



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

April 30, 2024 Government Records Council Meeting

Kevin Alexander
Complainant

Complaint No. 2022-645

v.

NJ Department of Corrections
Custodian of Record

At the April 30, 2024 public meeting, the Government Records Council (“Council”) considered the April 23, 2024 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 violate OPRA when assessing a \$0.10 fee to disclose a hard copy of the two-page October 13, 2022 letter responsive to the Complainant’s OPRA request item No. 1. N.J.S.A. 47:1A-5(b). Further, OPRA did not require the Custodian to waive the fee because the Complainant could not pay it. See Reid v. GRC & N.J. Dep’t of Corr., 2013 N.J. Super. Unpub. LEXIS 2625, *5 (App. Div. 2013). Thus, the Custodian is not required to disclose the responsive letter until remittance of the assessed fee and no unlawful denial of access occurred. N.J.S.A. 47:1A-6; Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request item No. 2. Specifically, the Custodian has certified, and the record reflects, that no records responsive to the OPRA request exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 30th Day of April 2024

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 2, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2024 Council Meeting**

**Kevin Alexander¹
Complainant**

GRC Complaint No. 2022-645

v.

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

Records Relevant to Complaint: Hard copies of:

1. Letter from the Complainant to N.J. Department of Corrections (“DOC”) Commissioner Victoria Kuhn.
2. Attachment to the above letter.

Custodian of Record: John Falvey
Request Received by Custodian: October 31, 2022
Response Made by Custodian: November 1, 2022
GRC Complaint Received: November 29, 2022

Background³

Request and Response:

On an unknown date, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 1, 2022, the Custodian responded in writing stating that in response to OPRA request item No. 1, DOC located a letter dated October 13, 2022. The Custodian stated that same will be disclosed upon payment of \$0.10 for the copy cost associated with printing the two-page letter. The Custodian further stated that in response to OPRA request item No. 2, no attachments were located.

Denial of Access Complaint:

On November 29, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he wrote a letter to

¹ No legal representation listed on record.

² Represented by Deputy Attorney General (“DAG”) Elizabeth Micheletti. Previously represented by DAG Chanell Branch.

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.

Commissioner Kuhn regarding “poor persons’ and [the] “indigent”” being denied the ability to obtain photocopies of legal material from the Somerset County Jail library.

The Complainant first requested that because he is a “poor person,” the assessed copying cost be waived so that the GRC “could witness . . . that [the Complainant’s] letter dated 10-13-22 did enclose a[n] attachment.” The Complainant also contended that contrary to the Custodian’s response, there was an attachment included with the October 13, 2022 letter

Statement of Information:⁴

On March 8, 2023, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 31, 2022. The Custodian certified that he responded in writing on November 1, 2022 granting access to the October 13, 2022 letter pending payment of \$0.10 in copy costs and advising that DOC could not locate any attachments to that letter.

The Custodian argued that regarding OPRA request item No. 1, said charge was consistent with N.J.S.A. 47:1A-5(b) and the letter would be sent to the Complainant once he authorized payment thereof. The Custodian further argued that regarding OPRA request item No. 2, DOC could not locate any attachments included with the responsive letter. The Custodian argued that consistent with Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), no unlawful denial of access can occur where no records exist and a complainant fails to provide competent credible evidence to the contrary. The Custodian contended that the Complainant was not denied access to the subject OPRA request, and this complaint should be dismissed.

Additional Submissions:

On March 13, 2022, the Complainant submitted a sur-reply to the SOI. Therein, the Complainant argued that per a certification from Cindy Ford submitted in Alexander v. N.J. Dep’t of Corr., GRC Complaint No. 2022-32 (April 2022),⁵ the DOC Offender Correspondence Unit scans all correspondence sent to DOC’s Commissioners and saves them into a file labeled by the inmate’s name. The Complainant questioned how his letter could be received without the attachment when they were sent in the same envelope. The Complainant argued that the certification should result in an order to disclose the attachment or a charge of perjury against the Custodian or Ms. Ford. 28 U.S.C. §1746; N.J.S.A. 2C:28-1(a)-(b); N.J.S.A. 2A:81-17.2(a).

