



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

May 18, 2021 Government Records Council Meeting

Michael Camacho
Complainant

Complaint No. 2020-06

v.

NJ Department of Corrections
Custodian of Record

At the May 18, 2021 public meeting, the Government Records Council (“Council”) considered the May 11, 2021 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 that:

1. The Custodian complied with the Council’s April 27, 2021 Interim Order because he responded in the prescribed time frame disclosing the required communication with the appropriate redaction and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to communication Nos. 19052867 and 19053918. N.J.S.A. 47:1A-6. The Custodian also did not fully comply with the Council’s February 23, 2021 Interim Order. Notwithstanding, the Custodian lawfully denied access to the three (3) remaining responsive communications and timely complied with the Council’s April 27, 2021 Interim Order requiring disclosure of communication No. 19053918 with appropriate redactions. 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 18th Day of May 2021

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: May 20, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 18, 2021 Council Meeting**

**Michael Camacho¹
Complainant**

GRC Complaint No. 2020-6

v.

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

Records Relevant to Complaint: Hardcopies via U.S. mail of communications labeled 19050633, 1905322, 19055157, 19052867, and 19053918.³

Custodian of Record: John Falvey
Request Received by Custodian: December 16, 2019
Response Made by Custodian: December 23, 2019
GRC Complaint Received: January 10, 2020

Background

April 27, 2021 Council Meeting:

At its April 27, 2021 public meeting, the Council considered the April 20, 2021 *In Camera* 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 did not fully comply with the Council's February 23, 2021 Interim Order. Specifically, the Custodian, through Counsel, did not submit one (1) of the four (4) communications or certified confirmation of compliance within the prescribed time frame. However, the Custodian cured these deficiencies on April 7, 2021.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth above within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance**

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Beonica A. McClanahan.

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ 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.

with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶

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 April 28, 2021, the Council distributed its Interim Order to all parties. On May 4, 2021, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that on the same date, he sent to the Complainant via U.S. mail a copy of communication No. 19053918 with the appropriate redaction.

Analysis

Compliance

At its April 27, 2021 meeting, the Council ordered the Custodian to comply with its *In Camera* Examination findings and to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On April 28, 2021, 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 May 5, 2021.

On May 4, 2021, the fourth (4th) business day after receipt of the Council's Order, the Custodian disclosed to the Complainant via U.S. mail communication No. 19053918 with the required redaction as indicated in the Council's *In Camera* Examination. Additionally, the Custodian sent certified confirmation of compliance to the GRC. Thus, compliance has been achieved here.

Therefore, the Custodian complied with the Council's April 27, 2021 Interim Order because he responded in the prescribed time frame disclosing the required communication with the appropriate redaction and simultaneously providing 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

⁵ "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."

⁶ 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.

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 unlawfully denied access to communication Nos. 19052867 and 19053918. N.J.S.A. 47:1A-6. The Custodian also did not fully comply with the Council’s February 23, 2021 Interim Order. Notwithstanding, the Custodian lawfully denied access to the three (3) remaining responsive communications and timely complied with the Council’s April 27, 2021 Interim Order requiring disclosure of communication No. 19053918 with appropriate redactions. 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 April 27, 2021 Interim Order because he responded in the prescribed time frame disclosing the required communication with the appropriate redaction and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to communication Nos. 19052867 and 19053918. N.J.S.A. 47:1A-6. The Custodian also did not fully comply with the Council’s February 23, 2021 Interim Order. Notwithstanding, the Custodian lawfully denied access to the three (3) remaining responsive communications and timely complied with the Council’s April 27, 2021 Interim Order requiring disclosure of communication No. 19053918 with appropriate redactions. 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

May 11, 2021



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

April 27, 2021 Government Records Council Meeting

Michael Camacho
Complainant
v.
NJ Department of Corrections
Custodian of Record

Complaint No. 2020-6

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 2021 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 did not fully comply with the Council’s February 23, 2021 Interim Order. Specifically, the Custodian, through Counsel, did not submit one (1) of the four (4) communications or certified confirmation of compliance within the prescribed time frame. However, the Custodian cured these deficiencies on April 7, 2021.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth above within five (5) business days from receipt of this Order. 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 27th Day of April 2021

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: April 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Michael Camacho¹
Complainant**

GRC Complaint No. 2020-6

v.

