



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 26, 2018 Government Records Council Meeting

Tremayne Durham
Complainant

Complaint No. 2016-258

v.

NJ Department of Corrections
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 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 Custodian has borne his burden of proving that the Internal Management Procedures responsive to the Complainant’s OPRA request item Nos. 1 and 4 are exempt from disclosure as “. . . 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.” N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See Reid v. N.J. Dep’t of Corr., GRC Complaint No. 2013-165 (January 2014).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request item Nos. 2, 3, and 5 because he certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 26th Day of June, 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: June 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Tremayne Durham¹
Complainant**

GRC Complaint No. 2016-258

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Hard copies of Standard Operating Procedures for the following topics:

1. Cell searches, body searches, pat frisk, strip searches;
2. Double lock inmates;
3. Excessive noise on the unit;
4. Mess Hall; and
5. Denial of meals to an inmate.

Custodian of Record: John Falvey
Request Received by Custodian: August 19, 2016
Response Made by Custodian: August 19, 2016
GRC Complaint Received: September 15, 2016

Background³

Request and Response:

On an unknown date, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 19, 2016, the Custodian responded in writing denying access to two (2) Internal Management Procedures (“IMP”) responsive to item Nos. 1 and 4 as a security risk under N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9. The Custodian also denied access to item Nos. 2, 3, and 5 because no responsive records were located.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Nicole Adams.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On September 15, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant provided no arguments as to why he believed the Custodian unlawfully denied him access to the requested records.

Statement of Information:

On October 19, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 19, 2016. The Custodian certified that he responded in writing on the same day denying access to two (2) records responsive to item Nos. 1 and 4, and advising that no other records were located.

The Custodian stated that OPRA exempts access to records containing “emergency or security information or procedures for any building or facility which, if disclosed, would jeopardize security of the building or facility or persons therein” N.J.S.A. 47:1A-1.1. Further, the Custodian stated that OPRA also exempts access to records containing “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property . . .” Id. The Custodian also stated that the Courts have long deferred to the New Jersey Department of Corrections (“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. N.J. 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[.]”).

Regarding item No. 1, the Custodian contended that the responsive IMP was exempt under N.J.S.A. 47:1A-1.1. The Custodian argued that disclosure of the IMP would reveal details of prison search procedures. The Custodian affirmed that the IMP contained staff assignments, areas of search, how searches are conducted and documented, and the timing of searches. The Custodian argued that disclosing this IMP would give inmates insight in interior safety protocols and they could use this knowledge to circumvent search activities for nefarious purposes. The Custodian argued that disclosure would intrinsically place staff, other inmates, and visitors in jeopardy.

Regarding item No. 4, the Custodian argued that the responsive IMP was similarly exempt under N.J.S.A. 47:1A-1.1. The Custodian affirmed that the IMP contained staff and inmate job assignments, timing of mess hall activities, and mess hall officer shift information. The Custodian further affirmed that the IMP detailed how staff coordinates inmate movement and how to respond to emergencies. The Custodian contended that disclosure of the IMP would give inmates the same insight as discussed above, which would jeopardize staff, other inmates, or visitors.

Regarding item Nos. 2, 3, and 5, the Custodian affirmed that he did not locate any responsive records. The Custodian thus contended that he lawfully denied access to these items,

especially in the absence of any contrary evidence. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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.

Item Nos. 1 and 4

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.]

The Council has previously addressed whether the forgoing provision applied to DOC IMPs. In Reid v. N.J. Dep't of Corr., GRC Complaint No. 2013-165 (January 2014), the complainant sought access to an IMP for the “North Compound Close Custody Housing Unit” (“Unit”). The custodian denied access under N.J.S.A. 47:1A-1.1, which resulted in the filing of GRC 2013-165. In the SOI, the custodian argued that he lawfully denied access because the IMP contained safety and security measures taken by staff. The custodian further argued that the measures included the Unit’s physical setup, searches, and inmate movements. The Council looked to its prior decision in Fischer v. N.J. Dep't of Corr., GRC Complaint No. 2005-171 (February 2006) and held that the denial of access was lawful. The Council reasoned that:

In both cases, the complainants sought procedures for a unit within a prison facility and were denied access under N.J.S.A. 47:1A-1.1. Here, as in Fischer, the GRC is satisfied that disclosure of [the IMP] to the Complainant could pose a significant risk to the safe and secure operation of the NJSP for the reasons expressed by the Custodian. An inmate seeking to exploit facility weaknesses to plot escapes, assaults, or other prohibited activity would be given an advantage by having intimate knowledge of the procedures found in [the IMP]. Thus, the responsive records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

[Id. at 3.]

Here, the Complainant's OPRA request item Nos. 1 and 4 sought access to IMPs for cell searches, body searches, pat frisk, strip searches; and the Mess Hall. The Custodian denied access under N.J.S.A. 47:1A-1.1, and subsequently argued in the SOI that both IMPs contained a host of sensitive information. For the IMP responsive to item No. 1, the Custodian affirmed that the record comprised of staff assignments, areas of search, how searches are conducted and documented, and the timing of searches. For the IMP responsive to item No. 4, the Custodian affirmed that the record comprised of staff and inmate job assignments, timing of mess hall activities, and mess hall officer shift information.

In comparing the IMPs at issue here to the IMP in Reid, GRC 2013-165, the GRC is persuaded that the Custodian's denial of access was lawful. Here, as in Reid, the IMPs contain highly sensitive information that could be used to exploit facility protocols for nefarious purposes. The GRC is satisfied that such an exploitation would jeopardize the safety and security of both DOC facilities and the persons therein. For this reason, and in accordance with Reid, no unlawful denial of access to the responsive IMPs occurred.

Accordingly, the Custodian has borne his burden of proving that the IMPs responsive to the Complainant's OPRA request item Nos. 1 and 4 are exempt from disclosure as ". . . 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." N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See Reid, GRC 2013-165.

Item Nos. 2, 3, and 5

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. Here, the Custodian denied access to the Complainant's OPRA request item Nos. 2, 3, and 5 stating that no records existed. The Custodian subsequently certified to those facts in the SOI and argued that he did not unlawfully deny access in the absence of any evidence to the contrary. To this end, there is no evidence in the record to refute that the Custodian did not possess the responsive records.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item Nos. 2, 3, and 5 because he certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian has borne his burden of proving that the Internal Management Procedures responsive to the Complainant's OPRA request item Nos. 1 and 4 are exempt from disclosure as ". . . 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." N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See Reid v. N.J. Dep't of Corr., GRC Complaint No. 2013-165 (January 2014).

2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request item Nos. 2, 3, and 5 because he certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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

June 19, 2018