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

⁴ On December 29, 2022, this complaint was referred to mediation. On January 31, 2023, this complaint was referred back to the GRC for adjudication.

⁵ That complaint was administratively disposed of on the basis that no responsive records existed.

“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:

A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be: \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger.

[N.J.S.A. 47:1A-5(b).]

Here, the Complainant contended that the Council should waive the assessed \$0.10 copying cost for disclosure of a the two-page letter because he was unable to pay same. In the SOI, the Custodian argued that no unlawful denial occurred because his charge was clearly supported by N.J.S.A. 47:1A-5(b).

Upon review, the GRC declines to require the Custodian to waive the statutory fee based on the Complainant’s inability to pay same. In fact, this issue was already addressed by the Council in Reid v. N.J. Dep’t of Corr., GRC Complaint No. 2010-83 (October 2011). There, the Council held that OPRA did not include any “language relieving the Complainant from paying the appropriate copying cost because he is indigent.” Id. at 2. The Council further held that the custodian was not required to disclose the responsive records until after receipt of the payment (citing Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006)). After the Council denied a request for reconsideration, the complainant appealed the decision and the Appellate Division affirmed “substantially for the reasons set forth” by the Council. Reid v. GRC & N.J. Dep’t of Corr., 2013 N.J. Super. Unpub. LEXIS 2625, *5 (App. Div. 2013). Thus, consistent with the foregoing, the Custodian did not violate OPRA because he was not required to waive the \$0.10 copy cost associated with disclosing the responsive October 13, 2022 letter.

Accordingly, the Custodian did not violate OPRA when assessing a \$0.10 fee to disclose a hard copy of the two-page October 13, 2022 letter responsive to the Complainant’s OPRA request item No. 1. N.J.S.A. 47:1A-5(b). Further, OPRA did not require the Custodian to waive the fee because the Complainant could not pay it. See Reid, 2013 N.J. Super. Unpub. LEXIS at *5. Thus, the Custodian is not required to disclose the responsive letter until remittance of the assessed fee and no unlawful denial of access occurred. N.J.S.A. 47:1A-6; Paff, GRC 2006-54.

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, GRC 2005-49. Here, the Complainant’s OPRA request item No. 2 sought an attachment to the responsive October 13, 2022 letter. The Custodian responded stating that no records were located. The Custodian subsequently

certified to this fact. In his sur-reply, the Complainant argued that Ms. Ford's certification submitted in Alexander, GRC 2022-32 detailing how DOC processes mail for the Commissioner proved that the attachment existed.

The GRC is persuaded that the evidence of record supports that no unlawful denial of access to OPRA request item No. 2 has occurred. The Custodian has certified that DOC was unable to locate any attachment to the October 13, 2022 letter. The Complainant contends that Ms. Ford's certification from Alexander proves otherwise. However, the certification simply provides an explanation of how DOC handles correspondence addressed to the Commissioner and does not prove that the alleged attachment existed. Based on the foregoing, a conclusion in line with Pusterhofer is appropriate for OPRA request item No. 2.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item No. 2. Specifically, the Custodian has certified, and the record reflects, that no records responsive to the OPRA request 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 violate OPRA when assessing a \$0.10 fee to disclose a hard copy of the two-page October 13, 2022 letter responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-5(b). Further, OPRA did not require the Custodian to waive the fee because the Complainant could not pay it. See Reid v. GRC & N.J. Dep't of Corr., 2013 N.J. Super. Unpub. LEXIS 2625, *5 (App. Div. 2013). Thus, the Custodian is not required to disclose the responsive letter until remittance of the assessed fee and no unlawful denial of access occurred. N.J.S.A. 47:1A-6; Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item No. 2. Specifically, the Custodian has certified, and the record reflects, that no records responsive to the OPRA request exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

April 23, 2024