



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

December 18, 2008 Government Records Council Meeting

Christopher John Serrone
Complainant

Complaint No. 2007-88

v.

NJ Department of Corrections,
Central Reception and Assignment Facility
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 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 Complainant has failed to identify the particular records sought, the Custodian has not unlawfully denied the Complainant access to Items No. 1-5 of the Complainant's OPRA request. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).
2. Pursuant to N.J.A.C. 10A:33-3.2, Items No. 6-9 of the Complainant's OPRA request are not disclosable. Moreover, the Custodian has certified that no records responsive to request Items No. 6-9 exist. Therefore, the Custodian has not unlawfully denied access to the requested records. 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, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005).
3. Because the Complainant has failed to bring about the desired result, *i.e.*, release of the records sought, by filing this complaint, he is not a prevailing party and is therefore not entitled to an award of reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Further, an award of attorney's fees is appropriate only to compensate an attorney, not to cover a Complainant's own copying or other self-incurred expenses.



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 18th Day of December, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: December 22, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

**Christopher John Serrone¹
Complainant**

GRC Complaint No. 2007-88

v.

**New Jersey Department of Corrections,
Central Reception and Assignment Facility²
Custodian of Records**

Records Relevant to Complaint:

1. All documents regarding the New Jersey Department of Correction's ("DOC") policy on marriages between inmates. Verification of the lack of such records if they do not exist.
2. All documents pertaining to the authority of the DOC to alter the criterion set forth in *N.J.A.C. 10A:17-7* for granting permission for inmate marriages.
3. All documents granting each or any particular institution permission to develop policies regarding inmate marriages. Verification of the lack of such records if they do not exist.
4. Any document generated by the DOC regarding the inability of prisoners to marry while in a close-custody unit. Verification of the lack of such records if they do not exist.
5. Any notification generated by the DOC to inmates informing them of the prohibition against inmate marriage while in a close-custody unit. Verification of the lack of such records if they do not exist.
6. The name, SBI number, copy of application, and the DOC response of the last ten (10) prisoners to request permission to marry while in a close-custody housing unit.
7. The name, SBI number, copy of application and the DOC response to the last ten (10) female prisoners to request permission to marry while in a close-custody housing unit. Verification of the lack of such records if they do not exist.
8. The name, SBI number, and court docket number of the last ten (10) prisoners who filed suit under U.S.C.A. 1983, appealing a denial for permission to marry.
9. The name and SBI number of the last five (5) prisoners to request to marry another prisoner and the status of their requests.

¹ No legal representation listed on record.

² Represented by DAG Ellen Hale, on behalf of the NJ Attorney General.

Request Made: March 8, 2007³
Response Made: March 15, 2007
Custodian: Michelle Hammel
GRC Complaint Filed: April 2, 2007⁴

Background

March 8, 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.

March 15, 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 the requested records is denied because the Complainant's OPRA request is invalid. The Custodian states that the request is overly broad and does not adequately identify the particular records sought. The Custodian also states that the Complainant's request is denied because it is a request for information. The Custodian further states that pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005), a request is invalid where it requires a custodian to conduct research and correlate data from various records. The Custodian invites the Complainant to resubmit his OPRA request which clearly identifies the records sought.

April 2, 2007

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

- The Complainant's OPRA request dated March 8, 2007
- *N.J.A.C.* 10A: 17-7.1-18 through *N.J.A.C.* 10A: 17- 8.8
- Letter from the New Jersey State Prison Marriage Committee to Complainant dated September 19, 2006
- New Jersey State Prison Memorandum on Marriage Procedures (undated)

The Complainant states that his OPRA request consisted of the custodial agency's OPRA request form and two (2) additional pages. The Complainant further states that he has not received a response to his OPRA request from the Custodian. The Complainant argues that the Custodian's denial of access to the records requested has delayed the Complainant's appeal of the DOC's denial of his application to marry.

April 10, 2007

Offer of Mediation sent to both parties.

³ Custodian indicates receipt of the OPRA request on March 14, 2007.

⁴ The GRC received the Denial of Access Complaint on said date.

April 14, 2007

The Complainant accepts the Offer of Mediation. The Custodian did not respond to the Offer of Mediation.

June 12, 2007

Request for the Statement of Information sent to the Custodian.

