



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

May 26, 2015 Government Records Council Meeting

Joseph Baker
Complainant

Complaint No. 2014-262

v.

Union County Prosecutor's Office
Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council ("Council") considered the May 19, 2015 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 did not unlawfully deny access to the Complainant's request for a third party's presentence report because such reports are not public records subject to disclosure under OPRA. N.J.S.A. 47:1A-6. See N.J.S.A. 47:1A-9(a), Pitts v. NJ Dep't of Corrections, GRC Complaint No. 2013-299 (September 2014), and State v. DeGorge, 113 N.J. Super. 542 (App. Div. 1971).

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 26th Day of May, 2015

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 28, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 26, 2015 Council Meeting**

**Joseph Baker¹
Complainant**

GRC Complaint No. 2014-262

v.

**Union County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Hard copy of “the entire adult pre-sentence report of my father William Baker who was the primary witness at both of my trial [sic].”

Custodian of Records: Robert Vanderstreet, Esq.

Request Received by Custodian: April 2, 2014

Response Made by Custodian: April 2, 2014

GRC Complaint Received: July 16, 2014

Background³

Request and Response:

On March 24, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-mentioned records. On April 2, 2014, the date of receipt, the Custodian responded in writing, stating that pre-sentence reports are confidential and not subject to OPRA.

Denial of Access Complaint:

On July 16, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that he responded to the Custodian’s denial of access on May 12, 2014, citing State v. Blue, 124 N.J. 276, (1973). There, the Court held that the confidentiality of presentence reports “must yield to the right of a defendant to produce evidence in the hands of the state authorities bearing upon the truth of the issues in his case.” Id. at 283.

¹ No legal representation listed on record.

² Brian P. Trelease, Esq. (Elizabeth, NJ).

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.

Statement of Information:

On October 1, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he never received the Complainant’s May 12, 2014, response. Nevertheless, the Custodian argued that the law clearly states that presentence reports are confidential and not a matter of public record. The Custodian relied upon State v. DeGorge, 113 N.J. Super. 542, 544 (App. Div. 1971), where the court noted that the State improperly included copies of the defendant’s presentence report within its brief and appendices. The court ordered for the presentence reports to be “expunged from the filed document, because such reports should not be a matter of public record.” Thus, the Custodian concluded that presentence reports are not subject to OPRA, since they are not considered public records. N.J.S.A. 47:1A-9.

The Custodian further contended that even if the Complainant were allowed access to his presentence report via OPRA, he is not seeking his own presentence report but that of a third party. The Custodian maintained that since presentence reports are not public records, seeking a third party’s presentence report is actually more prohibited than requesting one’s own.

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 also provides that:

- (a) 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.
- (b) The provisions of [OPRA] shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, *court rule* or *judicial case law*, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

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

The GRC has previously ruled on whether presentence reports are public records subject to disclosure under OPRA. See Pitts v. NJ Dep’t of Corrections, GRC Complaint No. 2013-299

(September 2014). In Pitts, the Council found that the contents of presentence reports meet the definition of consultative, advisory, or deliberative material. Id. at 4. Most notable, the Council relied upon DeGeorge, holding that even if presentence reports are available to defendants in certain judicial proceedings, that in itself “does not render it a public record.” Pitts, GRC No. 2013-299 at 5 (*citing* DeGeorge, 113 N.J. Super. at 542).

Here, the Complainant’s request is for the presentence report of a third party rather than his own. However, because the contents of presentence reports are not a matter of public record -- even the requestor’s own report -- and not subject to disclosure under OPRA, any request for a third party’s presentence report is prohibited.

Thus, the Custodian did not unlawfully deny access to the Complainant’s request for a third party’s presentence report because such reports are not public records subject to disclosure under OPRA. N.J.S.A. 47:1A-6. *See* N.J.S.A. 47:1A-9(a), Pitts, GRC No. 2013-299, and DeGeorge, 113 N.J. Super. at 542.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to the Complainant’s request for a third party’s presentence report because such reports are not public records subject to disclosure under OPRA. N.J.S.A. 47:1A-6. *See* N.J.S.A. 47:1A-9(a), Pitts v. NJ Dep’t of Corrections, GRC Complaint No. 2013-299 (September 2014), and State v. DeGorge, 113 N.J. Super. 542 (App. Div. 1971).

Prepared By: Samuel A. Rosado
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

May 19, 2015