

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4754-14T3

KEVIN CONLEY,

Appellant,

v.

NEW JERSEY DEPARTMENT
OF CORRECTIONS,

Respondent.

APPROVED FOR PUBLICATION

January 12, 2018

APPELLATE DIVISION

Submitted March 1, 2017 – Decided January 12, 2018

Before Judges Fuentes, Simonelli and Gooden
Brown.

On appeal from the Government Records Council,
GRC Complaint No. 2014-269.

Kevin Conley, appellant pro se.

Christopher S. Porrino, Attorney General,
attorney for respondent New Jersey Department
of Corrections (Lisa A. Puglisi, Assistant
Attorney General, of counsel; Nicole E. Adams,
Deputy Attorney General, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent Government Records
Council (Debra A. Allen, Deputy Attorney
General, of counsel and on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

This appeal requires this court to determine whether certain data generated by the New Jersey Department of Corrections (DOC) is subject to disclosure under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. The discrete legal question raised is whether data that was previously compiled and kept by the DOC in monthly reports is not a "government record" pursuant to N.J.S.A. 47:1A-1.1, because the DOC implemented a new data collection system that no longer generates these reports. In response to the requestor's challenge of the denial of these reports, the Government Records Council (GRC) found the DOC's Custodian of Government Records "[bore] his burden of proof . . . that no responsive documents exist."

After reviewing the record developed by the parties, we reverse. The following facts will inform our analysis.

I

Appellant Kevin Conley is an inmate at New Jersey State Prison located in Trenton. On June 24, 2014, Conley sent a formal request to the DOC Custodian of Records seeking copies of the following documents:

(1) MONTHLY REMEDY FORM STATISTICAL REPORT prepared pursuant to [N.J.A.C.] 10A:1-4.8(a)(4) and N.J.A.C. 10A:1-4.8(b), and as required by Federal Regulations, 28 C.F.R. 40.10(a) for the NJDOC to receive Federal funding, for the months of January, February, March, and April of 2014, for each of the

following seven NJ prisons: NORTHERN S.P., EAST JERSEY S.P., NEW JERSEY S.P., EDNA MAHON Correctional Facility, SOUTHWOODS S.P., SOUTHERN STATE Correctional Facility, and BAYSIDE S.P.

(2) MONTHLY REMDEY LOG prepared pursuant to N.J.A.C. 10A:1-4.8(a)(4) and as required by Federal Regulations 28 C.F.R. 40.10(a) for the NJDOC to receive Federal funding, for the months of January, February, March, and April of 2014, at N.J.S.P.

In a letter dated July 3, 2014, the Custodian of Records John Falvey acknowledged receipt of the request and advised appellant that as of January 2014, the DOC began "utilizing a new database system in which the above requested monthly reports (as provided to [appellant] in previous requests) are no longer generated or available." Falvey included with this letter "statistical information obtained from said database to satisfy this part of [appellant's] request." The "statistical information" Falvey provided consisted of seven columns of numbers listed horizontally across the page, above each column are initials presumably corresponding to the name of the penal institution. The information provided in this format appears to cover January through April 2014, the months identified by appellant.

In response to the second part of appellant's request, Falvey indicated that he had "obtained 114 pages of available records

that are responsive to [appellant's] request."¹ Falvey informed appellant he had incurred a \$7.98 document reproduction fee, which he could pay through the New Jersey State Prison Business Office. Finally, Falvey apprised appellant he could challenge this decision by either instituting a proceeding in the Superior Court or filing a complaint in writing with the GRC.

In a letter dated July 14, 2014, appellant responded to Falvey and continued to argue that the DOC was required by State and federal regulations to prepare and maintain the statistical grievance reports and make them available to the public upon request under OPRA. By letter dated July 22, 2014, Falvey reaffirmed that these reports "are no longer generated or available." As Records Custodian, Falvey asserted that he was not obligated under OPRA to create any document "in order to respond to a request."

