



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 24, 2016 Government Records Council Meeting

Richard Spillane
Complainant

v.

Clinton Township (Hunterdon)
Custodian of Record

Complaint Nos. 2015-129 and
2015-267

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 Supplemental 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 Complainant has failed to establish in his request for reconsideration of the Council’s February 25, 2016 Final Decision that either: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. The Complainant raised no new arguments in his request for reconsideration. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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.



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Supplemental Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting**

**Richard Spillane¹
Complainant**

GRC Complaint No. 2015-129; 2015-267²

v.

**NJ Department of Corrections³
Custodial Agency**

Records Relevant to Complaint:

- 1) Copies of any letters or comments the Department of Corrections may have received from interested persons regarding a January 6, 2014 petition, filed by the Complainant, for amendments of five DOC rules.
- 2) Copies of any letters by which the DOC may have responded to correspondence received regarding the petition.

Custodian of Record: John Falvey

Request Received by Custodian: August 28, 2014; June 24, 2015

Response Made by Custodian: September 9, 2014; September 18, 2014; July 2, 2015

GRC Complaint Received: May 11, 2015; August 21, 2015

Background

February 23, 2016 Council Meeting:

At its February 23, 2016 public meeting, the Council considered the February 16, 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:

The Custodian has borne his burden of proof that he lawfully denied access to the requested letters from inmates and DOC letters to inmates. Disclosure would be contrary to standing DOC regulations prohibiting inmates from obtaining records concerning other inmates, or would jeopardize the safety and security of any person or a correctional facility. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(5); and N.J.A.C. 10A:22-2.3(b).

¹ No legal representation listed on record.

²The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ No legal representation listed on record.

Procedural History:

On February 25, 2016, the Council distributed its Final Decision to all parties. On March 8, 2016, the Complainant sought⁴ additional time to submit a request for reconsideration. On March 31, 2016, the GRC granted the Complainant's request for an extension until April 21, 2016.

On April 14, 2016, the Complainant filed a request for reconsideration of the Council's February 23, 2016 Final Decision based on a mistake. The Complainant argued that the Council "committed a mistake by not considering my requests for an *in camera* review, and redaction of all information that would serve to identify the inmates involved."

On April 20, 2016, the Custodian submitted objections to the request for reconsideration. The Custodian opposed the Complainant's request for reconsideration by arguing that he has raised no new issues and that the GRC's Final Decision addressed all of the Complainant's objections to the denial of access.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In

⁴ The GRC received the Complainant's request on March 14, 2016.

The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. In requesting reconsideration, the Complainant failed to establish that the complaint should be reconsidered based on mistake because the Complainant raised no new arguments in his request. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Thus, the Complainant's request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's February 25, 2016 Final Decision that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. The Complainant raised no new arguments in his request for reconsideration. Thus, the Complainant's request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Husna Kazmir
Staff Attorney

May 17, 2016

Final Decision Rendered by the
Government Records Council
On The 24th Day of May, 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: May 27, 2016



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

February 23, 2016 Government Records Council Meeting

Richard Spillane
Complainant

Complaint No. 2015-129 and 2015-267

v.

NJ Department of Corrections
Custodian of Record

At the February 23, 2016 public meeting, the Government Records Council (“Council”) considered the February 16, 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 the Custodian has borne his burden of proof that he lawfully denied access to the requested letters from inmates and DOC letters to inmates. Disclosure would be contrary to standing DOC regulations prohibiting inmates from obtaining records concerning other inmates, or would jeopardize the safety and security of any person or a correctional facility. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(5); and N.J.A.C. 10A:22-2.3(b).

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 February, 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: February 25, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2016 Council Meeting**

**Richard Spillane¹
Complainant**

GRC Complaint No. 2015-129; 2015-267²

v.

**NJ Department of Corrections³
Custodial Agency**

Records Relevant to Complaint:

- 1) Copies of any letters or comments the Department of Corrections may have received from interested persons regarding a January 6, 2014 petition, filed by the Complainant, for amendments of five DOC rules.
- 2) Copies of any letters by which the DOC may have responded to correspondence received regarding the petition.

Custodian of Record: John Falvey

Request Received by Custodian: August 28, 2014; June 24, 2015

Response Made by Custodian: September 9, 2014; September 18, 2014; July 2, 2015

GRC Complaint Received: May 11, 2015; August 21, 2015

Background⁴

Request and Response:

August 21, 2014 OPRA Request

On August 21, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 9, 2014, the Custodian responded to the Complainant, confirming receipt of the request and requesting an additional ten (10) business days to respond. On September 18, 2014, the Custodian responded in writing, denying the request under N.J.A.C. 10A:22-2.3(b) and privacy concerns. In his response, the Custodian indicated that the DOC received seven letters regarding the petition, all from inmates, and that these letters could not be released to the Complainant because “an inmate

¹ No legal representation listed on record.