June 25, 2007

Custodian's Statement of Information ("SOI") with the following attachments:

- The Complainant's OPRA request dated March 8, 2007
- Letter from the Custodian to the Complainant dated March 15, 2007
- Additional certification from the Custodian dated June 25, 2007

The Custodian certifies that she responded to the Complainant's OPRA request on March 15, 2007. The Custodian states that the Complainant's OPRA request was denied for the following reasons:

1. The Complainant's request was overly broad
2. The Complainant improperly requested information
3. The Complainant failed to identify with specificity the records sought

The Custodian states that she based the denial of access on the court's holding in MAG. supra, which held, in part, that a request that requires the custodian to conduct research is invalid under OPRA. The Custodian argues that her response to the Complainant's OPRA request was appropriate because the Custodian based the denial of access on the correct grounds and the response was provided within the seven (7) business days required by OPRA.

The Custodian argues that the last four (4) items of Complainant's OPRA request are invalid because they require research and correlation of data from various sources, which is not required under OPRA. The Custodian certifies that the DOC does not maintain a comprehensive list of inmates who have requested to marry or who have appealed the DOC's unfavorable decision regarding their marriage application. The Custodian further argues that the Complainant's request for verification of the non-existence of the records requested is invalid because it requires the Custodian to create a record that does not otherwise exist.

The Custodian also states that the records requested by the Complainant regarding another inmate's request to marry is prohibited under the DOC proposed regulation *N.J.A.C. 10A:22-3.2.*, which states that an inmate is not permitted to inspect, examine or obtain copies of documents concerning another inmate. The Custodian asserts that the proposed regulation is enforceable under Executive Order 21 (McGreevey 2002) ("E.O. 21") and Executive Order 26 (McGreevey 2002) ("E.O. 26").

The Custodian further asserts that the DOC has serious safety and security concerns when an inmate is able to obtain information regarding another inmate. The Custodian argues that under the proposed rule the records requested by the Complainant

are not discloseable. The Custodian states that because the Complainant was properly denied access to the records requested, the Denial of Access Complaint should be dismissed.

July 11, 2007

The Complainant's response to the Custodian's SOI. The Complainant asserts that the Custodian's denial of access is unlawful because the proposed rule upon which the Custodian relied was not enacted and is therefore unenforceable. The Complainant further argues that under E.O. 21, if a proposed regulation is not enacted within a reasonable time it is no longer enforceable. The Complainant further argues that E.O. 21 only authorizes enforcement of proposed regulation up until OPRA's effective date. The Complainant states that a proposed rule cannot remain proposed in perpetuity. The Complainant argues that while E.O. 21 allows an agency to amend a proposed regulation immediately upon proposal, it does not abrogate the responsibility of the agency to complete the enactment process. The Complainant requests that, pursuant to C. 47:1A-7(e)⁵, the GRC finds that it is unable to determine the records' accessibility based solely on the information available and order a hearing.

The Complainant further argues that the information requested is necessary for the defense of his appeal. The Complainant requests that if the GRC determines that the Custodian has unlawfully denied the Complainant access to the records requested, the GRC impose the maximum penalty allowed and attorney fees in an amount sufficient to cover the Complainant's copying costs. The Complainant argues that proposed regulation *N.J.A.C. 10A:33-3.2* is unconstitutional. The Complainant requests that the GRC conduct a thorough investigation and not, "...simply accept the Record Custodian's statement that all the records...sought were protected." *Paff v. N.J. Dept. of Labor*, 379 *N.J. Super.* 346 (Decided August 2005).

The Complainant asserts that he has a common law right to access the records requested. The Complainant further asserts that the proposed rule upon which the Custodian based the denial of access is overly broad. The Complainant contends that the records requested are not subject to proposed rule *N.J.A.C. 10A:22-3.2*. The Complainant further contends that the Custodian should maintain records of the type he has requested. The Complainant argues that if the records do not exist, they can easily be created by the Custodian. As such, the Complainant contends that the non-existence of the records requested should not constitute a lawful basis for denying the Complainant access to the records requested. The Complainant states that the information he requests does not pose a safety hazard and therefore does not further the policy behind the proposed regulation. The Complainant asserts that if any research was required to fulfill the OPRA request it would be a relatively small amount of research. The Complainant states that it is unreasonable to expect an inmate to know the exact name of the records he wishes to request. The Complainant does not think that he should be penalized for the Custodian's bad record keeping.

⁵ *N.J.A.C. 47:1A-7.e.*

July 31, 2007⁶

The Custodian's response to the Complainant's July 11, 2007 submission. The Custodian argues that the Complainant's response is irrelevant since it mainly addresses non-OPRA related issues. The Custodian maintains the validity of proposed regulation *N.J.A.C. 10A:22-3.2*.

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 further states that:

"The provisions of this act, P.L.2001, c.404 (C.47:1A-5 et al.), shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.); 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.

