



State of New Jersey
 DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 31, 2018 Government Records Council Meeting

Teddy John Rose
 Complainant

Complaint No. 2016-325

v.

NJ Department of Corrections
 Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 2018 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 requested mental health notes, which can be categorized as medical, psychiatric, or psychological records, are exempt from disclosure as records that contain “information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation” N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(4); EO 26. Therefore, the Custodian lawfully denied access to the subject OPRA request. See also Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017); Brunson v. N.J. Dep’t of Corr., GRC Complaint No. 2015-357 (February 2017).

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 31st Day of July, 2018

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: August 3, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**Teddy John Rose¹
Complainant**

GRC Complaint No. 2016-325

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Hardcopies of the Complainant’s mental health chart notes from June 5, 2014 relating to a visit with a psychologist at South Woods State Prison.

Custodian of Record: John Falvey
Request Received by Custodian: December 1, 2016
Response Made by Custodian: December 8, 2016
GRC Complaint Received: December 27, 2016

Background³

Request and Response:

On November 23, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 8, 2016, the Custodian responded in writing denying the Complainant’s OPRA request under N.J.A.C. 10A:22-2.3(a)(4), which exempted access to “any information relating to medical, psychiatric, or psychological history, diagnosis, treatment, or evaluation.”

Denial of Access Complaint:

On December 27, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s denial of access. The Complainant noted that he sought access to a chart note memorializing that he sought counseling per the State Parole Board’s suggestion, that the psychiatrist determined he did not qualify, and that he was offered enrollment in a “Borderline group.”

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Adam Robert Gibbons.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

The Complainant contended that he should have received the requested notes under N.J.A.C. 10A:22-2.7(d). The Complainant asserted that this regulation allowed inmates to receive medical records, provided that they would not compromise the safety and security of a correctional facility. The Complainant argued that the responsive notes were not prepared by “professional mental health staff” and was not a “evaluative or administrative assessment [report].” The Complainant further contended that the notes did not constitute a psychiatric or psychological history, diagnosis, or treatment.⁴

Statement of Information:

On February 27, 2017, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that he received the Complainant’s OPRA request on December 1, 2016. The Custodian certified that mental health records were maintained in the Complainant’s file at his facility of incarceration. The Custodian certified that he responded in writing on December 8, 2016 denying the subject OPRA request under N.J.A.C. 10A:22-2.3(a)(4).

The Custodian argued that his denial was lawful under OPRA. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(4). The Custodian noted that the GRC has decided on this issue before. The Custodian stated that in both McLawnhorn v. N.J. Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013) and Riley v. N.J. Dep’t of Corr., GRC Complaint No. 2013-345 (July 2014), the Council held that the custodian lawfully denied access to mental health records under N.J.A.C. 10A:22-2.3(a)(4).

The Custodian also argued that the Complainant may have misunderstood the interplay between OPRA and another method for obtaining the records sought in N.J.A.C. 10A:22-2.7. The Custodian averred that N.J.A.C. 10A:22-2.3(a)(4) expressly exempted access to the record sought under OPRA. The Custodian averred that, conversely, N.J.A.C. 10A:22-2.7 applies to the New Jersey Department of Corrections’ (“DOC”) internal administrative procedures allowing for inmates to obtain their own medical records. The Custodian asserted that the two (2) processes differ in that OPRA does not take into account the identity of the requestor. The Custodian argued that a record is either exempt or disclosable under OPRA regardless of whether the requestor is the subject of the responsive record.

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

⁴ The Complainant also included as part of his Denial of Access Complaint a list of dates he attempted to obtain the record at issue here through other means, including in accordance with processes set forth in N.J.A.C. 10A:22-2.7(d). That process requires inmates to file a written request to the “Medical Department” on a Form MR-022. N.J.A.C. 10A:22-2.7(a). Additionally, the GRC notes that it does not have the authority to address issues arising from requests made under DOC’s regulations. N.J.S.A. 47:1A-7(b).

“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).