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ No legal representation listed on record.

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.

shall not be permitted to inspect, examine or obtain copies of documents concerning another inmate.” N.J.A.C. 10A:22-2.3(b). The Custodian additionally stated that the authors of the letters have a privacy interest in “their thoughts and comments,” and that the DOC would not want to “discourage open and frank input from the public by disclosing their letters.”

June 16, 2015 OPRA Request

On June 16, 2015, the Complainant submitted an OPRA request to the Custodian seeking item 2. On July 2, 2015, the Custodian denied the request, citing N.J.A.C. 10A:22-2.3(b). The Custodian indicated that records responsive to the request did exist, consisting of eight letters, but stated that there were privacy concerns with releasing mail addressed to someone other than the intended recipient.

Denial of Access Complaint:

August 21, 2014 OPRA Request

On April 21, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”), contending that he had mailed to the Department of Corrections on January 6, 2014, a petition for amendments to five DOC rules, which the DOC denied on April 25, 2014. On August 21, 2014, the Complainant stated that he submitted an OPRA request seeking copies of any letters or comments the DOC may have received, at any time, from interested persons regarding his January 6, 2014 petition.

The Complainant asserted he received a response from the Custodian on September 23, 2014, denying the request. The Complainant argued that the Custodian could have redacted from the letters all personal identifying information, pursuant to N.J.S.A. 47:1A-5(g), thus rendering the letters anonymous and therefore not violating the privacy concerns of the inmates.

In the alternative, the Complainant argued that the Custodian should disclose the letters in full. The Complainant asserts his “real, legitimate need” for the inmates’ identification information. The Complainant cited a future motion he intends to file in the Appellate Division to defend his need for the requested information. He additionally argued that the Custodian’s denial was an “illegitimate” attempt to “stymie the appeal of my petition by withholding important evidence.”

The Complainant further asserted that the Custodian’s nondisclosure would “heavily intrude upon inmates’ constitutional rights to freely and peacefully assemble and petition government for redress of grievances,” pursuant to the First Amendment of the U.S. Constitution, Article 1 § 18 of the N.J. Constitution, and Doe v. Poritz, 142 N.J. 1, 107-09 (1995). The Complainant additionally requested that the GRC conduct an *in camera* inspection of the requested letters.

June 16, 2015 OPRA Request

On August 14, 2015, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant requested that the GRC conduct an *in camera* review of the eight DOC responses pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). The Complainant additionally stated that he suspected that the letters sent by the DOC were form letters, thereby lessening the privacy concerns raised by the Custodian. See Burnett v. County of Bergen, 198 N.J. 408 (2009). The Complainant again cited his need for the requested records in order to proceed with a motion he has filed in the Appellate Division. The Complainant additionally argued that OPRA “clearly favors openness and transparency in government” and suggested that the DOC’s expression of privacy and security concerns was a “smoke screen.”

Statement of Information:

August 21, 2014 OPRA Request

On May 28, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 28, 2014. The Custodian certified that he responded in writing on September 9, 2014, the seventh business day following receipt, seeking an additional ten (10) business days to respond to the request. The Custodian averred that his office undertook a search, and the responsive records were located in the DOC’s Central Office with the Office of Legal and Regulatory Affairs. The Custodian averred that he responded on September 18, 2014, informing the Complainant that the Office provided him with seven letters, totaling seventeen pages. In the SOI, the Custodian noted that the records responsive, in fact, consisted of eight (8) letters, totaling seventeen pages.

In his September 18, 2014 response, the Custodian described the responsive records as “letters from New Jersey State inmates expressing their views/opinions/personal experiences.” The Custodian certified that he denied the request pursuant to N.J.A.C. 10A:22-2.3(b), which prohibits inmates from inspecting or obtaining documents concerning any other inmate. The Custodian averred that the letters contained each inmate’s personal feelings, views on a topic, interests, criminal histories, and future expectations.

The Custodian additionally argued, while noting that it was not stated in the original denial, that the letters are exempt because N.J.A.C. 10A:22-2.3(a)(5) exempts 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.” The Custodian further noted that, per N.J.S.A. 30:1B-6, the Commissioner of the DOC is empowered to promulgate rules and regulations to carry out the mission of protecting “the incarcerated offender . . . from victimization within the institution.” See also N.J.S.A. 30:1B-3(2)(c). The Custodian stated that the DOC specifically restricts inmates from viewing records of other inmates to deter violence and intimidation, as inmates “can use information about other inmates to threaten, extort, bribe or carry out any other nefarious activity.” The Custodian reiterated that the DOC has “broad discretionary powers” to promulgate regulations

aimed at maintaining security and order inside correctional facilities. Jenkins v. Fauver, 108 N.J. 239, 252 (1987).