Appellant chose to challenge the DOC's position by filing a formal complaint with the GRC. With respect to the grievance records the DOC claimed were no longer accessible under OPRA, appellant argued that 28 CFR 40.10(b) requires the DOC to compile this information and prepare and maintain reports which are subject

¹ Pursuant to N.J.A.C. 10A:22-2.3(b), the document provided to appellant was redacted to exclude the names of individual inmates and their State Bureau of Identification (SBI) numbers.

to disclosure under OPRA. The DOC's response to appellant's complaint included a certification submitted by Falvey in his capacity as Government Records Custodian. Relying on Pusterhofer v. NJ Dept. of Education, (GRC 2005-49), Falvey argued "that there is no denial of access when there are no records responsive to a request." Falvey then certified that there were "no records responsive to the first item of [appellant's] request."

Appellant now appeals from the final decision of the GRC denying his request to obtain copies of "Monthly Remedy Form Statistical Reports" for the months of January through April 2014, allegedly kept on file by the DOC. The GRC found that when a custodian certifies that "no responsive records exist, no unlawful denial of access occurred." Thus, the GRC held the DOC had met its burden of proving that the denial of access was authorized by law. N.J.S.A. 47:1A-6.

II

We begin our analysis by emphasizing that the purpose of OPRA is "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean Cty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). Thus, "[a]bsent . . . [specific reliable evidence], a citizen's right

of access is unfettered." Carter v. Doe (In re N.J. Firemen's Ass'n Obligation), 230 N.J. 258, 277 (2017) (alteration in original) (quoting Courier News v. Hunterdon Cty. Prosecutor's Office, 358 N.J. Super. 373, 383 (App. Div. 2003)).

OPRA defines "government record" in pertinent part as

any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.

[N.J.S.A. 47:1A-1.1 (emphasis added).]

The duties and responsibilities of a public agency's records custodian are also defined by OPRA. N.J.S.A. 47:1A-5(g). The custodian bears the burden to "indicate the specific basis" for the denial of access. Ibid. See also Lagerkvist v. Office of Governor of State, 443 N.J. Super. 230, 235 (App. Div. 2015). Here, appellant relies on a federal regulation which provides minimum standards for the preservation of records related to inmate grievances:

Records regarding the filing and disposition of grievances shall be collected and maintained systematically by the institution. Such records shall be preserved for at least three years following final disposition of the grievance. At a minimum, such records shall include aggregate information regarding the numbers, types and dispositions of grievances, as well as individual records of the date of and the reasons for each disposition at each stage of the procedure.

[28 CFR 40.10(a).]

State regulations also requires the DOC to maintain

an inmate data base and/or log, to include a numbering system for purposes of tracking "Inmate Inquiry Forms," "Inmate Grievance Forms," and "Administrative Appeals" and to ensure a timely response and retaining all related forms and records in accordance with the record retention schedule approved by the Department of Corrections[.]

[N.J.A.C. 10A:1-4.8(a)(4).]

We have held that OPRA defines "government record" as information "made, maintained or kept on file" by a government agency "in the course of its official business" or information that has been "received" by a government agency "in the course of its official business." Bergen County Imp. Authority v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 516 (App. Div. 2004). The federal and State regulations cited here clearly require the DOC to maintain and keep in the course of its official business the type of information appellant requested. Indeed, the

DOC acknowledges that prior to January 2014, it provided appellant with these reports upon request. The only argument the DOC advances for denying appellant access to this "government record" is based on the manner the DOC chose to store or maintain this public information. Acceptance of the DOC's argument would leave the public policy of transparency and openness the Legislature codified in N.J.S.A. 47:1A-1 unacceptably vulnerable to bureaucratic manipulation.

