



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 28, 2023 Government Records Council Meeting

Stephen Grogan
Complainant

Complaint No. 2021-20

v.

Union County Prosecutor's Office
Custodian of Record

At the March 28, 2023 public meeting, the Government Records Council ("Council") considered the March 28, 2023 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. The Custodian did not unlawfully deny access to the Complainant's OPRA request dated October 7, 2020 because the Custodian certified that the requested records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. With respect to the Complainant's OPRA request dated November 17, 2020, the Custodian has borne his burden of proving that he lawfully denied access to the requested records because said records are not government records subject to disclosure pursuant to EO 26, applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). See also Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010), Nevin v. N.J. Dep't of Health and Senior Servs., GRC Complaint No. 2013-18 (October 2013) and Grogan v. Sussex Cnty. Prosecutor's Office, GRC Complaint No. 2021-19 (February 2023). Because said records are exempt from access under EO 26, it is unnecessary for the GRC to examine additional reasons asserted by the Custodian for denying access.

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 28th Day of March 2023

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: April 3, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2023 Council Meeting**

**Stephen Grogan¹
Complainant**

GRC Complaint No. 2021-20

v.

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

Records Relevant to Complaint:

OPRA request dated October 7, 2020: Copies via e-mail of “[n]umber of veteran applicants for the Veterans Diversion Program and number of veterans approved for Veterans Diversion Program for years 2017, 2018, 2019 and 2020.”

OPRA request dated November 17, 2020: Copies via e-mail of “[r]edacted applications for the Union County Veterans Diversion County (sic) Program from 2017 to [November 17, 2020].”

Custodian of Record: Robert J. Rosenthal

Requests Received by Custodian: October 7, 2020 and November 16, 2020³

Response Made by Custodian: November 13, 2020 and November 20, 2020

GRC Complaint Received: January 19, 2021

Background⁴

Requests and Responses:

On October 7, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 13, 2020, the Custodian responded in writing via letter informing the Complainant that the County has no record that contains a tally of the number of total applicants, or the number of applicants accepted into the program. The Custodian also informed the Complainant that the requested records are not contained within an electronic database from which the information can be extracted. As such, the Custodian stated that the County has no records responsive to the request.

¹ No legal representation listed on record.

² Represented by April C. Bauknight, Esq. (Elizabeth, NJ).

³ Although the request was dated November 17, 2020, the Custodian certified that he received it on November 16, 2020.

⁴ 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.

On November 16, 2020, the Complainant submitted an OPRA request dated November 17, 2020 to the Custodian seeking the above-mentioned records. On November 20, 2020, the Custodian responded in writing via letter informing the Complainant that the County has no application specific to the Veterans Diversion Program (“VDP”). The Custodian stated that the County uses a combined Jail Diversion Program/Veterans Diversion Program application which does not ask the applicant to specify the program to which the individual is applying. The Custodian stated that the applications are reviewed and processed under the most appropriate program. As such, the Custodian stated that the County has no records responsive to the request. However, the Custodian stated that even if responsive records existed, the Complainant’s request would be denied under Executive Order 26 (McGreevey) which provides that records which contain information concerning an individual’s “medical, psychiatric or physiological history, diagnosis, treatment or evaluation” are not government records subject to disclosure under OPRA. The Custodian further stated that if the records existed they could not be properly redacted because OPRA’s privacy clause requires a custodian to maintain the confidentiality of “a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.” The Custodian cited N.J.S.A. 47:1A-1.1., Paff v. Ocean Cnty. Prosecutor’s Office, 235 N.J. 1, 26 (2018), and Burnett v. Cnty. of Bergen, 198 N.J. 408, 427 (2009).

Denial of Access Complaint:

On January 19, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he filed an OPRA request on October 7, 2020. The Complainant stated that the Custodian denied his request because an OPRA request “is not for statistics.”

The Complainant stated that he filed another OPRA request on November 16, 2020, seeking redacted VDP applications without doctor or attorney reports. The Complainant stated that the Custodian denied his request because they have no specific form for the VDP and that releasing such a form would release personal information. The Complainant stated that he knows the County has a VDP application because he filed one for himself. The Complainant asserted that redacting the application would eliminate personal information. The Complainant further asserted that according to the VDP, completed applications are to be submitted to the State of New Jersey for review by the Attorney General.

Statement of Information:

On February 25, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received two (2) OPRA requests from the Complainant which formed the basis of this complaint. The request dated October 7, 2020 was assigned Request #721-2020, and the request dated November 17, 2020 was assigned Request #828-2020.

