



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 29, 2014 Government Records Council Meeting

Quddoos Farrad
Complainant

Complaint No. 2013-215

v.

State Parole Board
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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. The Custodian complied with the Council’s April 29, 2014 Interim Order because she responded in the prescribed time frame submitting nine (9) copies of the requested record for an *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access to the Complainant’s Yearly Assessment Report because it contains an offender’s risk evaluation that measures in part his psychological and emotional health, which is exempt from access under OPRA. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:71-2.2(a)(1); Executive Order 26, ¶ 4(b)(1) (Governor McGreevey 2002); Groelly v. N.J. Dep’t of Corrections, GRC Complaint No. 2010-294 (June 2012). Finally, because the Custodian complied with the Council’s April 29, 2014 Order and lawfully denied access to the responsive record, the Council should decline to analyze whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

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 July, 2014

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 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Quddoos Farrad¹
Complainant**

GRC Complaint No. 2013-215

v.

**State Parole Board²
Custodial Agency**

Records Relevant to Complaint:

1. Hard copy or inspection of a Yearly Assessment Report issued by Kintock of Paterson, NJ.
2. A copy of Assessment Report from Dr. Furord, in which I requested and paid for.

Custodian of Record: Dina I. Rogers, Esq.

Request Received by Custodian: July 8, 2013

Response Made by Custodian: July 9, 2013

GRC Complaint Received: July 23, 2013

Records Submitted for *In Camera* Examination: Yearly Assessment Report of Quddoos Farrad prepared on April 9, 2013.

Background

April 29, 2014 Council Meeting:

At its April 29, 2014 public meeting, the Council considered the April 22, 2014 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, found that:

1. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, the GRC must conduct an *in camera* review of requested Item No. 1 to determine the validity of the Custodian's certification that the record constitutes information, files, documents, reports, records or other written materials concerning an offender's medical, psychiatric or psychological history, diagnosis, treatment or evaluation. 379 N.J. Super. 346 (App. Div. 2005); N.J.A.C. 47:1A-2.2(a)1; Executive Order 26 (McGreevy, 2002).

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Christopher C. Josephson.

2. Since there is no evidence to refute the Custodian's certification that the requested Item No. 2 is a psychological report, the Custodian did not unlawfully deny access to the record pursuant to N.J.S.A. 47:1A-6. N.J.A.C. 10A:71-2.2(a)1; Executive Order 26 (McGreevy, 2002).
3. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On May 1, 2014, the Council distributed its Interim Order to all parties. On May 5, 2014, the Custodian responded to the Council's Interim Order, submitting nine (9) copies of the Yearly Assessment Report ("YAR") per the Council's Order.

Analysis

Compliance

At its April 29, 2014 meeting, the Council ordered the Custodian to submit nine (9) copies of the Complainant's YAR, issued by Klintock of Paterson, N.J., for *in camera* review. The Council further required that the Custodian provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 1, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 8, 2014.

On May 5, 2014, the second (2nd) business day after receipt of the Council's Order, the Custodian submitted certified confirmation of compliance to the GRC, via hand delivery, and nine (9) copies of the YAR.

Therefore, the Custodian complied with the Council's April 29, 2014 Interim Order because she responded in the prescribed time frame submitting nine (9) copies of the YAR for an

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

in camera review and simultaneously provided certified confirmation of compliance to the Executive Director.

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. N.J.S.A. 47:1A-6.

OPRA further provides 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.”

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

Paragraph 4 of Executive Order 26, (Governor McGreevey 2002) (“EO 26”), provides in relevant part:

“[t]he following records shall not be...subject to public access pursuant to [OPRA]...: Information relating to medical, psychiatric, or *psychological* history, diagnosis, treatment or *evaluation*.” (Emphasis added.)

Additionally, N.J.A.C. 10A:71-2.2(a)(1) provides in relevant part:

“[T]he following records shall be deemed confidential and shall not be subject to public access: [i]nformation, files, documents reports, records or other written materials concerning an offender’s medical, psychiatric or *psychological* history, diagnosis, treatment, or *evaluation*[.]” (Emphasis added).