The Custodian further argued that with respect to the responsive letters, the letters were in response to a petition and not a proposed rule. N.J.S.A. 52:14B-4(f). The Custodian stated that the substance of these letters would not be addressed in the New Jersey Register as they would in response to a proposed rule. The Custodian additionally argued that the Complainant's First and Fourteenth Amendment claims were without merit, as the Department may restrict the rights of inmates while they are incarcerated to achieve "penological" interests. Jones v. NC Prisoner's Labor Union, 433 U.S. 119 (1977). The Custodian averred that in the matters of inmates obtaining information about other inmates, the DOC has a demonstrated need and mandate to restrict access to records relating to other inmates.

June 16, 2015 OPRA Request

On September 8, 2015, the Custodian filed an SOI regarding this request. He certified that he received the request on June 24, 2015. The DOC's Office of Legal and Regulatory Affairs located the records, consisting of eight (8) letters totaling eight (8) pages, and provided them to the Custodian. The Custodian averred that he responded to the Complainant on July 2, 2015, with a written denial, as the records were exempt pursuant to N.J.A.C. 10A: 22-2.3(b), stating that "an inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate." In the denial, the Custodian noted additional privacy concerns with respect to releasing mail addressed to someone other than the intended recipient.

Although not stated in the original denial, the Custodian noted that N.J.A.C. 10A:22-2.3(a)(5), which provides that "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," would also exempt the letters. The Custodian averred that the responsive letters were specifically addressed to identifiable inmates and were responding to issues of concern raised by those inmates.

The Custodian noted that the DOC has "broad discretionary powers" to promulgate regulations aimed at maintaining security and order inside correctional facilities. Jenkins v. Fauver, 108 N.J. 239, 252 (1987). The Custodian added that, per N.J.S.A. 30:1B-6, the Commissioner of the DOC is empowered to promulgate rules and regulations to carry out the mission of protecting "the incarcerated offender . . . from victimization within the institution." See also N.J.S.A. 30:1B-3(2)(c).

With respect to privacy concerns, the Custodian argued that releasing the responsive letters would "essentially be making an individual's mail public" and that the correspondence here was sent directly to inmate commenters who had submitted letters to the Department. The Custodian contended that when weighing the factors announced in Burnett v. County of Bergen, 198 N.J. 408 (2009), release of the letters would be exempt under OPRA because the letters are mail addressed to specific people responding to their specific inquiries. The Custodian claimed that release of these records "would have a chilling effect on the public's need to engage candidly with agencies about rule making and other legislative procedures."

Additional Submissions:

On September 20, 2015, the Complainant wrote to the GRC, requesting that his two complaints be heard as one, as both complaints “resulted from the same factual transactions between the Department of Corrections (DOC) and myself.”

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.

Further, OPRA provides that:

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

N.J.S.A. 47:1A-9(a).

In Cordero v. N.J. Dep’t of Corr., GRC Complaint No. 2012-209 (June 2013), the complainant sought access to a Special Investigations Division Evidence Review Form, detailing the use of narcotics canines with prison visitors and subsequent investigations thereafter. The report also contained the identities of civilians and inmates. The Council agreed with the Custodian that disclosing the SID report would jeopardize the safety and security of personnel, inmates, and visitors.

In the current matter, the Complainant requested copies of letters the DOC may have received from “interested persons” regarding a petition he submitted, and later requested copies of letters by which the DOC may have responded to the received letters. The Custodian responded in a timely manner to both of the Complainant’s requests, denying access to the responsive records because of N.J.A.C. 10A:22-2.3(b), which prohibits inmates from inspecting or obtaining documents concerning any other inmate. Though not cited in the original denial, the Custodian additionally argued that N.J.A.C. 10A:22-2.3(a)(5) would also exempt the letters as 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.” Similar to the SID report sought in Cordero, the letters received by the DOC contained inmates’ identities and other personal information, disclosure of which could create a substantial risk of retaliation and directly conflict with DOC regulations.

See N.J.A.C. 10A:22-2.3(a)(5) and N.J.A.C. 10A:22-2.3(b). The provisions of OPRA cannot abrogate exemptions made pursuant to promulgated regulations via a state agency. N.J.S.A. 47:1A-9.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested letters from inmates and DOC letters to inmates. Disclosure would be contrary to standing DOC regulations prohibiting inmates from obtaining records concerning other inmates, or would jeopardize the safety and security of any person or a correctional facility. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(5); and N.J.A.C. 10A:22-2.3(b).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proof that he lawfully denied access to the requested letters from inmates and DOC letters to inmates. Disclosure would be contrary to standing DOC regulations prohibiting inmates from obtaining records concerning other inmates, or would jeopardize the safety and security of any person or a correctional facility. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(5); and N.J.A.C. 10A:22-2.3(b).

Prepared By: Husna Kazmir
Staff Attorney

February 16, 2016