DOC’s regulations provide that:

In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., any other law, rule promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq. . . . (4) Any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation

[N.J.A.C. 10A:22-2.3(a)(4).]

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). Additionally, the language contained in N.J.A.C. 10A:22-2.3(a)(4) is consistent with longstanding language contained in Executive Order 26 (McGreevey, 2002)(“EO 26”), which provides in relevant part that “[t]he following records shall not be . . . subject to public access pursuant to [OPRA] . . . [i]nformation relating to medical, psychiatric, or psychological history, diagnosis, treatment or evaluation.” Id.

Moreover, in Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017) (on appeal from Spillane v. N.J. State Parole Bd., GRC Complaint No. 2014-169)(March 2015)), the Superior Court of New Jersey, Appellate Division upheld the Council’s determination that the custodian lawfully denied access to complainant’s mental health records under OPRA. In reaching its conclusion, the court reasoned that the language of EO 26 and State Parole Board regulations at N.J.A.C. 10A:71-2.2 “rendered the report exempt from disclosure under OPRA.” Id. at 6. Further the court dismissed complainant’s assertion that he was entitled to access because the report was about him: “OPRA provides a vehicle for public access to government records. OPRA does not afford appellant a right of personal access to government records that are subject to OPRA’s exceptions or exemptions.” Id. (citations omitted). See also Groelly v. N.J. Dep’t of Corr., GRC Complaint No. 2010-294 (June 2012); McLawhorn v. N.J. Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013); Riley v. N.J. Dep’t of Corr., GRC Complaint No. 2013-345 (July 2014); Brunson v. N.J. Dep’t of Corr., GRC Complaint No. 2015-357 (February 2017).

In the matter currently before the Council, the Complainant submitted an OPRA request seeking access to notes made on his mental health chart. The Custodian denied access to the request under N.J.A.C. 10A:22-2.3(a)(4). In the Denial of Access Complaint, the Complainant argued that he should have been given access to the record based on DOC's administrative procedures at N.J.A.C. 10A:22-2.7(d). In the SOI, the Custodian argued that he lawfully denied access to the responsive mental health record under OPRA. The Custodian further asserted that the Complainant appeared to confuse OPRA with DOC's administrative processes: mental health records were always exempt under OPRA.

All relevant case law provides that the Custodian's denial of access here was lawful. Specifically, the Complainant sought a portion of a mental health chart that he described as "memorializing that he sought counseling per the State Parole Board's suggestion, that the psychiatrist determined he did not qualify, and that he was offered enrollment in a 'Borderline group.'" Regardless of who made the notes on the Complainant's record, it is clear that the notes were part of a larger mental health record. Such a fact is confirmed by both parties in the wording of OPRA request, as well as in the record the Custodian identified as responsive. The GRC finds Spillane, 2017 N.J. Super. Unpub. LEXIS 2392 to be instructive in the instant complaint. Although unpublished and decided during the pendency of this complaint, Spillane supports a plain reading of OPRA and its exemptions. Spillane also supports the GRC's long-standing precedent on mental health records, where the Council routinely held that the custodian lawfully denied access to requests for medical records regardless of whether the complainant sought his own records. See *i.e.* Brunson, GRC 2015-357. For these reasons, the GRC is satisfied that the Custodian unlawfully denied access to the responsive notes under OPRA.

Accordingly, the requested mental health notes, which can be categorized as medical, psychiatric, or psychological records, are exempt from disclosure as records that contain "information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation" N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(4); EO 26. Therefore, the Custodian lawfully denied access to the subject OPRA request. See also Spillane, 2017 N.J. Super. Unpub. LEXIS 2392; Brunson, GRC 2015-357.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the requested mental health notes, which can be categorized as medical, psychiatric, or psychological records, are exempt from disclosure as records that contain "information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation" N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(4); EO 26. Therefore, the Custodian lawfully denied access to the subject OPRA request. See also Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017); Brunson v. N.J. Dep't of Corr., GRC Complaint No. 2015-357 (February 2017).

Prepared By: Frank F. Caruso
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July 24, 2018