



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**

**September 29, 2020 Government Records Council Meeting**

Henry Tukes  
Complainant

Complaint No. 2018-88, 2018-89 and 2018-90

v.

NJ Department of Corrections  
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 2020 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 did not comply fully with the Council’s July 28, 2020 Interim Order. Specifically, although the Custodian provided to the GRC nine (9) copies of the Forms were an *in camera* review, a document index, and certified confirmation of compliance to the Executive Director, he failed to do so within the prescribed time frame.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the responsive Close Watch Forms pursuant to N.J.S.A. 47:1A-6.**
3. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

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 29<sup>th</sup> Day of September 2020

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: October 1, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
September 29, 2020 Council Meeting**

**Henry Tukes<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2018-88,  
2018-89 & 2018-90<sup>2</sup>**

v.

**New Jersey Department of Corrections<sup>3</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies of “[t]he following documents related to a .204A disciplinary charge (being intoxicated):”

OPRA Request No. 1:<sup>4</sup> Records obtainable from Bo Robinson Education and Training Center (“BRT”) 377 Enterprise Avenue, Trenton, New Jersey 08638, as follows:

1. Two (2) urine results taken from March 7, 2018 and all paperwork related to the investigation of said charge
2. Any video or audio evidence related to said charge<sup>5</sup>

OPRA Request No. 2:<sup>6</sup>

1. All records relating to charge and hearing from March 2018
2. Transcript of the hearing

OPRA Request No. 3:<sup>7</sup> Records obtainable from Garden State Youth Correctional Facility (“GSYCF”), Highbridge Road, P.O. Box 11410, Yardville, N.J. 08620, as follows:

1. Documents related to the “close watch” status from March 8, 2018
2. Urine test results from March 8, 2018
3. Video footage of “close watch” from March 8, 2018
4. Urine test results and procedures from March 9, 2018

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

<sup>2</sup> These complaints have been consolidated due to the commonality of the parties and issues.

<sup>3</sup> Represented by Deputy Attorney General Suzanne Davies.

<sup>4</sup> This OPRA request is the subject of GRC Complaint No. 2018-88.

<sup>5</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>6</sup> This OPRA request is the subject of GRC Complaint No. 2018-89.

<sup>7</sup> This OPRA request is the subject of GRC Complaint No. 2018-90.

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** April 30, 2018  
**Response Made by Custodian:** May 3, 2018  
**GRC Complaint Received:** May 16, 2018

**Records Submitted for *In Camera* Examination:** New Jersey Department of Corrections (“DOC”) Close Watch Forms (16 pages).

### **Background**

#### **July 28, 2020 Council Meeting:**

At its July 28, 2020 public meeting, the Council considered the July 21, 2020 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, found that:

1. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request No. 1, item No. 1 and OPRA request No. 3, item No. 2 seeking urine reports on March 7, and 8, 2018. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian has borne his burden of proof that he did not unlawfully deny access to the Complainant’s OPRA request No. 1, item No. 2 and OPRA request No. 3, item No. 3 seeking audio and video coverage from Bo Robinson Education and Training Center and Garden State Youth Correctional Facility. Specifically, the Custodian 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).
3. The Custodian has borne his burden of proof that he did not unlawfully deny access to the Complainant’s OPRA request No. 2, item No. 2 seeking a transcript of his disciplinary hearing from March 2018. Specifically, the Custodian 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).
4. The Custodian has borne his burden of proof that no unlawful denial of access to the Complainant’s OPRA request No. 3, item No. 4 seeking urine test results from March 9, 2018 occurred. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that he provided all records that existed. N.J.S.A. 47:1A-6; see Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
5. Pursuant to Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the denied records responsive to

OPRA request No. 3, Item No. 1 to determine the validity of the Custodian's assertion that they were lawfully denied because said records contain material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

6. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 5 above), a document or redaction index<sup>9</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>10</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On July 29, 2020, the Council distributed its Interim Order to all parties.<sup>11</sup> On August 13, 2020, the Government Records Council ("GRC") received the Custodian's response to the Interim Order. Therein, the Custodian certified that was providing nine (9) unredacted copies of the Close Watch Forms for *in camera* review. The Custodian also affirmed that attached was a document index indicating that the Forms were exempt from disclosure under N.J.S.A. 47:1A-1.1.