The Custodian certified that Request #721-2020 requested statistical information regarding the VDP. The Custodian certified that the request was denied because the Union County Prosecutor’s Office (“UCPO”) does not have any responsive records. The

Custodian certified that Request #828-2020 was denied due to “HIPAA, SSN, Address, Executive Order 26 and attorney client privilege.” The Custodian also certified that the requested applications are used for more than the VDP. The Custodian certified that the UCPO would have had to research all applications submitted to determine for which program the individual was eligible, ascertain the status of the individual’s acceptance into the program, and then identify those enrolled in the VDP. The Custodian certified that such research is not required under OPRA. The Custodian included a blank Jail Diversion Program/Veterans Diversion Program application form as part of item 9.

Additional Submissions:

On November 20, 2020, the Complainant e-mailed the Custodian in response to the SOI. The Complainant stated that there is a Union County VDP application, and it is posted on the UCPO website. The Complainant stated that the form is used when applying to the Union County VDP, not the Jail Diversion Program. The Complainant stated that the two programs are different. The Complainant further stated that the form is the application, and the medical paperwork is supplemental material that was not requested. The Complainant stated that he is seeking the VDP application form with information regarding accepted or denied and the reason for a denial. The Complainant asserted that he is seeking public information disclosable under OPRA.

On that same date the Custodian sent a reply e-mail to the Complainant. The Custodian informed the Complainant that the form the Complainant referenced in his e-mail is available for download, and it is a combined Jail Diversion Program/Veterans Diversion Program application form. The Custodian provided the Complainant with links to the form and attached a copy of the form to the e-mail. The Custodian stated that he is standing by his earlier denial of the Complainant’s request.

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 request dated October 7, 2020

In Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the records responsive to the Complainant's request for the number of applicants and number of approvals for the VDP for the years 2017 to 2020 do not exist. As such, the Custodian certified that he denied the request.

Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request dated October 7, 2020 because the Custodian certified that the requested records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

OPRA request dated November 17, 2020

OPRA provides that its provisions:

[S]hall 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)]

Executive Order No. 26 (McGreevey, 2002) ("EO 26") states in part that, "[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation" are not government records subject to access under OPRA.

The Council has long held that records which contain information that relates to medical, psychiatric or psychological history, diagnosis, treatment or evaluation are not government records as per EO 26. In Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010), the complainant sought access to psychological test and medical reports for a Trenton Police Department detective. The Council held that such records were exempt from access as "[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation" under EO 26. Subsequently, in Nevin v. N.J. Dep't of Health and Senior Servs., GRC Complaint No. 2013-18 (October 2013), the Council held that the custodian lawfully denied access to medical records under EO 26 because the complainant failed to submit evidence to refute the custodian's certification that certain requested records contained medical information. More recently, in Grogan v. Sussex Cnty. Prosecutor's Office, GRC Complaint No. 2021-19 (February 2023), the Complainant requested redacted copies of VDP applications. The Council found that the records were lawfully denied by the Custodian because said records were not government records subject to disclosure pursuant to EO 26.

Here, the Custodian stated that the requested records were denied, *inter alia*, because they are exempt from disclosure pursuant to EO 26. Moreover, in reply to the Complainant's November 20, 2020 e-mail, the Custodian provided a copy of a blank multi-use Jail Diversion/VDP form. The form was made part of the evidence of record

via its inclusion in the SOI. An examination of the form revealed that it requires the applicant to provide his/her medical history, including diagnoses of physical and/or mental illness and any psychiatric treatment.⁵

Therefore, with respect to the Complainant's OPRA request dated November 17, 2020, the Custodian has borne his burden of proving that he lawfully denied access to the requested records because said records are not government records subject to disclosure pursuant to EO 26, applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). See also Vaughn, GRC 2009-177, Nevin, GRC 2013-18 and Grogan, GRC 2021-19. Because said records are exempt from access under EO 26, it is unnecessary for the GRC to examine additional reasons asserted by the Custodian for denying access.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to the Complainant's OPRA request dated October 7, 2020 because the Custodian certified that the requested records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. With respect to the Complainant's OPRA request dated November 17, 2020, the Custodian has borne his burden of proving that he lawfully denied access to the requested records because said records are not government records subject to disclosure pursuant to EO 26, applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). See also Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010), Nevin v. N.J. Dep't of Health and Senior Servs., GRC Complaint No. 2013-18 (October 2013) and Grogan v. Sussex Cnty. Prosecutor's Office, GRC Complaint No. 2021-19 (February 2023). Because said records are exempt from access under EO 26, it is unnecessary for the GRC to examine additional reasons asserted by the Custodian for denying access.

Prepared By: John E. Stewart

March 28, 2023

⁵ Contrary to the Complainant's assertions, the requested medical information is not supplemental material. There are blanks on the form itself for the applicant to insert the information.
Stephen Grogan v. Union County Prosecutor's Office, 2021-20 – Findings and Recommendations of the Executive Director