



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**May 22, 2018 Government Records Council Meeting**

Waymon Chester  
Complainant

Complaint No. 2016-167

v.

NJ Department of Corrections  
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 Supplemental 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 Complainant has failed to establish in his request for reconsideration of the Council’s March 27, 2018 Final Decision that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to provide any argument as to why the Council’s Final Decision was illegal. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council should rescind its March 27, 2018 Final Decision and reanalyze whether the Custodian’s denial of access was lawful. Specifically, the Council’s decision mistakenly applied a New Jersey Department of Correction’s regulation retroactively. N.J.S.A. 47:1A-5(a).
3. The Custodian lawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Specifically, the three (3) reports pertained to the Special Investigation Division’s investigation into what ultimately resulted in the Complainant’s “Protective Custody” designation. Disclosure of these reports, regardless of whether they pertain to the Complainant, is prohibited by DOC’s regulations because they pertain to individual inmates and would jeopardize the safe and secure operation of the prison system.



N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3; Edwards v. N.J. Dep't of Corr., GRC  
Complaint No. 2014-8 (September 2014).

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 22<sup>nd</sup> Day of May, 2018

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 25, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*  
**Supplemental Findings and Recommendations of the Council Staff  
May 22, 2018 Council Meeting**

**Waymon Chester<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-167**

**v.**

**New Jersey Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies via U.S. mail of “all the paperwork and reports” Special Investigation Division (“SID”) has on why the Complainant is in Protective Custody (“PC”).

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** April 27, 2016  
**Response Made by Custodian:** May 6, 2016  
**GRC Complaint Received:** June 16, 2016

**Background**

**March 27, 2018 Council Meeting:**

At its March 27, 2018 public meeting, the Council considered the March 20, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

[T]he Custodian lawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Specifically, the responsive records relate to the Complainant’s protective custody designation and are expressly exempt from access under the New Jersey Department of Corrections’ regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(10).

**Procedural History:**

On March 29, 2018, the Council distributed its Final Decision to all parties. On April 12, 2018, the Complainant filed a request for reconsideration of the Council’s March 27, 2018 Final

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

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

Decision based on illegality. The Complainant contended that he believed it was illegal to deny him access to the responsive records.<sup>3</sup>

## Analysis

### Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's March 27, 2018 Final Decision on April 12, 2018, nine (9) business days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

To briefly address the request for reconsideration, the Complainant failed to provide any argument as to why the Council's Decision was illegal. For this reason, the Council should deny the Complainant's request for reconsideration of its March 27, 2018 Final Decision.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative,

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<sup>3</sup> On May 1, 2018, the Custodian advised that he would rely on “the current record” in lieu of filing objections to the request for reconsideration.

competent evidence. See Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria, 242 N.J. Super. at 401. Specifically, the Complainant failed to provide any argument as to why the Council’s Final Decision was illegal. Thus, the Complainant’s request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

However, notwithstanding the above, OPRA provides that:

Except where an agency can demonstrate an emergent need, a regulation that limits access to government records shall not be retroactive in effect or applied to deny a request for access to a government record that is pending before the agency, the council or a court at the time of the adoption of the regulation.

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

The GRC’s review of this complaint after receiving the Complainant’s request for reconsideration indicated that it mistakenly applied a promulgated regulation retroactively. Specifically, the GRC relied on N.J.A.C. 10A:22-2.3(a)(10) in finding that the Custodian lawfully denied access to the requested records. However, a second review of the New Jersey Department of Corrections’ (“DOC”) regulations revealed that this provision was part of a September 6, 2016 “Proposed Readoption with Amendments.” 48 N.J.R. 1775(a). Further, the proposed amendments became effective on December 19, 2016. 48 N.J.R. 2813(a). Thus, the provision the GRC relied upon in its prior recommendation did not become effective until more than seven (7) months after the Complainant submitted his OPRA request.

Accordingly, the Council should rescind its March 27, 2018 Final Decision and reanalyze whether the Custodian’s denial of access was lawful. Specifically, the Council’s decision mistakenly applied a DOC regulation retroactively. N.J.S.A. 47:1A-5(a).

### **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.

OPRA provides that:

A government record shall not include . . . emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein; [or] security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.

[N.J.S.A. 47:1A-1.1.]

OPRA also provides that its provisions:

[S]hall 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) (emphasis added).]

DOC's regulations provide that:

[T]he following records shall not be considered government records subject to public access . . . [SID] investigations records and reports, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility . . . [a] report or record 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 . . . [a]n inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate.

[N.J.A.C. 10A:22-2.3(a) and (b) (emphasis added).]

The GRC has found that the regulation set forth at N.J.A.C. 10A:22-2.3(a)(10) was not in effect at the time of the Complainant's OPRA request and subsequent filing of this complaint. Thus, the GRC will review the denial of access based on the Custodian's asserted reasons for denial from his initial response and Statement of Information ("SOI").

