



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

September 29, 2020 Government Records Council Meeting

Bernard Reid
Complainant

Complaint No. 2019-30

v.

NJ Department of Corrections
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 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 the Custodian lawfully denied access to the Complainant’s OPRA request seeking access to Inmate Legal Association’s “training class manual lessons.” N.J.S.A. 47:1A-6; Hittinger v. N.J. Transit, GRC Complaint No. 2013-324 (July 2014); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-142 (March 2015). Specifically, the Inmate Legal Association is an independent organization making and maintaining its own records that do not meet the definition of a “government record” under OPRA. N.J.S.A. 47:1A-1.1.

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 29th Day of September 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: October 1, 2020

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2020 Council Meeting**

**Bernard Reid¹
Complainant**

GRC Complaint No. 2019-30

v.

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

Records Relevant to Complaint: Hardcopy via U.S. mail of the Inmate Legal Association, Inc. (“ILA”) “training class manual lessons . . . used in the ILA training class.”

Custodian of Record: John Falvey
Request Received by Custodian: January 3, 2019
Response Made by Custodian: January 11, 2019
GRC Complaint Received: February 13, 2019

Background³

Request and Response:

On December 13, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant noted that he was not asking the Custodian to “compel the ‘[ILA]’ [to] disclose the requested records from its files” but that he sought those maintained by New Jersey State Prison (“NJSP”).

On January 3, 2019, the Custodian responded in writing obtaining an extension of time until January 14, 2019 to respond to the subject OPRA request. On January 11, 2019, the Custodian responded in writing stating that the New Jersey Department of Corrections (“DOC”) did not maintain “[t]raining material used by ILA to train paralegals.” The Custodian noted that those training materials were “the property of ILA.”

Denial of Access Complaint:

On February 13, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian purposely

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Beonica A. McClanahan.

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.

changed the wording of his OPRA request in order to deny access to it. The Complainant contended that this misinterpretation of the records sought resulted in an unlawful denial of access. The Complainant further contended that the records sought were maintained by NJSP, which is under “the jurisdiction of” DOC. The Complainant argued that the Custodian was thus required to obtain the responsive records from NJSP and disclose them. The Complainant also argued that the Custodian’s actions here were knowing and willful in nature.⁴

Statement of Information:

On March 15, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 3, 2019. The Custodian certified that his/her search included contacting NJSP Administrators responsible for educating inmates. The Custodian affirmed that an NJSP Administrator advised that the ILA was a private organization and that DOC did not “approve, create, or maintain” their files. The Custodian certified that after an extension of time, he responded in writing on January 11, 2019 advising that no records existed.

The Custodian argued that he lawfully denied access to the Complainant’s OPRA request. The Custodian contended that the Complainant sought records that were the property of an outside entity that creates and maintains its own documents. The Custodian further argued that DOC did not “approve or maintain records associated with said documents.”

Additional Submissions:⁵

On April 5, 2019, the Complainant submitted a response to the SOI. The Complainant contended that the SOI indicated that the Custodian performed an insufficient search and failed to contact NJSP in furtherance of locating responsive records. The Complainant argued such a conclusion is logical because then the responsive records would have been located within NJSP’s files.

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.

⁴ The Complainant also contended that the Custodian’s denial was a violation of the N.J. Law Against Discrimination, N.J. Civil Rights Act, and the State/U.S. Constitution. However, the complaint process set forth under OPRA, as well as the GRC’s authority to adjudicate complaints, do not include discrimination, civil rights issues, or constitutional rights. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7.

⁵ The Complainant made multiple requests to the GRC to contact the Division on Civil Rights to obtain legal representation for him. The GRC rejected each of those requests as not within its authority. N.J.S.A. 47:1A-7; N.J.A.C. 5:105-1.5.

OPRA defines a “government record” as:

“[A]ny 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 . . . or that has been received* in the course of his or its official business by any officer[.]”

In Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the custodian claimed that records in possession of a third-party contractor executed on behalf of an agency are not subject to access. The Appellate Division reviewed the Law Division’s ruling, interpreting Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005) and holding that the defendant did not have to disclose the records responsive to the plaintiff’s OPRA request because the records were not in the defendant’s possession. The Appellate Division found that the motion judge interpreted Bent, *supra*, too broadly. The Appellate Division held:

We find the circumstances in Bent, *supra*, to be far removed from those existing in the present matter because . . . the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply . . . relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA . . . We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.

[Id. at 517.]

However, in Hittinger v. N.J. Transit, GRC Complaint No. 2013-324 (July 2014), the complainant sought, among other records, contracts and agreements between an advertising agency under contract with NJ Transit and vendors who contracted with said agency. The Council distinguished the relationship between the advertising agency and NJ Transit, finding that unlike the custodian in Burnett, 415 N.J. Super. 506, NJ Transit was not bound by, nor has any discretion over, contracts made between the advertising agency and client vendors. Hittinger, GRC 2013-324. The terms of the agreement between NJ Transit and the advertising agency provided that the agency accepted full responsibility for the procurement of advertising. Id. at 3. The Council therefore held that NJ Transit was not obligated to obtain responsive records pertaining to agreements and communications between the advertising agency and client vendors. Id. at 7.