#### Analysis

##### Compliance

At its July 28, 2020 meeting, the Council ordered the Custodian to provide to the GRC nine (9) unredacted copies of the responsive Close Watch Forms for *in camera* review, as well as a document index. The Council further ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4, to the Executive Director. On July 29, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 5, 2020.

On August 13, 2020, the eleventh (11<sup>th</sup>) business day after receipt of the Council's Order, the GRC received the Custodian's compliance package. Therein, the Custodian included nine (9) copies of the unredacted Close Watch Forms, a document index, and certified confirmation of compliance, as required by the Order.

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<sup>8</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>9</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>11</sup> On August 11, 2020, in response to a status update request, Custodian's Counsel advised the GRC that her office sent the Custodian's compliance package via regular mail.

Notwithstanding that the Custodian's compliance package included all documentation required by the Order, same was untimely. That is, the GRC's order clearly states that a custodian has discretion on choosing overnight mail, regular mail, or hand-delivery to deliver *in camera* documents. See Tukes v. N.J. Dep't of Corr., GRC Complaint No. 2018-88, *et seq.* (Interim Order dated July 28, 2020) at FN 9. However, the Order also requires that a custodian ensure that the GRC physically receives the package by the deadline. Id. Here, the envelope was not postmarked until August 6, 2020 and not received by the GRC until August 13, 2020. Further, neither the Custodian nor Counsel sought an extension to cover the additional time necessary to allow for any delays with regular mail.

Therefore, the Custodian did not comply fully with the Council's July 28, 2020 Interim Order. Specifically, although the Custodian provided to the GRC nine (9) copies of the Forms were an *in camera* review, a document index, and certified confirmation of compliance to the Executive Director, he failed to do so within the prescribed time frame.

### **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. N.J.S.A. 47:1A-6.

OPRA provides that:

A government record shall not include the following information which is deemed to be confidential . . . 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 [and] 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 the disclosability of certain DOC records where the Custodian cited the emergency and security exemptions. For example, in Reid v. N.J. Dep't of Corr., GRC Complaint No. 2013-165 (January 2014), the complainant sought access to an Internal Management Procedure ("IMP") for the "North Compound Close Custody Housing Unit" ("Unit"). The custodian denied access under N.J.S.A. 47:1A-1.1, and the complainant filed that complaint. In the Statement of Information, 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 [New Jersey State Prison] 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. See also Durham v. N.J. Dep't of Corr., GRC Complaint No. 2012-35 (March 2013); Abdur-Raheem v. N.J. Dep't of Corr., GRC Complaint No. 2016-204 (February 2020).]

In the matter before the Council, the GRC conducted an *in camera* examination on the submitted "Closed Watch Forms" and finds that the Custodian lawfully denied access to them under OPRA. N.J.S.A. 47:1A-1.1. First and foremost, the forms include detailed instructions for officers on how to conduct a close watch, including examples. Further, the form includes codes used for certain activities observed during those close watch periods. The dissemination of these prescribed surveillance techniques would inherently create a risk to personnel within DOC's facilities.

However, and most compelling, is the log-based table on each which denotes time, code, and observation description. An inmate armed with even redacted copies of these forms will easily be able to subvert the close watch process to the detriment of DOC's facilities and the personnel therein. That is, even if the forms were redacted, the inmate would be able to glean those occasions which DOC personnel were performing their close watch obligation, thus allowing them to predict the observation schedule with better certainty. Although the Forms are not the same as those records contemplated in Reid, GRC 2013-165 and the other cited cases, disclosure would result in the same security and surveillance issues that OPRA's exemptions are meant to prevent.

Thus, the responsive Close Watch Forms are exempt from disclosure under OPRA because they contained emergency and security information, the disclosure of which would jeopardize, and create a risk to, DOC's facilities and personnel. N.J.S.A. 47:1A-1.1; Reid, GRC 2013-165. Thus, the Custodian did not unlawfully deny access to the responsive Close Watch Forms. N.J.S.A. 47:1A-6.