The Department of Corrections' proposed regulation states, "An 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)*.

⁶ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
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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.

The OPRA request in the case currently before the Council contains nine (9) items. Request Items No. 1-5 seek “any and all” documents that contain the information specified above. The Complainant does not include any names or dates that may help the Custodian identify the particular records sought. To fulfill the Complainant’s OPRA request, the Custodian would have to research each record in her files to determine if that record contained the information sought by the Complainant.

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 Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (March 2005). 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.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁷ the Superior Court, referencing MAG, 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.”⁸ *Id.*

Additionally, in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004)

⁸ As stated in Bent.

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 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 (March 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).”

Agencies are required to disclose only identifiable government records. Because the Complainant has failed to identify the particular records sought, the Custodian has not unlawfully denied the Complainant access to Items No. 1-5 of the Complaint’s OPRA request. Mag, supra; Bent, supra.

The Custodian contends that the denial of access to the remaining items of the Complainant’s request is lawful because N.J.S.A. 47:1A-9.a., E.O.s 21 and 26 operate to make effective N.J.A.C. 10A:33-3.2, which bars disclosure of the record sought by the Complainant. E.O. 21, paragraph 4 provides that:

"[i]n 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..." (Executive Order 21, Governor James E. McGreevey, July 8, 2002).

E.O. 26, adopted on August 13, 2002, rescinded paragraphs 2 and 3 of E.O. 21. The paragraphs rescinded are not relevant for the analysis of the applicability of the proposed OPRA rules of a state department or agency. However, the relevant portion of E.O. 26 (paragraph 6) provides that: "[t]he remaining provisions of Executive Order 21 are hereby continued to the extent that they are no inconsistent with this Executive Order." (Executive Order 26, Governor James E. McGreevey, August 13, 2002). This language continues the viability of the proposed OPRA rules.

In an unpublished opinion of the New Jersey Superior Court (the only legal authority on point in this matter), it has been determined that paragraph 6 of E.O. 26:

"continues to permit a department or agency within State [g]overnment to adopt rules and regulations and to permit the operation of a proposed rule or regulation prior to its final adoption. Therefore, pursuant to Paragraph 4 of E.O. 21, State departments and 'agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed ...'" 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, Superior Court of New Jersey, Law

Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) at page 11.

The court further stated 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 also held that, "[r]ecognizing the time delay inherent in the normal rule adoption process, E.O. 21 and E.O. 26 included language to permit custodians of record to deny access to requested records, 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 E.O. 21, paragraph 4 and E.O. 26, paragraph 6, resolution of that issue is not required. ... the court assumes that the proposed rule change is still pending." *Id.* at 13.

Although the Complainant challenges the validity of proposed rule *N.J.A.C.* 10A:33-3.2, a court of appropriate jurisdiction has decided that proposed rules are "still pending" and state departments and agencies are "directed to handle all government records requests in a manner consistent with the rules as they have been proposed." Newark Morning Ledger, *supra*. Pursuant to *N.J.A.C.* 10A:33-3.2, Items No. 6-9 of the Complainant's OPRA request are not disclosable. Moreover, the Custodian has certified that no records responsive to request Items No. 6-9 exist. Therefore, the Custodian has not unlawfully denied access to Items No. 6-9 of the Complainant's OPRA request.

Whether the Complainant is entitled to prevailing party attorney's fees under OPRA?

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or

- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, *supra*, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. § 47:1A-6 and N.J.S.A. § 47:1A-7.f., against the Division of Youth and Family Services ("DYFS"). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Because the Complainant has failed to bring about the desired result, *i.e.*, release of the records sought, by filing this Complaint, he is not a prevailing party and is therefore not entitled to an award of reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters, *supra*. Further, an award of attorney's fees is appropriate only to compensate an attorney, not to cover a complainant's own copying or other self-incurred expenses.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant has failed to identify the particular records sought, the Custodian has not unlawfully denied the Complainant access to Items No. 1-5 of the Complainant's OPRA request. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).

2. Pursuant to *N.J.A.C.* 10A:33-3.2, Items No. 6-9 of the Complainant's OPRA request are not disclosable. Moreover, the Custodian has certified that no records responsive to request Items No. 6-9 exist. Therefore, the Custodian has not unlawfully denied access to the requested records. 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, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005).
3. Because the Complainant has failed to bring about the desired result, *i.e.*, release of the records sought, by filing this complaint, he is not a prevailing party and is therefore not entitled to an award of reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Further, an award of attorney's fees is appropriate only to compensate an attorney, not to cover a Complainant's own copying or other self-incurred expenses.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 10, 2008