



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

March 26, 2008 Government Records Council Meeting

Andrew Hamilton
Complainant

Complaint No. 2007-196

v.

NJ Department of Corrections
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council (“Council”) considered the March 19, 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 requested records relating to the Complainant’s dental implants are medical records, the requested dental records are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey 2002), Kamau v. NJ Department of Corrections, GRC Complaint No. 2004-175 (February 2005), and Caban v. NJ Department of Corrections, GRC Complaint No. 2004-174 (March 2005). As such, the Custodian has borne the burden of proving a lawful denial of access to item # 1 of the Complainant’s request pursuant to N.J.S.A. 47:1A-6.
2. Because items #2-3 of the Complainant’s OPRA request are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), NJ Builders Association v NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 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 26th Day of March, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Janice Kovach
Government Records Council

Decision Distribution Date: March 28, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 26, 2008 Council Meeting**

**Andrew Hamilton¹
Complainant**

GRC Complaint No. 2007-196

v.

**NJ Department of Corrections²
Custodian of Records**

Records Relevant to Complaint:

1. Records from the Medical Department regarding the implants in [Complainant's] gums.
2. Names of the people call[ed] "special ones" on the computers.
3. A polygraph test.

Request Made: July 16, 2007

Response Made: July 31, 2007

Custodian: Michelle Hammel

GRC Complaint Filed: August 18, 2007

Background

July 16, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

July 30, 2007

Custodian receives Complainant's OPRA request.

July 31, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to item #1 of the Complainant's request is denied because medical and dental records are exempt from disclosure pursuant to Executive Order No. 26 (McGreevey 2002). The Custodian states that access to items #2-3 of the Complainant's request are denied because said requests are invalid under OPRA as they are requests for information and not specific records. The Custodian states that pursuant to MAG Entertainment v. Div. Of ABC, 375 N.J. Super. 534 (App. Div. 2005) a request is invalid when it requires a custodian to conduct research and correlate

¹ No legal representation listed on record.

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

data from various records. The Custodian also states that if the Complainant wishes to request specific records, the Complainant may do so by clearly identifying the records and providing a description of such.

August 15, 2007

Letter from Complainant to Custodian. The Complainant asserts that his First Amendment rights are being violated and that he needs to take a polygraph test to prove that he is being slandered and disrespected because of his religion. The Complainant states that he has filled out several forms requesting a polygraph test including an OPRA request form. The Complainant requests that the Custodian have the State Police administer said test.

August 18, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”). The Complainant states that he submitted his OPRA request on July 21, 2007³ and was denied access on July 31, 2007. The Complainant contends that his First Amendment rights are being violated at New Jersey State Prison. The Complainant asserts that a polygraph test will prove this and asks for the GRC’s help in obtaining a polygraph test under “10A-3;7.1 through 10A-3;7.3.”

August 29, 2007

Letter from Custodian to Complainant. The Custodian states that she is in receipt of the Complainant’s letter dated August 15, 2007, in which it appears as though the Complainant is asking the Custodian to reconsider her denial of the Complainant’s OPRA request. The Custodian states that the reasons for the denial of access were clearly stated in her July 31, 2007 response to said request. The Custodian states that the Department’s position regarding the Complainant’s request remains unchanged.

September 5, 2007

Offer of Mediation sent to both parties.

September 7, 2007

Complainant’s signed Agreement to Mediate.

September 10, 2007

Letter of representation from Custodian’s Counsel. Counsel declines mediation and asserts that the Custodian properly denied the Complainant’s request.

September 13, 2007

Request for the Statement of Information sent to the Custodian.

September 26, 2007

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

- Complainant’s OPRA request dated July 16, 2007
- Custodian’s response to the Complainant’s request dated July 31, 2007
- Letter from Complainant to Custodian dated August 15, 2007

³ The Complainant’s OPRA request is dated July 16, 2007.

- Letter from Custodian to Complainant dated August 29, 2007

The Custodian certifies receiving the Complainant's OPRA request on July 30, 2007. The Custodian certifies providing the Complainant a written response dated July 31, 2007, in which the Custodian denied item #1 of the Complainant's request under OPRA on the basis that medical and dental records are exempt from disclosure pursuant to Executive Order No. 26 (McGreevey 2002). However, the Custodian certifies that she also informed the Complainant that he could obtain a copy of his medical and dental records by submitting the appropriate request form. The Custodian also certifies that she denied items #2-3 of the Complainant's request because the Complainant failed to identify the specific records he sought pursuant to MAG Entertainment v. Division of ABC, 375 N.J. Super. 534 (App. Div. 2005).

