



State of New Jersey  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**April 30, 2019 Government Records Council Meeting**

Ricky Roman  
Complainant

Complaint No. 2017-47

v.

NJ Department of Corrections  
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 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 phone call records responsive to the Complainant’s OPRA request are 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)(12). 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 applicable regulation, the GRC declines to address whether the Custodian had an obligation to transcribe the calls under N.J.S.A. 47:1-5(d).

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 30<sup>th</sup> Day of April 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: May 3, 2019**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
April 30, 2019 Council Meeting**

**Ricky Roman<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-47**

v.

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

**Records Relevant to Complaint:** Audio recording and transcript of telephone calls made to a specific telephone number at New Jersey State Prison (“NJSP”) from 8:45 a.m. through 9:45 a.m. on February 7, 2016 “to be reproduced in paper form . . .”

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** December 6, 2016  
**Response Made by Custodian:** December 6, 2016  
**GRC Complaint Received:** March 3, 2017

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

**Request and Response:**

On November 24, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 6, 2016, the Custodian responded in writing asking whether the Complainant sought an audio recording or transcripts. On January 3, 2017, the Complainant responded stating that he wanted both. On January 10, 2017, the Custodian responded denying the Complainant’s OPRA request. Regarding the audio recording, the Custodian stated that same was exempt under N.J.A.C. 10A:22-2.3(a)(12). Regarding the transcript, the Custodian replied that no transcript existed because the New Jersey Department of Corrections (“DOC”) did not make or maintain phone call transcripts.

**Denial of Access Complaint:**

On March 3, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted first argued that the Custodian unlawfully denied access to his request for transcript of the responsive recordings under N.J.S.A.

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

<sup>2</sup> “Represented by Deputy Attorney General Erica R. Heyer.

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

47:1A-5(d). The Complainant argued that the Custodian had an obligation to convert the recordings into transcripts. The Complainant noted that he had an interest in receiving the recording converted to transcripts because he needed them for a court proceeding.<sup>4</sup>

The Complainant next argued that the Custodian's denial was an "attempt to confuse" him with irrelevant citations. The Complainant argued that he was allowed to make phone calls under N.J.A.C. 10A:18-8.7; thus, the calls could be disclosed under OPRA. The Complainant also noted that it was illogical to assume disclosure resulted in a security issue because he was already approved by DOC to use the numbers in question. The Complainant further contended that the responsive record does not fall within any cited exemption, as same was not "investigative" in nature.

Finally, the Complainant argued that the Custodian violated OPRA by failing to return the OPRA request form back to him. N.J.S.A. 47:1A-5(g). The Complainant also contended that Magargal v. N.J. Dep't of Military & Veterans Affairs, GRC Complaint No. 2007-250 (November 2007) did not apply here because the Custodian received the request and responded to it.

#### Statement of Information:

On April 4, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on December 6, 2016, which sought "sound recordings . . . to be produced on paper form." The Custodian certified that he responded on the same day seeking clarification, to which the Complainant replied that he wished to obtain both an audio recording and transcripts. The Custodian certified that he responded in writing on January 10, 2017 denying the request under DOC regulations and because no transcript existed.

The Custodian argued that he lawfully denied access to the responsive records because DOC's regulations expressly exempt them. N.J.A.C. 10A:22-2.3(a)(12). The Custodian argued that OPRA recognizes exemptions existing in State regulations. N.J.S.A. 47:1A-9; Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-65 (2012). The Custodian thus contended that the instant complaint should be dismissed.

The Custodian also argued that he lawfully denied access to the requested transcripts because none existed. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian affirmed that DOC did not make or maintain transcripts of phone calls. The Custodian averred that the Complainant failed to provide any evidence to the contrary; thus, this portion of the subject request was properly denied.

#### Additional Submissions:

On April 10, 2017, the Complainant submitted a letter reply to the SOI. The Complainant first argued that the SOI was incomplete because the Custodian did not attach the subject OPRA request and all communications between the parties. The Complainant reiterated that the Custodian violated OPRA by failing to respond "on the form" and return it to him. N.J.S.A. 47:1A-5(g). The Complainant also reasserted the reasons that he believed he was unlawfully denied access to the

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<sup>4</sup> The Complainant cited to Dugan v. Camden Cnty. Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005),

responsive records. The Complainant thus contended that the GRC must order DOC to “convert” the audio recordings into transcripts and disclose them. N.J.S.A. 47:1A-5(d).