In Groelly v. N.J. Dep’t of Corrections, GRC Complaint No. 2010-294 (June 2012), the requestor sought his own medical, psychiatric and psychological reports. The Council held that such records are explicitly exempt pursuant to EO 26. That the requestor sought his own reports was irrelevant in the Council’s determination that they were not subject to OPRA. Id.

Similarly, the Complainant seeks his own evaluation assessment. The Custodian did not provide a clear description of what the Complainant’s YAR comprises, warranting the GRC’s *in camera* review. The review reveals that the YAR is a three (3) page assessment containing the results of an offender’s risk of committing harm and/or recidivism. The assessment accounts for the offender’s psychological and emotional health among various social settings, in addition to

the offender's home environment. Based on the foregoing, the GRC is satisfied that the YAR is the conclusory report of a psychological evaluation conducted of the Complainant.

Therefore, the Custodian lawfully denied access to the Complainant's YAR because it contains an offender's risk evaluation that measures in part his psychological and emotional health, which is exempt from access under OPRA. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:71-2.2(a)(1); EO 26; Groelly, GRC No. 2010-294. Finally, because the Custodian complied with the Council's April 29, 2014 Order and lawfully denied access to the responsive record, the Council should decline to analyze whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's April 29, 2014 Interim Order because she responded in the prescribed time frame submitting nine (9) copies of the requested record for an *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access to the Complainant's Yearly Assessment Report because it contains an offender's risk evaluation that measures in part his psychological and emotional health, which is exempt from access under OPRA. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:71-2.2(a)(1); Executive Order 26, ¶ 4(b)(1) (Governor McGreevey 2002); Groelly v. N.J. Dep't of Corrections, GRC Complaint No. 2010-294 (June 2012). Finally, because the Custodian complied with the Council's April 29, 2014 Order and lawfully denied access to the responsive record, the Council should decline to analyze whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

April 29, 2014 Government Records Council Meeting

Quddoos Farrad
Complainant

Complaint No. 2013-215

v.

State Parole Board
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council ("Council") considered the April 22, 2014 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. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, the GRC must conduct an *in camera* review of requested Item No. 1 to determine the validity of the Custodian's certification that the record constitutes information, files, documents, reports, records or other written materials concerning an offender's medical, psychiatric or psychological history, diagnosis, treatment or evaluation. 379 N.J. Super. 346 (App. Div. 2005); N.J.A.C. 47:1A-2.2(a)1; Executive Order 26 (McGreevy, 2002).
2. Since there is no evidence to refute the Custodian's certification that the requested Item No. 2 is a psychological report, the Custodian did not unlawfully deny access to the record pursuant to N.J.S.A. 47:1A-6. N.J.A.C. 10A:71-2.2(a)1; Executive Order 26 (McGreevy, 2002).
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of April, 2014

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: May 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2014 Council Meeting**

**Quddoos Farrad¹
Complainant**

GRC Complaint No. 2013-215

v.

**State Parole Board²
Custodial Agency**

Records Relevant to Complaint:

1. Hard copy or inspection of a Yearly Assessment Report issued by Kintock of Paterson, NJ.
2. A copy of Assessment Report from Dr. Furord, in which I requested and paid for.

Custodian of Record: Dina I. Rogers, Esq.

Request Received by Custodian: July 8, 2013

Response Made by Custodian: July 9, 2013

GRC Complaint Received: July 23, 2013

Background³

Request and Response:

On July 8, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 9, 2013, the Custodian denied the Complainant access to the records, in writing, as confidential pursuant to N.J.A.C. 10A:71-2.2(a)1 and not subject to disclosure under OPRA.

Denial of Access Complaint:

On July 23, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that upon completing his parole sentence, he began a Community Supervision for Life (“CSL”) program. The Complainant provided that Kintock staff at its Paterson, New Jersey facility were responsible for

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Christopher C. Josephsen.

