



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 31, 2023 Government Records Council Meeting

Kevin Lawrence Conley
Complainant

Complaint No. 2021-218

v.

NJ Office of the Attorney General
Custodian of Record

At the January 31, 2023 public meeting, the Government Records Council (“Council”) considered the January 24, 2023 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. Because the Complainant’s OPRA request sought records maintained by the Division of Consumer Affairs, and not the Office of the Attorney General, the Custodian was under no obligation to adhere to N.J.S.A. 47:1A-5(h).
2. Although the Custodian’s initial bases for denial are not persuasive, she lawfully denied access to the Complainant’s OPRA request because the records sought did not exist within the Office of Attorney General’s files. N.J.S.A. 47:1A-6; Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 38 (App. Div. 2005).
3. The Council should also decline to address the knowing and willful issue because no violation of OPRA occurred.

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 31st Day of January 2023

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 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2023 Council Meeting**

**Kevin Lawrence Conley¹
Complainant**

GRC Complaint No. 2021-218

v.

**N.J. Office of the Attorney General²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of:

1. 42 N.J.R. 132(a) and 42 N.J.R. 1221(a) from 2010 and effective on June 21, 2010.
2. 48 N.J.R. 565(a) and 49 N.J.R. 451(a) from 2017 and effective March 6, 2017.

Custodian of Record: Ivonnely Colon-Fung
Request Received by Custodian: June 10, 2021
Response Made by Custodian: June 21, 2021
GRC Complaint Received: September 13, 2021

Background³

Request and Response:

On May 23, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 21, 2021, the sixth (6th) business day after receipt of the OPRA request,⁴ the Custodian responded in writing identifying 49 pages of responsive records and stating that the Complainant’s OPRA request could be considered a request for legal research. The Custodian noted that per N.J.S.A. 52:17A-4(e), the New Jersey Department of Law & Public Safety (“LPS”) is limited to providing legal advice only to State entities and officials. The Custodian stated that because the Complainant was neither, she could not provide him with such services. The Custodian also stated that the New Jersey Register (“Register”) is protected by copyright; the Complainant may utilize services such as the East Jersey State Prison’s (“EJSP”) law library and the Office of Administrative Law’s (“OAL”) website.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Austin J. Edwards.

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 GRC notes that State offices were closed on June 18, 2021 in observation of Juneteenth.

On August 16, 2022, the Complainant sent a letter to the Custodian disputing her denial of access as “arbitrary and unlawful.” The Complainant noted that he clearly identified the Register documents sought and that the Custodian was able to easily locate them based on the cited number of pages in her response. The Complainant thus demanded that the Custodian disclose the responsive records or he would file a Denial of Access Complaint “seek[ing] fines and disciplinary sanctions.”

Denial of Access Complaint:

On September 13, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied his OPRA request seeking specific records and that such denial was knowing and willful. N.J.S.A. 47:1A-11.⁵ The Complainant contended that he was not seeking legal research, the State Parole Board and New Jersey Department of Corrections (“DOC”) routinely disclose Register submissions when sought through OPRA. The Complainant also disputed that the Register was copyrighted; such a classification would mean that all regulations, executive orders, and “even statutes” would not be subject to access under OPRA.

The Complainant further disputed the Custodian’s assertion that he could obtain the sought records from EJSP. The Complainant first argued that being able to access records outside of OPRA does not represent a lawful basis for denying access to an OPRA request. The Complainant asserted that such a policy is contrary to OPRA and has already been considered by New Jersey’s courts to be “bureaucratic manipulation.” Conley v. N.J. Dep’t of Corr., 457 N.J. Super. 605, 612 (App. Div. 2018). The Complainant argued that contrary to the general “notorious” speculation, EJSP does not maintain Register books or a legal database that he could utilize to obtain the sought records. The Complainant also noted that EJSP inmates do not have “access to the internet directly” through the law librarian. The Complainant contended that even if the forgoing was true, such third-party access would not allow a custodian to deny access to an OPRA request.

Statement of Information:

On October 13, 2021, the Custodian filed a Statement of Information (“SOP”) attaching a legal certification from John Falvey. The Custodian certified that she received the Complainant’s OPRA request on June 10, 2021 and manually entered it into her OPRA tracking system on the same day. The Custodian certified that her search included entering the citations into LexisNexis Advance, a paid subscription service for legal research. The Custodian affirmed that she was able to locate the four (4) Register items, which were identified as copyrighted by the OAL, and found that each were rule proposals and adoptions promulgated by the Board of Pharmacy (“Board”). The Custodian noted that the Board falls under the Division of Consumer Affairs (“DCA”), which is separate from the Office of the Attorney General (“OAG”) and has its own custodian per N.J.A.C. 13:1E-2.2(b). The Custodian averred that she determined that the request required “legal research/services” and would result in a violation of OAL’s copyright. The Custodian certified that she thus responded in writing on June 21, 2021 denying the request based on the forging reasons.