As stated in the Council's March 27, 2018 Final Decision, the Complainant sought access to multiple records regarding his PC status. The Custodian denied access to three (3) records citing OPRA and DOC's regulations. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; N.J.A.C. 10A:22-2.3. Those exemptions include SID reports, if redaction would not suffice to protect any person or facility, records relating to an individual that would jeopardize the safe and secure operation of a facility, and a prohibition against inmates possessing records concerning other inmates. In the SOI, the Custodian provided further detail of the three (3) responsive records to support that he lawfully denied access to them. The Custodian explained that disclosure of each record contained information about multiple inmates involved in a fight at Essex County Jail, was critical to the SID's investigation into the PC designation, and discussed a number of SID investigative techniques involving the "Protective Custody" ("PC") and "Security Threat Group" ("STG") elements within the DOC system. The Complainant's argument throughout the pendency of this complaint was simply that he wanted to ascertain why he was placed within the PC designation.

Taking into account all evidence in the record and arguments presented by the parties, the GRC is satisfied that the Custodian lawfully denied access to the three (3) responsive records.

Specifically, the Custodian provided sufficient detail in his SOI response to show that disclosure could result in severe consequences to the safety and security of the prison system. N.J.A.C. 10A:22-2.3(a)(2). This is especially true given the high-risk nature of the PC and STG designations. The record also supports that the records related to or included information about other inmates, which is exempt under N.J.A.C. 10A:22-2.3(a)(5), N.J.A.C. 10A:22-2.3(b). The GRC notes that the Council has previously upheld the denial of reports regardless of whether the complainant was included therein. See Edwards v. N.J. Dep't of Corr., GRC Complaint No. 2014-8 (September 2014) (holding that the complainant could not have access to records pertaining to the person accused of assaulting him under N.J.A.C. 10A:22-2.3(b)).

Accordingly, the Custodian lawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Specifically, the three (3) reports pertained to the SID's investigation into what ultimately resulted in the Complainant's PC designation. Disclosure of these reports, regardless of whether they pertain to the Complainant, is prohibited by DOC's regulations because they pertain to individual inmates and would jeopardize the safe and secure operation of the prison system. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3; Edwards, GRC 2014-8.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Complainant has failed to establish in his request for reconsideration of the Council's March 27, 2018 Final Decision that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to provide any argument as to why the Council's Final Decision was illegal. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council should rescind its March 27, 2018 Final Decision and reanalyze whether the Custodian's denial of access was lawful. Specifically, the Council's decision mistakenly applied a New Jersey Department of Correction's regulation retroactively. N.J.S.A. 47:1A-5(a).
3. The Custodian lawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Specifically, the three (3) reports pertained to the Special Investigation Division's investigation into what ultimately resulted in the Complainant's "Protective Custody" designation. Disclosure of these reports, regardless of whether they pertain to the Complainant, is prohibited by DOC's regulations because they pertain to individual

inmates and would jeopardize the safe and secure operation of the prison system. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3; Edwards v. N.J. Dep't of Corr., GRC Complaint No. 2014-8 (September 2014).

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

May 15, 2018





**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**March 27, 2018 Government Records Council Meeting**

Waymon Chester  
Complainant

Complaint No. 2016-167

v.

NJ Department of Corrections  
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Findings and Recommendations of the Council Staff 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 lawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Specifically, the responsive records relate to the Complainant’s protective custody designation and are expressly exempt from access under the New Jersey Department of Corrections’ regulations. N.J.S.A. 47:1A-9(a); 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 27<sup>th</sup> Day of March, 2018

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: March 29, 2018**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
March 27, 2018 Council Meeting**

**Waymon Chester<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-167**

**v.**

**New Jersey Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies via U.S. mail of “all the paperwork and reports” Special Investigation Division (“SID”) has on why the Complainant is in Protective Custody (“PC”).

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** April 27, 2016  
**Response Made by Custodian:** May 6, 2016  
**GRC Complaint Received:** June 16, 2016

**Background<sup>3</sup>**

**Request and Response:**

On April 20, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 6, 2016, the Custodian responded in writing obtaining an extension of ten (10) business days to locate responsive records.

On May 11, 2016, the Custodian responded to the Complainant in writing advising that his office located a one (1) page “Pre-Hearing PC Placement” form, seven (7) pages of SID reports, and five (5) pages of Essex County reports. The Custodian denied access to these records, stating that they were exempt under N.J.S.A. 47:1A-1.1 (emergency/security information and security measures/surveillance techniques). Further, the Custodian stated that the records were exempt as SID records that could not be sufficiently redacted. N.J.A.C. 10A:22-2.3(a)(2). The Custodian also stated that the records were exempt because they relate to an individual and “if disclosed, would jeopardize” New Jersey Department of Corrections’ (“DOC”) operations at correctional facilities. N.J.A.C. 10A:22-2.3(a)(5). Finally, the Custodian stated that the records were exempt because “an

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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 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.

inmate shall not be permitted to inspect, examine, or obtain” records regarding other inmates. N.J.A.C. 10A:22-2.3(b)

#### Denial of Access Complaint:

On June 16, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his OPRA request to determine why he was in PC. The Complainant asserted that he is aware that SID maintained seven (7) pages of records and five (5) pages of Essex County reports. The Complainant contended that he should be allowed access to those records to ascertain their content.