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.

completing an annual Yearly Assessment Report (“YAR”). The Complainant states that a copy of the YAR was forwarded to his parole officer at his request.

A second Assessment Report of the Complainant conducted by a Dr. Furord at the Complainant’s request and expense was also forwarded to the Complainant’s parole officer. The Complainant states that the parole officer, upon receiving both reports, denied the Complainant access to either. The Complainant argues that neither record should be considered confidential and was denied access without cause or reason.

Statement of Information:

On July 31, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that both records are deemed confidential pursuant to state law/regulation. In support of her position, the Custodian cites N.J.A.C. 10A:71-2.2(a)1 (information, files, documents, reports, records or other written materials concerning an offender’s medical, psychiatric or psychological history, diagnosis, treatment or evaluation are exempt from OPRA), and Executive Order 26 (McGreevy, 2002) (exempts information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation are exempt from OPRA). The Custodian identifies requested Item No. 2 as a psychological evaluation.

Additional Submissions

On October 16, 2013, the Complainant sent a letter to the GRC stating that he received documents responsive to requested Item No. 2 of his OPRA request.

Analysis

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.

Requested Item No. 1

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC⁴ in which the GRC dismissed the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and

⁴ Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The court further stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court held that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

In this matter, neither the Complainant nor the Custodian described with specificity the contents of the YAR conducted by Kintock on April 9, 2013.

Therefore, pursuant to Paff, the GRC must conduct an *in camera* review of requested Item No. 1 to determine the validity of the Custodian’s certification that the record constitutes information, files, documents, reports, records or other written materials concerning an offender’s medical, psychiatric or psychological history, diagnosis, treatment or evaluation. 379 N.J. Super. at 346; N.J.A.C. 47:1A-2.2(a)1; EO 26.

Requested Item No. 2

OPRA provides that:

The provisions of [OPRA] 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) (emphasis added).

EO 26 provides that:

The following records shall not be considered to be government records subject to public access ... Information concerning individuals ... relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation ...

Id. at 4(b)(1).

Here, the Custodian denied access to the Complainant's request for an Assessment Report conducted by Dr. Furord. The Custodian certifies that the Assessment Report is a psychological evaluation of the Complainant, and is therefore exempt from disclosure pursuant to EO 26. The Complainant provides no additional submissions or evidence refuting the Custodian's certification that the report requested is a psychological examination other than asserting that he paid for and initiated the examination himself. On October 16, 2013, the Complainant notified the GRC that he had received the requested record.

The definition of a government record includes not only those records which have been "made, maintained or kept on file . . .," but also those records which have been "*received* in the course of his or its official business . . ." N.J.S.A. 47:1A-1.1 (emphasis added). The statute contains no exceptions as to how and from whom the public agency received the record. Ergo, regardless of whether the Complainant initiated or paid for the examination, once the Assessment Report came into the agency's possession, it became a government record and thus subject to the exemptions placed upon documents requested pursuant to OPRA.

Therefore, since there is no evidence to refute the Custodian's certification that the requested Item No. 2 is a psychological report, the Custodian did not unlawfully deny access to the record pursuant to N.J.S.A. 47:1A-6. N.J.A.C. 10A:71-2.2(a)1; EO 26.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, the GRC must conduct an *in camera* review of requested Item No. 1 to determine the validity of the Custodian's certification that the record constitutes information, files, documents, reports, records or other written materials concerning an offender's medical, psychiatric or psychological history, diagnosis, treatment or evaluation. 379 N.J. Super. 346 (App. Div. 2005); N.J.A.C. 47:1A-2.2(a)1; Executive Order 26 (McGreevy, 2002).

2. Since there is no evidence to refute the Custodian's certification that the requested Item No. 2 is a psychological report, the Custodian did not unlawfully deny access to the record pursuant to N.J.S.A. 47:1A-6. N.J.A.C. 10A:71-2.2(a)1; Executive Order 26 (McGreevy, 2002).
3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

April 22, 2014

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."