Finally, because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not comply fully with the Council's July 28, 2020 Interim Order. Specifically, although the Custodian provided to the GRC nine (9) copies of the Forms

were an *in camera* review, a document index, and certified confirmation of compliance to the Executive Director, he failed to do so within the prescribed time frame.

2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the responsive Close Watch Forms pursuant to N.J.S.A. 47:1A-6.**
3. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Executive Director

September 22, 2020





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

**INTERIM ORDER**

**July 28, 2020 Government Records Council Meeting**

Henry Tukes  
Complainant

Complaint No. 2018-88, 2018-89 and 2018-90

v.

NJ Department of Corrections  
Custodian of Record

At the July 28, 2020 public meeting, the Government Records Council (“Council”) considered the July 21, 2020 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 proof that he lawfully denied access to the Complainant’s OPRA request No. 1, item No. 1 and OPRA request No. 3, item No. 2 seeking urine reports on March 7, and 8, 2018. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian has borne his burden of proof that he did not unlawfully deny access to the Complainant’s OPRA request No. 1, item No. 2 and OPRA request No. 3, item No. 3 seeking audio and video coverage from Bo Robinson Education and Training Center and Garden State Youth Correctional Facility. Specifically, the Custodian 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).
3. The Custodian has borne his burden of proof that he did not unlawfully deny access to the Complainant’s OPRA request No. 2, item No. 2 seeking a transcript of his disciplinary hearing from March 2018. Specifically, the Custodian 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).
4. The Custodian has borne his burden of proof that no unlawful denial of access to the Complainant’s OPRA request No. 3, item No. 4 seeking urine test results from March 9, 2018 occurred. Specifically, the Custodian certified in the Statement of Information,



and the record reflects, that he provided all records that existed. N.J.S.A. 47:1A-6; see Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

5. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the denied records responsive to OPRA request No. 3, Item No. 1 to determine the validity of the Custodian's assertion that they were lawfully denied because said records contain material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
6. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 5 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of July 2020

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: July 29, 2020**

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<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>2</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 28, 2020 Council Meeting**

**Henry Tukes<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2018-88,  
2018-89 & 2018-90**

v.

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

**Records Relevant to Complaint:** Hardcopies of “[t]he following documents related to a .204A disciplinary charge (being intoxicated):”

OPRA Request No. 1:<sup>3</sup> Records obtainable from Bo Robinson Education and Training Center (“BRT”) 377 Enterprise Avenue, Trenton, New Jersey 08638, as follows:

1. Two (2) urine results taken from March 7, 2018 and all paperwork related to the investigation of said charge
2. Any video or audio evidence related to said charge<sup>4</sup>

OPRA Request No. 2:<sup>5</sup>

1. All records relating to charge and hearing from March 2018
2. Transcript of the hearing

OPRA Request No. 3:<sup>6</sup> Records obtainable from Garden State Youth Correctional Facility (“GSYCF”), Highbridge Road, P.O. Box 11410, Yardville, N.J. 08620, as follows:

1. Documents related to the “close watch” status from March 8, 2018
2. Urine test results from March 8, 2018
3. Video footage of “close watch” from March 8, 2018
4. Urine test results and procedures from March 9, 2018

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

<sup>2</sup> Represented by Deputy Attorney General Suzanne Davies.

<sup>3</sup> This OPRA request is the subject of GRC Complaint No. 2018-88.

<sup>4</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>5</sup> This OPRA request is the subject of GRC Complaint No. 2018-89.

<sup>6</sup> This OPRA request is the subject of GRC Complaint No. 2018-90.

Henry Tukes v. New Jersey Department of Corrections, 2018-88, 2018-89 and 2018-90 – Findings and Recommendations of the Executive Director

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** April 30, 2018  
**Response Made by Custodian:** May 3, 2018  
**GRC Complaint Received:** May 16, 2018

### Background<sup>7</sup>

#### Request and Response:

On April 16, 2018, the Complainant submitted three (3) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On May 3, 2018, the Custodian responded to each OPRA request as follows:

#### OPRA request No. 1

1. No records exist.
2. Sixteen (16) pages of records are being disclosed with redactions of emergency and security information, medical information, and information concerning other inmates. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(4)-(5) and (b).

