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JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

March 25, 2025 Government Records Council Meeting

Ronald Long
Complainant

Complaint No. 2022-643

v.

NJ Department of Law and Public Safety,
Division of Criminal Justice
Custodian of Record

At the March 25, 2025 public meeting, the Government Records Council (“Council”) considered the March 18, 2025 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 bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. Notwithstanding the “deemed” denial of access, the Custodian lawfully denied access to the Conviction Review Unit report responsive to OPRA request item No. 1 because it fell within the “inter-agency advisory, consultative, or deliberative material” exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 284 (2009). Specifically, the Conviction Review Unit memorandum report details the in-depth investigation regarding an applicant’s claims of actual innocence regarding convicted felonies and details determinations as to whether a case is opened for re-investigation on the merits.
3. Notwithstanding the “deemed” denial of access, the Custodian has borne her burden of proof that she lawfully denied access to item No. 2 of the Complainant’s OPRA request. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no records responsive to request item No. 2 exist. N.J.S.A. 47:1A-6; 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 March 2025

John A. Alexy, 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: March 27, 2025

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 25, 2025 Council Meeting**

**Ronald Long¹
Complainant**

GRC Complaint No. 2022-643

v.

**N.J. Department of Law and Public Safety,
Division of Criminal Justice²
Custodial Agency**

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

1. The Report by the Conviction Review Unit (“CRU”) to the Attorney General in State v. Ronald Long.
2. The “internal criteria” used by the CRU to assess wrongful conviction claims.

Custodian of Record: Lt. Edward Augustyn
Request Received by Custodian: August 23, 2022
Response Made by Custodian: November 14, 2022
GRC Complaint Received: November 28, 2022

Background³

Request and Response:

On August 23, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 14, 2022, the fifty-ninth (59th) business day after receipt of the OPRA request, the Custodian responded in writing denying OPRA request item No. 1 as “inter-agency advisory, consultative, or deliberative [“ACD”)] material” exempt under N.J.S.A. 47:1A-1.1. The Custodian also disclosed in response to OPRA request item No. 2 a paragraph concerning CRU’s “internal criteria.”

Denial of Access Complaint:

On November 28, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian denied

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Vivek N. Mehta, Esq.

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.

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OPRA request item No. 1 and did not disclose a record responsive to OPRA request item No. 2.

Statement of Information:

On March 7, 2023, the Custodian filed a Statement of Information (“SOI”) attaching a legal certification from CRU Director Carolyn Murray. The Custodian certified that he received the Complainant’s OPRA request on August 23, 2022. The Custodian certified that his search included forwarding the request to the Office of Public Integrity and Accountability, who has access to copies of the memorandum sent by the CRU to the Attorney General and located an eight (8) page internal memorandum. The Custodian certified that he responded in writing on November 14, 2022 denying OPRA request item No. 1 under the ACD exemption and providing the criteria requested in OPRA request item No. 2 in a paragraph as no produceable record exists for this request.

The Custodian stated that the CRU reviews claims of actual innocence by persons convicted of felonies in New Jersey State courts to evaluate whether there is clear and convincing evidence of actual innocence. The Custodian averred that the CRU investigates claims deemed meritorious and presents its findings to the Attorney General for decision and appropriate action. The Custodian stated that claimants must submit a “Request for Review by Conviction Review Unit” (“Application”). The Custodian stated that the CRU conducts a multi-step process involving review of the Application, background research on legal decisions and media coverage, and an initial in-depth review conducted by former public defenders and prosecutors. The Custodian stated that after the initial screening, some cases may be closed, further investigated, or – where appropriate - opened for re-investigation by a Deputy Attorney General and a detective from the Office of Public Integrity and Accountability. The Custodian averred that at the conclusion of an investigation, CRU personnel submit a recommendation about whether to seek court action to the Director for review. See Murray Cert. ¶ 2-5.

Regarding OPRA request item No. 1, the Custodian argued that the Complainant’s request for a CRU report was denied because the responsive record constituted ACD material under OPRA per N.J.S.A. 47:1A-1.1 and Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 284 (2009). The Custodian asserted that any records created were made to provide advice, deliberation, and consultation to the CRU Director and the Attorney General in aid of reaching a decision in a CRU Application. The Custodian certified that, as in Ciesla v. N.J. Dep’t of Health and Senior Servs., 429 N.J. Super. 127, 143 (App. Div. 2012), the memorandum sought was not the CRU’s final decision and was generated before a final decision was reached. The Custodian argued that the memorandum is also deliberative in that disclosure would indisputably reflect and expose the deliberative aspects of the CRU’s review process. The Custodian thus argued that he lawfully denied access to the responsive memorandum because it contained “advisory opinions, recommendations, and deliberations comprising part of a process by which a governmental decision was formulated.” Id at 140.

Additionally, the Custodian argued that the memorandum responsive to OPRA request item No. 1 was exempt from disclosure under OPRA because it is protected by the attorney-client privilege under N.J.S.A. 47:1A-1.1 and N.J.S.A. 2A:84A-20; N.J.R.E. 504. The Custodian maintained that courts recognize that “the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system.” (citing In re Grand Jury

Subpoenas Duces Tecum Served by Sussex Cnty., 241 N.J. Super. 18, 27-28 (App. Div. 1989)). The Custodian affirmed that the memorandum in question was prepared and submitted to the Attorney General by Director Murray in her capacity as counsel to the Attorney General, and its purpose was to provide legal counsel in furtherance of a decision on Complainant's request for CRU review. See Murray Cert. ¶ 9, 12.

