



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 10, 2020 Government Records Council Meeting

Graziano Martinez Rosales
Complainant

Complaint No. 2019-74

v.

Middlesex County Department of Corrections
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 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’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally impeded the GRC’s efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. Notwithstanding the Custodian’s failure to submit an Statement of Information, he lawfully denied access to the Complainant’s March 5, 2019 OPRA request seeking a log or record of his visitation since such records are expressly exempt from disclosure pursuant to N.J.A.C. 10A:31-6.10(a)(12) and (13), and N.J.S.A. 47:1A-9(a). N.J.S.A. 47:1A-6; see also Azzolini v. N.J. Dep’t of Corr., GRC Complaint No. 2018-26 (November 2019).

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 10th Day of November 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: November 13, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting**

**Graziano Martinez Rosales¹
Complainant**

GRC Complaint No. 2019-74

v.

**Middlesex County Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of “any and all existing log or daily record of the joint visit I received from Celso Serrano Contrera and Tiofilo Rosale Contreras while imprisoned or housed at [Middlesex County Jail] during or around the month of December 2004.”

Custodian of Record: Robert Grover, Jr.

Request Received by Custodian: March 5, 2019

Response Made by Custodian: February 27, 2019

GRC Complaint Received: April 5, 2019

Background³

Request and Response:

On March 5, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 11, 2019, Sergeant A. Hippeli responded on behalf of the Custodian in writing denying access to the request.⁴

Denial of Access Complaint:

On April 5, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that Sergeant Hippeli’s response referred to New Jersey’s Records Retention Schedule as the basis for denial but lacked additional specificity. The Complainant also asserted that he was not given a copy of the Middlesex County Department of Corrections (“Department”) retention policy, or of his right to appeal the decision. The Complainant also argued that the record should not have been destroyed due to security concerns.

¹ No legal representation listed on record.

² Represented by Jeanne-Marie Scollo, Esq., Deputy County Counsel (New Brunswick, N.J.).

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.

⁴ The Complainant did not include a copy of Sergeant Hippeli’s response.

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The Complainant maintained that the record was not burdensome and should have been easily located and asserted a common law right of access to the records to aid in his post-conviction relief petition.⁵

Statement of Information:⁶

On July 19, 2019, the GRC sent the Custodian a request for the Statement of Information (“SOI”). The Custodian failed to submit the SOI to the GRC. On July 24, 2019, the GRC sent the Custodian a “No Defense” letter, stating that if the GRC did not receive the SOI within three (3) business days, the complaint would proceed to adjudication based only upon the information contained within the complaint. The Custodian failed to submit the SOI or otherwise respond to the GRC’s notice.

Analysis

Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian’s failure to adhere to N.J.A.C. 5:105-2.4(a). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the Custodian did not comply with the GRC’s initial request for an

⁵ The GRC does not have the authority to address a requestor’s common law right to access records. N.J.S.A. 47:1A-7(b); Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013); Kelly v. N.J. Dep’t of Transp., GRC Complaint No. 2010-215 (November 2011) at 2. Thus, the GRC cannot address any common law right of access to the responsive records.

⁶ The Complaint was referred to mediation on June 4, 2019. The Complaint was referred back from mediation on July 10, 2019.

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SOI. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a “No Defense” letter and requesting a completed SOI within three (3) business days of receipt. The Custodian failed to submit an SOI within the three (3) business days or otherwise respond to the GRC’s letter.

Accordingly, the Custodian’s failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally impeded the GRC’s efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

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.

Additionally, the Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.), certif. denied, 193 N.J. 292 (2007).⁷ In Paff, the complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian’s denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian’s cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to “render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.”

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975)

⁷ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).
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(judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957).

OPRA provides that:

[OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute* or Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1, *et seq.*, N.J.A.C. 10A:31-6.10 exempts from access several types of records maintained by New Jersey's county correctional facilities. On December 19, 2016, five (5) new exemptions were added, including "[r]ecords and/or content related to inmate phone, e-mail, or visit information," and "[l]og books." N.J.A.C. 10A:31-6.10(a)(12) and (13).

Although decided during the pendency of this complaint, Azzolini v. N.J. Dep't of Corr., GRC Complaint No. 2018-26 (November 2019) is instructive. The complainant sought access to his visitation log while incarcerated at New Jersey State Prison. The custodian denied access citing New Jersey Department of Corrections ("DOC") regulations, which exempts log books from disclosure. N.J.A.C. 10A:22-2.3(a)(13). The Council held that the custodian lawfully denied access to the complainant's request since log books were expressly identified as exempt via DOC's regulations.

In the instant matter, the Complainant submitted an OPRA request seeking a log of his visitation with two (2) individuals while incarcerated at Middlesex County Jail. The Custodian allegedly denied access to the request by referencing the Department's retention schedule. The Complainant asserted that the response lacked specificity and should be easy to locate.

The GRC initially notes that due to the Custodian's failure to submit an SOI, this adjudication proceeds based solely on the submissions before it. N.J.A.C. 5:105-2.4(f). Notwithstanding, the evidence and available facts of the record parallel those in Azzolini, GRC 2018-26. Although the complainant in Azzolini sought a visitation log from DOC versus a county correctional facility, the regulations pertaining to confidential records for both entities are substantially similar. See N.J.A.C. 10A:22-2.3. Furthermore, N.J.A.C. 10A:31-6.10(a)(12) expressly exempts records or content related to inmate visitation. Accordingly, because log books and visitation information are expressly identified as exempt under N.J.A.C. 10A:31-6.10(a)(12)

and (13), the GRC is satisfied that the Custodian lawfully denied access under N.J.S.A. 47:1A-9(a).⁸

Accordingly, notwithstanding the Custodian's failure to submit an SOI, he lawfully denied access to the Complainant's March 5, 2019 OPRA request seeking a log or record of his visitation since such records are expressly exempt from disclosure pursuant to N.J.A.C. 10A:31-6.10(a)(12) and (13), and N.J.S.A. 47:1A-9(a). N.J.S.A. 47:1A-6; see also Azzolini, GRC 2018-26.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally impeded the GRC's efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).
2. Notwithstanding the Custodian's failure to submit an Statement of Information, he lawfully denied access to the Complainant's March 5, 2019 OPRA request seeking a log or record of his visitation since such records are expressly exempt from disclosure pursuant to N.J.A.C. 10A:31-6.10(a)(12) and (13), and N.J.S.A. 47:1A-9(a). N.J.S.A. 47:1A-6; see also Azzolini v. N.J. Dep't of Corr., GRC Complaint No. 2018-26 (November 2019).

Prepared By: Samuel A. Rosado
Staff Attorney

October 27, 2020

⁸ Notwithstanding the GRC's satisfaction, the GRC reiterates the Custodian's obligation to file an SOI. The GRC also notes that at minimum, the Custodian could have filed an SOI addressing the substance of the Complainant's request, or whether the were destroyed in accordance with the retention schedules.
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