



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2019 Government Records Council Meeting

Darius Heiner Gittens
Complainant

Complaint No. 2017-03

v.

NJ Department of Corrections
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 2019 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 Internal Management Procedure responsive to the Complainant’s December 20, 2016 OPRA request is exempt from disclosure under OPRA pursuant to New Jersey Department of Corrections’ regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(9). Thus, the Custodian lawfully denied access to the request record. N.J.S.A. 47:1A-6. Further, because the responsive record is exempt from disclosure under the New Jersey Department of Corrections’ regulations, the GRC declines to address whether the other asserted exemptions apply.

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 February, 2019

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 1, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
February 26, 2019 Council Meeting**

**Darius Heiner Gittens¹
Complainant**

GRC Complaint No. 2017-3

v.

**N.J. Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: On-site inspection of: “memorandum(s), training, employee rule book sections that direct transportation officers concerning legal materials allowed and disallowed on transport to CRAF.”

Custodian of Record: John Falvey
Request Received by Custodian: December 20, 2016
Response Made by Custodian: December 20, 2016
GRC Complaint Received: January 6, 2017

Background³

Request and Response:

On December 8, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 20, 2016, the Custodian responded in writing stating that a twenty-four (24) page document identified as an Internal Management Procedure (“IMP”) was responsive to the Complainant’s request. However, the Custodian stated that the IMP is exempt from disclosure under the security information and surveillance techniques provisions pursuant to N.J.S.A. 47:1A-1.1. The Custodian also cited N.J.A.C. 10A:22-2.3(a)(9).

Denial of Access Complaint:

On January 6, 2017 the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that his request sought none of the records mentioned by the Custodian in his response. The Complainant asserted that the Custodian’s mention of the IMP was meaningless and he did not know what an IMP was.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Adam Robert Gibbons.

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.

The Complainant contended that his request was unequivocal and spoke for itself. The Complainant asserted that the Custodian could have redacted the record but instead chose to deny access entirely. The Complainant requested that the GRC insist upon the Custodian's compliance with OPRA.

Statement of Information:

On March 22, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on December 20, 2016. The Custodian certified that the IMP was the only responsive record to the Complainant's request. The Custodian certified that he responded in writing on December 20, 2016 denying access to the IMP.

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 stated 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).

The Custodian also contended that he properly denied access to the IMP under DOC regulations. The Custodian stated that N.J.A.C. 10A:22-2.3(a)(9) exempted access to IMPs related to "safety and security measures, inmate movement, staffing, investigative techniques, contraband detection, intelligence gathering techniques, structural or physical plant designs, surveillance techniques, and search techniques." The Custodian contended that the IMP delineated the procedures for transporting prisoners from one facility to another, and therefore pertained to the process for taking inmates from secure facilities to public streets. Thus, the Custodian argued that should the IMP become public, the safe and orderly operation of transporting prisoners could be compromised, thereby justifying his denial of access.

Additional Submissions:

On April 3, 2017, the Complainant responded to the Custodian's SOI. The Complainant asserted that the Custodian failed to explain why there was no mention of the Complainant's request for indices to the IMP, memos, or other documents that were part of his request. The Complainant also contended that the Custodian did not explain why he could not have redacted the IMP instead of denying access completely.

The Complainant asserted that the Custodian possessed more responsive records than just the IMP. The Complainant requested that the GRC not only require the Custodian to redact and produce the IMP, but to also provide those other responsive records.

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 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).]

In the complaint before the Council, the Complainant sought access to records pertaining to policies, training materials, and memoranda regarding the transport of prisoners. The Custodian located an IMP responsive to the request, but denied access to the record under, among other exemptions, DOC’s regulations. In response to the Denial of Access Complaint, the Custodian certified in the SOI that the IMP delineates the procedures for transporting prisoners from one facility to another, and therefore pertains to the process for taking inmates from secure facilities to public streets. The Custodian argued that he thus lawfully denied access to the responsive record.

The GRC’s case law in recognizing exemptions contained in DOC’s regulations as a lawful denial of access under OPRA is extensive. See Robinson v. N.J. Dep’t of Corr., GRC Complaint No. 2012-129 (May 2013) (holding that the custodian lawfully denied access to a preliminary incident report under DOC’s regulations); Riley v. N.J. Dep’t of Corr., GRC Complaint No. 2013-345 (July 2014) (holding that the custodian lawfully denied access to mental health records under N.J.A.C. 10A:22-2.3(a)(4)); 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)). On December 19, 2016, DOC promulgated new OPRA regulations that included five (5) new exemptions. One of these exemptions was for IMPs:

[T]he following records shall not be considered government records subject to public access . . . [a]ll internal management procedures, or any portion thereof, including any portions of those procedures and/or any indexes or lists identifying the procedures related to the following: safety and security measures, *inmate movement*, staffing, investigative techniques, contraband detection, intelligence gathering techniques, structural or physical plant designs, surveillance techniques, and search techniques;

[N.J.A.C. 10A:22-2.3(a)(9) (emphasis added).]

Based on the forgoing, it is clear that the requested record is exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(9).

Accordingly, the IMP responsive to the Complainant's December 20, 2016 OPRA request is exempt from disclosure under OPRA pursuant to DOC's regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(9). Thus, the Custodian lawfully denied access to the request record. N.J.S.A. 47:1A-6. Further, because the responsive record is exempt from disclosure under DOC's regulations, the GRC declines to address whether the other asserted exemptions apply.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Internal Management Procedure responsive to the Complainant's December 20, 2016 OPRA request is exempt from disclosure under OPRA pursuant to New Jersey Department of Corrections' regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(9). Thus, the Custodian lawfully denied access to the request record. N.J.S.A. 47:1A-6. Further, because the responsive record is exempt from disclosure under the New Jersey Department of Corrections' regulations, the GRC declines to address whether the other asserted exemptions apply.

Prepared By: Samuel A. Rosado
Staff Attorney

February 19, 2019