#### OPRA request No. 2

1. Sixteen (16) pages of records are being disclosed with redactions for emergency and security information, medical information, and information concerning other inmates. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(4)-(5) and (b).
2. No records exist.

#### OPRA request item No. 3

1. Access to sixteen (16) pages of “Close Watch Forms” is denied under the emergency and security exemption. N.J.S.A. 47:1A-1.1.
2. No records exist.
3. No records exist.
4. Three (3) pages of records are being disclosed in their entirety.

#### Denial of Access Complaint:

On May 16, 2018, the Complainant filed three (3) Denial of Access Complaints with the Government Records Council (“GRC”).

#### GRC 2018-88:

The Complainant asserted that his OPRA request No. 1 sought the results of two (2) urine

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<sup>7</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.  
Henry Tukes v. New Jersey Department of Corrections, 2018-88, 2018-89 and 2018-90 – Findings and Recommendations of the Executive Director

tests administered to him at BRT on March 7, 2018, but no responsive records were provided. The Complainant further asserted that there were no video or audio recordings produced to prove that he was intoxicated. The Complainant argued that failure to produce the records sought should result in a dismissal of the .204A charge and he should be restored to “full minimum status.” The Complainant argued that he received no records responsive to OPRA request No. 1.

GRC 2018-89:

The Complainant asserted that on March 8, 2018, he was transferred from the BRT facility to GSYCF for being deemed intoxicated. The Complainant further asserted that he was placed on “close watch” at GSYCF. The Complainant averred that he was administered a urine test at GSYCF on March 8, 2018, and again on March 9, 2018. The Complainant further averred that he received a .204A charge of being intoxicated on March 9, 2018.

GRC 2018-90:

The Complainant asserted that there should be more records in his file that were used to determine he was intoxicated. The Complainant further asserted that he requested any and all records used to find him guilty of the .204A charge, including those of the hearing officer. The Complainant further argued that eight (8) pages of the sixteen (16) pages to which the Custodian denied access should be released to him. The Complainant also argued that there existed “substantially more” records than three (3) pages provided in response to OPRA request item No. 4.

The Complainant contended that overall, he never possessed any of the results of the urine tests that were used to find him guilty. The Complainant argued that the Custodian must possess some record of the urine tests taken in order to find him guilty, otherwise the charge of being intoxicated should have been dismissed. Additionally, the Complainant argued that close watch areas are equipped with camera surveillance and that footage should be disclosed for court proceedings to determine the validity of the .204A charge.

Statement of Information:

On June 26, 2018, the Custodian filed two (2) Statements of Information (“SOI”) relevant to GRC 2018-88 and 2018-89.

GRC 2018-88:

The Custodian certified that he received the Complainant’s OPRA request No. 1 on April 30, 2019. The Custodian certified that he searched the Complainant’s inmate file as well as his disciplinary file. The Custodian certified that there were no records responsive to item No. 1 of the Complainant’s OPRA request. The Custodian cited Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005) asserting that the Complainant failed to submit any evidence to refute his certification. The Custodian further certified that he provided sixteen (16) pages of responsive records to item No. 2.

GRC 2018-89:

The Custodian certified that he received the Complainant's OPRA request No. 2 on April 30, 2018. The Custodian certified that he provided sixteen (16) pages of redacted documents responsive to item No. 1. The Custodian certified that no responsive records existed for item No. 2. Additionally, the Custodian certified that the New Jersey Department of Corrections ("DOC") did not make, maintain, or keep on file any transcripts from any inmate disciplinary hearings. The Custodian cited Pusterhofer, GRC 2005-49 asserting that the Complainant failed to submit any evidence to refute his certification.

On June 29, 2018, the Custodian filed a third (3<sup>rd</sup>) SOI relevant to GRC 2018-90.