Additionally, the Custodian certifies that she received a letter from the Complainant dated August 15, 2007 which appeared to be a request for reconsideration of the Custodian's denial of access. The Custodian certifies that she provided the Complainant a letter dated August 29, 2007 advising that her response remained unchanged.

September 26, 2007

Letter from Custodian's Counsel to GRC. Counsel asserts that the Custodian's response to the Complainant's request, which was within the statutorily mandated response time, was proper. Counsel contends that the Complainant's request for records regarding dental implants is clearly a request for medical records which are exempt from disclosure under Executive Order No. 26 (McGreevey 2002). Counsel states that the relevant provision of Executive Order No. 26 states that:

“4. The following records shall not be considered to be government records subject to public access pursuant to N.J.S.A. 47:1A-1 et. seq., as amended and supplemented:

(b) (1) Information relating to medical, psychiatric, or psychological history, diagnosis, treatment or evaluation.”

Based on the above, Counsel contends that the Complainant's request for records relating to his dental implants was properly denied as an invalid OPRA request.

Additionally, Counsel asserts that the Custodian properly denied the Complainant's requests for names of people called “special ones” on the computer and a polygraph test because said requests do not identify the specific records being sought pursuant to MAG Entertainment v. Division of ABC, 375 N.J. Super. 534 (App. Div. 2005).

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.

Additionally, 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 ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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 also states that:

“*[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.*” (Emphasis added). N.J.S.A. 47:1A-9.a.

Executive Order No. 26 states that:

“*[t]he following records shall not be considered to be government records subject to public access pursuant to [OPRA]... Information concerning individuals as follows: Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation...*” (Emphasis added). Executive Order No. 26 paragraph 4.b.1. (McGreevey 2002).

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.

In this complaint, the Custodian certifies denying access to the Complainant's request for records relating to the implants in his gums on the basis that said records are exempt from public access pursuant to Executive Order No. 26 (McGreevey 2002).

N.J.S.A. 47:1A-9.a. provides that OPRA shall not abrogate any exemption of a government record made pursuant to an Executive Order of the Governor. Executive Order No. 26 paragraph 4.b.1 (McGreevey 2002) specifically exempts medical records from public access.

In Kamau v. NJ Department of Corrections, GRC Complaint No. 2004-175 (February 2005), the Complainant requested medical records relating to his treatment by Correctional Medical Services. The Council dismissed the complaint "on the basis that the records requested are not disclosable under N.J.S.A. 47:1A-9 pursuant to Executive Order 26 as they are medical records." The Council reached a similar conclusion in Caban v. NJ Department of Corrections, GRC Complaint No. 2004-174 (March 2005).

Therefore, because the requested records relating to the Complainant's dental implants are medical records, the requested dental records are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey 2002), Kamau, supra, and Caban, supra. As such, the Custodian has borne the burden of proving a lawful denial of access to item # 1 of the Complainant's request pursuant to N.J.S.A. 47:1A-6.

Additionally, the Custodian certifies that she denied items #2-3 of the Complainant's request because the Complainant failed to identify the specific records being sought pursuant to MAG Entertainment v. Division of ABC, 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.) *Id.* 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. *See also* NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005)⁴, the Superior Court references Mag, supra, 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

⁴ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

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.”⁵

Therefore, because items #2-3 of the Complainant’s OPRA request are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag, supra, NJ Builders, supra, and Bent, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the requested records relating to the Complainant’s dental implants are medical records, the requested dental records are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey 2002), Kamau v. NJ Department of Corrections, GRC Complaint No. 2004-175 (February 2005), and Caban v. NJ Department of Corrections, GRC Complaint No. 2004-174 (March 2005). As such, the Custodian has borne the burden of proving a lawful denial of access to item # 1 of the Complainant’s request pursuant to N.J.S.A. 47:1A-6.

2. Because items #2-3 of the Complainant’s OPRA request are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), NJ Builders Association v NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

March 19, 2008

⁵ As stated in Bent.