State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 27, 2019 Government Records Council Meeting

Steven Mozer
Complainant
v.
NJ Department of Corrections
Custodian of Record

Complaint No. 2018-5 and 2018-6

At the August 27, 2019 public meeting, the Government Records Council ("Council") considered the August 20, 2019 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:

1. The Complainant's request No. 1 seeking access to his "classification folder [from] October 15, 2016 to December 19, 2017" is invalid because it was a blanket request that failed to identify the specific records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Bragg v. N.J. Dep't of Corr., GRC Complaint No. 2010-145 (March 2011). Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.

2. Because the responsive presentence reports fall within the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption, they are exempt from disclosure under OPRA. See Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2013-299 (September 2014) (citing State v. DeGeorge, 113 N.J. Super. 542 (App. Div. 1971)). Accordingly, the Custodian did not unlawfully deny access to the Complainant's OPRA request No. 2, item No. 1. N.J.S.A. 47:1A-6.

3. The requested psychological evaluation is exempt from disclosure as a record that contains "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 OPRA request No. 2, item No. 2. 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 27th Day of August 2019

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 29, 2019

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
August 27, 2019 Council Meeting

Steven Mozer[1] **GRC Complaint No. 2018-5 and 2018-6**[2]
Complainant

v.

NJ Department of Corrections[3]
Custodial Agency

Records Relevant to Complaint:

OPRA request No. 1:[4] On-site inspection of the Complainant's "classification folder [from] October 15, 2016 to December 19, 2017."

OPRA request No. 2:[5] On-site inspection of:

1. Adult Presentence Report dated April 19, 1989 in Indictment No. 111-07-88.
2. Psychological evaluation ("PSI") dated January 19, 2017.

Custodian of Record: John Falvey
Request Received by Custodian: December 19, 2017
Response Made by Custodian: December 28, 2017
GRC Complaint Received: January 10, 2018

Background[6]

Request and Response:

On December 19, 2017, the Complainant submitted two (2) Open Public Records Act ("OPRA") requests to the Custodian seeking the above-mentioned records. On December 28, 2017, the Custodian responded in writing to both OPRA requests. Regarding OPRA request No. 1, the Custodian denied the request as invalid, citing MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bragg v. N.J. Dep't of Corr., GRC Complaint No. 2010-145 (March 2011).

[1] No legal representation listed on record.
[2] The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.
[3] Represented by Deputy Attorney General Nicole Adams.
[4] This OPRA request is the subject of GRC Complaint No. 2018-5.
[5] This OPRA request is the subject of GRC Complaint No. 2018-6.
[6] 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.

Regarding OPRA request No. 2, the Custodian denied access to item No. 1 under the "inter-agency or intra-agency advisory, consultative, or deliberative [("ACD"]) material" exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9. The Custodian also denied access to item No. 2 under N.J.A.C. 10A:22-2.3(a)(4). The Custodian noted that the Complainant could file a form MR-022 with the New Jersey Department of Corrections' ("DOC") Medical Department to access medical records.

Denial of Access Complaint:

On January 10, 2018, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council ("GRC"). The Complainant asserted that he was unlawfully denied access to records responsive to each OPRA request.

Regarding OPRA request No. 1, the Complainant contended that he was permitted to inspect his classification folder under OPRA.[7] The Complainant asserted that OPRA supports New Jersey's "history of commitment to public participation in government and to the corresponding need for an informed citizenry."

Regarding OPRA request No 2, the Complainant contended that the Custodian unlawfully denied access to the responsive reports. The Complainant argued that if his defense attorney could provide him the reports, DOC should also be able to provide them. The Complainant contended that failure to disclose the responsive records "would thwart the policy of transparency that underlies OPRA." (Citing N.J.S.A. 47:1A-1; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010)). The Complainant also argued that he had input in his PSI, which impacted ongoing litigation at the Appellate Division and before the New Jersey Supreme Court. The Complainant asserted that he previously submitted multiple form MR-022s, at which time he was directed to file an OPRA request instead.

Statement of Information:

On January 26, 2018, the Custodian filed a Statement of Information ("SOI") for each complaint. The Custodian certified that he received the Complainant's two (2) OPRA requests on December 19, 2017. The Custodian certified that he responded in writing on December 28, 2017 denying access to both OPRA requests.

