



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

November 19, 2008 Government Records Council Meeting

Edwin Ortiz
Complainant

Complaint No.2007-101

v.

NJ Department of Corrections
Custodian of Record

At the November 19, 2008 public meeting, the Government Records Council (“Council”) considered the November 13, 2008 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. Because the Custodian certifies Record #1, a Security Threat Group Member Validation Form, is designated as a confidential document by Department of Corrections proposed regulation *N.J.A.C. 10A:22-3.2(a)(27)*, and because the Custodian certifies that Records #2 through #4, letters to the Complainant containing references to Security Threat Groups, the possession or exhibition of which by an inmate is prohibited under proposed regulation *N.J.A.C. 10A:4-4.1*, and because the Custodian certifies the records cannot be redacted without risk of posing a safety and security threat within the correctional facility, and because the proposed regulations are continued in effect pursuant to Executive Orders No. 21 and No. 26 (McGreevey) and the court’s decision in Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005), Records #1 through 4 are exempt from disclosure under N.J.S.A. 47:1A-9.a. and the Custodian has lawfully denied access to these requested records.
2. Because the Custodian certified that she will disclose copies of Records #5, #6 and #7 to the Complainant upon the Complainant’s payment of a \$4.50 copy fee, and because the Custodian is not required to release the requested records until payment is received pursuant to N.J.S.A. 47:1A-5.b. and the Council’s decision in Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), the Custodian has not unlawfully denied the Complainant access to said records.



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 19th Day of November, 2008

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: November 20, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2008 Council Meeting**

**Edwin Ortiz¹
Complainant**

GRC Complaint No. 2007-101

v.

**N. J. Department of Corrections²
Custodian of Records**

Records Relevant to Complaint: A copy of any and all information in the Intelligence Unit files associating the Complainant with the Latin Kings.

Request Made: March 23, 2007

Response Made: April 2, 2007

Custodian: Michelle Hammel

GRC Complaint Filed: April 19, 2007

Background

March 23, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to the complaint listed above on an official OPRA request form.

April 2, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the requested record is denied because Special Investigation Division records are confidential pursuant to the provisions of N.J.S.A. 47:1A-1. et seq. The Custodian contends that Department of Corrections ("DOC") regulations provide that informant documents and statements and Special Investigation Division ("SID") investigations shall not be government records subject to public access.

April 19, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Letter from SID Chief Investigator Muller to the Complainant dated March 19, 2007
- Complainant's OPRA request dated March 23, 2007

¹ No legal representation listed on record.

² Represented by DAG Lisa A. Puglisi, on behalf of the NJ Attorney General.

- Custodian's response to the Complainant's OPRA request dated April 2, 2007

The Complainant alleges that he appeared before the Prison Classification Committee on February 21, 2007, and was informed that he had been identified as a member of the Security Threat Group ("STG") the Latin Kings. The Complainant states that he denied being a member of a STG and wrote the Commissioner requesting that the classification be removed from his file. The Complainant states that his letter to the Commissioner was turned over to Chief Investigator Muller. Investigator Muller reviewed the Complainant's file and by letter dated March 19, 2007, informed the Complainant that the Complainant had previously admitted being a Latin King member and the information gathered by the SID confirmed such affiliation.

The Complainant contends that he filed an OPRA request seeking non-confidential records from the SID files. The Complainant states that the Custodian responded to his OPRA request, denying it because the records the Complainant seeks are allegedly confidential and the release of information gathered by the SID may compromise investigative techniques and/or ongoing investigations.

The Complainant contends that he needs the requested information to challenge the validity of the information contained in SID files.

May 2, 2007

Offer of Mediation sent to both parties.

May 7, 2007

The Complainant agrees to mediate this complaint.

May 7, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel sent a letter of representation informing the GRC that the Custodian will not agree to mediation.

May 8, 2007

Request for the Statement of Information sent to the Custodian.

May 15, 2007

Telephone call from the Custodian's Counsel. Counsel requests a five (5) business day extension of time to complete the Statement of Information.

May 15, 2007

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian a five (5) business day extension of time to complete and return the Statement of Information.

May 17, 2007

The Custodian agrees to mediate this complaint and the matter is referred to mediation.

September 19, 2007

Complaint is referred back to the GRC for adjudication.

September 20, 2007

Request for the Statement of Information sent to the Custodian.

