



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

April 29, 2009 Government Records Council Meeting

U'Bay K. Lumumba
Complainant

Complaint No. 2008-196

v.

New Jersey Department of Corrections
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council ("Council") considered the April 22, 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 the requested Special Investigation Division report is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey, 2002) and *N.J.A.C.* 10A:1-1.4 through 31-6.13.

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 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
Government Records Council

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

Janice L. Kovach



Government Records Council

Decision Distribution Date: May 4, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**U'Bay K. Lumumba¹
Complainant**

GRC Complaint No. 2008-196

v.

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

Records Relevant to Complaint: September 30, 2005 and October 1, 2005 New Jersey State Investigation Division (“SID”) report arising from a group demonstration.

Request Made: August 1, 2008

Response Made: August 12, 2008

Custodian: Michelle Hammel

GRC Complaint Filed: September 2, 2008³

Background

August 1, 2008

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 attaching the following:

- Management Control Unit (“M.C.U.”) Criteria Sheet dated March 20, 2006.
- M.C.U. Placement Hearing Transcript dated March 24, 2006.
- M.C.U. Placement Decision dated May 18, 2006.⁴

August 12, 2008

Custodian’s response to the OPRA request.⁵ 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 no SID reports dated September 30, 2005 and October 1, 2005 exist.

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 All three (3) documents attached to the Complainant’s August 1, 2008 OPRA request form identify the Complainant as a participant in a group demonstration held on September 30, 2005 into October 1, 2005 and the subsequent special investigation.

⁵ The Custodian received the Complainant’s request on August 11, 2008 as evidenced by the date stamp contained thereon.

Additionally, the Custodian advises that any SID reports pertaining to the group demonstration held on September 30, 2005 into October 1, 2005, which were referred to in the attachments included in the Complainant's August 1, 2008 OPRA request, are not subject to disclosure pursuant to OPRA.

The Custodian states that the report is exempt from disclosure because informant documents, statements and SID investigations shall not be considered government records 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 N.J.S.A. 47:1A-9.a. and Executive Order No. 26 (Gov. McGreevey, 2002) ("E.O. No. 26").⁶ Additionally, the Custodian states that the New Jersey Department of Corrections ("DOC") cannot provide the Complainant with information gathered by the SID because doing so may compromise the investigation techniques utilized by DOC and/or other ongoing investigations.

September 2, 2008

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

- Complainant's OPRA request dated August 1, 2008 (with attachments).
- Letter from the Custodian to the Complainant dated August 12, 2008.

The Complainant states that he submitted an OPRA request to the Custodian on August 1, 2008. The Complainant states that the request for the SID report arose from a disturbance at the New Jersey State Prison ("NJSP") held on September 30, 2005 into October 1, 2005. The Complainant states that he attached NJSP documents alluding to the report to prove that the SID report did exist.⁷

The Complainant states that the Custodian responded on August 12, 2008 stating that no SID report dated September 30, 2005 or October 1, 2005 exists, but that the SID report at issue is not subject to disclosure pursuant to OPRA.

The Complainant contends that the SID report responsive to his request does not fall within any of the designated exemptions found in OPRA. The Complainant argues that the SID report does not reveal the identity of the informant, does not reveal the investigation techniques of the SID and cannot be used to disrupt the secure operations of the facility, as asserted by the Custodian.

⁶ E.O. No. 26 reaffirms the directive in Executive Order No. 21 (McGreevey, 2002) which provides that "[s]tate 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.

⁷ The Complainant states that he tried to obtain the same SID report twice in the past year, but that the Custodian had responded both times denying that the requested SID report existed.

September 9, 2008⁸

Letter from the Custodian's Counsel to the GRC. Counsel states that she is in receipt of the Complainant's Denial of Access Complaint and will provide the Statement of Information by September 16, 2008.

September 17, 2008

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of the deadline to submit the Statement of Information.

September 17, 2008

Offer of Mediation sent to both parties.

September 24, 2008

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

- Complainant's OPRA request dated August 1, 2008.
- Letter from the Custodian to the Complainant dated August 12, 2008.⁹

The Custodian states that she received the Complainant's August 1, 2008 OPRA request on August 11, 2008. The Custodian certifies that her search for the requested records involved contacting the SID at the NJSP. The Custodian certifies that the SID located an investigation report regarding the group demonstration; however, the report was not dated either September 30, 2005 or October 1, 2005 and was marked confidential.

The Custodian argues that the requested SID report is not subject to disclosure pursuant to N.J.S.A. 47:1A-9.a. and E.O. No. 26. The Custodian contends that E.O. No. 26 shields from disclosure certain records that are exempt pursuant to other privileges. Further, the Custodian contends that informant documents and statements of SID investigations shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq. The Custodian asserts that this denial of access is authorized by law for all of the reasons set forth in her August 12, 2008 response to the Complainant.

Additionally, the Custodian certifies that no SID report dated September 30, 2005 or October 1, 2005 exists, but that the Custodian felt obligated to provide applicable exemptions because a SID report relating to the group demonstration was located. The Custodian asserts that even if there was a report that exactly matched the Complainant's OPRA request, it would not be subject to disclosure. The Custodian requests that this complaint be dismissed because no unlawful denial of access took place.

September 29, 2008

The Custodian declines mediation.

⁸ Counsel contacted the GRC regarding the Statement of Information prior to the GRC offering mediation to both parties or requesting the Statement of Information.

⁹ The Custodian provided two (2) additional OPRA requests and subsequent responses that are irrelevant to the adjudication of this complaint.

Analysis

Whether the Custodian unlawfully denied access to the requested Special Investigation Division report?

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 in part that:

“...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...[are exempt from disclosure]” *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 in this complaint responded to the Complainant’s August 1, 2008 OPRA request stating that no SID report dated September 30, 2005 or October 1, 2005 exists. However, the Custodian asserted that a SID report relevant to the group demonstration held on the corresponding dates was located but is exempt pursuant to N.J.S.A. 47:1A-9.a. and E.O. No. 26.

The DOC proposed regulations remain 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 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.

In the instant matter before the Council, the Custodian denied access to a SID report regarding a group demonstration held on September 30, 2005 into October 1, 2005 pursuant to N.J.S.A. 47:1A-9.a., E.O. No. 26. *N.J.A.C.* 10A:1-1.4 through 31-6.13 of the New Jersey Department of Corrections Proposed Amendments, which contains a clear exemption from disclosure of SID reports when redactions alone would be insufficient to the safety of any person or the safe and secure operation of a correctional facility. Therefore, the Custodian has born her burden of proving that the requested SID report is exempt under OPRA pursuant to N.J.S.A. 47:1A-9.a. and E.O. No. 26.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the requested Special Investigation Division report is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey, 2002) and *N.J.A.C.* 10A:1-1.4 through 31-6.13.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 22, 2009