



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 29, 2016 Government Records Council Meeting

Michael Murphy
Complainant

Complaint No. 2015-335

v.

NJ Department of Corrections
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 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:

1. The Custodian’s redactions from requested Item Nos. 1 and 2 of the August 6, 2015 OPRA request were lawful pursuant to N.J.S.A. 47:1A-9(a), N.J.A.C. 10A:22-2.3(b), and Young v. Dep’t of Corr., GRC Complaint No. 2014-377 (September 2015). Moreover, the Custodian lawfully redacted a reference to the Complainant’s psychological exam results, because such records are explicitly exempt from disclosure. McLawhorn v. N.J. Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013); Groelly v. N.J. Dep’t of Corr., GRC Complaint No. 2010-194 (June 2012); *See also* Roth v. N.J. Dep’t of Corr., GRC Complaint Number 2015-306 (May 2016).
2. With respect to Item No. 1 of the August 19, 2015 OPRA request, the Custodian certified that no responsive records exist because the officer is still employed. Additionally, the Complainant provided no competent, credible evidence to refute the Custodian’s certification. Therefore, there was no unlawful denial of access. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (2005).
3. Since Item No. 2 of the Complainant’s August 19, 2015 OPRA request sought records compiled by the SID concerning a complaint of official misconduct in a prison, the Custodian has met his burden of proof that he lawfully denied access. N.J.S.A. 47:1A-6. O’Shea v. Twp. of W. Milford, 410 N.J. Super. 371 (App. Div. 2009); Rivera v. Borough of Keansburg Police Dep’t, GRC Complaint No. 2007-222 (June 2010); Wares v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2014-330 (June 2015); Martin v Bedminster Twp. Police Dep’t, GRC Complaint No. 2014-337 (September 2015).
4. With respect to Item Nos. 3 and 4 of the August 18, 2015 request, the Custodian provided documentation to prove that the responsive records to those items are the same records already made available to the Complainant in response to his August 6,



2015 request. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). Moreover, the Complainant has not paid the required copying fees. A custodian has no obligation to provide records where lawful payment has not been made. See Coulson v. Town of Kearney Fire Dep't, GRC Complaint No. 2013-360 (June 2014) (*citing* Ortiz v. N.J. Dep't of Corr., GRC Complaint No. 2007-101 (November 2008)).

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 29th Day of September, 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: October 4, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2016 Council Meeting**

**Michael Murphy¹
Complainant**

GRC Complaint No. 2015-335

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint:

August 6, 2015 OPRA request:

1. Any and all statements given by E. Barreto and any witnesses “in regards to my charge.”
2. Any and all documents generated by Ms. Zimmerman and Senior Corrections Officer (“SCO”) DiPasquale “at my Courtline-Hearing dated May 27, 2015 and June 3, 2015.”

August 19, 2015 OPRA request:

1. The date that Corrections Officer E. Barreto quit the Department of Corrections.
2. Any and all “interviews, statements etc. given [in] any investigation by SCO E. Barreto in regards to her complaint of 5-13-15 against me.”
3. Any and all documents “generated at my Courtline hearing of 5-18-15 and 6-3-15.”
4. Copy of any and documents generated by SCO DiPasquale regarding the Complainant’s hearing.³

Custodian of Record: John Falvey

Request Received by Custodian: August 6, 2015 and August 19, 2015

Response Made by Custodian: August 17, 2015 and August 28, 2015

GRC Complaint Received: October 30, 2015

Background⁴

Request and Response:

¹ No legal representation listed on record.

² No legal representation listed on record.

³ Other records were requested that were not part of the instant complaint.

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.

August 6, 2015 OPRA request

On August 6, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-mentioned records. On August 17, 2015, the Custodian replied in writing and provided responsive records for Item Nos. 1 and 2 of the request. However, the Custodian made three (3) redactions to the records, asserting 1) that the material contains emergency or security information or procedures, the release of which would “jeopardize security of the building, facility, or person therein,” 2) that release of the records could reveal security measures and surveillance techniques, and 3) that the redacted material contained exempt “information relating to medical, psychiatric, or psychological history, diagnosis, treatment, or evaluation.” *Citing* N.J.S.A. 47:1A-1.1, N.J.A.C. 10A:22-2.3(a)(4). He further stated that the records contained information relating to an identified individual that, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility. *Citing* N.J.A.C. 10A:22-2.3(a)(5). Finally, the Custodian said that the redactions were justified because an inmate is not permitted to inspect, examine, or obtain copies of documents concerning any other inmate. *Citing* N.J.A.C. 10A:22-2.3(b).

