



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 23, 2021 Government Records Council Meeting

Kevin Alexander
Complainant

Complaint No. 2020-2

v.

NJ Office of the Public Defender
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council (“Council”) considered the February 16, 2021 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 lawfully denied access to the Complainant’s OPRA request seeking correspondence between himself and Mr. Miseo. N.J.S.A. 47:1A-6. Specifically, access to case file records from the N.J. Office of the Public Defender are deemed confidential pursuant to N.J.S.A. 47:1A-5(k) and the Complainant failed to provide any authorization necessary to overcome the exemption. See Lemon v. N.J. Office of the Pub. Defender, GRC Complaint No. 2015-297 (November 2015).

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 23rd Day of February 2021

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: February 25, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

**Kevin Alexander¹
Complainant**

GRC Complaint No. 2020-2

v.

**N.J. Office of the Public Defender²
Custodial Agency**

Records Relevant to Complaint: Hardcopy via U.S. mail of letters the Complainant sent to Deputy Public Defender Robert S. Miseo, Esq., and his responses.

Custodian of Record: Alison Perrone

Request Received by Custodian: December 4, 2019

Response Made by Custodian: December 11, 2019

GRC Complaint Received: January 8, 2020

Background³

Request and Response:

On an unknown date, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 11, 2019, the Custodian responded in writing denying access to the OPRA request under N.J.S.A. 47:1A-5(k). The Custodian stated that the Complainant should contact Mr. Miseo directly, who was also copied on her response.

Denial of Access Complaint:

On January 8, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records sought “did not fall under public records, it falls under attorney-client privilege.” The Complainant thus argued that he had a right to receive the requested correspondence, but that the Custodian unlawfully denied him access to his own records.

¹ No legal representation listed on record.

² No legal representation listed on record.

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 February 12, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 4, 2019. The Custodian certified that she responded in writing on December 11, 2019 denying the request under N.J.S.A. 47:1A-5(k).

The Custodian contended that she lawfully denied access to the Complainant’s OPRA request. The Custodian averred that the records sought were part of the N.J. Office of the Public Defender’s (“OPD”) litigation files and are clearly exempt under N.J.S.A. 47:1A-5(k). The Custodian asserted that there is no exception within OPRA that allows an OPD client to obtain access to their own file absent a court order or consent directly from the State Public Defender. The Custodian noted that the Council previously held in favor of the OPD in similar situations. See Gaines v. N.J. Office of the Pub. Defender, GRC Complaint No. 2012-261 (August 2013); Gaines v. N.J. Office of the Pub. Defender, GRC Complaint No. 2014-313 (March 2015); Lemon v. N.J. Office of the Pub. Defender, GRC Complaint No. 2015-297 (November 2015).

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 “[t]he files maintained by the [OPD] that relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender.” N.J.S.A. 47:1A-5(k). See also Gaines, GRC 2012-261 (holding that responsive records relating to OPD’s representation of the complainant were exempt from disclosure under OPRA).

In Lemon, GRC 2015-297, the complainant sought records, including plea forms, related to his own case file. The GRC held that based on the plain language of N.J.S.A. 47:1A-5(k), and without evidence of a law, court order or the State Public Defender authorizing disclosure, the custodian’s denial of access was lawful. See also Shabazz v. N.J. Office of the Pub. Defender, GRC Complaint No. 2017-145 (July 2019).

In the matter before the Council, the Complainant sought letters between himself and Mr. Miseo. The Custodian denied access under N.J.S.A. 47:1A-5(k), stating that the requested records were exempt under OPRA. In the Denial of Access Complaint, the Complainant correctly noted that the correspondence sought were not “public records,” but that he had a right to access them under the attorney-client privilege.⁴ The Custodian subsequently certified in the SOI that the

⁴ The GRC notes that OPRA’s attorney-client privilege provision is an exemption and not an exception allowing for disclosure to certain individuals.

records sought were part of a litigation file. The Custodian further argued that the Complainant provided no evidence of a law, court order, or State Public Defender authorization allowing him access to his records under OPRA. Based on the foregoing, the GRC is satisfied that the Custodian's denial of access was lawful because the plain language of OPRA exempts access to all OPD client records and contains no exceptions for persons attempting to access their own files.

Therefore, the Custodian lawfully denied access to the Complainant's OPRA request seeking correspondence between himself and Mr. Miseo. N.J.S.A. 47:1A-6. Specifically, access to case file records from the OPD are deemed confidential pursuant to N.J.S.A. 47:1A-5(k) and the Complainant failed to provide any authorization necessary to overcome the exemption. See Lemon, GRC 2015-297.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to the Complainant's OPRA request seeking correspondence between himself and Mr. Miseo. N.J.S.A. 47:1A-6. Specifically, access to case file records from the N.J. Office of the Public Defender are deemed confidential pursuant to N.J.S.A. 47:1A-5(k) and the Complainant failed to provide any authorization necessary to overcome the exemption. See Lemon v. N.J. Office of the Pub. Defender, GRC Complaint No. 2015-297 (November 2015).

Prepared By: Frank F. Caruso
Executive Director

February 16, 2021