



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

May 23, 2017 Government Records Council Meeting

King Victorious
Complainant

Complaint No. 2014-334

v.

NJ Department of Corrections
Custodian of Record

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 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 provided a lawful response to the Complainant’s October 3, 2014 OPRA request, seeking copies of envelopes subjected to heightened scrutiny under N.J.A.C. 10A:18-2.6(h), by stating that he could neither confirm or deny the existence of responsive records. N.J.S.A. 47:1A-9(a); North Jersey Media Group, Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182, 188 (App. Div. 2016). Thus, there was no unlawful denial of access. 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 23rd Day of May, 2017

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 30, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 23, 2017 Council Meeting**

**King Victorious¹
Complainant**

GRC Complaint No. 2014-334

v.

**NJ Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: “Pursuant to N.J.A.C. 10A:18-2.6(h), my name is on the authorized list which states that all my incoming correspondence is authorized to be read and maintained in the correctional facility’s Special Investigation Division or mail room . . . I am requesting . . . [c]opies of the ‘Envelopes’ of all my incoming correspondence that was authorize [sic] to be read from August 20, 2012 through July 23, 2014.”

Custodian of Records: John Falvey

Request Received by Custodian: September 18, 2014

Response Made by Custodian: September 19, 2014

GRC Complaint Received: October 2, 2014

Background

April 26, 2016 Council Meeting:

At its April 26, 2016 public meeting, the Council considered the March 22, 2016 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:

[B]ased on the insufficient evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. The complaint should also be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Macchiaverna v. NJ Dep’t of Banking & Insurance, GRC Complaint No. 2014-324 (Interim Order dated June 30, 2015).

¹ No legal representation listed on record.

² Represented by Suzanne Davies, DAG.

Procedural History:

On April 28, 2016, the Council distributed its Interim Order to all parties. On July 1, 2016, the GRC transmitted the complaint to the Office of Administrative (“OAL”). On December 13, 2016, OAL informed the Custodian’s Counsel that the Complainant had been transferred out of state to a new facility. On December 14, 2016, the Custodian’s Counsel notified OAL that the Complainant had been transferred to a facility in Oregon. On December 22, 2016, OAL sent notice to the Complainant in Oregon that the teleconference had been scheduled for March 2, 2017. The evidence in the record indicates that the Complainant failed to appear at the March 2, 2017 hearing.

On March 10, 2017, OAL transmitted the complaint back to the GRC because the Complainant failed to appear at his March 2, 2017 hearing. The Complainant subsequently failed to submit to the GRC an explanation for his failure to appear within thirteen (13) days, as provided by N.J.A.C. 1:1-18.4(a).

Analysis

Subsequent to the GRC transmitting the case to OAL, the New Jersey Appellate Division ruled on the issue of whether an agency can “neither confirm nor deny” the existence of records in response to an OPRA request. North Jersey Media Group, Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182 (App. Div. 2016).³ In that case, the plaintiff sought records under OPRA concerning an individual who was not charged with a crime. The court established a two-part test to determine when an agency may make a “Glomar”⁴ response to an OPRA request:

[T]he agency [must] (1) rel[y] upon the exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) present[] a sufficient basis for the court to determine that the claimed exemption applies.

[N. Jersey Media, 447 N.J. Super. at 188.]

In N. Jersey Media, the custodian-defendant’s initial response to the OPRA request argued that a confirmation of whether or not the subject of the request has been arrested, charged, or involved in an investigation could cause “irreparable harm” to the subject and open the defendant and its employees to civil liability. Id. at 205. It was not until after the requester-plaintiff challenged the defendant in court did they list specific OPRA exemptions: the criminal investigatory records exemption and the ongoing investigation exemption. Id. However, the court

³ The Appellate Division’s ruling in N. Jersey Media controls in the instant matter and provides the GRC with appropriate guidance on the law, thereby obviating the need for the previous referral to OAL for a fact finding hearing.

⁴ The moniker stems from Phillippi v. CIA, 546 F.2d 1009, 1011 (D.C. Cir. 1979), where the CIA responded to a Freedom of Information Act request regarding the Hughes Glomar Explorer, an oceanic ship allegedly owned by the federal government but officially listed as a private vessel.

rejected those exemptions because they only apply where government records actually exist. Id. at 207.

However, the court in N. Jersey Media noted that N.J.S.A. 47:1A-9(b) protects a preexisting grant of confidentiality for records if established by, among other authorities, judicial case law. Id. at 202. The court then highlighted pre-OPRA precedent, demonstrating the need for confidentiality pertaining to whether an individual has been arrested or charged. Id. at 203. According to the court, the grant of confidentiality benefits law enforcement in conducting investigations as well as protects the privacy interests of individuals. Id. at 203-204. Therefore, the court held that the defendant satisfied its two-part test and found that its “Glomar response” was valid. Id. at 206.