August 19, 2015 OPRA request

On August 19, 2015, the Complainant submitted another Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 28, 2015, the Custodian responded in writing, seeking an additional ten (10) business days to locate and produce all responsive records. On September 17, 2015, the Custodian wrote to the Complainant, denying requested Item No. 1 because no responsive records exist. The Custodian also denied access to responsive records to Item No. 2, claiming an exemption for security reasons and that the information requested was generated by or on behalf of employers and employees resulting from a grievance or a sexual harassment complaint. *Citing* N.J.S.A. 47:1A-1.1, and N.J.S.A. 47:1A-10. Additionally, the Custodian claimed that the records are exempt as relating to personnel and pensions. *Citing* N.J.S.A. 47:1A-10. Finally, the Custodian advised the Complainant that he located responsive records for Item Nos. 3 and 4, which required redactions and payment of \$1.35 in copying charges.⁵

Denial of Access Complaint:

On October 30, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s reasons for withholding the records were “invalid” because the Complainant needed the records in order to challenge the results of a disciplinary action. He characterized the denial of access to Item No. 2 of his August 19, 2015 OPRA request as unfair and evidence of denying his due process rights. The Complainant also questioned the Custodian’s reliance on OPRA’s personnel records exemption, contending that he was “entitled to SCO E. Barreto’s full name, title, position, salary, payroll record [and] length of service.”⁶

⁵ The record shows that the Complainant has not paid the \$1.35, and the documents remain undelivered.

⁶ The Complainant never requested those records and instead requested “interviews, statements etc., given [in] any investigation by SCO E. Barreto in regards to her complaint” There is no denial of access when a Complainant

Statement of Information:

On December 4, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s first OPRA request on August 6, 2015, and the second OPRA request on August 19, 2015. The Custodian certified that he responded to the first request on August 17, 2015, and to the second request on August 28, 2015.⁷

Regarding the August 6, 2015 request, the Custodian certified that he provided the records for Item Nos. 1 and 2, consisting of SCO Baretto’s statements and evidence from the Complainant’s disciplinary hearing. The Custodian stated that he twice redacted the name of another inmate pursuant to N.J.A.C. 10A:22-2.3(b). The Custodian also certified that he removed a reference to the Complainant’s psychological exam results pursuant to N.J.A.C. 10A:22-2.3(a)(4).

For Item No. 1 of the August 19, 2015 OPRA request, the Custodian certified that since SCO Barreto was still employed by the Department of Corrections (“DOC”), there was no responsive record which would show the date on which E. Barreto had resigned. *Citing Pusterhofer v. N.J. Dep’t of Educ.*, GRC Complaint No. 2005-49. Regarding Item No. 2, the Custodian denied access to a six-page investigative report completed by the Special Investigations Division (“SID”) for the following reasons: 1) the responsive records detail the investigative process into an internal affairs matter and identify witnesses (including inmates) and the evidence reviewed, thus constituting emergency or security information or procedures for a building or facility; 2) the records reveal “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property”; 3) the information was generated by or on behalf of public employers or employees in connection with a grievance filed by or against an individual or a sexual harassment complaint filed with a public employer; and 4) the requested records were exempt as personnel or pension records. *Citing N.J.S.A. 47:1A-1.1, and N.J.S.A. 47:1A-10.*

The records requested in Item Nos. 3 and 4 were identical to Item Nos. 1 and 2 of the August 6, 2015 OPRA request, necessitating identical redactions, and were subsequently made available to the Complainant pending payment for copying costs. *Citing N.J.S.A. 47:1A-1.1.*

Additional Information:

On May 26, 2016, the Custodian provided the GRC with copies of the documents previously disclosed to the Complainant without redactions for review. He also provided copies of all documents responsive to the Complainant’s August 6, 2015 request and those copied in

seeks records in his Denial of Access Complaint that he did not seek in his OPRA request. Burns v. N.J. Dep’t of State, Div. of Elec., GRC Complaint No. 2013-64 (September 2013).

