



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 27, 2008 Government Records Council Meeting

Major Tillery
Complainant

Complaint No. 2007-155

v.

NJ Department of Corrections
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council (“Council”) considered the February 20, 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 records requested in item #1 comprising all records used to place the Complainant in the MCU are not readily available and will require research and correlation of records by the Custodian in order to fulfill the Complainant’s OPRA request, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met her burden of proof pursuant to N.J.S.A. 47:1A-6 that access to these records was not unlawfully denied pursuant to the court’s decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005).
2. Because items #2 through #6, comprising all disciplinary records do not identify specific records and require the Custodian to research her files for records containing the Complainant’s name and for records of New Jersey State Prison inmates with more than 15 misconducts; and because under OPRA, agencies are required to disclose only identifiable government records not otherwise exempt and the Custodian is not required to do research to provide such records; the Custodian has met her burden of proof under N.J.S.A. 47:1A-6 that access to these records was not unlawfully denied pursuant to the court’s decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005).
3. Because the records requested in item #6, comprising all data records of any inmate who has more than fifteen (15) misconducts and remains in New



Jersey State Prison, are prohibited from release because an inmate is not permitted to inspect, examine or obtain copies of documents concerning any other inmate pursuant to the Department of Correction's proposed rule set forth in *N.J.A.C. 10A:22-3.2(b)*, continued in effect pursuant to Executive Orders No. 21 and No. 26 (McGreevey), they are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. 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).

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 February, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Kathryn Forsyth
Government Records Council

Decision Distribution Date: February 29, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 27, 2008 Council Meeting**

**Major Tillery¹
Complainant**

GRC Complaint No. 2007-155

v.

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

Records Relevant to Complaint:

- 1) All records used to place the Complainant in the Management Control Unit (MCU);
- 2) All disciplinary records containing the Complainant's name during the Complainant's incarcerations;
- 3) Any record of the Complainant being in a riot in Pennsylvania used to place the Complainant in the MCU;
- 4) Any record or misconduct that states the Complainant influenced others to assault staff;
- 5) Any and all misconduct used to place the Complainant in the MCU;
- 6) All data records of any inmate who has more than fifteen (15) misconducts and remains in New Jersey State Prison populations.

Request Made: June 12, 2007³

Response Made: June 12, 2007

Custodian: Michelle Hammel

GRC Complaint Filed: July 9, 2007

Background

June 12, 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.

June 12, 2007

Custodian's response to the OPRA request. The Custodian responded to the Complainant's OPRA request in writing on the same date the request was received. The Custodian denied the Complainant's request in its entirety because the request was alleged to be overly broad. The Custodian further advised the Complainant that the sixth

¹ No legal representation listed on record.

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

³ The Complainant did not date the DOC Government Records Request Form he submitted. For this reason, the date the request was received by the DOC will be used as the date request was made.

item of his request was also denied because information concerning an inmate will not be released to another inmate. The Custodian noted that the Department of Corrections (“DOC”) OPRA regulations exclude the release of records that may jeopardize the safety of any person or the safe and secure operation of a correctional facility. The Custodian informed the Complainant to request clearly identifiable records.

July 9, 2007

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

- Letter from the Custodian to the Complainant dated June 12, 2007⁴
- Document titled “Appeal from the Decision of the Gov. Record Request” (undated)

The Complainant alleges he was transferred to the New Jersey penal system from Pennsylvania and that one of the reasons he was placed in the Management Control Unit was because he purportedly had fifteen (15) misconducts during twenty-three (23) years of incarceration. The Complainant claims he was not in a control unit when imprisoned in Pennsylvania. The Complainant does not believe his OPRA request is too broad, as asserted by the Custodian, because the records he is requesting are those containing his name and he needs such records to challenge his placement in the Management Control Unit.

July 16, 2007

Offer of Mediation sent to both parties.

July 16, 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.

July 16, 2007

Request for the Statement of Information sent to the Custodian.

July 20, 2007

Letter from the Custodian’s Counsel to the GRC. The Custodian requests a five (5) business day extension of time to return the Statement of Information to the GRC.

July 20, 2007

Letter from the GRC to the Custodian’s Counsel. The GRC granted the Custodian an extension of time until July 31, 2007 to remit the completed Statement of Information.

July 31, 2007

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

- Complainant’s OPRA request⁵

⁴ This document has an original time stamp showing receipt by the GRC on June 25, 2007.

⁵ Undated.

- Letter from the Custodian to the Complainant dated June 12, 2007

The Custodian, citing MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), denied the Complainant's request for item #1 because she certifies the request would require her to conduct research and correlate records.

The Custodian certifies that pursuant to *N.J.A.C. 10A:5-2.6(h)*, inmates subject to placement in the MCU are entitled to notice and a hearing wherein the inmate "shall be informed of all adverse information bearing on the case, with the exception of information designated confidential." According to the Custodian, during the Complainant's hearing, the MCU Review Committee would have relied upon certain documents to reach a conclusion regarding placement of the Complainant. The Custodian also certifies, however, that the records contained in the Complainant's classification file do not indicate what records were utilized by the MCU Review Committee to render its decision [to place the Complainant in MCU]. Further, the Custodian certifies that the Department does not maintain a distinct MCU decision file. The Custodian therefore certifies that the Complainant's request for this record cannot be fulfilled because the request requires research and correlation which renders the request invalid pursuant to MAG.

With respect to items numbered 2 through 6, the Custodian certifies that the Complainant's requests are for information, do not identify specific records and require her to conduct research and collate information not required under OPRA. The Custodian again relies upon the Superior Court's decision in MAG, *supra*, as authority for denying the Complainant's request.