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

Records Relevant to Complaint: Hardcopies via U.S. mail of communications labeled 19050633, 1905322, 19055157, 19052867, and 19053918.³

Custodian of Record: John Falvey
Request Received by Custodian: December 16, 2019
Response Made by Custodian: December 23, 2019
GRC Complaint Received: January 10, 2020

Records Submitted for *In Camera* Examination: Communication Nos. 19050633, 19055157, and 19052322, and 19053918.

Background

February 23, 2021 Council Meeting:

At its February 23, 2021 public meeting, the Council considered the February 16, 2021 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 GRC must conduct an *in camera* review of communication Nos. 19053918, 19050633, 19055157, and 19052322 to determine the validity of the Custodian's assertion that the e-mails were exempt under the New Jersey Department of Corrections' regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(4). See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Beonica A. McClanahan.

³ The Complainant sought additional records that are not at issue in this complaint.

2. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 February 24, 2021, the Council distributed its Interim Order to all parties on. On March 3, 2021, the Custodian's Counsel responded to the Council's Interim Order. Therein, Counsel certified that she was providing nine (9) copies of the relevant communications for an *in camera* review. Counsel reasserted the argument that the records were exempt under N.J.A.C. 10A:22-2.3. See McLawnhorn v. N.J. Dep't of Corr., GRC Complaint No. 2012-292 (July 2013); Riley v. N.J. Dep't of Corr., GRC Complaint No. 2013-345 (July 2014).

On April 6, 2021, the Government Records Council ("GRC") e-mailed the Custodian acknowledging receipt of Custodian Counsel's response. The GRC noted that the response included communication Nos. 19050633, 19055157, and 19052322, but did not include No. 19053918. The GRC thus requested that the Custodian provide the outstanding communication, as well as certified confirmation of compliance executed by himself, on or before April 9, 2021. On April 7, 2021, the Custodian responded to the GRC's request. The Custodian certified that he was providing nine (9) copies of 19053918.

Analysis

Compliance

At its February 23, 2021 meeting, the Council ordered the Custodian to provide for *in camera* review nine (9) unredacted copies of the communications not disclosed to the Complainant. The Council further ordered the Custodian to simultaneously deliver certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On February 24, 2021, 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 March 3, 2021.

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."

On March 3, 2021, the fifth (5th) business day after receipt of the Council’s Order, the Custodian’s Counsel sent to the GRC nine (9) unredacted copies of only three (3) of the four (4) communications. Additionally, Counsel submitted a certification, but did not include one from the Custodian. Thereafter, on April 6, 2021, the GRC asked the Custodian to correct the compliance deficiencies identified above, which he did on April 7, 2021. However, the omission of one (1) communication and the Custodian’s certified confirmation of compliance at the time of Custodian Counsel’s response resulted in a failure to fully comply with the Council’s Order.

Therefore, the Custodian did not fully comply with the Council’s February 23, 2021 Interim Order. Specifically, the Custodian, through Counsel, did not submit one (1) of the four (4) communications or certified confirmation of compliance within the prescribed time frame. However, the Custodian cured these deficiencies on April 7, 2021.

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. N.J.S.A. 47:1A-6.

OPRA provides that its provisions “. . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; 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; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9(a).

DOC’s regulations provide that:

In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq. . . . the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq. . . . (4) Any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation . . .

[N.J.A.C. 10A:22-2.3(a)(4).]

Based on the forgoing, psychiatric or psychological records are not government records subject to disclosure pursuant to N.J.A.C. 10A:22-2.3(a)(4). Additionally, the language contained in N.J.A.C. 10A:22-2.3(a)(4) is consistent with longstanding language contained in Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”), which provides in relevant part that “[t]he following records shall not be . . . subject to public access pursuant to [OPRA] . . . [i]nformation relating to medical, psychiatric, or psychological history, diagnosis, treatment or evaluation.” Id.