⁷ On August 28, 2015, the Custodian requested a ten (10) day extension to obtain the requested records. On September 11, 2015, the tenth (10th) business day following the request for extension, the Custodian requested a second ten (10) day extension. On September 14, 2015, as certified by the Custodian and not refuted by the Complainant, the Custodian made the responsive records available to the Complainant.

response to the August 19, 2015 request.⁸

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, “[t]he 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).

August 6, 2015 OPRA Request

N.J.A.C. 10A:22-2.3(b) provides that “[a]n inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate.” Id. In applying this exemption, for example, the Council has previously found that the DOC’s custodian lawfully denied access to an inmate’s request for court orders and newspaper articles regarding all DOC prisoners who legally changed their names. *See* Werner v. N.J. Dep’t of Corr., GRC Complaint No. 2011-153 (September 2012).

The Council has repeatedly held that inmates’ requests for records relating to medical, psychiatric, or psychological treatment are properly denied, even when an inmate requests his or her own records. Mental health records are encompassed within the category of psychiatric or psychological records that are not government records subject to disclosure pursuant to N.J.A.C. 10A:22-2.3(a)(4). *See, e.g.*, McLawhorn v. N.J. Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013); Groelly v. N.J. Dep’t of Corr., GRC Complaint No. 2010-194 (June 2012); Hamilton v. N.J. Dep’t of Corr., GRC Complaint No. 2007-196 (March 2008); Kamau v. N.J. Dep’t of Corr., GRC Complaint No. 2004-175 (February 2005). *See also* Roth v. N.J. Dep’t of Corr., GRC Complaint No. 2015-306 (May 2016).

Further, the GRC has long recognized that records may be denied or redactions may be necessary to prevent release of inmates’ identities when such release would create a substantial risk of retaliation in correctional institutions. Young v. Dep’t of Corr., GRC Complaint No. 2014-377 (September 2015); N.J.A.C. 10A:22-2.3(b); Cordero v. Dep’t of Corr., GRC Complaint No. 2012-209 (June 2013). *See also* Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (2012).

⁸ With both sets of documents available, the GRC determined, as argued by the Custodian, that the responsive records for Item Nos. 3 and 4 of the Complainant’s August 19, 2015 request are the same records sought and provided in response to the August 6, 2015 request.

In the instant matter, the Custodian certified that he provided the responsive records to the Complainant on August 17, 2015. The evidence indicates that the Complainant received the responsive records, albeit with three (3) redactions. The record indicates that the Custodian redacted two (2) names of inmates, along with a reference to a mental health report.

The thirteen (13) pages of records reveal a disciplinary proceeding held in response to an alleged altercation involving the Complainant. The records also demonstrate that at least two (2) inmates provided evidence against the Complainant. The Custodian redacted both of the inmates' names. Although the Complainant asserted his need for the redacted names in order to file "subsequent appeals," the potential for retaliation cannot be discounted. Our courts have noted that "[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). N.J.A.C. 10A:22-2.3(b). *See also* Young, GRC 2014-377.

Based on the foregoing, the Custodian's redactions from requested Item Nos. 1 and 2 of the August 6, 2015 OPRA request were lawful pursuant to N.J.S.A. 47:1A-9(a), N.J.A.C. 10A:22-2.3(b), and Young, GRC 2014-377. Moreover, the Custodian lawfully redacted a reference to the Complainant's psychological exam results, because such records are explicitly exempt from disclosure. McLawhorn, GRC 2012-292; Groelly, GRC 2010-194; *See also* Roth, GRC 2015-306.

August 19, 2015 OPRA Request

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded, certifying that no records responsive to the complainant's request existed. In reply, the complainant did not provide any evidence to refute the custodian's certification. The GRC determined that, although the custodian failed to respond to the OPRA request in a timely manner, the custodian lawfully denied access to the requested records because the custodian certified that no records responsive to the request existed, and the Complainant provided no competent, credible evidence to refute the Custodian's certification.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian produced one (1) responsive record to the complainant's OPRA request and stated that no other responsive records existed. However, the complainant argued that more responsive records existed. Id. The GRC asked the custodian to certify as to whether all responsive records were produced. The custodian subsequently certified that the disclosed document was the only responsive record. Id. In reviewing the matter, the GRC held that:

[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.

Id.