GRC 2018-90:

The Custodian certified that he received the Complainant's OPRA request No. 3 on April 30, 2019. The Custodian certified that his search located sixteen (16) pages of "Close Watch Forms" exempt from disclosure pursuant to N.J.S.A. 47:1A-1, as well as three (3) disclosable pages. The Custodian certified that he responded in writing on May 3, 2018 denying access to item Nos. 1, 2, and 3 of the subject OPRA request. The Custodian asserted that the "Close Watch Forms" were logs of the intervals in which inmates are observed while on "close watch" status. The Custodian contended that inmates could use this information to successfully harm themselves while under observation. The Custodian argued that the release of said records would create a safety risk to inmates as well as the facility.

The Custodian certified that no responsive records existed for item Nos. 2 and 3. The Custodian certified that he provided three (3) pages of records containing urine results from March 9, 2018 in response to item No. 4. The Custodian certified that no additional responsive records existed in response to this request item.

Additional Correspondence:

On October 2, 2019, the GRC requested additional information from the Custodian. Specifically, the GRC asked the following question:

1. Did the Custodian withhold the same records in Tukes, GRC 2018-90 that were disclosed in Tukes, GRC 2018-88 and Tukes, GRC 2018-89? If no, please identify the records responsive to each of the subject OPRA requests and whether same were disclosed, with or without redactions, or denied.

On January 24, 2020, the Custodian responded to the GRC's request for additional information. Therein, the Custodian certified that:

1. In Tukes, GRC 2018-88 and Tukes, GRC 2018-89, the Custodian disclosed sixteen (16) pages of records responsive to the Complainant's OPRA request for all charges and documents and the staff reports related to a March 7, 2018 disciplinary charge. These records included the "Adjudication of Disciplinary Charge" form (3 pages)

- Investigation of Alleged Infraction (1page), Preliminary Incident Report (2 pages), Authorization for Prehearing Disciplinary Housing Placement (2 pages), Disciplinary/ Administrative Discharge Summary (2 pages), Special Incident Report Form (3 pages), Memo from Supervisor of Operations (1 page), Special Report (1 page).
2. The disclosed records were redacted pursuant to N.J.S.A. 47:1A-1 and N.J.A.C. 10A:22-2.3 (a) (5).
  3. Sixteen (16) pages of responsive records were located for Tukes, GRC 2018-90, however those records were withheld pursuant to N.J.S.A. 47:1A-1.
  4. The Custodian certified that the sixteen (16) pages withheld in Tukes, GRC 2018-90 were different from those disclosed in Tukes, GRC 2018-88 and Tukes, GRC 2018-89 because they related to “close watch” rather than the disciplinary charge.

### 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.

#### Urine test results March 7, 2018 and March 8, 2018:

The Council has previously found that, in light of a custodian’s certification that no records responsive to the request exist, no unlawful denial of access occurred. In Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant’s request existed. The complainant submitted no evidence to refute the custodian’s certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

In the instant matter, the Complainant’s OPRA request No. 1, item No. 1, and OPRA request No. 3, item No. 2 sought the results of urine tests taken on March 7, 2018 and March 8, 2018. The Complainant asserted that he had never possessed any of the urine tests that were used to find him guilty of the .204 disciplinary charge of being intoxicated. The Custodian certified in the SOI that no records responsive to either request item existed. There is no credible evidence in the record to refute this certification. The GRC notes that the Complainant also failed to substantiate his assertion that he was tested on the days in question.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request No. 1, item No. 1 and OPRA request No. 3, item No. 2 seeking urine reports on March 7, and 8, 2018. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. Pusterhofer, GRC 2005-49.

#### Audio and Video Coverage from BRT and GSYCF:

As noted above, the Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, no unlawful denial of access occurred. In Pusterhofer, GRC 2005-49. In the matter before the Council, the Complainant's OPRA request No. 1, item 2 and OPRA request No. 3, item 3 requested audio and video surveillance footage from the BRT and GSYCF facilities. The Custodian certified in the SOI that the requested footage did not exist. There is also no evidence in the record to support that any such records existed.