Moreover, in Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017),⁷ the Superior Court of New Jersey, Appellate Division affirmed the Council's determination that the custodian lawfully denied access to complainant's mental health records under OPRA. In reaching its conclusion, the court reasoned that the language of EO 26 and State Parole Board regulations at N.J.A.C. 10A:71-2.2 "rendered the report exempt from disclosure under OPRA." Id. at 6. Further the court dismissed complainant's assertion that he was entitled to access because the report was about him: "OPRA provides a vehicle for public access to government records. OPRA does not afford appellant a right of personal access to government records that are subject to OPRA's exceptions or exemptions." Id. (citations omitted). See also Groelly v. N.J. Dep't of Corr., GRC Complaint No. 2010-294 (June 2012); McLawnhorn, GRC 2012-292; Riley, GRC 2013-345; Brunson v. N.J. Dep't of Corr., GRC Complaint No. 2015-357 (February 2017).

The GRC conducted an *in camera* examination on the submitted communications at issue in this complaint. Upon review, communication Nos. 19055157, 19052322, and 19050633 all relate to medical appointments. Evidence supporting this is found in the "Description" field, as well as topics of discussion within the communications. Thus, the GRC agrees that these three (3) communications were exempt from disclosure in accordance with DOC's regulations.

The final communication, 19053918, appears to relate to the Complainant's attempt to receive a final decision regarding a grievance rather than a medical issue. Thus, on its face, the communication does not appear to fall under the cited exemption. However, the communication does include a sentence from the Complainant providing description of a medical condition. This excerpt, beginning at "[i]" and ending at before "and got it" is reasonably considered exempt under DOC's regulations. The remainder of the communication, however, is not exempt from disclosure under and should have been disclosed with the appropriate redaction.

Thus, the Custodian lawfully denied access to communication Nos. 19055157, 19052322, and 19050633 because they are exempt from disclosure under DOC's regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(4). However, the Custodian unlawfully denied access to communication No. 19053918 because most of that record does not comprise of medical information. For this communication, the Custodian shall disclose communication No. 19053918 redacting that portion of beginning at "[i]" and ending at before "and got it" as this excerpt contained limited exempt medical information.

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:

⁷ On appeal from Spillane v. N.J. State Parole Bd., GRC Complaint No. 2014-169) (March 2015).

1. The Custodian did not fully comply with the Council's February 23, 2021 Interim Order. Specifically, the Custodian, through Counsel, did not submit one (1) of the four (4) communications or certified confirmation of compliance within the prescribed time frame. However, the Custodian cured these deficiencies on April 7, 2021.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth above within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰**
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

April 20, 2021

⁸ 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.

⁹ "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."

¹⁰ 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.



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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 23, 2021 Government Records Council Meeting

Michael Camacho
Complainant

Complaint No. 2020-06

v.

NJ Department of Corrections
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council (“Council”) considered the February 16, 2021 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 GRC must conduct an *in camera* review of communication Nos. 19053918, 19050633, 19055157, and 19052322 to determine the validity of the Custodian’s assertion that the e-mails were exempt under the New Jersey Department of Corrections’ regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(4). See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
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 *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "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."

Interim Order Rendered by the
Government Records Council
On The 23rd Day of February 2021

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: February 24, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

**Michael Camacho¹
Complainant**

GRC Complaint No. 2020-6

v.

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

Records Relevant to Complaint: Hardcopies via U.S. mail of communications labeled 19050633, 1905322, 19055157, 19052867, and 19053918.³

Custodian of Record: John Falvey
Request Received by Custodian: December 16, 2019
Response Made by Custodian: December 23, 2019
GRC Complaint Received: January 10, 2020

Background⁴

Request and Response:

On December 16, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 23, 2019, the Custodian responded in writing denying access to the requested communications because they were medical records not subject to disclosure under OPRA. N.J.A.C.10A:22-2.3(a)(4). The Custodian noted that the Complainant could file an MR-022 form with the Medical/Mental Health Department to attempt gaining access to these records.

