



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

July 28, 2020 Government Records Council Meeting

Kory Shamar McClary
Complainant

Complaint No. 2019-06

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 the Custodian lawfully denied access to the Complainant’s OPRA requests seeking visitation records since same are exempt from disclosure pursuant to N.J.A.C. 10A:22-2.3(a)(12) and N.J.S.A. 47:1A-9(a). N.J.S.A. 47:1A-6. Because the records are exempt under N.J.A.C. 10A:22-2.3(a)(12), the Council declines to address the other defenses raised by the Custodian.

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 28th 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 30, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Kory Shamar McClary¹
Complainant**

GRC Complaint No. 2019-6

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint:

April 26, 2018 OPRA Request: Hard copies via U.S. mail of records of legal visits held with the Complainant's attorney from July 2011 until March 2013 under prisoner number 540014, including the dates and times of those visits.

December 3, 2018 OPRA Request: Hard copies via U.S. mail of records of legal visits held with the Complainant's attorney from February 2012 through March 2013 under prisoner number 540014, including the dates and times of those visits.

Custodian of Record: John Falvey
Request Received by Custodian: May 1, 2018; December 12, 2018
Response Made by Custodian: May 1, 2018; December 12, 2018
GRC Complaint Received: January 14, 2019

Background³

Request and Response:

On April 26, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On May 1, 2018, the Custodian responded in writing denying access to the request. The Custodian stated that under N.J.A.C. 10A:22-2.3(a)(12), "[r]ecords and/or content related to inmate phone, e-mail or visit information" were exempt from disclosure.

On December 3, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On December 12, 2018, the

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Francis Raso.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Custodian responded in writing denying access to the request. The Custodian stated that under N.J.A.C. 10A:22-2.3(a)(12), “[r]ecords and/or content related to inmate phone, e-mail or visit information” were exempt from disclosure.

Denial of Access Complaint:

On January 14, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he tried to file a complaint with the GRC regarding the May 1, 2018 OPRA request it but was returned as incomplete. The Complainant asserted that he therefore repeated the process by submitting the December 3, 2018 OPRA request. The Complainant asserted that he was only seeking a copy of his own visitation records.

Statement of Information:

On February 6, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA requests on May 1, 2018 and December 12, 2018. The Custodian certified that no search was undertaken since the records were exempt under New Jersey Department of Corrections (“DOC”) regulations. The Custodian certified that he responded in writing on May 1, 2018, and December 12, 2018 stating that the requests sought records exempt from disclosure under N.J.A.C. 10A:22-2.3(a)(12).

The Custodian asserted that although OPRA broadly defines the term “government record” under N.J.S.A. 47:1A-1.1, the public’s right of access was not absolute. Asbury Park Press v. Monmouth Cnty., 406 N.J. Super. 1, 7 (App. Div. 2006), aff’d, 201 N.J. 5 (2010). The Custodian argued that a government record can be exempt from access under OPRA pursuant to “regulation promulgated under the authority of any statute.” N.J.S.A. 47:1A-1; see also N.J.S.A. 47:1A-9(a).

The Custodian asserted that under N.J.A.C. 10A:22-2.3(a), “[r]ecords and/or content related to inmate phone, e-mail or visit information” were “not considered government records subject to public access[.]” The Custodian argued that the visitation records sought by the Complainant in both requests fell squarely within the purview of N.J.A.C. 10A:22-2.3(a)(12), and were therefore exempt under OPRA. The Custodian argued that the fact that the Complainant was seeking his own records was immaterial, asserting that OPRA was blind to requestors. Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017). The Custodian argued that if the Complainant could access these records, then anyone could.

Lastly, the Custodian argued that to the extent that the Complainant sought “dates” or “start and end time[s]” as opposed to the visitation records themselves, the requests were invalid as seeking information rather than government records. See Burke v. Brandes, 429 N.J. Super. 169, 174 (App. Div. 2012); Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005).

The Custodian argued that based on the forgoing, he did not err in denying access to the Complainant’s OPRA requests. The Custodian requested the Council dismiss the complaint with prejudice.

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:

[OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . 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; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1, *et seq.*, DOC regulations exempt access to “[r]ecords and/or content related to inmate phone, e-mail or visit information.” N.J.A.C. 10A:22-2.3(a)(12).

Furthermore, the Council has generally held that the fact that requested records pertained or referred to the complainant did not affect whether they were subject to access under OPRA. See Wassenaar v. N.J. Dep’t of Corr., GRC Complaint Nos. 2012-187 & 2012-192 (June 2013); Lobosco v. N.J. Dep’t of Health & Human Serv., Div. of Certificate of Need & Healthcare Facility Licensure, GRC Complaint No. 2010-64 (October 2010). See also Spillane, slip op at 6⁴ (dismissing appellant’s assertion that he was entitled to the requested report because it was about him).

Here, the Complainant, submitted two (2) OPRA requests seeking records pertaining to visitations he held with his attorney. The Custodian denied both requests pursuant to N.J.A.C. 10A:22-2.3(a)(12). The Complainant asserted that he was seeking his own records. In the SOI, the Custodian asserted that both OPRA requests sought records pertaining to visitation, which were exempt under DOC regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(12). The Custodian also contended that the fact that the Complainant sought his own records did not entitle him to records otherwise exempt under OPRA.

Collectively, the Complainant’s OPRA requests seek records pertaining to visitation held with his attorney while incarcerated, including specific dates and times. Such information is expressly exempt from disclosure under OPRA pursuant to N.J.A.C. 10A:22-2.3(a)(12). Additionally, that Complainant’s argument for disclosure – that he seeking his own records – is

⁴ Affirming on appeal Spillane v. N.J. Dep’t of Corr., GRC Complaint No. 2014-169 (March 2015).

immaterial here because the personal or private needs of the requestor does not justify their access to records otherwise exempt under OPRA. See Spillane, slip op. at 6.

Accordingly, the Custodian lawfully denied access to the Complainant's OPRA requests seeking visitation records since same are exempt from disclosure pursuant to N.J.A.C. 10A:22-2.3(a)(12) and N.J.S.A. 47:1A-9(a). N.J.S.A. 47:1A-6. Because the records are exempt under N.J.A.C. 10A:22-2.3(a)(12), the Council declines to address the other defenses raised by the Custodian.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to the Complainant's OPRA requests seeking visitation records since same are exempt from disclosure pursuant to N.J.A.C. 10A:22-2.3(a)(12) and N.J.S.A. 47:1A-9(a). N.J.S.A. 47:1A-6. Because the records are exempt under N.J.A.C. 10A:22-2.3(a)(12), the Council declines to address the other defenses raised by the Custodian.

Prepared By: Samuel A. Rosado
Staff Attorney

July 21, 2020