In the instant matter, the Custodian argued that acknowledging whether or not records exist would be in violation of N.J.A.C. 10A:18-2.6(h), which states that “[a] confidential list of names of inmates whose incoming correspondence is authorized to be read shall be established and maintained [] where the confidentiality of the list can be maintained.” The Custodian stated that the list contains inmates whose mail is subject to additional scrutiny to thwart illicit activities committed inside and outside the prison.

The Custodian argued that providing the Complainant with any response, whether denying access or stating that no records exist, would violate the principle behind N.J.A.C. 10A:18-2.6(h). The Custodian elaborated by stating that if he were to respond by denying access to responsive records, it would let the Complainant infer that he is on the confidential list. In the alternative, were the Custodian to respond that no responsive records exist, it would likewise let the Complainant infer that he is not on the list. In either situation, the Custodian argued that the Complainant could use the knowledge to circumvent the Special Investigation Division’s intelligence gathering and hinder its ability to maintain a safe and secure facility. Additionally, the Custodian asserted that N.J.A.C. 10A:22-2.3(a)(5) also prohibits release of redacted records, as disclosure would “jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement.” The Custodian stated that mere knowledge of whether an inmate is or is not on the list would run afoul of the stated obligations under N.J.A.C. 10A:22-2.3(a)(5).

The GRC finds that the Custodian passed the two-part test. The Custodian cited N.J.S.A. 47:1A-9(a), which states in part that OPRA “shall not abrogate any exemption of a public records or government record from public access heretofore made pursuant to . . . regulation promulgated under the authority of any statute[.]” In conjunction with N.J.A.C. 10A:18-2.6(h), the Custodian demonstrated that acknowledging the existence of responsive records would run afoul of the regulation’s stated confidentiality of the list of inmates subjected to heightened scrutiny of incoming and outgoing correspondence. Similar to the custodian in North Jersey Media, the Custodian relied upon existing authorities that establish a need for confidentiality. 447 N.J. Super. at 202-204.

Therefore, the Custodian provided a lawful response to the Complainant’s October 3, 2014 OPRA request, seeking copies of envelopes subjected to scrutiny under N.J.A.C. 10A:18-2.6(h), by stating that he could neither confirm or deny the existence of responsive records.

N.J.S.A. 47:1A-9(a); North Jersey Media, 447 N.J. Super. at 188. Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian provided a lawful response to the Complainant's October 3, 2014 OPRA request, seeking copies of envelopes subjected to heightened scrutiny under N.J.A.C. 10A:18-2.6(h), by stating that he could neither confirm or deny the existence of responsive records. N.J.S.A. 47:1A-9(a); North Jersey Media Group, Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182, 188 (App. Div. 2016). Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

Prepared By: Samuel A. Rosado
Staff Attorney

May 16, 2017



State of New Jersey
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
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KIM GUADAGNO
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CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

April 26, 2016 Government Records Council Meeting

King Victorious
Complainant

Complaint No. 2014-334

v.

NJ Department of Corrections
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 22, 2016 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 based on the insufficient evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. The complaint should also be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Macchiaverna v. NJ Dep’t of Banking & Insurance, GRC Complaint No. 2014-324 (Interim Order dated June 30, 2015).

Interim Order Rendered by the
Government Records Council
On The 26th Day of April, 2016

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: April 28, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**King Victorious¹
Complainant**

GRC Complaint No. 2014-334

v.

**NJ Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: “Pursuant to N.J.A.C. 10A:18-2.6(h), my name is on the authorized list which states that all my incoming correspondence is authorized to be read and maintained in the correctional facility’s Special Investigation Division or mail room . . . I am requesting . . . [c]opies of the ‘Envelopes’ of all my incoming correspondence that was authorize [sic] to be read from August 20, 2012 through July 23, 2014.”

Custodian of Records: John Falvey

Request Received by Custodian: September 18, 2014

Response Made by Custodian: September 19, 2014

GRC Complaint Received: October 2, 2014

Background³

Request and Response:

On September 8, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-mentioned records. On September 19, 2014, one (1) business day after receipt, the Custodian responded in writing, denying the request pursuant to N.J.S.A. 47:1A-9(b). The Custodian further stated that he could neither confirm or deny the existence of responsive records, stating that providing a definitive response would reveal the identities of individuals on the “authorized list,” thus violating the confidentiality requirement inherent in N.J.A.C. 10A:18-2.6(h). According to the Custodian, revealing such information “could be used as intelligence to thwart security measures.”

Denial of Access Complaint:

On October 3, 2014, the Complainant filed a Denial of Access Complaint with the

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.

