



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

September 30, 2009 Government Records Council Meeting

Quddoos Farra'D
Complainant

Complaint No. 2008-194

v.

New Jersey Department of Corrections
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 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 pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey, 2002), 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) and N.J.A.C. 10A:1-1.4 through 31-6.13 of the New Jersey Department of Corrections’ proposed regulations, the Custodian has not unlawfully denied the Complainant access to the record requested because the requested record was exempt from disclosure as a Special Investigation Division record, an informant record and a record relating to an identified individual which, if disclosed, would jeopardize the safety of the named person.

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 30th Day of September, 2009



Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Quddoos Farra'D¹
Complainant**

GRC Complaint No. 2008-194

v.

**New Jersey Department of Corrections²
Custodian of Records**

Records Relevant to Complaint: Copy of administrator or designee's written approval for Complainant's outgoing mail to be opened and resealed, which was issued at the East Jersey State Prison within the last six (6) months.

Request Made: July 28, 2008

Response Made: August 20, 2008

Custodian: Michelle Hammel

GRC Complaint Filed: August 29, 2008³

Background

July 28, 2008

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

August 20, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request.⁴ The Custodian states that access to the requested record is denied because records authorizing a mail cover are not subject to disclosure under OPRA. The Custodian further states that informant documents and Special Investigation Division ("SID") investigation documents are not considered government records subject to public access, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility.

The Custodian also states that, pursuant to Executive Order 26 (McGreevey, 2002), a report or record relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional

¹ No legal representation listed on record.

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

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Complainant's OPRA request is dated July 28, 2008. However, the Custodian certifies that she did not receive the Complainant's OPRA request until August 11, 2008.

facility or other designated place of confinement is exempt from disclosure under OPRA. The Custodian further states that the Department of Corrections cannot provide the Complainant with records gathered by the SID. The Custodian states that the disclosure of such records would compromise investigative techniques utilized by the Department and/or an ongoing investigation.

August 29, 2008

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:⁵

- Complainant’s OPRA request dated July 28, 2008;
- Letter from the Custodian to the Complainant dated August 20, 2008.

The Complainant states that he is an inmate at the East Jersey State Prison. The Complainant further states that around May 2008, his mail started going out opened and delayed. The Complainant states that he submitted an institutional remedy form stating that his personal mail and legal mail was opened and delayed without reason or cause. The Complainant states that he was informed that the staff was following procedure. The Complainant states that he conducted research and ascertained that to open any outgoing mail prior to mailing required the administrator’s approval pursuant to *N.J.A.C. 10A:18-2.7(d)*. The Complainant states that he filed an OPRA request with the Custodian which was denied on August 20, 2008. The Complainant states that he submitted this issue to the Government Records Council because he has been incarcerated for 15 years and does not participate in any illicit activities. The Complainant states that he believes the opening of his outgoing mails is a fabricated effort to stop his legal work and litigation. The Complainant further states that he believes that the record requested is a government record that is not confidential as claimed by the Custodian. The Complainant states that the only item he requested was a copy of the administrator’s authorization to open the Complainant’s outgoing mail pursuant to *N.J.A.C. 10A:18-2.7(d)*.

The Complainant did not agree to mediate this complaint.

September 19, 2008

Request for the Statement of Information sent to the Custodian.

October 6, 2008

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

- Complainant’s OPRA request dated July 28, 2008;
- Letter from the Custodian to the Complainant dated August 20, 2008.

The Custodian certifies that upon receipt of the Complainant’s OPRA request, the East Jersey State Prison OPRA Liaison reviewed the Complainant’s institutional file and contacted the SID regarding the Complainant’s OPRA request. The Custodian further certifies that a responsive record was found authorizing a mail cover for the Complainant. The Custodian also certifies that the responsive record is exempt from disclosure

⁵ The Complainant included additional material that was not relevant to the adjudication of this complaint. *Quddoos Farra’D v. New Jersey Department of Corrections, 2008-194 – Findings and Recommendations of the Executive Director*

pursuant to the New Jersey Department of Corrections' rules regarding SID records and records related to identified individuals. The Custodian argues that disclosure of the requested record would jeopardize the safety and security of the institution and the identified individual who authorized the mail cover. The Custodian certifies that she responded to the Complainant's OPRA request on August 20, 2008, denying access to the requested record for these reasons.

The Custodian argues that pursuant to N.J.S.A. 47:1A-1.1, a government record does not include confidential information. The Custodian also states that the Department of Corrections' proposed OPRA regulations state:

“[i]n addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., as amended and supplemented, any other law, regulation promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court, or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

1. Informant documents and statements; ...

6. A report or record relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement.” *N.J.A.C. 10A:1-1.4* through 31-6.13, PRN 2002-228, July 1, 2002.

The Custodian assert that the denial of access was lawful and that this complaint should be dismissed because the Complainant is not entitled to the confidential record authorizing the mail cover because it is not a public record subject to disclosure under OPRA.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

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

Paragraph 4 of Executive Order No. 21 provides in relevant part as follows:

“[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...” 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.”

The New Jersey Department of Corrections’ proposed amendments provide that:

“[i]n addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., as amended and supplemented, any other law, regulation promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court, or any Federal law, Federal regulation or Federal order, the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

1. Informant documents and statements;

2. Special Investigations Division investigations, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility; ...

6. A report or record relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement.” *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 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.

The Custodian responded to the Complainant’s July 28, 2008 OPRA request stating that records authorizing a mail cover are not subject to disclosure under OPRA. The Custodian further stated that informant documents and SID investigation documents are not considered government records subject to public access, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility pursuant to New Jersey Department of Corrections (“DOC”) proposed regulations.

The DOC proposed regulations remain in effect pursuant to paragraph 4 of Executive Order No. 21 (McGreevey, 2002) and paragraph 6 of Executive Order No. 26 (McGreevey, 2002).

Paragraph 4 of Executive Order No. 21 provides in relevant part as follows:

“[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...”

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 six (6) 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.

Moreover, OPRA provides that “[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.” (Emphasis added.) N.J.S.A. 47:1A-9.a. The DOC has proposed a regulation that exempts SID records from disclosure. Executive Order No. 26 (McGreevey, 2002) directs Custodians 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.” The DOC proposed regulations exempting SID records from disclosure is therefore a lawful basis for denying a requestor access to SID records under OPRA, N.J.S.A. 47:1A-9.a.

Therefore, pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey, 2002), 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), and *N.J.A.C. 10A:1-1.4* through 31-6.13 of the New Jersey Department of Corrections’ proposed regulations, the Custodian has not unlawfully denied the Complainant access to the record requested because the requested record was exempt from disclosure as a Special Investigation Division record,

an informant record and a record relating to an identified individual which, if disclosed, would jeopardize the safety of the named person.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey, 2002), 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) and N.J.A.C. 10A:1-1.4 through 31-6.13 of the New Jersey Department of Corrections' proposed regulations, the Custodian has not unlawfully denied the Complainant access to the record requested because the requested record was exempt from disclosure as a Special Investigation Division record, an informant record and a record relating to an identified individual which, if disclosed, would jeopardize the safety of the named person.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009