⁵ The Complainant also argued that he submitted other OPRA requests to the Custodian that were unanswered. However, those OPRA requests are not at issue in the instant complaint and will not be addressed as part of the totality of circumstances in this complaint.

The Custodian also noted that she never received the Complainant’s August 16, 2021 letter disputing the denial of access.

The Custodian argued that this complaint is now moot per Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 291-92 (App. Div. 2017) because she worked with DOC, who disclosed the records to the Complainant on October 12, 2021. Falvey Cert. ¶ 3. The Custodian contended that the Courts have routinely dismissed those complaints where the “controversies have become moot or academic prior to judicial resolution . . .” N.J. Div. of Youth & Family Servs. v. W.F., 434 N.J. Super. 288, 297 (App. Div. 2014).

Additional Submissions:

On October 15, 2021, the Complainant sent a letter to the GRC confirming that he received through DOC the records at issue in this complaint at a cost of \$7.88 for copying and mailing. The Complainant contended that the disclosure of these records now clearly indicates an “ongoing pattern, practice, or habit” of unlawfully denying his OPRA requests. The Complainant thus argued that this complaint is not moot because the knowing and willful issue is still ripe for adjudication. The Complainant noted that he would be willing to “withdraw” his request to have the Custodian fined the civil penalty only if OAG compensated his “costs in prosecuting this matter” and did not continue to deny his OPRA requests on “lawless grounds . . .”

On October 19, 2021, the Complainant sent another letter to the GRC confirming receipt of the SOI and disputing the argument that this complaint was moot because the knowing and willful issue and other potential disciplinary actions are still relevant. The Complainant contended that the Custodian’s disclosure of the responsive records support that an unlawful denial of access occurred. The Complainant also contended that the cases cited by the Custodian did not apply to the GRC’s process.

Further, the Complainant contended that the Custodian failed to adhere to N.J.S.A. 47:1A-5(h) and instead chose to outright deny access. The Complainant argued that the Custodian “[i]nterestingly” failed to support her denial with any case law and ignored any arguments regarding OPRA’s forwarding obligation present in N.J.S.A. 47:1A-5(h). The Complainant contended that the Custodian cannot argue that the Board was separate from OAG as both are “interconnected [d]ivisions” under LPS. The Complainant contended that instead of “typing a few key[-]strokes to e-mail an OPRA request to a custodian in the same agency,” the Custodian chose to deny access and “mislead” the GRC in the SOI.

Analysis

Failure to Forward or Direct Request

OPRA further provides that “[a]ny officer or *employee* of a public agency *who receives a request* for access to a government record *shall forward the request to the custodian* of the record or *direct the requestor to the custodian* of the record. N.J.S.A. 47:1A-5(h) (emphasis added).

In Kossup v. City of Newark Police Dep't, GRC Complaint No. 2006-174 (February 2007), the complainant filed a Denial of Access Complaint after not receiving a response from the custodian. On October 4, 2006, OPRA Manager Joyce Lanier asserted that the custodian never received the request because it was sent directly to Lieutenant Caroline Clark of the City of Newark Police Department. Based on the facts presented, the Council held that “. . . [because] the Newark Police Department employee, [Lt. Clark] did not forward the Complainant’s request form or direct the Complainant to the [Custodian], . . . [Lt. Clark] has violated N.J.S.A. 47:1A-5(h).” Id. at 5. See also Morgano v. N.J. Office of the Pub. Defender, Essex Cnty., GRC Complaint No. 2008-79 (July 2008) (citing Mourning v. Dep’t of Corr., GRC Complaint No. 2006-75 (August 2006); Vessio v. N.J. Dep’t of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007)); Redd v. Franklin Twp. Pub. Sch. (Somerset), GRC Complaint No. 2014-185 (February 2015).

In the instant matter, the Complainant contended in his October 19, 2021 letter to the GRC that the Custodian violated N.J.S.A. 47:1A-5(h) by failing to forward his OPRA request seeking proposed Board regulations to DCA, which is another division within LPS. While both OAG and DCA are within the LPS umbrella, each division has its own designated custodian responsible for responding to OPRA requests seeking records maintained by that specific division.⁶

LPS’s custodial structure complicates the issue of whether the Custodian here committed a violation of OPRA by failing to adhere to N.J.S.A. 47:1A-5(h). A plain reading of N.J.S.A. 47:1A-5(h) clearly contemplates an official or employee’s inter-agency responsibility to return an OPRA request to the requestor with specific custodial contact information or to forward the OPRA request to the proper custodian. When applying this plain reading to LPS’s custodian structure, OPRA does not expressly apply to a custodian from one division to a custodian in another division. Further, while best practices may dictate that the Custodian could have assisted the Complainant by directing him to DCA or forwarding same thereto, OPRA did not require her to do so here. Thus, the facts here are distinguished from Kossup, GRC 2006-174 and the GRC declines to find that the Custodian violated N.J.S.A. 47:1A-5(h).