Regarding OPRA request No. 1, the Custodian argued that he lawfully denied access to same because it was invalid. The Custodian argued that the Complainant's request sought inspection of a file that contained numerous categories of records. The Custodian argued that the file is a "comprehensive dossier that could contain numerous categories of records" exempt from disclosure under OPRA and DOC regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3, *et seq.* The Custodian further affirmed that those categories could include multiple confidential records

[7] The GRC notes that the Complainant also asserted a right to the records under the Open Public Meetings Act ("OPMA"), the Right to Know Law ("RTKL"), and common law. However, the GRC has no authority to adjudicate OPMA or common law issues. N.J.S.A. 47:1A-7(b); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2008-111 (June 2009); Rowan, Jr. (O.B.O. Express Times) v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013). Further, OPRA replaced the RTKL in July 2002; thus, OPRA supersedes the former statute.

such as Special Investigation Division reports, medical and mental health records, comprehensive criminal histories, security threat group records, and communication and visitor information. The Custodian certified that the Complainant could submit an "Inmate Remedy System Form" through any JPAY kiosk located within his facility to request certain records from his file. The Custodian noted that the Complainant could "articulat[e]" the records he would like to view and reasons why through the kiosk.

The Custodian contended that he lawfully denied access to the Complainant's OPRA request. The Custodian asserted that the request, similar to the request in Bragg, GRC 2010-145, failed to identify a specific record. The Custodian also argued that the Complainant failed to identify any specific records sought from his classification file. Additionally, the Custodian argued that the classification file is not subject to disclosure, regardless of whether the Complainant was seeking his own file. Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017).

Regarding OPRA request No. 2, item No. 1, the Custodian contended that he lawfully denied access to the requested presentence report as ACD material. The Custodian contended that he lawfully denied access to the responsive presentence reports. In support of his denial, the Custodian argued that this complaint was directly on point with the Council's prior decision in Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2013-299 (September 2014). The Custodian stated that there, the Council upheld the custodian's denial of access to presentence reports under the ACD exemption. Id. (citing N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:2.3(a); N.J. Court Rules R. 1:38(b)(1)-(2); State v. DeGeorge, 113 N.J. Super. 542 (App. Div. 1971)). The Custodian

Regarding OPRA request No. 2, item No 2., the Custodian again contended that he lawfully denied access to the requested psychological evaluation record under N.J.S.A. 47:1A-9(a) and N.J.A.C. 10A:22-2.3. The Custodian stated that 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 Appellate Division affirmed the GRC's decision that the custodian lawfully denied access to responsive mental health reports in accordance with Executive Order No. 26 (Gov. McGreevey, 2002) ("EO 26"). The Custodian stated that the court was also unpersuaded by the complainant's argument that he was entitled to the report under OPRA because it was about him. The Custodian argued that the facts here were on point with Spillane. The Custodian asserted that the Complainant sought a psychological evaluation that was expressly exempt from disclosure under DOC's regulations. The Custodian further argued that the Complainant was not entitled to the record, even if it referred to him.

Analysis

Validity of Request

The New Jersey Appellate Division has held that:

> While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information*.

Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination." N.J.S.A. 47:1A-1.

[MAG, 375 N.J. Super. at 546 (emphasis added).]

The Court reasoned that:

> Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.
>
> [Id. at 549 (emphasis added).]

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. (emphasis added). Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005),[8] N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad ("any and all" requests seeking "records" generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm'n, GRC Complaint No. 2008-97 (December 2008).

The GRC has typically held that a request seeking access to a "file" is invalid because it represents a blanket request for a class of various, unidentifiable records. See Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008); Nunley v. N.J. State Parole Bd., GRC Complaint No. 2013-335 (July 2014). In Bragg, GRC 2010-145, the complainant disputed the custodian's denial of his request seeking his "[c]omplete institutional" and "Special Investigation Division" files. In the SOI, the custodian argued that a portion of the request was invalid because it failed to identify specific records. The Council agreed, finding that both request items were invalid because the complainant's "request seeks entire files rather than specific identifiable government records." (Citations Omitted). See also Bradley-Williams v. Atlantic

[8] Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

Cnty. Jail, GRC Complaint No. 2011-232 (December 2012); Torian v. N.J. State Parole Bd., GRC Complaint No. 2013-245 (June 2014).

In the instant complaint, the Complainant's request No. 1 sought access to his "classification folder [from] October 15, 2016 to December 19, 2017" The Custodian denied the request as invalid. In the Denial of Access Complaint, the Complainant argued that he had a right to inspect his classification file under OPRA. The Custodian reiterated DOC's position that the request was invalid in the SOI.

In reviewing all available case law above, the GRC is satisfied that the request at issue here was invalid and that the Custodian lawfully denied access to it. The request at issue here was very similar to the request at issue in Bragg, GRC 2010-145. Also, all relevant case law continuously reaffirms the Council's view on requests seeking a "file" as a blanket request. Thus, a holding consistent with prevailing case law is warranted here.