Denial of Access Complaint:

On January 10, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he was unlawfully denied access to the responsive communications, which were inquiries and grievances about rescheduling appointments and “a request for Parole.” The Complainant noted that three (3) of the communications were attempts to schedule appointments with an ombudsman and the other two

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Beonica A. McClanahan.

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ 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.

(2) related to obtaining a signed form from the State Parole Board. The Complainant argued that the records in question were not medical records.

Statement of Information:

On February 7, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 16, 2019. The Custodian certified that he responded in writing on December 23, 2019 denying access to the records sought. The Custodian noted that he ultimately produced communication No. 19052867 via facility mail contemporaneously with the SOI after realizing that it did not fall under the “medical records” exemption.

The Custodian contended that he lawfully denied access to the requested communications because they contained medical information exempt from disclosure under N.J.S.A. 47:1A-9(a) and N.J.A.C. 10A:22-2.3(a)(4); McLawhorn v. N.J. Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013); Riley v. N.J. Dep’t of Corr., GRC Complaint No. 2013-345 (July 2014). The Custodian contended that the New Jersey Department of Corrections’ (“DOC”) regulations exempts “information relating to medical, psychiatric, or psychological history, diagnosis, treatment or evaluation.” Id. The Custodian noted that although N.J.A.C. 10A:22-2.7(d) allows for production of certain mental health information, that regulation does not contemplate disclosure under OPRA. The Custodian argued that here, the Complainant is mistaken that the requested records were not medical records. The Custodian asserted that although the communications may include notes from a physician, the Complainant inquired about medical appointments, diagnoses, and discussed his medical condition.

The Custodian further asserted that this complaint, as it relates to communication No. 19052867, is now moot. Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660, 7 (App. Div. 2008). The Custodian noted that he disclosed the record to the Complainant via facility mail upon realizing that he erroneously classified same as a medical record.⁵

Additional Submissions:

On July 6, 2020, the Complainant sent a letter to the GRC arguing that Kiosk communications were not considered medical records. The Complainant contended that should his complaint not yield the records at issue, he would ask the Court to “summon[]” them.

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.

⁵ The Custodian did not include communication No. 19052322 at any point in the SOI.

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005), the complainant appealed a final decision of the Council⁶ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the matter before the Council, the Complainant sought access to five (5) specific communications. The Custodian denied access to them under OPRA based on DOC's regulations exempting access to medical information. In the Denial of Access Complaint, the Complainant argued that none of the denied communications related to medical information. In the SOI, the Custodian certified that the three (3) of the denied records contained medical information. However, the Custodian noted that he mistakenly classified communication No. 19052867 as a medical record and disclosed same on February 7, 2020. Further, the Custodian did not address communication No. 19052322 at all in the SOI.

Upon review of the evidence of record in the instant complaint, the GRC finds that a "meaningful review" is necessary to determine whether the redactions portions of the responsive minutes fall within the asserted exemptions. Paff, 379 N.J. Super. at 355. This is because there is a discrepancy as to whether all the exempted communications contain medical information. Among the facts supporting the need for an *in camera* is the Complainant's description of his

⁶ Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

communications differing from the Custodian's assertion as to their content. Further, this complaint resulted in the Custodian reversing an unlawful denial to communication No. 19052867. N.J.S.A. 47:1A-6. Also, the Custodian did not address communication No. 19052322 in the SOI.

Therefore, the GRC must conduct an *in camera* review of communication Nos. 19053918, 19050633, 19055157, and 19052322 to determine the validity of the Custodian's assertion that the e-mails were exempt under DOC's regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(4). See Paff, 379 N.J. Super. at 346.

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 GRC must conduct an *in camera* review of communication Nos. 19053918, 19050633, 19055157, and 19052322 to determine the validity of the Custodian's assertion that the e-mails were exempt under the New Jersey Department of Corrections' regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(4). See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).
2. **The Custodian shall deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁹ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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.

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Executive Director

February 16, 2021

⁷ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁸ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁹ "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."