#### Statement of Information:

On July 19, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 27, 2016. The Custodian certified that his search included contacting SID to obtain responsive records. The Custodian certified that he initially responded in writing on May 6, 2016 obtaining an extension to respond. The Custodian certified that he subsequently responded in writing on May 11, 2016, denying access to thirteen (13) pages of records. N.J.S.A. 47:1A-1.1; N.J.A.C. 10A:22-2.3(a)(2); N.J.A.C. 10A:22-2.3(a)(5); N.J.A.C. 10A:22-2.3(b).

The Custodian stated that this matter began with a PC<sup>4</sup> hearing. The Custodian averred that SID makes PC determinations based on their investigations. The Custodian affirmed that the responsive records consisted of: 1) the PC Pre-Hearing Placement Form (1 page); 2) SID reports (7 pages); and 3) Essex County Jail reports (5 pages).

Regarding the PC Pre-Hearing form, the Custodian argued that it was exempt under N.J.A.C. 10A:22-2.3(a)(5) as a report relating to an identified individual. The Custodian also argued that the form was exempt under the security information and procedures exemption in N.J.S.A. 47:1A-1.1. The Custodian affirmed that the form laid out the reasons for PC and indicates whether it was ultimately approved. The Custodian certified that disclosure of this form could place inmates, who are already in PC due to a need for extra protection, at a greater risk. The Custodian noted that those risks included threats, gang actions, discovery as an informant, *etc.* The Custodian also noted that an inmate in PC could not remain with other inmates due to the fear for their safety.

Regarding the SID reports, the Custodian averred that they relate to the investigation into the PC designation. The Custodian averred that the reports include interview details, concerns of retaliation from Security Threat Groups (“STG”)<sup>5</sup> or fellow inmates, and name other inmates. The

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<sup>4</sup> PC is defined as “confinement to a secure unit designated to restrict or limit an inmate's activities and contacts with others, in order to provide protection to the inmate from injury or harm actually threatened, or reasonably believed to exist based on events, investigative reports, reports from an informant(s) or other reliable source(s) of information.” N.J.A.C. 10A:1-2.2.

<sup>5</sup> STG is defined as “a group of inmates possessing common characteristics, interests and goals that serve to distinguish the group or group members from other inmate groups or other inmates and which, as a discrete entity, poses a threat to the safety of the staff, other inmates, the community or causes damage to or destruction of property, or interrupts the safe, secure and orderly operation of the correctional [facility].” N.J.A.C. 10A:1-2.2.

Custodian further stated that the reports discuss intelligence gathering, investigative techniques, and discusses the STG network. The Custodian argued that disclosure of these reports would jeopardize the safe and secure running of the prison system by hampering intelligence gathering and exposing inmates to physical harm, extortion, or some other retaliation. The Custodian asserted that these risks would undermine DOC's primary obligation to maintain a safe and secure environment. N.J.S.A. 30:1B-3.

Regarding the Essex County Jail reports, the Custodian argued that they are exempt for the same reasons as the SID reports. The Custodian affirmed that the reports detail a fight between inmates, describe their involvement, discuss injuries and the staff response, and detail the motivation behind the fight. The Custodian certified that the reports were used by SID to investigate the PC claim against the Complainant. The Custodian asserted that disclosure would pose a risk to the Complainant, other inmates, and the prison facility as a whole.

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.

OPRA provides that:

A government record shall not include . . . emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein; [or] security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.

[N.J.S.A. 47:1A-1.1.]

OPRA also provides that its provisions:

[S]hall 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) (emphasis added).]

DOC's regulations provide that:

[T]he following records shall not be considered government records subject to public access . . . [SID] investigations records and reports, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility . . . [a] report or record 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 . . . [r]ecords related to involuntary or voluntary [PC] . . . [a]n inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate.

[N.J.A.C. 10A:22-2.3 (emphasis added).]

Further, 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)(certif. denied 193 N.J. 292 (2007)).<sup>6</sup> In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The Court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

The Court further stated that:

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<sup>6</sup> On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff'd, 24 N.J. 139 (1957)).

Here, the Complainant sought access to multiple records regarding his PC status. The Custodian denied access to three (3) records citing OPRA and DOC's regulations. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9; N.J.A.C. 10A:22-2.3. Those exemptions include SID reports, if redaction would not suffice to protect any person or facility, records relating to an individual that would jeopardize the safe and secure operation of a facility, and a prohibition against inmates possessing records concerning other inmates.

However, also included in DOC's regulations is an exemption specific to records relating to PC. N.J.A.C. 10A:22-2.3(a)(10). Notwithstanding that the Custodian did not identify this exemption in either his denial or as part of the SOI, it is clear that the exemption applies here. Thus, the GRC must exercise its *sua sponte* authority in finding that the records sought, which pertain specifically to the Complainant's PC status, are exempt from disclosure pursuant to DOC's regulations.

Accordingly, the Custodian lawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Specifically, the responsive records relate to the Complainant's PC designation and are expressly exempt from access under DOC's regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(10).

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that the Custodian lawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Specifically, the responsive records relate to the Complainant's protective custody designation and are expressly exempt from access under the New Jersey Department of Corrections' regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(10).

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