



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

October 28, 2014 Government Records Council Meeting

Michael Pavlyik
Complainant

Complaint No. 2014-94

v.

NJ Department of Corrections
Custodian of Record

At the October 28, 2014 public meeting, the Government Records Council (“Council”) considered the October 21, 2014 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 the Custodian has borne his burden of proof that he lawfully denied access to recorded telephone conversations. N.J.S.A. 47:1A-6. Such denial is lawfully consistent with the restrictions on dissemination prescribed in 28 CFR 23 and the authority granted by N.J.S.A. 47:1A-9, N.J.S.A. 31:1B-1, and N.J.S.A. 30:1B-6(g). See also Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (2012).

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 28th Day of October, 2014

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: October 30, 2014



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 28, 2014 Council Meeting**

**Michael Pavlyik¹
Complainant**

GRC Complaint No. 2014-94

v.

**NJ Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: “I am requesting transcripts of telephone calls I made on the following dates and times (times are approximate):

May 01, 2013 – 8:46pm
May 15, 2013 – 8:21pm
June 02, 2013 – 12:22pm
June 16, 2013 – 8:26pm
July 25, 2013 – 8:30pm³
October 29, 2013 – 12:15pm
November 12, 2013 – 5:47pm
November 19, 2013 – 6:01pm

All calls are approx. 12 – 15 minutes in length.”

Custodian of Record: John Falvey
Request Received by Custodian: December 16, 2013
Response Made by Custodian: January 30, 2014
GRC Complaint Received: February 26, 2014

Background⁴

Request and Response:

On December 16, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 26, 2013, the Custodian responded, in writing, seeking additional ten (10) business days to respond.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant subsequently corrected the time for this date as 8:39pm.

⁴ 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.

On January 9, 2014, the Custodian sought additional information from the Complainant. Specifically, the Custodian asked the Complainant whether he sought actual printed conversations held on the requested dates. On January 30, 2014, the Complainant responded, in writing, clarifying that he seeks physical printed copies of the requested conversations. The Complainant further stated that he would accept audio recordings of said conversations if printed copies were unavailable.

On January 30, 2014, the Custodian responded, in writing, stating that the New Jersey Department of Corrections (“NJDOC”) neither creates nor maintains printed transcripts of phone calls. Additionally, the Custodian denied access to audio recordings of the requested telephone conversations pursuant to N.J.S.A. 47:1A-9. The Custodian stated that federal regulation 28 CFR 23.20(e) prohibits dissemination of the information contained within the records unless “there is a need to know and a right to know the information in the performance of a law enforcement activity.”

Denial of Access Complaint:

On February 26, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that 28 CFR 23.20(e) is inapplicable to his particular request and was improperly relied upon by the Custodian. The regulation’s stated purpose is to “assure that all criminal intelligence systems operating through support under the Omnibus Crime Control and Safe Streets Act of 1968 . . . are utilized in conformance with the privacy and constitutional rights of individuals.” 28 CFR 23.1.

The Complainant first argued that the regulation is inapplicable because a private entity operates the NJDOC’s telephone system and is unaffiliated with the NJDOC and the State of New Jersey. The Complainant next contended that the private entity does not receive funding through the Omnibus Crime Control and Safe Streets Act of 1968, and therefore not subject to the disclosure restrictions under 28 CFR 23. Moreover, the Complainant claimed that even if the private entity was receiving funds from said statute, he is not suspected of any ongoing criminal conduct or activity, nor would the requested records be relevant to any ongoing criminal conduct or activity. *See* 28 CFR 23.20(a).

The Complainant also contended that the NJDOC’s telephone system does not constitute a “criminal intelligence system,” nor do the telephone conversations at issue contain “criminal intelligence information.” *See* 28 CFR 23.20(b).

Statement of Information:

On March 21, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the NJDOC’s Special Investigation Division (“SID”) maintains access to and monitors telephone calls made to and from inmates in prison. The Custodian explained that the monitoring and collection of such communications is to ensure the safety and security of the inmates and corrections personnel. The Custodian maintained that the Commissioner has broad powers realize the safety and security of the institutions within his jurisdiction. *See* N.J.S.A. 31:1B-1; N.J.S.A. 30:1B-6(g).

The Custodian stated further that SID elected to maintain these recorded conversations in accordance with the “New Jersey Attorney General Guidelines on the Collection, Handling, Storage, and Dissemination of Intelligence in New Jersey” (“Guidelines”). The Custodian certified that the Guidelines required participating agencies to comply with 28 CFR 23. Therefore, the requested records are not subject to disclosure.

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.

Further, “[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9(a).

The Council has previously recognized that, in accordance with N.J.S.A. 30:1B-6(g), the NJDOC Commissioner has broad discretionary powers to determine matters of public policy and regulate the institutions under his jurisdiction. *See Harris v. NJ Dep’t of Corr.*, GRC Complaint No. 2011-65 (2012) (citing N.J.S.A. 30:1B-6(g)). These powers include formulating and adopting policies pertaining to maintaining security and order within correctional institutions. *See Jenkins v. Fauver*, 108 N.J. 239, 252 (1987); *Russo v. NJ Dep’t of Corr.*, 324 N.J. Super. 576, 584 (App. Div. 1999).

The Custodian certified that the NJDOC monitors and records telephone conversations conducted to and from its facilities as a matter of maintaining the safety and security of prisons under its jurisdiction, and criminal intelligence gathering. Therefore, the NJDOC Commissioner’s decision to regulate the collection and dissemination of these conversations pursuant to the Guidelines, and in turn 28 CFR 23, is within the broad authority granted to him under N.J.S.A. 30:1B-6(g). *See Russo*, 324 N.J. Super. at 583-584.

The Custodian has borne his burden of proof that he lawfully denied access to recorded telephone conversations. N.J.S.A. 47:1A-6. Such denial is lawfully consistent with the restrictions on dissemination prescribed in 28 CFR 23 and the authority granted by N.J.S.A. 47:1A-9, N.J.S.A. 31:1B-1, and N.J.S.A. 30:1B-6(g). *See also Harris*, GRC No. 2011-65.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proof that he lawfully denied access to recorded telephone conversations. N.J.S.A. 47:1A-6. Such denial is lawfully consistent with the restrictions on dissemination prescribed in 28 CFR 23 and the authority granted by N.J.S.A. 47:1A-9, N.J.S.A. 31:1B-1, and N.J.S.A. 30:1B-6(g). *See also* Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (2012).

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

October 28, 2014