



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

May 26, 2015 Government Records Council Meeting

Michael Hayes
Complainant

Complaint No. 2014-286

v.

NJ Department of Corrections
Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 2015 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 has borne his burden of proving that the release of the requested record would jeopardize the security of the South Woods State Prison or the persons therein, because the requested records consist of security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property. N.J.S.A. 47:1A-1.1. *See also* Fischer v. NJ Dept. of Corrections, GRC Complaint No. 2005-171 (February 2006); Cordero v. NJ Dept. of Corrections, GRC Complaint No. 2012-209 (June 2013). Because the records are exempt under N.J.S.A. 47:1A-1.1, the GRC declines to address the applicability of N.J.S.A. 47:1A-3(a), N.J.A.C. 10A:22-2.3(a)(2), and N.J.A.C. 10A:22-2.3(a)(5). As such, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6.

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 May, 2015

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 28, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 26, 2015 Council Meeting**

**Michael Hayes¹
Complainant**

GRC Complaint No. 2014-286

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Copies of the “investigation notes” regarding a September 13, 2009, visit by the Complainant’s wife to South Woods State Prison and the “classification file” regarding the same incident.

Custodian of Record: John Falvey
Request Received by Custodian: June 26, 2014
Response Made by Custodian: June 27, 2014
GRC Complaint Received: August 11, 2014

Background³

Request and Response:

On June 27, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 27, 2014, the Custodian responded in writing seeking clarification as to the “incident” referred to by the Complainant, in order to identify the records sought. On July 14, 2014, the Complainant provided clarification. On July 15, 2014, the Custodian responded in writing denying access due to the responsive record being 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 person therein, and security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property,” N.J.S.A. 47:1A-1.1. The Custodian also denied access due to the fact that the requested records “pertained to an investigation in progress by any public agency,” N.J.S.A. 47:1A-3(a). Further, the Custodian denied access due to the requested records containing “Special Investigations Division investigations records and reports, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility,” N.J.A.C. 10A:22-2.3(a)(2). Finally, the Custodian denied access due to requested records “relating to an identified individual which, if disclosed, would jeopardize the safety

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

of any person or the safe and secure operation of the correctional facility or other designated place of confinement,” N.J.A.C. 10A:22-2.3(a)(5).

Denial of Access Complaint:

On August 7, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the provisions cited by the Custodian in his denial were not applicable here.

Statement of Information:

On August 27, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on June 26, 2014, and that he responded in writing on June 27, 2014, seeking clarification. The Custodian certified that the Complainant provided clarification concerning the OPRA request on July 14, 2014. The Custodian certified that he located a record responsive to the request at South Woods State Prison, consisting of a three (3) page Special Investigations Division (“SID”) Investigative Report dated October 26, 2009. The Custodian certified that this report detailed an investigation into the suspected introduction of contraband into a prison. The Custodian certified that the report described observations made by custodial staff in the visit hall at South Woods State Prison during a September 13, 2009, visit between the Complainant and two visitors. The Custodian certified that the report further detailed how the observations were made, what actions were deemed suspicious to the custodial staff, and the investigative actions taken by the SID as a result of the observations.

The Custodian certified that on July 15, 2014, he responded in writing to deny the request because the record responsive to the request was 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 person therein, and security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property pursuant to N.J.S.A. 47:1A-1.1. Additionally, the Custodian denied the request because the records pertained to an investigation in progress by a public agency pursuant to N.J.S.A. 47:1A-3(a). The Custodian also denied the request because the records consisted of Special Investigations Division investigatory records and reports. The Custodian further provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility pursuant to N.J.A.C. 10A:22-2.3(a)(2). Finally, the Custodian denied the request because the records consisted of a report or record relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement. N.J.A.C. 10A:22-2.3(a)(5).

Moreover, the Custodian certified that disclosing the responsive record would reveal the techniques used by New Jersey Department of Corrections (“DOC”) Officers when monitoring inmate visits and how the DOC investigates the introduction of contraband into prison. The Custodian certified that revealing the contents of the record would also show what DOC staff looks for and how they respond to the suspected introduction of contraband into prison. The Custodian certified that the contents of the record could be used to exploit weaknesses in the detection and investigation process, and that once practices are known, those wishing to smuggle contraband into prison could plan around the DOC’s security measures.