Further, the Custodian certifies that access to item #6 was also lawfully denied pursuant to N.J.S.A. 47:1A-9.a. and the Department of Corrections proposed regulation that provides "[a]n inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate." *N.J.A.C. 10A:22-3.2(b)*. The Custodian contends that these proposed regulations remain in effect pursuant to paragraph 4 of Executive Order No. 21 and paragraph 6 of Executive Order No. 26, both issued in 2002 under Governor James E. McGreevey.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

".....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.

Regarding Executive Orders, OPRA provides that:

“.....government records shall be subject to public access unless exempt from such access by...*Executive Order of the Governor...*” (Emphasis added.) N.J.S.A. 47:1A-1.

OPRA also 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. 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. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

With respect to item #1 of the Complainant’s OPRA request, the Custodian acknowledges that records responsive to the request may exist, but if they do their precise whereabouts are unknown to the Custodian and would therefore require the Custodian to conduct research to locate and compile them. The Custodian argues that she is not legally required to conduct research and correlate records pursuant to the Superior Court’s decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005).

The New Jersey Superior Court has held that “[w]hile 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.” (Emphasis added.) MAG, supra, at 546. 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." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (App. Div. 2005), the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents." *Id.*

Because the records requested in item #1 comprising all records used to place the Complainant in the MCU are not readily available and will require research and correlation of records by the Custodian in order to fulfill the Complainant's OPRA request, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met her burden of proof pursuant to N.J.S.A. 47:1A-6 that access to these records was not unlawfully denied pursuant to the court's decision in MAG, *supra*.

With respect to items numbered 2 through 6, the Custodian once more relies on MAG to deny the Complainant access to the records. The Custodian contends that the Complainant's requests are for information, do not identify specific records and again would require her to conduct research and collate information not required under OPRA.

In MAG, the court found that a request that does not identify the particular records sought by name, date, type of record or some other specific identifying characteristic may be found to be invalid. As noted above, a custodian is not required to "identify and siphon useful information" from the records made, maintained or kept on file by a public agency. "[U]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt." MAG *supra* at 549. Further, the MAG court observed that "[f]ederal courts, considering the permissible scope of requests for government records under the Freedom of Information Act [FOIA], 5 U.S.C.A. § 522, have repeatedly held that the requested record must 'be reasonably identified as a record not as a general request for data, information and statistics . . .'" *Id.* at 548 (quoting Krohn v. Dep't of Justice, 202 U.S. App. D.C. 195, 628 F.2d 195, 198 (D.C. Cir. 1980)).

Because items #2 through #6, comprising (1) all disciplinary records containing the Complainant's name during the Complainant's incarcerations, (2) any record of the Complainant being in a riot in Pennsylvania used to place the Complainant in the MCU, (3) any record or misconduct that states the Complainant influenced others to assault staff, (4) any and all misconduct used to place the Complainant in the MCU, and (5) all data records of any inmate who has more than fifteen (15) misconducts and remains in New Jersey State Prison, do not identify specific records, the Complainant's request would require the Custodian to research her files for records containing the Complainant's name and for records of New Jersey State Prison inmates with more than 15 misconducts. Under OPRA, agencies are required to disclose only identifiable government records not otherwise exempt and the Custodian is not required to do research to provide such records. Accordingly, the Custodian has met her burden of

proof pursuant to N.J.S.A. 47:1A-6 that access to these records was not unlawfully denied pursuant to the court's decision in MAG, *supra*.

Moreover, the Custodian argues that item #6 was also lawfully denied pursuant to N.J.S.A. 47:1A-9.a. and the Department of Corrections proposed regulation providing that "[a]n inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate." *N.J.A.C. 10A:22-3.2(b)*, which remains 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 five 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 records requested in item #6, comprising all data records of any inmate who has more than fifteen (15) misconducts and remains in New Jersey State Prison, are prohibited from release because an inmate is not permitted to inspect, examine or obtain copies of documents concerning any other inmate pursuant to the Department of Correction's proposed rule set forth in *N.J.A.C. 10A:22-3.2(b)*, continued in effect pursuant to Executive Orders No. 21 and No. 26 (McGreevey), they are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. 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).

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. Because the records requested in item #1 comprising all records used to place the Complainant in the MCU are not readily available and will require research and correlation of records by the Custodian in order to fulfill the Complainant's OPRA request, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met her burden of proof pursuant to N.J.S.A. 47:1A-6 that access to these records was not unlawfully denied pursuant to the court's decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005).
2. Because items #2 through #6, comprising all disciplinary records do not identify specific records and require the Custodian to research her files for records containing the Complainant's name and for records of New Jersey State Prison inmates with more than 15 misconducts; and because under OPRA, agencies are required to disclose only identifiable government records not otherwise exempt and the Custodian is not required to do research to provide such records; the Custodian has met her burden of proof under N.J.S.A. 47:1A-6 that access to these records was not unlawfully denied pursuant to the court's decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005).

3. Because the records requested in item #6, comprising all data records of any inmate who has more than fifteen (15) misconducts and remains in New Jersey State Prison, are prohibited from release because an inmate is not permitted to inspect, examine or obtain copies of documents concerning any other inmate pursuant to the Department of Correction's proposed rule set forth in *N.J.A.C. 10A:22-3.2(b)*, continued in effect pursuant to Executive Orders No. 21 and No. 26 (McGreevey), they are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. 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).

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

February 20, 2008