



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 23, 2013 Government Records Council Meeting

Larry McLawhorn
Complainant

Complaint No. 2012-292

v.

New Jersey Department of Corrections
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 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 mental health records, which can be categorized as medical, psychiatric or psychological records, are exempt from disclosure as records which contain “...information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation...” *N.J.A.C.* 10A:22-2.3(a)(4), applicable to OPRA under *N.J.S.A.* 47:1A-9(a). As such, the Custodian lawfully denied access to said records pursuant to *N.J.S.A.* 47:1A-6. *See also* Hamilton v. NJ Department of Corrections, GRC Complaint No. 2007-196 (March 2008), and Groelly v. New Jersey Department of Corrections, GRC Complaint No. 2010-294 (June 2012).

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 23rd Day of July, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council



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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Larry McLawhorn¹
Complainant**

GRC Complaint No. 2012-292

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Complete copies of the Complainant's mental health records.

Custodian of Records: John Falvey
Request Received by Custodian: October 9, 2012
Response Made by Custodian: October 10, 2012
GRC Complaint Received: October 26, 2012

Background³

Request and Response:

The Complainant submitted an Open Public Records Act ("OPRA") request dated October 2, 2012, seeking the above-listed records. On October 10, 2012, the first (1st) business day following receipt of said request, the Custodian responded in writing denying the request because Executive Order No. 47 (Christie) approved *N.J.A.C. 10A:22-2.3(a)(4)*, which exempts "any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation" from disclosure.⁴

Denial of Access Complaint:

On October 26, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant states that the date he provided his request to the Custodian is not applicable. The Complainant asserts the Custodian denied his request on October 10, 2012.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁴ Executive Order No. 47 extended the November 5, 2010 deadline for final rule adoption imposed by the court in *Slaughter v. Government Records Council*, 413 N.J. Super. 544 (App. Div. 2010) until the sooner of rule adoption or November 15, 2011. The Department of Corrections adopted the pertinent regulation prior to the extended deadline.

The Complainant contends that the regulation cited by the Custodian to deny access to the requested records provides that "...an inmate is not permitted to inspect or copy such records of another inmate." The Complainant states that he is not requesting records of another inmate, but rather his personal records. The Complainant concludes that, as such, the Custodian erred in relying upon *N.J.A.C.* 10A:22-2.3 to deny him access to the requested records.

Statement of Information:

On December 7, 2012, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's OPRA request on October 9, 2012, and that he responded to the request on October 10, 2012. The Custodian states that the request was denied because *N.J.A.C.* 10A:22-2.3(a)(4) exempts from disclosure "[a]ny information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation." The Custodian contends that *N.J.A.C.* 10A:22-2.3(a)(4) is applicable to OPRA under N.J.S.A. 47:1A-9(a). The Custodian cites Groelly v. New Jersey Department of Corrections, GRC Complaint No. 2010-294, in support of his argument. The Custodian states that in Groelly, the Council determined that personnel records containing "all medical, psychiatric and psychological reports" were exempt from disclosure.

Analysis⁵

Unlawful Denial of Access

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.

Further "[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." N.J.S.A. 47:1A-9.a.

The Complainant stated that the date the records request was provided to the Custodian was not applicable. Moreover, the Complainant failed to attach a copy of the OPRA request to the complaint. The Custodian attached a copy of the request to the SOI. The request is dated October 2, 2012, but the Custodian certified he did not receive the request until October 9, 2012.

Here, the Complainant requested his mental health records. The Custodian in a timely manner responded to the Complainant's request, informing the Complainant that his request was denied because Executive Order No. 47 (Christie) approved *N.J.A.C.* 10A:22-2.3(a)(4), which

⁵ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

exempts from disclosure any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.

N.J.A.C. 10A:22-2.3(a) provides:

“In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., any other law, rule 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...(4) Any information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation...”

Mental health records are encompassed within the category of psychiatric or psychological records, and psychiatric or psychological records are not government records subject to disclosure pursuant to *N.J.A.C.* 10A:22-2.3(a)(4). Therefore, the Custodian did not err in his reliance upon *N.J.A.C.* 10A:22-2.3(a)(4) to deny access to the requested records. Rather, the Complainant erred in interpreting the denial on the grounds that “...an inmate is not permitted to inspect or copy such records of another inmate,” which is actually *N.J.A.C.* 10A:22-2.3(b).

N.J.A.C. 10A:22-2.3(a)(4), although a relatively new Department of Corrections regulation, is consistent with longstanding language contained in paragraph 4 of Executive Order 26 (McGreevey), which provides in relevant part that “[t]he following records shall not be...subject to public access pursuant to [OPRA]...[i]nformation relating to medical, psychiatric, or psychological history, diagnosis, treatment or evaluation.”

The Council repeatedly held that medical, psychiatric, or psychological records were exempt from disclosure pursuant to Executive Order 26, even when a complainant was seeking his personal records. In Hamilton v. NJ Department of Corrections, GRC Complaint No. 2007-196 (March 2008), the Council upheld the custodian’s denial of the complainant’s medical records regarding dental implants. Subsequently, in Groelly v. New Jersey Department of Corrections, GRC Complaint No. 2010-294 (June 2012), where the complainant sought access to his personal medical, psychiatric and psychological reports, the Council held:

“...the [records] requested by the Complainant are exempt from disclosure pursuant to N.J.S.A. 47:1A-9(a) and Executive Order No. 26, paragraph 4.b.1 (Governor McGreevey, 2002) as “information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.” As such, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6.”

Like the complainant in Hamilton, *supra*, and Groelly, *supra*, the Complainant here is also seeking access to his personal medical records. Further, as in the Council decisions cited above, the requested records here are also medical, psychiatric or psychological reports that are exempt from disclosure.

Therefore, the requested mental health records, which can be categorized as medical, psychiatric or psychological records, are exempt from disclosure as records which contain "...information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation..." *N.J.A.C.* 10A:22-2.3(a)(4), applicable to OPRA under N.J.S.A. 47:1A-9(a). As such, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6. *See also* Hamilton, supra, and Groelly, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the requested mental health records, which can be categorized as medical, psychiatric or psychological records, are exempt from disclosure as records which contain "...information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation..." *N.J.A.C.* 10A:22-2.3(a)(4), applicable to OPRA under N.J.S.A. 47:1A-9(a). As such, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6. *See also* Hamilton v. NJ Department of Corrections, GRC Complaint No. 2007-196 (March 2008), and Groelly v. New Jersey Department of Corrections, GRC Complaint No. 2010-294 (June 2012).

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013