October 4, 2007

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated March 23, 2007
- Letter from the Custodian responding to the Complainant’s OPRA request dated April 2, 2007
- Letter from the Custodian to the Complainant dated June 25, 2007

The Custodian certifies that she forwarded the Complainant’s OPRA request to the SID. The SID maintains the records responsive to the Complainant’s request and could search the appropriate file for the records. The Custodian also certifies that no records responsive to the request have been destroyed and that the records must be retained for seven (7) years after the inmate is released in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian has identified seven (7) records responsive to the Complainant’s request:

| Record | Name/Type of Record | General Nature Description |
|---------------|---|---|
| 1 | STG Member Validation Form (1 page). | Form identifying inmate as a member of a STG. |
| 2 | Undated letter to Complainant (3 pages). | Letter containing STG references. |
| 3 | Undated letter to Complainant with envelope (4 pages). | Letter containing STG references. |
| 4 | Undated letter to Complainant (2 pages). | Letter containing STG references. |
| 5 | Inmate Request Form from the Complainant dated February 21, 2007. | Request from the Complainant to prison authorities seeking to remove his STG classification. |
| 6 | Letter from the Complainant to Commissioner Hayman dated March 10, 2007 | Request from the Complainant to remove his STG classification. |
| 7 | Memo from SID Chief Investigator Muller to the Complainant dated March 19, 2007 (1 page). | Memo advises the Complainant that SID confirmed his STG affiliation and the designation has been properly placed on record. |

The Custodian certifies Records #1 through #4 cannot be disclosed because they contain gang-related information and, under the common law balancing test, the DOC’s interest in maintaining the safety and security of the correctional facility by suppressing

gang activity and violence outweighs the Complainant's curiosity about persons associated with the Latin Kings.

Further, the Custodian certifies that Record #1 was also lawfully denied to the Complainant pursuant to DOC's proposed regulation, which provides that SID investigations are confidential "...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:22-3.2 (a) (27). The Custodian states that the proposed regulation remains in effect pursuant to paragraph 4 of Executive Order No. 21 and paragraph 6 of Executive Order No. 26 (McGreevey). The Custodian certifies that Records #2, #3 and #4 also cannot be disclosed because they contain references to Security Threat Groups, which is prohibited by *N.J.A.C.* 10A:4-4.1. The Custodian certifies that the possession or exhibition of anything related to a STG is in violation of the DOCs disciplinary code and will subject an inmate to charges and sanctions.

The Custodian asserts that Record #1 cannot be properly redacted because, in addition to the written information on the form, the form itself would divulge how the DOC gathers gang intelligence as well as the type of information considered by the DOC to identify a gang member. The Custodian asserts that Records #2, #3 and #4 likewise cannot be properly redacted because the persons who wrote the letters could possibly be identified by their handwriting and become the targets of retaliation.

The Custodian certifies that Records #5, #6 and #7 were made available to the Complainant; however, the Complainant stated that he did not want those records because he already had copies of them.³

February 5, 2008

Letter from the Complainant to the GRC. The Complainant forwards a change of address to the GRC.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." *N.J.S.A.* 47:1A-1.

OPRA also provides:

³ Notwithstanding the Complainant's present refusal of the records, the Custodian has certified that copies of Records #5, #6 and #7 will be disclosed by the Custodian to the Complainant upon the Complainant's payment of a \$4.50 copy fee.

“.....government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added) N.J.S.A. 47:1A-1.1.

OPRA defines a government record as:

“ ... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file...or that has been received in the course of his or its official business ...” N.J.S.A. 47:1A-1.1.

OPRA also provides:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation...” N.J.S.A. 47:1A-5.b.

OPRA further provides:

“[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...Executive Order of the Governor. N.J.S.A. 47:1A-9.a.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” 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.

The Custodian certifies Record #1 cannot be disclosed because it contains sensitive gang-related information and, pursuant to N.J.S.A. 47:1A-1. and the common law balancing test, the DOC’s interest in maintaining the safety and security of the correctional facility by suppressing gang activity and violence outweighs the Complainant’s curiosity about persons associated with the Latin Kings.

It is unnecessary to evaluate whether Record #1 may or may not be disclosed under the common law balancing test, however, because the Custodian also certifies that access to this record must be denied because the DOC’s proposed regulations prohibit

disclosure of the record. *N.J.A.C.* 10A:22-3.2 sets forth records that are designated as confidential. Section (a) (27) of that proposed regulation provides:

“...Special Investigations Division investigations, 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...” Department of Corrections, Office of the Commissioner, Proposed Amendments: *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002.

The Custodian certifies that Record #1 cannot be sufficiently redacted because not only the written information on the form, but also the information that is gathered, will implicate safety and security issues. The Custodian certifies that, even redacted, the form will disclose how the DOC gathers gang intelligence and the information considered in identifying gang members.

The Custodian certifies that Records #2 through #4 cannot be disclosed because they contain references to STGs, and possession or exhibition of anything related to a STG by an inmate is prohibited under proposed regulation *N.J.A.C.* 10A:4-4.1 which provides in relevant part:

“An inmate who commits one or more of the following numbered prohibited acts shall be subject to disciplinary action and a sanction that is imposed by a Disciplinary Hearing Officer or Adjustment Committee...* .011 possession or exhibition of anything related to a security threat group.” *N.J.A.C.* 10A:4-4.1(a).

Further, the Custodian asserts that the records cannot be properly redacted because the Complainant may be able to identify the persons who wrote the letters by their handwriting and therefore there is a risk of retaliation. The Custodian therefore states that disclosure of Records #2, #3 and #4 could adversely affect the safety and security of the corrections facility. For this reason, the Custodian states that these records cannot be disclosed.

