, 2020, the fourth (4th) business day of the extended time frame, the Custodian responded to the Council's Order. Therein, the Custodian certified that he located three (3) pages of responsive records. The Custodian explained the reason as to why these records were responsive: the Complainant was designated "high risk" on the same day he was placed in the MCU. The Custodian also provided certified confirmation of compliance to the Executive Director.

A review of the disclosed pages shows the individual that signed off on the Complainant's designation, the date, and the reasons therefor. Thus, the GRC is satisfied that these three (3) pages of records were the ones sought by the Complainant and that the Custodian unlawfully denied access to them. N.J.S.A. 47:1A-6. Further, based on the Custodian's disclosure and certification, the GRC is satisfied that the Custodian adequately complied with the Council's Order.

Therefore, the Custodian complied with the Council's July 28, 2020 Interim Order because he responded in the extended time frame providing three (3) pages of records responsive to the Complainant's OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

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)).

Although the Custodian unlawfully denied access to records responsive to the Complainant's OPRA request, he ultimately provided them to the Complainant as part of his timely compliance with the Council's July 28, 2020 Interim Order. 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 Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's July 28, 2020 Interim Order because he responded in the extended time frame providing three (3) pages of records responsive to the Complainant's OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to records responsive to the Complainant's OPRA request, he ultimately provided them to the Complainant as part of his timely compliance with the Council's July 28, 2020 Interim Order. 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: Frank F. Caruso
Executive Director

August 18, 2020



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

July 28, 2020 Government Records Council Meeting

U'Bay Lumumba
Complainant

Complaint No. 2018-261

v.

NJ Department of Corrections
Custodian of Record

At the July 28, 2020 public meeting, the Government Records Council ("Council") considered the July 21, 2020 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 may have unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff's Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). The Custodian must locate and disclose the responsive records to the Complainant. Should the Custodian determine that the responsive records are exempt from disclosure, he must provide a specific lawful basis for that denial. Should a sufficient search result in no responsive records, the Custodian and those who conducted the search at New Jersey State Prison are required to certify to this fact, inclusive of a search description.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the
Government Records Council
On The 28th Day of July 2020

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, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2020 Council Meeting**

**U'Bay Lumumba¹
Complainant**

GRC Complaint No. 2018-261

v.

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

Records Relevant to Complaint: Hardcopies via U.S. mail of:

1. “[F]ormal notice or request of who recommended and who signed off on designating [the Complainant] “high risk.”
2. “[T]he formal notice date [the Complainant] was designated “high risk.”
3. “[T]he formal notice of reasons why [the Complainant] was designated “high risk.”

Custodian of Record: John Falvey
Request Received by Custodian: September 11, 2018
Response Made by Custodian: September 19, 2018
GRC Complaint Received: November 1, 2018

Background³

Request and Response:

On August 31, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 19, 2018, the Custodian responded in writing acknowledging receipt of the subject OPRA request and stating that he would respond by September 28, 2018. On September 25, 2018, the Custodian again responded in writing advising that his “office has been provided a one[-]page record.” The Custodian stated that he would disclose same upon payment of \$0.05. On October 19, 2018, the Custodian confirmed receipt of payment and disclosed the record to the Complainant.

Denial of Access Complaint:

On November 1, 2018, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Suzanne Davies.

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.

Government Records Council (“GRC”). The Complainant asserted that the record he received was “completely unresponsive” to his OPRA request.

Statement of Information:

On November 28, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on September 11, 2018. The Custodian certified that his search included forwarding the subject OPRA request to New Jersey State Prison for responsive records. The Custodian certified that he responded in writing on September 25, 2018 granting access to a one-page record pending payment of the applicable copying cost.

The Custodian certified that the record he provided was the only responsive record that existed. The Custodian argued that like the custodian in Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), he did not unlawfully deny access to any additional records because they do not exist. The Custodian further argued that the Complainant failed to contradict his certification that no additional records existed.

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 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 Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Council held that a custodian did not unlawfully deny access to a request where they certified, and the record reflected, that they provided all records responsive to a request.⁴ However, in Macek v. Bergen Cnty. Sheriff’s Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019), the Council held that evidence contained in the record suggested that additional responsive records may exist. Based on this, the Council ordered the Custodian to perform another search and submit a certification regarding the results of that search.

In the matter before the Council, the Complainant contended in the Denial of Access Complaint that the Custodian disclosed a record that was “completely unresponsive” to his OPRA request. In the SOI, the Custodian certified that NJSP provided him with the one-page record and he disclosed same. The Custodian further certified that no additional records existed.

While such a response typically results in a finding similar to Burns, GRC 2005-49, conflicting facts here require an outcome consistent with Macek. Specifically, the Complainant’s

⁴ The GRC notes that its decision in Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005) only applies to situations where a custodian is certifying that no responsive records exist, and not where a custodian certifies that all responsive records were provided.

OPRA request sought the “formal notice” of the original “high risk” designation, as well as who requested the designation and the reasons for it. However, the record disclosed to the Complainant states that he “remain high risk.” Thus, it is possible that the disclosed record was an interim determination and may not have been what the Complainant sought. As in Macek, which was decided during the pendency of this complaint, the evidence suggests that other responsive records may exist.

Therefore, the Custodian may have unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Macek, GRC 207-156. The Custodian must locate and disclose the responsive records to the Complainant. Should the Custodian determine that the responsive records are exempt from disclosure, he must provide a specific lawful basis for that denial. Should a sufficient search result in no responsive records, the Custodian and those who conducted the search at New Jersey State Prison are required to certify to this fact, inclusive of a search description.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff’s Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). The Custodian must locate and disclose the responsive records to the Complainant. Should the Custodian determine that the responsive records are exempt from disclosure, he must provide a specific lawful basis for that denial. Should a sufficient search result in no responsive records, the Custodian and those who conducted the search at New Jersey State Prison are required to certify to this fact, inclusive of a search description.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

July 21, 2020

record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Lumumba v. N.J. Department of Corrections, 2018-261 – Findings and Recommendations of the Executive Director