Given the history of accessibility and the conceded public character of this information, the DOC should have considered the public-access ramifications before modifying the manner it stored public records. Technological advancements in data storage should enhance, not diminish, the public's right to access "government records" under OPRA. The facts here are not remotely similar to the "research tool" approach or vaguely worded request we criticized in MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). To be clear, we reaffirm our holding in MAG Entm't, LLC. Custodians of government records are not obligated to conduct research in response to a requestor's vague or poorly described request. However, the flipside of this proposition is equally true. A government agency cannot erect technological barriers to deny

access to government records that were previously available under OPRA.

We also take the opportunity to address an apparent misapprehension concerning our standard of review of decisions made by the GRC. Both the DOC and the GRC, represented in this appeal by the Office of the Attorney General, Department of Law and Public Safety, Division of Law, argue that we should review the decision made by the GRC here through the traditional deferential standard employed by appellate courts to a final decision of a State administrative agency. Under this standard, our role is limited to determining: (1) whether the agency's decision conforms with relevant law; (2) whether the decision is supported by substantial credible evidence in the record; and (3) whether, in applying the law to the facts, the administrative agency clearly erred in reaching its conclusion. In re Stallworth, 208 N.J. 182, 194 (2011).

This deferential approach is predicated on the agency's presumed "expertise and superior knowledge of a particular field." Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). This standard precludes us from substituting our judgment for the agency's, even if we would have reached a different legal conclusion. Stallworth, 208 N.J. at

194. This deferential standard of review is not applicable here. The GRC did not conduct an evidentiary hearing or make factual findings based on witnesses' testimony. The GRC merely accepted as reasonable the DOC's legal position concerning the denial of appellant's request.

In determining matters involving purely legal issues, we apply a de novo review; this well-established principle of appellate jurisprudence is especially appropriate in addressing questions of statutory interpretation. Palisades at Fort Lee Condo. Ass'n v. 100 Old Palisade, LLC, 230 N.J. 427, 442 (2017). Thus, "[w]e review de novo the issue of whether access to public records under OPRA and the manner of its effectuation are warranted." MAG Entm't, LLC, 375 N.J. Super. at 543. When the Legislature adopted OPRA, it established two forums for a requestor to challenge a decision of a custodian of government records: (1) instituting a summary action in the Superior Court under Rule 4:67-5, N.J.S.A. 47:1A-6; and (2) filing a complaint with the GRC under N.J.S.A. 47:1A-7. However, these two methods of dispute resolution do not have equal legal significance.

Although the GRC is authorized to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access," N.J.S.A. 47:1A-7(b), it can only issue "advisory opinions, on its own initiative, as to whether a particular type

of record is a government record which is accessible to the public[.]" Ibid. (emphasis added). Thus, "[a] decision of the [GRC] shall not have value as a precedent for any case initiated in Superior Court[.]" N.J.S.A. 47:1A-7(e). However, both a final judgment of the Superior Court arising from a summary action filed under OPRA and a decision issued by the GRC may be appealed as of right to this court. See Courier News, 358 N.J. Super. at 378-79.

Based on our de novo review of the record developed before the GRC, we conclude the DOC did not provide a legally recognized basis under N.J.S.A. 47:1A-1.1 for denying appellant's request for a copy of the following government record:

MONTHLY REMEDY FORM STATISTICAL REPORT prepared pursuant to [N.J.A.C.] 10A:1-4.8(a)(4) and N.J.A.C. 10A:1-4.8(b), and as required by Federal Regulations, 28 C.F.R. 40.10(a) for the NJDOC to receive Federal funding, for the months of January, February, March, and April of 2014, for each of the following seven NJ prisons: NORTHERN S.P., EAST JERSEY S.P., NEW JERSEY S.P., EDNA MAHON Correctional Facility, SOUTHWOODS S.P., SOUTHERN STATE Correctional Facility, and BAYSIDE S.P.

We remand this matter to the DOC and order the Custodian of Records to provide appellant with the information he requested within thirty days from the date of this opinion. In determining the timeframe for compliance, the parties should be guided by the method of computation codified in Rule 1:3-1.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

A handwritten signature in black ink, appearing to be 'JWA', is written over the text of the certification.

CLERK OF THE APPELLATE DIVISION