Additionally, while not stated in his response to the OPRA request, the Custodian maintained that prior GRC decisions held that information related to prison security was exempt from disclosure. Cordero v. NJ Dept. of Corrections, GRC Complaint No. 2012-209 (June 2013); Fischer v. NJ Dept. of Corrections, GRC Complaint No. 2005-171 (February 2006). The Custodian also noted that courts have generally deferred to the DOC when making decisions about safety and security. Jenkins v. Fauver, 108 N.J. 239, 252 (1987); Russo v. NJ Dept. of Corrections, 324 N.J. Super. 576, 584 (App. Div. 1999).

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 exempts from public access 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. The Council has previously addressed whether OPRA’s security exemption applies to records maintained by the Department of Corrections.

In Fischer, GRC 2005-171, the complainant sought access to all current and existing policies/post orders for East Jersey State Prison’s Administrative Close Supervision Unit. The custodian denied access to said records on the basis that their release would jeopardize the security of the prison. In the SOI, the custodian asserted that the requested records contain emergency and security information including when and how staff shift changes occur, when and how doors are opened, and when and how often prisoners’ cells are searched. The Council held that the custodian had borne the burden of proving that the records were exempt from disclosure under OPRA’s security exemption and lawfully denied access to said records.

Additionally, in Cordero, GRC 2012-209, the complainant’s OPRA request sought reports or documents connected to a positive reading made by a K-9 unit dog on a visitor to New Jersey State Prison. In that instance, the custodian denied access to the responsive records on the basis that said records were exempt from disclosure as emergency or security information or procedures which, if disclosed, would jeopardize the security of the building or facility or persons therein, pursuant to N.J.S.A. 47:1A-1.1. The Council held that release of the records would jeopardize the security of the New Jersey State Prison or the persons therein and that the record was exempt from public access.

In the instant matter, the Complainant’s request sought copies of the “investigation notes” and “classification file” regarding a September 13, 2009, visit by the Complainant’s wife. The Custodian certified that he located a record responsive to the request, consisting of a three (3) page SID report. The Custodian certified that the requested record detailed an investigation into the suspected introduction of contraband into the prison during the September 13 visit, described observations made by custodial staff in the visit hall at South Woods State Prison between the Complainant and two visitors, indicated how the observations were made, what actions were deemed suspicious to the staff, and described the investigative actions taken by the SID as a result of the observations. The Custodian certified that the contents of the record could be used to exploit

weaknesses in the detection and investigative process, and once practices are known, those wishing to smuggle contraband into the prison could plan around the DOC's security measures.

As was the case in Cordero, the request here concerned reports or investigative documents relating to a visitor to a New Jersey prison. The Council's decision there, and in Fischer, are applicable in this matter. Similarly here, the Custodian demonstrated that release of the requested reports, which contain sensitive information necessary to maintaining security of the prison, would jeopardize the security of South Woods State Prison.

Therefore, the Custodian has borne his burden of proving that the release of the requested record would jeopardize the security of the South Woods State Prison or the persons therein, because the requested records consist of security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property. N.J.S.A. 47:1A-1.1. *See also* Fischer, GRC 2005-17 and Cordero, GRC 2012-209. Because the records are exempt under N.J.S.A. 47:1A-1.1, the GRC declines to address the applicability of N.J.S.A. 47:1A-3(a), N.J.A.C. 10A:22-2.3(a)(2), and N.J.A.C. 10A:22-2.3(a)(5). As such, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proving that the release of the requested record would jeopardize the security of the South Woods State Prison or the persons therein, because the requested records consist of security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property. N.J.S.A. 47:1A-1.1. *See also* Fischer v. NJ Dept. of Corrections, GRC Complaint No. 2005-171 (February 2006); Cordero v. NJ Dept. of Corrections, GRC Complaint No. 2012-209 (June 2013). Because the records are exempt under N.J.S.A. 47:1A-1.1, the GRC declines to address the applicability of N.J.S.A. 47:1A-3(a), N.J.A.C. 10A:22-2.3(a)(2), and N.J.A.C. 10A:22-2.3(a)(5). As such, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6.

Prepared By: Husna Kazmir
Staff Attorney

Approved By: Dawn R. SanFilippo
Deputy Executive Director

May 19, 2015