Accordingly, the Complainant's request No. 1 seeking access to his "classification folder [from] October 15, 2016 to December 19, 2017" is invalid because it was a blanket request that failed to identify the specific records sought. MAG, 375 N.J. Super. at 549; Bent, 381 N.J. Super. at 37; N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Bragg, GRC 2010-145. Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.

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.

Presentence Reports

OPRA provides that the definition of a government record "shall not include . . . [ACD] material." Further, the Council has previously held that presentence reports were exempt from disclosure under the ACD material exemption. For instance, in Pitts, GRC 2013-299 (September 2014) the Council found that the contents of presentence reports meet the definition of consultative, advisory, or deliberative material. Id. at 4 (citing DeGeorge, 113 N.J. Super. at 544); see also Baker v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2014-262 (May 2015). The Council further relied upon DeGeorge, 113 N.J. Super. at 542 in holding that even if presentence reports were available to defendants in certain judicial proceedings, that did "not render [presentence reports] a public record." Id.

Here, the Complainant's OPRA request No. 2, item No. 1 sought access to copies of a presentence report dated April 19, 1989. In response to the Custodian's denial, the Complainant filed this complaint arguing that he should have been given access to the responsive presentence report for several reasons. In the SOI, the Custodian reiterated DOC's position that the responsive records were exempt from disclosure under the ACD exemption. Citing Pitts, GRC 2013-299.

The Council's decision in Pitts, GRC 2013-299 is on point with the facts of the instant complaint. The Complainant sought access to a presentence report, which the Custodian denied as ACD material. The Complainant filed the instant complaints arguing a similar position to the complainant in Pitts. The Custodian subsequently argued in the SOI that Pitts controlled here. The GRC agrees and finds that the Custodian lawfully denied access to the Complainant's OPRA request substantially for the reasons set forth in Pitts. See also Rose v. N.J. Dept' of Corr., GRC Complaint No. 2016-302 (July 2018).

Accordingly, because the responsive presentence reports fall within the ACD exemption, they are exempt from disclosure under OPRA. See Pitts, GRC 2013-299 (citing De George, 113 N.J. Super. at 544). Accordingly, the Custodian did not unlawfully deny access to the Complainant's OPRA request No. 2, item No. 1. N.J.S.A. 47:1A-6.

Psychological evaluation

OPRA provides that its provisions ". . . 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. . . . 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).]

Based on the forgoing, psychiatric or psychological records 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 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, 2017 N.J. Super. Unpub. LEXIS 2392, the Superior Court of New Jersey, Appellate Division affirmed 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's OPRA request No. 2, item No. 2, sought access to his psychological evaluation. 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 because he provided input in the report and had a right to review it. In the SOI, the Custodian argued that he lawfully denied access to the responsive mental health record under OPRA. The Custodian further cited Spillane, 2017 N.J. Super. Unpub. LEXIS 2392 in asserting that health records were always exempt under OPRA, regardless of the identity of the requestor.

All relevant case law provides that the Custodian's denial of access here was lawful. Specifically, the Complainant sought a psychological evaluation report, which is clearly identified in DOC's regulations and EO 26 as exempt. This is regardless of whether the Complainant provided "input" for the record. Further, Spillane, 2017 N.J. Super. Unpub. LEXIS 2392 is instructive in the instant complaint. Although unpublished, 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 has held that the custodian lawfully denied access to requests for medical records regardless of whether complainants sought their 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 psychological evaluation is exempt from disclosure as a record that contains "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 OPRA request No. 2, item No. 2. See also Spillane, 2017 N.J. Super. Unpub. LEXIS 2392; Brunson, GRC 2015-357.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant's request No. 1 seeking access to his "classification folder [from] October 15, 2016 to December 19, 2017" is invalid because it was a blanket request that failed to identify the specific records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Bragg v. N.J. Dep't of Corr., GRC Complaint No. 2010-145 (March 2011). Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.

2. Because the responsive presentence reports fall within the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption, they are exempt from disclosure under OPRA. See Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2013-299 (September 2014) (citing State v. DeGeorge, 113 N.J. Super. 542 (App. Div. 1971)). Accordingly, the Custodian did not unlawfully deny access to the Complainant's OPRA request No. 2, item No. 1. N.J.S.A. 47:1A-6.

3. The requested psychological evaluation is exempt from disclosure as a record that contains "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 OPRA request No. 2, item No. 2. 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
Executive Director

August 20, 2019