Further, in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-142 (March 2015), the Council applied its decision in Hittinger, GRC 2013-324, in determining that the custodian did not unlawfully deny access to a software manual cover page maintained by Network Blade, its information technology (“IT”) vendor. The Council reasoned that the relationship between the vendor and the agency was similar to that in Hittinger, and that the vendor had control of all IT decisions and software choices. For those reasons, the Council found that the custodian was not obligated to obtain the requested software manual cover from Network Blade. Id. at 3. See also Owoh v. West Windsor-Plainsboro Sch. Dist. (Mercer), GRC Complaint No.

2014-16, *et seq.* (September 2014) (providing that a contract between a private entity and a public agency does not require the agency to obtain and disclose the entity's personnel records because same are not created and maintained on behalf of the custodian).

Here, the Complainant's OPRA request sought access to ILA's "training class manual lessons," noting that he did not intend to have the Custodian "compel" ILA to give records to him for disclosure. After obtaining an extension of time, the Custodian responded in writing stating that no records existed. In the Denial of Access Complaint, the Complainant contended that NJSP maintained the responsive records and that the Custodian misinterpreted his OPRA request in order to deny access.⁶ In the SOI, the Custodian certified that he contacted NJSP's Administrators, who advised that ILA was a private organization that maintained their own records. In refuting the SOI, the Complainant argued that the Custodian failed to prove that he contacted NJSP because they would have been able to provide the responsive records.

The United States Court of Appeals, 3rd Circuit, has provided a basic description of the ILA at NJSP as follows:

[T]he [ILA is] an incorporated inmate affinity group. The ILA has established an organizational network of inmates who perform legal tasks such as interviewing inmates, researching the law and preparing legal papers. The ILA also includes members who are not prison-classified paralegals. One can become a member of the ILA by a vote of its membership; but only those ILA members cloaked with prison classification paralegal status are permitted to function officially as such. The membership has been provided office space and has acquired corporate assets including lawbooks, desks, file cabinets, and typewriters. The ILA meets weekly at which time legal work is assigned and its continuing legal education program is conducted.

[Valentine v. Beyer, 850 F.2d 951, 953 (3d Cir. 1988)].

Based on the forgoing, the GRC concludes that the ILA is an advocate organization comprised of inmate members dedicated to providing legal services and education. However, it does not appear that DOC maintains control over or contracts with the ILA in any way. Nor is there no evidence in the record to prove that DOC creates or otherwise maintains ILA's work-product, inclusive of training materials.

In reviewing the evidence submitted herein, the GRC finds the facts to be different from Hittinger, GRC 2013-324 and Verry, GRC 2014-142 in that there is no evidence to suggest that DOC maintains any kind of contractual agreement with the ILA. However, and like the contracted entities in Hittinger and Verry, the ILA is responsible for making and maintaining its own records. The GRC acknowledges that the Burnett court required the defendant "public agency" to obtain and disclose records made or maintained on behalf of said agency. Id. at 517. However, there is no evidence in the record here indicating that the ILA was making or maintaining records on behalf of DOC. Rather, the ILA is a separate organization comprised of inmates that provides legal support and education to the inmate population; it cannot be said that the ILA's training materials

⁶ As the GRC does not agree that the Custodian mischaracterized the Complainant's OPRA request, it will not address this issue below.

are made or maintained on behalf of DOC. Simply put, ILA's potential physical location inside NJSP does not classify their work-product as "government records." N.J.S.A. 47:1A-1.1. Thus, the GRC is persuaded that the Custodian lawfully denied access to the requested records.

The GRC also notes that the Complainant's own suggestion that he did not intend the Custodian to "compel the '[ILA]' [to] disclose the requested records from its files" further supports the aforementioned conclusion. Also, the GRC is not persuaded by the Complainant's argument that the Custodian's failure to locate and disclose responsive records meant that he did not contact NJSP. In fact, the Custodian certified in the SOI that he indeed contacted NJSP Administrators about the subject OPRA request. Further, there is no competent, credible evidence in the record to refute the Custodian's certification.

Accordingly, the Custodian lawfully denied access to the Complainant's OPRA request seeking access to ILA's "training class manual lessons." N.J.S.A. 47:1A-6; Hittinger, GRC No. 2013-324; Verry, GRC 2014-142. Specifically, the ILA is an independent organization making and maintaining its own records that do not meet the definition of a "government record" under OPRA. N.J.S.A. 47:1A-1.1.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to the Complainant's OPRA request seeking access to Inmate Legal Association's "training class manual lessons." N.J.S.A. 47:1A-6; Hittinger v. N.J. Transit, GRC Complaint No. 2013-324 (July 2014); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-142 (March 2015). Specifically, the Inmate Legal Association is an independent organization making and maintaining its own records that do not meet the definition of a "government record" under OPRA. N.J.S.A. 47:1A-1.1.

Prepared By: Frank F. Caruso
Executive Director

September 22, 2020