



**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**

**November 14, 2017 Government Records Council Meeting**

Josue Rodriguez  
Complainant

Complaint No. 2016-139

v.

NJ Department of Corrections  
Custodian of Record

At the November 14, 2017 public meeting, the Government Records Council (“Council”) considered the November 8, 2017 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 the responsive records are expressly exempt from disclosure under the New Jersey Department of Correction’s regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(10). The Custodian has thus lawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Further, the GRC declines to address the applicability of N.J.S.A. 47:1A-1.1 and N.J.A.C. 10A:22-2.3(a)(1)(5) because the records are exempt from disclosure under N.J.A.C. 10A:22-2.3(a)(10).

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 14<sup>th</sup> Day of November, 2017

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: November 17, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 14, 2017 Council Meeting**

**Josue Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-139**

v.

**NJ Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies of the evidence or statement leading to the Complainant's Involuntary Protective Custody ("IPC") status.<sup>3</sup>

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** February 16, 2016  
**Response Made by Custodian:** February 16, 2016  
**GRC Complaint Received:** May 11, 2016

**Background<sup>4</sup>**

**Request and Response:**

On January 28, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On February 16, 2016, the Custodian responded in writing, denying access to three (3) pages of records. The Custodian stated that disclosure of the records "jeopardize[s] security of the building or facility or person therein," and contained "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property. . ." N.J.S.A. 47:1A-1.1. Also, the Custodian stated that the records constituted "inter-agency or intra-agency advisory, consultative, or deliberative ["ACD"]" material. Id. Further, the Custodian stated that the records were exempt as informant documents and statements. N.J.A.C. 10A:22-2.3(a)(1). Finally, the Custodian stated that the records belonged to an identified individual which, if the records were disclosed, would jeopardize the safety of any person or safe and secure operation of the correctional facility or other designated place of confinement. N.J.A.C. 10A:22-2.3(a)(5).

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> 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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### Denial of Access Complaint:

On May 11, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian unlawfully denied him access to the responsive records. The Complainant alleged that he was wrongfully placed in IPC without the benefit of seeing any evidence or facing his accuser. The Complainant contended that he needed the records to take proper actions to lift the IPC placement. The Complainant stated that he knew he could not have the informant’s name per N.J.S.A. 47:1A-1.1 but that the Custodian had an obligation to redact the responsive records.

### Statement of Information:

On June 7, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on February 16, 2016. The Custodian certified that his search included contacting the Special Investigations Division (“SID”) because the records dealt with an IPC. The Custodian certified that his office received three (3) pages of records consisting of: 1) an e-mail regarding the Complainant’s transfer from East Jersey State Prison (“EJSP”) to New Jersey State Prison (“NJSP”); and 2) an SID report dated November 10, 2014. The Custodian certified that he responded in writing on the same day, denying access to the responsive records pursuant to N.J.S.A. 47:1A-1.1; N.J.A.C. 10A:22-2.3(a)(1); N.J.A.C. 10A:22-2.3(a)(5).

The Custodian stated that this matter began with an IPC<sup>5</sup> hearing. The Custodian noted that a hearing is conducted when an inmate refuses the IPC placement but the SID instead believes the placement is needed for the inmate’s safety and the safe and secure running of the facility. The Custodian affirmed that SID will then typically provide a report or other evidence as part of that hearing. The Custodian certified that here, the e-mail included the reasons why it was too dangerous to keep the Complainant at EJSP. The Custodian also certified that the report detailed SID’s reasons for the IPC designation.

The Custodian argued that it is clear that these records are exempt from disclosure under OPRA. The Custodian affirmed that they related to an SID investigation, detailed interviews with a confidential informant, and contained concerns about retaliation from members of a Security Threat Group (“STG”)<sup>6</sup> inside the prison. The Custodian further certified that the records contained the name of other inmates with knowledge of the reasons the Complainant needed IPC. The Custodian also certified that the records discussed details of a criminal case associated with the IPC, indicated intelligence gathered, sources used, interviews conducted, and spoke on the networks of STGs with the New Jersey prison system.

