



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 25, 2013 Government Records Council Meeting

Stephen Perry
Complainant

Complaint No. 2012-237

v.

New Jersey Department of Corrections
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 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 properly denied the Complainant access to the four (4) Special Custody Reports because the Custodian certified that disclosure of said reports would compromise the safety and security of Northern State Prison and “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” does not constitute a government record subject to disclosure. N.J.S.A. 47:1A-1.1. *See also Fischer v. Department of Corrections*, GRC Complaint No. 2005-171 (February 2006).
2. The Custodian did not unlawfully deny access to the requested video surveillance footage because the Custodian certified that no responsive record exists and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).

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 25th Day of June, 2013



I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting**

**Stephen Perry¹
Complainant**

GRC Complaint No. 2012-237

v.

**New Jersey Department of Corrections²
Custodian of Records**

Records Relevant to Complaint: New Jersey Department of Corrections incident reports dated May 9, 2012 to June 11, 2012 involving Stephen Perry and security gate C-Unit Recreation Yard, to include video surveillance, witness reports, special reports, etc.

Request Made: June 11, 2012

Response Made: June 27, 2012

GRC Complaint Filed: August 10, 2012³

Background⁴

Request and Response:

On June 11, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On June 27, 2012, the fourth (4th) business day following receipt of said request, the Custodian responded in writing denying the request because disclosure of the requested records would pose a potential safety and security issue for the correctional facility. The Custodian cited OPRA as exempting from disclosure “...emergency or security information or procedures which, if disclosed, would jeopardize the security of the building or facility or persons therein.” N.J.S.A. 47:1A-1.1. The Custodian further informed the Complainant that Executive Order No. 47 (Christie) approves regulation 10A:22-2.3(a)(4), which permits the exemption of “any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.” The Custodian states that said regulation was adopted as final on February 7, 2011.

Denial of Access Complaint:

¹ No legal representation listed on record.

² John Falvey, Custodian of Records. No legal representation listed on record.

³ The GRC received the Denial of Access Complaint on said date.

⁴ 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.

On August 10, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he provided his request to the Custodian on June 8, 2012, and that the Custodian denied his request on June 27, 2012.⁵

Statement of Information:

On August 27, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on June 21, 2012, and that he responded to the request on June 27, 2012.

The Custodian certifies that the following records, located by the staff at Northern State Prison, are responsive to the Complainant’s request:

- One (1) page Special Custody Report (Hollingsworth);
- Two (2) page Special Custody Report (Coleman);
- One (1) page Special Custody Report (Moreno);
- Two (2) page Special Custody Report (Johnson); and
- Video surveillance footage which may have captured images of the Complainant and security gate C-Unit Recreation Yard on or about May 9, 2012.

The Custodian certifies that the Special Custody Reports are not subject to disclosure because they reveal (1) how staff responds to a security gate malfunction, (2) where the controls for the gate are located, (3) the time it took to address the problem, (4) how a security gate could be defeated, and (5) injury, diagnosis and treatment for injuries sustained. The Custodian certifies that if the reports are disclosed to the Complainant such disclosure will allow information about the operation of internal security gates to be disseminated to inmates, which will compromise the safety and security of the correctional facility. The Custodian certifies that he denied access to the records pursuant to N.J.S.A. 47:1A-1.1, which exempts records related to “...emergency or security information or procedures which, if disclosed, would jeopardize the security of the building or facility or persons therein.” The Custodian also cited *N.J.A.C. 10A:22-2.3(a)(4)*, which exempts “any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation,” which the Custodian states was originally authorized pursuant to Executive Order No. 47 (Christie).⁶ The Custodian certifies that *N.J.A.C. 10A:22-2.3(a)(4)* is applicable to OPRA under N.J.S.A. 47:1A-9(a). The Custodian further cites Fischer v. Department of Corrections, GRC Complaint No. 2005-171 (February 2006), as holding that policies of a state prison were properly withheld from disclosure under OPRA because disclosure of such records could jeopardize the safety and security of the prison.

The Custodian certifies that the requested video surveillance footage responsive to the Complainant’s request, if any, would have been recorded over prior to the date of request; therefore, no such record exists.

⁵ The evidence of record reveals the Complainant’s request was dated June 11, 2012.

⁶ The Custodian did not state which portion(s) of the requested records would be subject to this exemption.

Analysis⁷

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.

“A government record shall not include...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; 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.

With respect to correctional facilities, the Council determined that where a complainant sought access to policies and post orders for a section of East Jersey State Prison, the custodian properly denied access pursuant to N.J.S.A. 47:1A-1.1 because the evidence of record revealed “...that the requested information contains procedures for emergencies [and] when doors are opening and closing...” See Fischer v. Department of Corrections, GRC Complaint No. 2005-171 (February 2006).

Special Custody Reports

The Custodian determined that four (4) Special Custody Reports were responsive to the Complainant’s request. The Custodian certified that access to these reports was denied because the reports contain, *inter alia*, how staff responds to a security gate malfunction, where the controls for the gate are located, and how a security gate could be defeated. The Custodian certified that if the reports were disclosed to the Complainant such disclosure would compromise the safety and security of the correctional facility.

OPRA provides that records pertaining to “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 [or] property” are not government records subject to disclosure. N.J.S.A. 47:1A-1.1. The Custodian certified that if the reports were disclosed to the Complainant such disclosure would compromise the safety and security of Northern State Prison.

Accordingly, the Custodian properly denied the Complainant access to the four (4) Special Custody Reports because the Custodian certified that disclosure of said reports would compromise the safety and security of Northern State Prison and “emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize

⁷ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

security of the building or facility or persons therein” does not constitute a government record subject to disclosure. N.J.S.A. 47:1A-1.1. See also Fischer, *supra*.

Since the requested record is exempt from disclosure as a record that would compromise the safety and security of a correctional facility pursuant to N.J.S.A. 47:1A-1.1, it is unnecessary for the Council to determine whether the requested record is also exempt from disclosure under *N.J.A.C. 10A:22-2.3(a)(4)* and N.J.S.A. 47:1A-9(a) as “any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.”

Video Surveillance Footage

In Pusterhofer v. New Jersey Department of Education, 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.

Here the Custodian determined that the record responsive to the Complainant’s request was video surveillance footage which may have captured images of the Complainant and security gate C-Unit Recreation Yard at Northern State Prison on or about May 9, 2012. The Custodian further certified that the requested video surveillance footage, if any, would have been recorded over prior to the date of the Complainant’s request. As such, the Custodian certified that the requested record is nonexistent.

Therefore, the Custodian did not unlawfully deny access to the requested video surveillance footage because the Custodian certified that no responsive record exists and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian properly denied the Complainant access to the four (4) Special Custody Reports because the Custodian certified that disclosure of said reports would compromise the safety and security of Northern State Prison and “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” does not constitute a government record subject to disclosure. N.J.S.A. 47:1A-1.1. See also Fischer v. Department of Corrections, GRC Complaint No. 2005-171 (February 2006).

2. The Custodian did not unlawfully deny access to the requested video surveillance footage because the Custodian certified that no responsive record exists and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013