With respect to Item No. 1 of the August 19, 2015 OPRA request, the Custodian certified that no responsive records exist because the officer is still employed. Additionally, the Complainant provided no competent, credible evidence to refute the Custodian's certification. Therefore, there was no unlawful denial of access. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

With respect to Item No. 2, the Custodian certified that he withheld six pages of a confidential SID report. As stated in the SOI, the "report is an investigation into an employee based on allegations of misconduct." As partial support for his denial of access, the Custodian cites Wares v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2014-330 (June 2015), where the GRC held in pertinent part that the requested records were compiled as part of an internal affairs investigation. As noted in Wares, the GRC has held that Internal Affairs Policies and Procedures (IAPP) and other Attorney General Guidelines have the force of law. Id., citing Rivera v. Borough of Keansburg Police Dep't, GRC Complaint No. 2007-222 (June 2010). The IAPP provides detailed and precise procedures and practices in processing investigations of misconduct by law enforcement officials and agencies. The courts and the GRC have consistently recognized that such records are exempt from disclosure. See O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371 (App. Div. 2009); Wares, GRC 2014-274; Rivera, GRC 2007-222. See also Martin v Bedminster Twp. Police Dep't, GRC Complaint No. 2014-337 (September 2015).

Therefore, since Item No. 2 of the Complainant's August 19, 2015 OPRA request sought records compiled by the SID concerning a complaint of official misconduct in a prison, the Custodian has met his burden of proof that he lawfully denied access. N.J.S.A. 47:1A-6. O'Shea, 410 N.J. Super. 371; Rivera, GRC 2007-222; Wares, GRC 2014-274; Martin, GRC 2014-337.

With respect to Item Nos. 3 and 4 of the August 18, 2015 request, the Custodian provided documentation to prove that the responsive records to those items are the same records already made available to the Complainant in response to his August 6, 2015 request. Bart v. City of Passaic, 403 N.J. Super. 609, 618 (App. Div. 2008); Burns, GRC 2005-68. Moreover, the Complainant has not paid the required copying fees. A custodian has no obligation to provide records where lawful payment has not been made. See Coulson v. Town of Kearney Fire Dep't, GRC Complaint No., 2013-360 (June 2014) (citing Ortiz v. N.J. Dep't of Corr., GRC Complaint No. 2007-101 (November 2008)).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's redactions from requested Item Nos. 1 and 2 of the August 6, 2015 OPRA request were lawful pursuant to N.J.S.A. 47:1A-9(a), N.J.A.C. 10A:22-2.3(b), and Young v. Dep't of Corr., GRC Complaint No. 2014-377 (September 2015). Moreover, the Custodian lawfully redacted a reference to the Complainant's psychological exam results, because such records are explicitly exempt from disclosure. McLawhorn v. N.J. Dep't of Corr., GRC Complaint No. 2012-292 (July 2013); Groelly v. N.J. Dep't of Corr., GRC Complaint No. 2010-194 (June 2012); See also Roth v. N.J. Dep't of Corr., GRC Complaint Number 2015-306 (May 2016).

2. With respect to Item No. 1 of the August 19, 2015 OPRA request, the Custodian certified that no responsive records exist because the officer is still employed. Additionally, the Complainant provided no competent, credible evidence to refute the Custodian's certification. Therefore, there was no unlawful denial of access. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (2005).
3. Since Item No. 2 of the Complainant's August 19, 2015 OPRA request sought records compiled by the SID concerning a complaint of official misconduct in a prison, the Custodian has met his burden of proof that he lawfully denied access. N.J.S.A. 47:1A-6. O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371 (App. Div. 2009); Rivera v. Borough of Keansburg Police Dep't, GRC Complaint No. 2007-222 (June 2010); Wares v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2014-330 (June 2015)); Martin v Bedminster Twp. Police Dep't, GRC Complaint No. 2014-337 (September 2015).
4. With respect to Item Nos. 3 and 4 of the August 18, 2015 request, the Custodian provided documentation to prove that the responsive records to those items are the same records already made available to the Complainant in response to his August 6, 2015 request. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). Moreover, the Complainant has not paid the required copying fees. A custodian has no obligation to provide records where lawful payment has not been made. See Coulson v. Town of Kearney Fire Dep't, GRC Complaint No, 2013-360 (June 2014) (*citing* Ortiz v. N.J. Dep't of Corr., GRC Complaint No. 2007-101 (November 2008)).

Prepared By: Ernest Bongiovanni
Staff Attorney

September 22, 2016