The Custodian argued that it is clear that the responsive records would reveal a significant amount of information that would jeopardize the safe and secure operation of the prison system. The Custodian contended that the risks inherent in disclosure would undermine the New Jersey Department of Corrections’ (“DOC”) ability to maintain a safe and secure

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<sup>5</sup> IPC is defined at N.J.A.C. 10A:1-2.2.

<sup>6</sup> An STG is also defined at N.J.A.C. 10A:1-2.2.

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environment. He also noted that STGs have been identified by DOC as posing an enhanced security risk to the orderly operation of the prison system.

The Custodian further argued that the Courts have long deferred to the DOC when making safety and security decisions. The Custodian states that DOC has “broad discretionary power” to promulgate regulations aimed at maintaining security and order inside correctional facilities. Jenkins v. Fauver, 108 N.J. 239, 252 (1987). The Custodian stated that the Courts have noted that “[p]risons are dangerous places, and the courts must afford appropriate deference and flexibility to administrators trying to manage this volatile environment.” Russo v. NJ Dep’t of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999). *See also* Florence v. Bd. of Chosen Freeholders, Burlington Cnty., 132 S.Ct. 1510, 1515 (2012) (“[m]aintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face[.]”)

### 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.

The provisions of OPRA provide that “[ACD] material” and “emergency or security information or procedures for any buildings . . . which, if disclosed, would jeopardize security of the building or facility or persons therein” are exempt from disclosure. N.J.S.A. 47:1A-1.1. OPRA also provides that its provisions “shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to any other . . . regulation promulgated under the authority of any statute or Executive Order of the Governor. . .” N.J.S.A. 47:1A-9(a).

DOC’s regulations provide that:

[T]he following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 *et seq.*: Informant documents and statements . . . report[s] or record[s] relating to an identified individual, which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement . . .

N.J.A.C. 10A:22-2.3(a)(1), (5).

Moreover, DOC’s regulations expressly exempt access to “[r]ecords related to involuntary or voluntary protective custody”. Id. at (10).

Here, the Complainant sought access to the “evidence” or “statement” relied upon to place him in IPC. The Custodian responded by denying access to: 1) an e-mail regarding the

Complainant's transfer from East Jersey State Prison ("EJSP") to New Jersey State Prison ("NJSP"); and 2) an SID report dated November 10, 2014, pursuant to N.J.S.A. 47:1A-1.1; N.J.A.C. 10A:22-2.3(a)(1); N.J.A.C. 10A:22-2.3(a)(5). In the Denial of Access Complaint, the Complainant asserted that he should be allowed access to the records, with redactions to defend the IPC designation. In the SOI, the Custodian provided a detailed explanation of the IPC process. The Custodian also provided a detailed explanation of how the records were used as part of that process. Specifically, the Custodian affirmed that the e-mail and report contained the reasons for the IPC designation. The Custodian also certified that report included names of inmates, indicated intelligence gathered, sources used, interviews conducted, and spoke on the networks of STGs with the New Jersey prison system.

Although the Custodian did not raise the point,<sup>7</sup> DOC's regulations expressly exempt access to records related to IPC. N.J.A.C. 10A:22-2.3(a)(10). It is clear from both the Complainant's OPRA request and the Custodian's SOI that the responsive records refer to the IPC. Thus, the plain language of DOC's regulations provide that responsive records were exempt under OPRA. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(10).

Accordingly, the Custodian has borne his burden of proof that disclosure of the responsive records is expressly exempt from disclosure under DOC's regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(10). The Custodian has thus lawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Further, the GRC declines to address the applicability of N.J.S.A. 47:1A-1.1 and N.J.A.C. 10A:22-2.3(a)(1)(5) because the records are exempt from disclosure under N.J.A.C. 10A:22-2.3(a)(10).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proof that the responsive records are expressly exempt from disclosure under the New Jersey Department of Correction's regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(10). The Custodian has thus lawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Further, the GRC declines to address the applicability of N.J.S.A. 47:1A-1.1 and N.J.A.C. 10A:22-2.3(a)(1)(5) because the records are exempt from disclosure under N.J.A.C. 10A:22-2.3(a)(10).

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

November 8, 2017

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<sup>7</sup> The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (*certify. denied* 193 N.J. 292 (2007)).  
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