Government Records Council (“GRC”). The Complainant argued that disclosure of whether or not he is on the list is irrelevant, claiming that he is already aware he is on the confidential list. Additionally, the Complainant provided Inmate Remedy System Forms as evidence to show he is on the list described under N.J.A.C. 10A:18-2.6(h). Moreover, the Complainant stated that he is seeking neither the confidential list itself nor copies of the correspondence

Statement of Information

On October 20, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he contacted the Special Investigations Division (“SID”) at New Jersey State Prison (“NJSP”) in his search for responsive records. In response, a representative from SID stated that confirming or denying the existence of responsive records would jeopardize the safety and security of the facility.

The Custodian stated that OPRA cannot “abrogate or erode any . . . grant of confidentiality established by . . . statute . . . which may duly be claimed to restrict public access to a public records or government records.” N.J.S.A. 47:1A-9(b).

N.J.A.C. 10A:18-2.6(h), referenced by the Complainant states that “[a] confidential list of names of inmates whose incoming correspondence is authorized to be read shall be established and maintained [] where the confidentiality of the list can be maintained.” The Custodian stated that the list is of inmates whose mail is subject to additional scrutiny to thwart illicit activities committed inside and outside the prison. The Custodian argued that providing the Complainant with any response whatsoever, either denying access or to state that no records exist, would violate the principle behind N.J.A.C. 10A:18-2.6(h).

The Custodian claimed that, if he were to respond by denying access to responsive records, it would let the Complainant know that he is on the confidential list. In the alternative, if the Custodian were to respond that no responsive records exist, it would likewise allow the inmate to infer that he is not on that confidential list. In either situation, the Custodian argued that the Complainant could use the knowledge to circumvent SID’s intelligence gathering and hinder its ability to maintain a safe and secure facility. Additionally, the Custodian asserted that N.J.A.C. 10A:22-2.3(a)(5) also prohibits release of redacted records, as disclosure would “jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement.” The Custodian stated that mere knowledge of whether an inmate is or is not on the list would run afoul of the stated obligations under N.J.A.C. 10A:22-2.3(a)(5).

Additionally, the Custodian countered the Complainant’s claim that he is already aware that he is on the confidential list as referenced under N.J.A.C. 10A:18-2.6(h). The Custodian argued that the Complainant’s evidence only reveals that his correspondence may be subject to scrutiny but does not specify the level of scrutiny applied. Furthermore, the Complainant’s evidence does not state whether he is subject to the level of scrutiny reserved for those inmates named in the confidential list under N.J.A.C. 10A:18-2.6(h).

The Custodian argued that the Courts have long deferred to DOC when making safety and security decisions. The Custodian states that DOC has “broad discretionary power” to promulgate regulations aimed at maintaining security and order inside correctional facilities. Jenkins v. Fauver, 108 N.J. 239, 252 (1987). The Custodian stated that the Courts have noted, “[p]risons are dangerous places, and the courts must afford appropriate deference and flexibility to administrators trying to manage this volatile environment.” Russo v. N.J. Dep’t of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999). *See also* Florence v. Bd. of Chosen Freeholders Burlington Cnty., 132 S.Ct. 1510, 1515 (2012) (“[m]aintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face[.]”).

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.

In Macchiaverna v. NJ Dep’t of Banking & Insurance, GRC Complaint No. 2014-324 (Interim Order dated June 30, 2015), the custodian certified that she could not confirm or deny the existence of responsive records to the complainant’s OPRA request. The custodian therefore refused to complete Item No. 9 of the SOI, which requires a document index. Because there was inadequate evidence to adjudicate the matter, the Council referred the complaint to the Office of Administrative Law (“OAL”) to resolve the facts.

In the current matter, the Custodian certified that he could neither confirm nor deny the existence of responsive records, claiming that doing so would violate the Custodian’s confidentiality obligations under N.J.A.C. 10A:18-2.6(h) and N.J.A.C. 10A:22-2.3(a)(5). Similar to Macchiaverna, the Custodian here refused to complete Item No. 9 of the SOI, which requires a document index. Thus, the GRC does not have a complete record to adjudicate the complaint. Id.

Therefore, based on the insufficient evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the OAL for a hearing to resolve the facts. This complaint should also be referred to the OAL for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Macchiaverna, GRC No. 2014-324.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that based on the insufficient evidence in this matter, the GRC is unable to determine whether the Custodian

unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. The complaint should also be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Macchiaverna v. NJ Dep't of Banking & Insurance, GRC Complaint No. 2014-324 (Interim Order dated June 30, 2015).

Prepared By: Samuel A. Rosado
Staff Attorney

March 22, 2016