



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 30, 2022 Government Records Council Meeting

Wayne I. Hodges
Complainant

Complaint No. 2021-114

v.

NJ Department of Corrections
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 2022 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 has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request item No. 1 seeking video footage taken from within NSP. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian unlawfully denied access to the Complainant’s OPRA request item No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian initially denied access to the responsive record. However, the Custodian reversed course after receiving the Denial of Access Complaint and conceded that the initial denial was inadvertent. Notwithstanding, the Council declines to order disclosure since the Custodian certified that responsive records were provided to the Complainant on September 3, 2021.
3. The Custodian unlawfully denied access to the Complainant’s OPRA request item No. 2. N.J.S.A. 47:1A-6. However, the Custodian demonstrated that he ultimately provided responsive records after the complaint filing, and lawfully denied access to the remainder of the Complainant’s request. 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 30th Day of August 2022

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: September 1, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting**

**Wayne I. Hodges¹
Complainant**

GRC Complaint No. 2021-114

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. “Video footage from December 5, 2020 12:00pm – 2:00pm from E-Unit stairway at Northern State Prison [(“NSP”).]”
2. “Inquiry ref #NSP20067479 off my JPay account.”

Custodian of Record: John Falvey
Request Received by Custodian: December 28, 2020
Response Made by Custodian: January 7, 2021
GRC Complaint Received: June 2, 2021

Background³

Request and Response:

On December 28, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 7, 2021, the Custodian responded in writing stating that no responsive records exist regarding request item No. 1. Regarding request item No. 2, the Custodian stated that the record was exempt under OPRA’s security and “information generated in connection with a grievance filed by or against an individual” exemptions. N.J.S.A. 47:1A-1.1. The Custodian also stated that the record was exempt as records “relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement.” N.J.A.C. 10A:22-2.3(a)(5). The Custodian then directed the Complainant to contact the Special Investigations Division to obtain the records.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Erica Heyer. Previously represented by Deputy Attorney General Kimberly Williams.

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 June 2, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he was unlawfully denied access to his request on January 7, 2021.

Statement of Information:

On September 8, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 28, 2020. The Custodian certified that he responded in writing on January 7, 2021, stating that no responsive video footage exists, and denying access to the requested JPay document.

The Custodian maintained that no responsive records exist regarding item No. 1, which sought video footage from within NSP, and therefore could not have unlawfully denied access pursuant to Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

The Custodian asserted, however, that he inadvertently denied access to the record responsive to OPRA request item No. 2. The Custodian certified that a copy of the requested record was sent to the Complainant on September 3, 2021. The Custodian argued that because the record was provided to the Complainant, the matter should be dismissed as moot, citing Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 294-92 (App. Div. 2017); and Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660, *7 (App. Div. Jan. 29, 2008).

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.

Item No. 1

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. In the matter before the Council, the Complainant’s OPRA request item No. 1 sought video footage taken from a camera at NSP. The Custodian responded in writing that no responsive records exist. The Custodian also certified to this fact in the SOI and no evidence contradicts this certification. Thus, the GRC is persuaded that the Custodian lawfully denied access to the requested video footage.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request item No. 1 seeking video footage taken from within NSP.

Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Item No. 2

In the instant matter, the Custodian initially denied access to the Complainant's request for a specific JPay inquiry on several grounds. However, after the complaint filing, the Custodian certified in the SOI that the denial was inadvertent and responsive records were provided to the Complainant on September 3, 2021. Thus, without a valid basis for denial and the Custodian's admission, the evidence demonstrates that his initial denial was unlawful. N.J.S.A. 47:1A-6.

Therefore, the Custodian unlawfully denied access to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian initially denied access to the responsive record. However, the Custodian reversed course after receiving the Denial of Access Complaint and conceded that the initial denial was inadvertent. Notwithstanding, the Council declines to order disclosure since the Custodian certified that responsive records were provided to the Complainant on September 3, 2021.

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)).

In the instant matter, the Custodian unlawfully denied access to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. However, the Custodian demonstrated that he ultimately provided responsive records after the complaint filing, and lawfully denied access to the remainder of the Complainant's request. 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 has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item No. 1 seeking video footage taken from within NSP. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian unlawfully denied access to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian initially denied access to the responsive record. However, the Custodian reversed course after receiving the Denial of Access Complaint and conceded that the initial denial was inadvertent. Notwithstanding, the Council declines to order disclosure since the Custodian certified that responsive records were provided to the Complainant on September 3, 2021.
3. The Custodian unlawfully denied access to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. However, the Custodian demonstrated that he ultimately provided responsive records after the complaint filing, and lawfully denied access to the remainder of the Complainant's request. 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: Samuel A. Rosado
Staff Attorney

August 23, 2022