



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**

**July 26, 2016 Government Records Council Meeting**

Jose A. Vega, Jr.  
Complainant

v.

NJ Department of Corrections  
Custodian of Record

Complaint No. 2015-74

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 19, 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 all three (3) Special Investigation Division reports responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. The records contain “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. Furthermore, disclosure would be contrary to standing DOC regulations prohibiting inmates from obtaining records concerning other inmates or would jeopardize the safety and security of a correctional facility. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3; Diaz-Young v. NJ Dep’t of Corr., GRC Complaint No. 2014-377 (September 2015) (*citing Cordero v. N.J. Dep’t of Corr.*, GRC Complaint No. 2012-209 (June 2013)). Because the GRC finds that the records at issue are exempt for the above reasons, the GRC need not address the Custodian’s remaining asserted exemptions.

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 July 26<sup>th</sup> Day of July, 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: July 29, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**José A. Vega, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-74**

v.

**NJ Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via U.S. mail of all reports completed by the Special Investigation Division (“SID”) and “NOC” custody staff regarding the Complainant’s placement on involuntary protective custody (“IPC”).

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** January 13, 2015  
**Response Made by Custodian:** January 20, 2015  
**GRC Complaint Received:** March 20, 2015

**Background<sup>3</sup>**

**Request and Response:**

On December 27, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 20, 2015, the fifth (5<sup>th</sup>) business day after receipt of the OPRA request, the Custodian responded in writing, denying access to a three (3) page report dated February 10, 2009, a four (4) page report dated October 23, 2013, and a one (1) page report dated November 18, 2014.<sup>4</sup> The Custodian stated that the records were exempt based on the following:

- N.J.S.A. 47:1A-1.1 – “emergency and security information or procedures for any building or facility which, if disclosed, would jeopardize security of the building or facility or person therein.”
- N.J.S.A. 47:1A-1.1 – “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property.”

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> 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.

<sup>4</sup> The Custodian initially identified the date as December 17, 2014. However, he later clarified in the Statement of Information that he accidentally put the date of the hearing (as opposed to the report date) in his initial response.

- N.J.A.C. 10A:22-2.3(a)(1) – “Informant documents and statements.”
- N.J.A.C. 10A:22-2.3(a)(2) – “[SID] 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)(5) – “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.

Finally, the Custodian stated that the records are exempt under the N.J.S.A. 47:1A-9, as a Hearing Officer deemed the records confidential in accordance with powers bestowed by N.J.A.C. 10A:5-5.2.

Denial of Access Complaint:

On March 20, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that, had the Custodian been aware of certain facts, he would have disclosed all responsive records. The Complainant asserted that he was placed in IPC and not given a hearing until four (4) years later. The Complainant stated that he wanted to file an appeal in the Appellate Division and needed the responsive reports for that action. The Complainant contended that he wished to use the reports to prove that SID used information he provided to them to create multiple justifications to keep him in IPC.

Statement of Information:

On April 8, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 13, 2015. The Custodian certified that SID located three (3) reports. The Custodian certified that he responded in writing on January 20, 2015, denying access to the responsive reports for a number of reasons.

The Custodian certified that all three (3) reports detailed gang activity/retaliation and the reasons for the Complainant’s IPC designation as defined under N.J.A.C. 10A:1-2.2. The Custodian affirmed that the reports relate to an SID investigation into circumstances surrounding the IPC request. The Custodian certified that the reports contained detailed interviews with other inmates, concerns with retaliation against co-defendants in criminal matters, and concerns with retaliation from members of a security threat group (“STG”) inside the prison system. Further, the Custodian certified that the reports named other inmates, discussed intelligence gathered, sources, interviews conducted, investigative techniques, and discussed the networks of STGs within the prison system also as defined under N.J.S.A. 10A:1-2.2. The Custodian noted that DOC has identified STGs as an enhanced security risk to the orderly running of the State’s prison facilities.

The Custodian asserted that disclosure of the responsive reports would jeopardize the safe and secure operation of the prison system. N.J.S.A. 47:1A-1.1; N.J.A.C. 10A:22-2.3(a)(1)-(a)(5). The Custodian argued that the reports reveal intelligence gathering capabilities that inmates could use to exploit and hamper investigations, as well as subject other inmates to physical abuse, extortion, and other forms of retaliation. The Custodian asserted that these risks would

undermine DOC's ability to maintain a safe and secure environment. The Custodian also contended that a Hearing Officer, with power vested under N.J.A.C. 10A:5-5.2, deemed all three (3) reports confidential. N.J.S.A. 47:1A-9.

The Custodian further argued that the Courts have long deferred to the New Jersey Department of Corrections ("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 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. NJ 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"). The Custodian noted that the NJ Courts have confirmed the importance of deference to correctional officers when making safety and security determinations. The Custodian stated that the Council should find that he properly denied access to the requested reports.

### 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 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 further provides that:

A government record shall not include the following information which is deemed to be confidential . . . 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.

OPRA also provides that:

[OPRA] shall not abrogate any exemption of a public record or government

record from public access heretofore made pursuant to . . . 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)(emphasis added).

In Diaz-Young v. NJ Dep't of Corr., GRC Complaint No. 2014-377 (September 2015), the complainant sought access to SID records related to his activity as part of a STG. The custodian denied access to said records under N.J.S.A. 47:1A-1.1 and N.J.A.C. 10A:22-2.3. The Council held that the custodian lawfully denied access to the responsive records based on the significant risk disclosure posed to the safe and secure operation of the New Jersey State Prison. (*citing Cordero v. N.J. Dep't of Corr.*, GRC Complaint No. 2012-209 (June 2013)). The Council also held that disclosing the records would have created a potential retaliation risk and directly conflicted with DOC's regulations.

In the instant matter, the Complainant argued that he should have received the responsive records and that he wanted to use them to appeal his IPC designation. Conversely, the Custodian contended that he lawfully denied access to three (3) reports pursuant to OPRA statute and DOC regulations.

Although decided after the filing of the instant complaint, the GRC finds its decision in Diaz-Young, GRC 2014-377, to be instructive here. See N.J.S.A. 47:1A-1.1. Specifically, the records at issue in both complaints involved SID investigations into STGs.

The GRC is thus satisfied that disclosure of either responsive records could pose a significant risk to the safe and secure operation of the Complainant's current facility for the reasons expressed by the Custodian. Furthermore, the Custodian adequately described the type of exempt information contained within the reports and the potential harm to persons within the facility. 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 all three (3) SID reports responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The records contain "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. Furthermore, disclosure would be contrary to standing DOC regulations prohibiting inmates from obtaining records concerning other inmates or would jeopardize the safety and security of a correctional facility. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3; Diaz-Young, GRC 2014-377 (*citing Cordero*, GRC 2012-209). Because the GRC finds that the records at issue are exempt for the above reasons, the GRC need not address the Custodian's remaining asserted exemptions.

## 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 all three (3) Special Investigation Division reports responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The records contain "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. Furthermore, disclosure would be contrary to standing DOC regulations prohibiting inmates from obtaining records concerning other inmates or would jeopardize the safety and security of a correctional facility. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3; Diaz-Young v. NJ Dep't of Corr., GRC Complaint No. 2014-377 (September 2015) (*citing Cordero v. N.J. Dep't of Corr.*, GRC Complaint No. 2012-209 (June 2013)). Because the GRC finds that the records at issue are exempt for the above reasons, the GRC need not address the Custodian's remaining asserted exemptions.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

July 19, 2016