Therefore, the Custodian has borne his burden of proof that he did not unlawfully deny access to the Complainant's OPRA request No. 1, item No. 2 and OPRA request No. 3, item No. 3 seeking audio and video coverage from BRT and GSYCF. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

#### Transcript of hearing:

As noted above, the Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, no unlawful denial of access occurred. In Pusterhofer, GRC 2005-49. The Complainant's OPRA request No. 2, item No. 2 sought a transcript of the March 2018 hearing where he was found guilty of the .204 charge. The Custodian responded denying access because no records existed. In the Denial of Access Complaint, the Complainant argued that he received the .204 charge on March 9, 2018. The Custodian certified in the SOI that the DOC did not maintain transcripts of any of its disciplinary hearings.

Therefore, the Custodian has borne his burden of proof that he did not unlawfully deny access to the Complainant's OPRA request No. 2, item No. 2 seeking a transcript of his disciplinary hearing from March 2018. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

#### Urine tests results March 9, 2018:

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Council held that a custodian did not unlawfully deny access to a request where they certified, and the record reflected, that they provided all records responsive to a request. Here, the Complainant's OPRA request No. 3, item No. 4 sought urine test results from March 9, 2018. The Custodian responded disclosing three (3) pages of responsive records without redactions. The Complainant subsequently argued that "substantially more" records existed than those the Custodian disclosed. In the SOI, the Custodian certified that no additional responsive records existed. As stated above, the Complainant did not provide any credible evidence to support his assertion that additional records existed.



Therefore, the Custodian has borne his burden of proof that no unlawful denial of access to the Complainant's OPRA request No. 3, item No. 4 seeking urine test results from March 9, 2018 occurred. Specifically, the Custodian certified in the SOI, and the record reflects, that he provided all records that existed. N.J.S.A. 47:1A-6; see Burns, GRC 2005-68.

“Close Watch Forms”

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>8</sup> dismissing the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The Court stated that “OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court also stated that:

The statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Complainant's OPRA request No. 3, item No. 1 sought documents related to his “close watch” status from March 8, 2018. The Custodian denied access under the emergency and security exemptions. N.J.S.A. 47:1A-1.1. The Complainant generally argued in the Denial of Access Complaint that the requested records should be provided to him. The Custodian reaffirmed his denial in the SOI, arguing that the sixteen (16) pages of records related to the intervals at which inmates on “close watch” were observed.

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<sup>8</sup> Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).  
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Upon review of the arguments advanced by the parties, the GRC cannot determine whether the Custodian properly denied access to the responsive “close watch” forms. Further, there is no precedential case law supporting an outright denial to the “close watch” forms. For these reasons, “meaningful review” is necessary to determine whether the responsive “close watch” forms contain the type of emergency and security information necessary to fall within the asserted exemption. Paff, 379 N.J. Super. at 355.

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the denied records responsive to OPRA request No. 3, Item No. 1 to determine the validity of the Custodian’s assertion that they were lawfully denied because said records contain material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request No. 1, item No. 1 and OPRA request No. 3, item No. 2 seeking urine reports on March 7, and 8, 2018. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian has borne his burden of proof that he did not unlawfully deny access to the Complainant’s OPRA request No. 1, item No. 2 and OPRA request No. 3, item No. 3 seeking audio and video coverage from Bo Robinson Education and Training Center and Garden State Youth Correctional Facility. Specifically, the Custodian 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).
3. The Custodian has borne his burden of proof that he did not unlawfully deny access to the Complainant’s OPRA request No. 2, item No. 2 seeking a transcript of his disciplinary hearing from March 2018. Specifically, the Custodian 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).
4. The Custodian has borne his burden of proof that no unlawful denial of access to the Complainant’s OPRA request No. 3, item No. 4 seeking urine test results from March

- 9, 2018 occurred. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that he provided all records that existed. N.J.S.A. 47:1A-6; see Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
5. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the denied records responsive to OPRA request No. 3, Item No. 1 to determine the validity of the Custodian's assertion that they were lawfully denied because said records contain material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
  6. **The Custodian must deliver<sup>9</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 5 above), a document or redaction index<sup>10</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>11</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
  7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Brandon Garcia  
Case Manager

July 21, 2020

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<sup>9</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>10</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>11</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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