Therefore, because the Complainant’s OPRA request sought records maintained by DCA, and not OAG, the Custodian was under no obligation to adhere to N.J.S.A. 47:1A-5(h).

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.

Here, the Complainant sought access to specific rule proposals and the resulting promulgated regulations from the Board within DCA. The Custodian denied access to that request arguing that a response was akin to legal advice, disclosure would violate OAL’s copyright, and the records were available to the Complainant through EJSP. This complaint ensued wherein the

⁶ This separation of custodial duties is identified by individual contact information for division custodians on LPS’s website. [Public Records Request - New Jersey Office of Attorney General \(njoag.gov\)](https://www.njoag.gov/public-records-request).

Complainant contended that the Custodian unlawfully denied him access and that her actions were knowing and willful in nature. In the SOI, the Custodian maintained her position while noting that she worked with DOC to ultimately disclose the responsive records to the Complainant on October 12, 2021.

Initially, the GRC is not persuaded by the Custodian's arguments that disclosing the requested records constitutes providing legal advice, would violate the OAL's copyright of Register publications, or that availability elsewhere warranted a denial here. To the first point, there is no active legal advice apparent in disclosing records responsive to an OPRA request, whether same is a statute, regulation, or otherwise. As for the second point, copyright law does not prohibit access to a "government record" otherwise available under OPRA. Bd. of Chosen Freeholders of Burlington Cnty. v. Tombs, 215 F. App'x 80 (3d Cir. NJ 2006); Albrecht v. N.J. Dep't of Treasury, GRC Complaint No. 2006-191 (Interim Order dated July 25, 2007). Regarding the third point, availability through other public agencies does not allow a custodian to outright deny access to a particular record. See *e.g.* Welenc v. N.J. State Police, GRC Complaint No. 2017-134 (Interim Order dated February 26, 2019).

Setting the above aside, the GRC is nonetheless persuaded that no unlawful denial of access occurred here. The Complainant's OPRA request sought proposed regulations created and produced by the Board within DCA. As noted above, both OAG and DCA are within the LPS umbrella but have assigned separate custodians to address OPRA requests sent directly to each division. Thus, it is reasonable to assume that DCA, and not OAG, maintains their own rules and rule proposals and that the Complainant should have submitted his OPRA request thereto. For this reason, the Custodian here was under no obligation to go beyond her agency's files to obtain and disclose responsive records. See Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 38 (App. Div. 2005).

Additionally, the Custodian's ability to access such a record through a third-party website, such as LexisNexis, does not convert that record into a "government record" made, maintained, kept on file, or received in the course of OAG's official business. See Franklin v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2016-308 (August 2018) (noting that OPRA does not contemplate a custodian's responsibility to access an online system not made or maintained by that agency). Such a position would require a custodian to disclose innumerable records based on their ability to access them from anywhere on the internet. For example, OPRA does not support that a custodian from one municipality is required disclose minutes from another municipality simply because the latter posted them on their website or they existed on some third-party website. Further, interpreting OPRA in such a manner would result an absurd outcome.

Finally, the Custodian (nor DOC who ultimately provided the records) was not required to obtain and disclose records not maintained in their files. See Libertarians for Transparent Gov't v. Point Pleasant Borough Bd. of Educ. (Ocean), GRC Complaint No. 2017-236 (August 2019) (citing Bent, 381 N.J. Super. at 38 in holding that a custodian was not required to contact the court to obtain a complete copy of a court order). Thus, the OPRA request at issue here was best submitted to DCA, which is the agency vested with promulgating regulations relevant to the boards and commissions falling under its purview.

Accordingly, although the Custodian's initial bases for denial are not persuasive, she lawfully denied access to the Complainant's OPRA request because the records sought did not exist within OAG's files. N.J.S.A. 47:1A-6; Bent, 381 N.J. Super. at 38.

The Council should also decline to address the knowing and willful issue because no violation of OPRA occurred.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's OPRA request sought records maintained by the Division of Consumer Affairs, and not the Office of the Attorney General, the Custodian was under no obligation to adhere to N.J.S.A. 47:1A-5(h).
2. Although the Custodian's initial bases for denial are not persuasive, she lawfully denied access to the Complainant's OPRA request because the records sought did not exist within the Office of Attorney General's files. N.J.S.A. 47:1A-6; Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 38 (App. Div. 2005).
3. The Council should also decline to address the knowing and willful issue because no violation of OPRA occurred.

Prepared By: Frank F. Caruso
Executive Director

January 24, 2023