



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 25, 2020 Government Records Council Meeting

Jose Correa
Complainant

Complaint No. 2019-89

v.

NJ Office of the Attorney General
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 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 has borne her burden of proof that she lawfully denied access to the Complainant’s April 5, 2019 OPRA request seeking various records and information pertaining to a criminal indictment. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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**

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

**Jose Correa¹
Complainant**

GRC Complaint No. 2019-89

v.

**New Jersey Office of the Attorney General²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of:

1. All papers and documents in the possession of the prosecutor pertaining to indictment #14-12-001875.
2. The results of any lab reports pertaining to indictment #14-12-001875.
3. All information pursuant to New Jersey Court Rule 3:13-3(b).

Custodian of Record: Ivonnely Colon-Fung, DAG

Request Received by Custodian: April 17, 2019

Response Made by Custodian: April 23, 2019

GRC Complaint Received: May 9, 2019

Background³

Request and Response:

On April 5, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 23, 2019, the Custodian responded in writing stating that the records were not made maintained or kept on file with the Office of the Attorney General (“OAG”). The Custodian also stated that to the extent that responsive records exist, they may be in the possession of the Division of Criminal Justice (“DCJ”). The Custodian stated that DCJ handled the indictment cited by the Complainant and provided copies of DCJ’s OPRA request forms. The Custodian also stated that OAG regulations and policies prevented him from transferring the Complainant’s request directly to DCJ.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Nicholas Sullivan.

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.

Denial of Access Complaint:

On May 9, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he was denied access to his request on April 23, 2019.

Statement of Information:

On June 2, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 17, 2019. The Custodian certified that her search included entering the identified indictment number into the New Jersey Judiciary’s eCourts system and located a criminal prosecution conducted by a Deputy Attorney General (“DAG”) within DCJ. The Custodian certified that she responded in writing on April 23, 2019, stating that OAG did not possess responsive records and directed the Complainant to file an OPRA request with DCJ.

The Custodian, through counsel, asserted that in Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the Council found that there was no unlawful denial of access when the custodian certified that no responsive records exist and the complainant failed to submit any evidence to refute the custodian’s certification. The Custodian asserted that in the instant matter, she conducted a search for responsive records using the indictment number provided by the Complainant. The Custodian asserted that the search failed to locate responsive records but revealed that the underlying prosecution was handled by a DAG within DCJ. The Custodian therefore argued that she properly informed the Complainant that OAG did not possess responsive records.

The Custodian also asserted that OAG regulations did not allow her to forward the OPRA request to DCJ. See N.J.A.C. 13:1E-2.4(b). The Custodian thus argued that she properly suggested the Complainant to submit a new OPRA request directly to DCJ.

The Custodian therefore asserted that OAG properly denied the request since she certified that OAG did not possess responsive records, and the Complainant failed to proffer any evidence to contradict her certification.

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. Here, the

Complainant's request sought records and information related to a criminal indictment. The Custodian responded and later certified in the SOI that no responsive records exist. The Custodian further certified that she conducted a search using the indictment number, discovered that the criminal prosecution was conducted by a DAG at DCJ, and informed the Complainant of same. Additionally, the Complainant did not provide evidence to refute the Custodian's certification.

Therefore, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's April 5, 2019 OPRA request seeking various records and information pertaining to a criminal indictment. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. See Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's April 5, 2019 OPRA request seeking various records and information pertaining to a criminal indictment. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado
Staff Attorney

August 18, 2020