The Complainant also contended that N.J.S.A. 47:1A-9(a) permitted him to obtain access to the responsive records. Specifically, the Complainant argued that OPRA “shall not abrogate . . . from public access . . . any . . . Rules of court.” Id. The Complainant argued that he needed the calls for “Newly Discovered Evidence,” which is covered under N.J. Court Rules, R. 3:20-1(2).

The Complainant finally argued that the Custodian’s standalone SOI certification was not valid because of the inclusion of “to the best of my knowledge” in the certification language.

## 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).]

DOC’s regulations provide that “the following records shall not be considered government records subject to public access . . . [*records and/or content related to inmate phone, e-mail, or visit information*]”. N.J.A.C. 10A:22-2.3(a)(12) (emphasis added).

In the complaint before the Council, the Complainant sought access to audio recordings and transcripts of phone calls he made between 8:45 a.m. and 9:45 a.m. on February 7, 2016. After receiving clarification, the Custodian responded on January 10, 2017 denying access to said records pursuant to DOC’s regulations.

In the Denial of Access Complaint, the Complainant advanced multiple arguments for why the denial was unlawful. Included in those arguments were that the Complainant was allowed to make the telephone calls in accordance with N.J.A.C. 10A:18-8.7(a). The Complainant further argued that the responsive records were not “investigative” in nature. In response to the Denial of Access Complaint, the Custodian argued that his denial was lawful and in accordance with OPRA and prevailing case law. N.J.S.A. 47:1A-9; Harris, GRC 2011-65. In response to the SOI, the

Complainant argued that N.J.S.A. 47:1A-9(a) allowed him access because he was going to use the recordings and transcripts as discovery in court. R. 3:20-1(2).

GRC case law recognizes exemptions contained in DOC regulations as a lawful denial of access under OPRA. See Robinson v. N.J. Dep't of Corr., GRC Complaint No. 2012-129 (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)). Most recently, in December 2016, DOC promulgated new OPRA regulations that included five (5) new exemptions. One of these exemptions was the inmate phone information exemption.

The GRC is persuaded by the Custodian's argument that the requested phone information is exempt from disclosure under DOC's regulations. This is notwithstanding the potential non-existence of transcripts. The GRC cited to multiple decisions above that support such a denial.

Further, none of the Complainant's arguments disputing the denial are compelling. That the Complainant was allowed to make phone calls does not render the resulting records disclosable because DOC's regulations contain such no exception to the overall exemption. Further, the Complainant misconstrued N.J.S.A. 47:1A-9(a) by omitting the most critical part of provision: OPRA "shall not abrogate *any exemption of a public record*" contained in the Rules of court. Id. Finally, whether the Complainant had an interest in the record is of no moment. The common law right of access threshold does not similarly apply to OPRA requests. See Rowan, Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013). 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)(12).

Accordingly, the phone call records responsive to the Complainant's OPRA request are 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)(12). 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 applicable regulation, the GRC declines to address whether the Custodian had an obligation to transcribe the calls under N.J.S.A. 47:1-5(d).

Finally, the GRC briefly addresses the Complainant's allegation that the Custodian violated OPRA by not "indict[ing] the specific basis therefor on the request form and promptly return[ing] it" to the Complainant. N.J.S.A. 47:1A-5(g). In Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2010-256 (March 2012), the complainant argued that the custodian violated OPRA by failing to note the reason for denial on the submitted OPRA request form. The Council, in holding that no violation occurred, stated that it "routinely recognizes a custodian's written response to a request even when same is not on the official OPRA request form." (citing Renna v. Cnty. of Union, 407 N.J.S.A. 230 (App. Div. 2009)). The Council later reaffirmed this position in Valdes v. Twp. of Belleville (Essex), GRC Complaint No. 2012-181 (June 2013) at 3. Thus, it follows that no violation occurred here.

## **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that the phone call records responsive to the Complainant's OPRA request are 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)(12). 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 applicable regulation, the GRC declines to address whether the Custodian had an obligation to transcribe the calls under N.J.S.A. 47:1-5(d).

Prepared By: Frank F. Caruso  
Acting Executive Director

April 30, 2019