



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 28, 2016 Government Records Council Meeting

Larry Fleming
Complainant

v.

NJ Department of Corrections
Custodian of Record

Complaint No. 2015-257

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 2016 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 the requested Internal Management Procedure document titled “Excessive Heat-Ice Distribution” pursuant to N.J.S.A. 47:1A-1.1. Such denial is also lawfully consistent with 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 Russo v. NJ Dept. of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999); Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (2012); Reid v. NJ DOC (GRC Complaint No. 2013-165); Smith v. NJ DOC (GRC Complaint No. 2013-337).

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 June, 2016

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: June 30, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2016 Council Meeting**

**Larry Fleming¹
Complainant**

GRC Complaint No. 2015-257

v.

**NJ Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: A copy of the New Jersey State Prison (“NJSP”) Standard Operating Procedures for “Excessive Heat and Distribution of Ice”

Custodian of Record: John Falvey
Request Received by Custodian: July 16, 2015
Response Made by Custodian: July 22, 2015
GRC Complaint Received: August 10, 2015

Background³

Request and Response:

On July 10, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 22, 2015, the Custodian responded in writing, noting that he located a five-page “Internal Management Procedure.” The Custodian denied the request, claiming that the document was exempt from disclosure pursuant to the following exemptions: N.J.S.A. 47:1A-1.1 (emergency or security information or procedures for any buildings or facility, which, if disclosed, would jeopardize security of the building of facility or person therein); N.J.S.A. 47:1A-1.1 (security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property); and N.J.S.A. 47:1A-9, as the Commissioner had deemed the policy confidential.

Denial of Access Complaint:

On August 5, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he made the above-mentioned request “for the sole purpose of understanding” the temperature requirement for

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

“excessive heat” within NJSP, the temperature requirement for “cool-off-showers” within NJSP, the temperature requirement for “distribution of free ice” within NJSP, and who determines the excessive heat temperature within NJSP. The Complainant argued that the exemptions cited by the Custodian in the denial did not apply. The Complainant made no additional legal arguments.

Statement of Information:

On August 20, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 16, 2015, and thereafter located a five-page Internal Management Procedure document titled “Excessive Heat-Ice Distribution.” The Custodian noted that the record has a “Confidential” stamp across each page and additionally includes a sentence at the bottom of the first page stating “As a confidential N.J.D.O.C. document, this document is to be released to authorized *personnel* only.” (emphasis from the Custodian).

The Custodian certified that he responded in writing on July 22, 2015, denying the request pursuant to N.J.S.A. 47:1-9, because the Commissioner of Corrections had deemed the record confidential. The Custodian noted that this designation is within the powers of the Commissioner of the Department of Corrections (“DOC”) pursuant to N.J.S.A. 30:1B-6(g). The Custodian noted that a prior GRC decision, Harris v. NJ DOC (GRC Complaint No. 2011-65) acknowledged the Commissioner’s powers under N.J.S.A. 30:1B-6(g) to determine all matters of policy and regulate the administration of institutions within his jurisdiction.

The Custodian additionally denied the requested record pursuant to the security information or procedures exemption of N.J.S.A. 47:1A-1.1. The Custodian certified that the record details the policy and procedures regarding security components, staff’s movements, staff’s responsibilities, timing of staff’s actions, and areas of heightened security concerns during incidents of extreme heat. The Custodian argued that release of the record would give inmates an insight into the confidential security workings of the DOC and could potentially be used to exploit weaknesses in security procedures during a heat emergency. The Custodian posited that inmates could use such information to plan assaults, escapes, or other unlawful activity. The Custodian additionally noted that courts have generally deferred to the DOC when making safety and security decisions and noted that the DOC has “broad discretionary powers” to promulgate security regulations. See Jenkins v. Fauver, 108 N.J. 239, 252 (1987), Russo v. NJ Dept. of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999). The Custodian additionally noted that the GRC had previously found similar DOC Internal Management Procedures exempt from disclosure under the safety and security exemption. Reid v. NJ DOC (GRC Complaint No. 2013-165); Smith v. NJ DOC (GRC Complaint No. 2013-337).

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 DOC 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).

Here, the Custodian certified that the information contained in the requested record detailed policy and procedures regarding security components, staff’s movements, staff’s responsibilities, timing of staff’s actions, and areas of heightened security concerns during incidents of extreme heat. The Custodian additionally argued that releasing the record could give inmates an insight into the confidential security workings of the DOC and could potentially be used to exploit weaknesses in security procedures during a heat emergency. The Custodian further suggested that inmates could use such information to plan assaults, escapes, or other unlawful activity. Therefore, the DOC Commissioner’s decision to deem such a record “confidential” 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; Reid v. NJ DOC (GRC Complaint No. 2013-165); Smith v. NJ DOC (GRC Complaint No. 2013-337).

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested Internal Management Procedure document titled “Excessive Heat-Ice Distribution” pursuant to N.J.S.A. 47:1A-1.1. Such denial is also lawfully consistent with 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 Russo v. NJ Dep’t of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999); Harris, GRC No. 2011-65; Reid v. NJ DOC (GRC Complaint No. 2013-165); Smith v. NJ DOC (GRC Complaint No. 2013-337).

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 the requested Internal Management Procedure document titled “Excessive Heat-Ice Distribution” pursuant to N.J.S.A. 47:1A-1.1. Such denial is also lawfully consistent with 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 Russo v. NJ Dept. of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999); Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (2012); Reid v. NJ DOC (GRC Complaint No. 2013-165); Smith v. NJ DOC (GRC Complaint No. 2013-337).

Prepared By: Husna Kazmir
Staff Attorney

June 21, 2016