Finally, the Custodian argued that there was no unlawful denial of OPRA request item No. 1 because the memorandum is exempt from disclosure under N.J.A.C. 13:1E-3.2(a)(2), which prohibits disclosure of "records that may reveal an agency's investigative or operational techniques, measures, or procedures, which, if disclosed, would compromise an agency's ability to effectively conduct investigations." The Custodian certified if the memorandum were disclosed, it could reveal the CRU's investigative or operational techniques and could compromise the CRU's ability to effectively conduct investigations. See Murray Cert. ¶ 13.

Regarding OPRA request item No. 2, the Custodian argued that there are no records responsive to this request. The Custodian asserted that under OPRA a denial of a request on the basis that records do not exist or are not in a records custodian's possession is "no denial of access at all." Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 38 (App. Div. 2005) and Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian affirmed that CRU does not maintain a specific internal document containing rigid "internal criteria" used by the CRU to assess wrongful conviction claims. See also Murray Cert. ¶ 15. The Custodian asserted that in the alternative, he provided the Complainant the eligibility requirements contained on the publicly available CRU application. The Custodian thus argued that no unlawful denial of access occurred to this OPRA request item.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant submitted his OPRA request on August 23, 2022. On November 14, 2022, the fifty-ninth (59th) business day after receipt of the OPRA request, the Custodian responded in writing denying OPRA request item No. 1 and providing a written response to OPRA

⁴ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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request item No. 2. In the SOI, the Custodian confirmed that forgoing timing of receipt and his response. Thus, the evidence clearly supports that a “deemed” denial of access occurred.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

OPRA Request Item No. 1

OPRA provides that the definition of a government record “shall not include . . . [ACD] material.” When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Ctr., 198 N.J. at 285 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. See Educ. Law Ctr., 198 N.J. at 286. The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep’t of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

In the instant matter, the Complainant’s OPRA request item No. 1 sought a CRU report sent to the Attorney General in “State v. Ronald Long” to which the Custodian denied access. This complaint followed, wherein the Complainant disputed the denial. In the SOI, the Custodian

certified that that the CRU report constituted ACD material exempt under OPRA pursuant to N.J.S.A. 47:1A-1.1 and Educ. Law Ctr., 198 N.J. 284. The Custodian and Director Murray both certified that the responsive CRU report was created to provide advice, deliberation, and consultation to the Attorney General in aid of reaching a decision in a CRU Application. The Custodian certified that the memorandum sought was not the CRU's final decision and was generated before a final decision was reached. citing Ciesla, 429 N.J. Super. 127. The Custodian further argued that the memorandum is also deliberative in that disclosure would indisputably reflect and expose the deliberative aspects of the CRU's review process.

According to Director Murray's certification, CRU reports document the multi-step review process when evaluating an Application. CRU reports investigate claims deemed meritorious and present such findings to the Attorney General, who then determines whether further investigation is necessary. The purpose of a CRU report is to aid in evaluating whether there is clear and convincing evidence of actual innocence and could disclose investigation and deliberation information. Thus, the evidence of record supports that the inherent nature of a CRU report constitutes ACD material. Therefore, the Custodian lawfully denied access based upon the ACD exemption under OPRA.

Accordingly, notwithstanding the "deemed" denial of access, the Custodian lawfully denied access to the CRU report responsive to OPRA request item No. 1 because it fell within the ACD exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Educ. Law Ctr., 198 N.J. 284. Specifically, the CRU memorandum report details the in-depth investigation regarding an applicant's claims of actual innocence regarding convicted felonies and details determinations as to whether a case is opened for re-investigation on the merits.

OPRA Request Item No. 2

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA request item No. 2 sought "the 'internal criteria' used by the CRU to assess wrongful conviction claims." The Custodian responded in writing explaining the guidelines the CRU uses to assess wrongful convictions. In the SOI, the Custodian and Ms. Murray both certified that there is no record containing a set listing of "internal criteria" made, maintained, or kept on file in the course of the CRU's official business and therefore, no record exists.

Upon review, the GRC is persuaded that no unlawful denial of access has occurred in response to OPRA request item No. 2. The evidence of record supports the Custodian's position that no responsive records exist containing the "internal criteria" utilized by the CRU in reviewing wrongful conviction claims, as certified by the Custodian and Ms. Murray. Also, the Complainant has not provided any competent, credible evidence necessary to refute the Custodian's certifications presented in the SOI. Based on the forgoing, a conclusion in line with Pusterhofer is appropriate here.

Accordingly, notwithstanding the "deemed" denial of access, the Custodian has borne her burden of proof that she lawfully denied access to item No. 2 of the Complainant's OPRA request.

Specifically, the Custodian certified in the SOI, and the record reflects, that no records responsive to request item No. 2 exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. Notwithstanding the "deemed" denial of access, the Custodian lawfully denied access to the Conviction Review Unit report responsive to OPRA request item No. 1 because it fell within the "inter-agency advisory, consultative, or deliberative material" exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009). Specifically, the Conviction Review Unit memorandum report details the in-depth investigation regarding an applicant's claims of actual innocence regarding convicted felonies and details determinations as to whether a case is opened for re-investigation on the merits.
3. Notwithstanding the "deemed" denial of access, the Custodian has borne her burden of proof that she lawfully denied access to item No. 2 of the Complainant's OPRA request. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no records responsive to request item No. 2 exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Maria M. Rossi
Staff Attorney

March 18, 2025