The DOC proposed regulations remain in effect pursuant to paragraph 4 of Executive Order No. 21 and paragraph 6 of Executive Order No. 26 (McGreevey).

Paragraph 4 of Executive Order No. 21 provides in relevant part as follows:

“In light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order...”

Paragraph 6 of Executive Order No. 26 provides that “[t]he remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order.” Paragraph 4 of Executive Order No. 21 was one of its remaining provisions.

Although these Orders were issued over six (6) years ago, no rescinding or modifying order has been issued. Accordingly, they are still in full force and effect. The Superior Court in an unpublished opinion examined the continuing effect of these Orders in 2005. In Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005), the court stated “[paragraph 6 of Executive Order No. 26] continues to permit a department or agency within State Government (sic) to adopt rules and regulations and to permit the operation of a proposed rule or regulation prior to its final adoption. Therefore...public ‘agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published...” *Id.* at 11.

In that case, the court went on to state that “[i]t appears, from the language of both Executive Orders, that these provisions were added to provide sufficient time for departments and agencies within State government to evaluate their records, propose regulations and withhold certain documents from public inspection pending the adoption of the proposed rules. While this process may be at variance with the normal regulatory process, one can only conclude that the Executive Branch, understanding the broad scope of OPRA, felt it was appropriate to have agencies and departments, within State government, undertake a careful review and analysis of its records to determine, for purposes of security and safety, those records to be considered confidential.” *Id.* at 12.

The court further held that “[r]ecognizing the time delay inherent in the normal rule adoption process, Executive Order No. 21 and Executive Order No. 26 included language to permit custodians of records to deny access, based on the proposed rule, pending final adoption. Now, three years after the passage of OPRA, for the court, the continued efficacy of that practice raises some concerns.” *Id.*

The court concluded, however, that “[w]hile [it] does not know the status of this proposed regulation, under Executive Order No. 21, paragraph 4 and Executive Order No. 26, paragraph 6, resolution of that issue is not required. ... the court assumes that the proposed rule change is still pending.” *Id.* at 13.

Because the Custodian certifies Record #1, a Security Threat Group Member Validation Form, is designated as a confidential document by Department of Corrections proposed regulation *N.J.A.C. 10A:22-3.2(a)(27)*, and because the Custodian certifies that Records #2 through #4, letters to the Complainant containing references to Security Threat Groups, the possession or exhibition of which by an inmate is prohibited under proposed regulation *N.J.A.C. 10A:4-4.1*, and because the Custodian certifies the records cannot be redacted without risk of posing a safety and security threat within the correctional facility, and because the proposed regulations are continued in effect pursuant to Executive Orders No. 21 and No. 26 (McGreevey) and the court’s decision in Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police

of the New Jersey Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005), Records #1 through 4 are exempt from disclosure under N.J.S.A. 47:1A-9.a. and the Custodian has lawfully denied access to these requested records.

The Custodian certified that she will disclose copies of Records #5, #6 and #7 to the Complainant upon the Complainant's payment of a \$4.50 copy fee; however, the Complainant has refused these records. OPRA provides that copies of government records may be purchased upon payment of the fee prescribed by law or regulation. N.J.S.A. 47:1A-5.b. Additionally, in Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), the Council held that:

“...the Custodian is...not required to release said records until payment is received pursuant to N.J.S.A. 47:1A-5.b., Santos v. New Jersey State Parole Board, GRC Case No. 2004-74 (August, 2004) and Cuba v. Northern State Prison, GRC Case No. 2004-146 (February, 2005).”

Because the Custodian certified that she will disclose copies of Records #5, #6 and #7 to the Complainant upon the Complainant's payment of a \$4.50 copy fee, and because the Custodian is not required to release the requested records until payment is received pursuant to N.J.S.A. 47:1A-5.b. and Paff, supra, the Custodian has not unlawfully denied the Complainant access to said records.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. Because the Custodian certifies Record #1, a Security Threat Group Member Validation Form, is designated as a confidential document by Department of Corrections proposed regulation *N.J.A.C. 10A:22-3.2(a)(27)*, and because the Custodian certifies that Records #2 through #4, letters to the Complainant containing references to Security Threat Groups, the possession or exhibition of which by an inmate is prohibited under proposed regulation *N.J.A.C. 10A:4-4.1*, and because the Custodian certifies the records cannot be redacted without risk of posing a safety and security threat within the correctional facility, and because the proposed regulations are continued in effect pursuant to Executive Orders No. 21 and No. 26 (McGreevey) and the court's decision in Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005), Records #1 through 4 are exempt from disclosure under N.J.S.A. 47:1A-9.a. and the Custodian has lawfully denied access to these requested records.
2. Because the Custodian certified that she will disclose copies of Records #5, #6 and #7 to the Complainant upon the Complainant's payment of a \$4.50 copy fee, and because the Custodian is not required to release the requested records until payment is received pursuant to N.J.S.A. 47:1A-5.b. and the Council's decision in Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July

2006), the Custodian has not unlawfully denied the Complainant access to said records.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

November 13, 2008