



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

September 30, 2014 Government Records Council Meeting

Daryle L. Pitts
Complainant

Complaint No. 2013-299

v.

NJ Department of Corrections
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 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. Notwithstanding its origination from the Judiciary, because the presentence report was received by and kept on file with the New Jersey State Prison, it meets the definition of a government record. *See* N.J.S.A. 47:1A-1.1; R. 3:21-2(c); Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (July 2013); Paff v. Barrington School Dist. (Camden), GRC Complaint No. 2009-55 (October 2010). Thus, it is subject to OPRA unless otherwise exempt.
2. Because the presentence report contains advisory, consultative, or deliberative discussions for use by a judge in the course of rendering a decision on a defendant’s sentence, it is exempt from disclosure. *See* N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a); R. 1:38(b)(1)-(2). *See also* State v. De George, 113 N.J. Super. 542 (App. Div. 1971). Accordingly, the Custodian did not unlawfully deny access to the record. N.J.S.A. 47:1A-6.

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, 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: October 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Daryle L. Pitts¹
Complainant**

GRC Complaint No. 2013-299

v.

**NJ Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

“Presentence Reports of my incarceration [sic] sent to New Jersey Department of Corrections and or New Jersey State prison in 1985 and 1991. Both years are for the same Camden County Indictment Number 1322-05-84. Thank you.”

Custodian of Record: John Falvey
Request Received by Custodian: September 13, 2013
Response Made by Custodian: September 16, 2013
GRC Complaint Received: October 11, 2013

Background³

Request and Response:

On September 13, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 16, 2013, the Custodian responded, in writing, denying access to the responsive record under Executive Order No. 47 (Gov. Christie, 2010) (“EO 47”). The record was also denied under N.J.A.C. 10A:22-2.3(a)(7), which exempts from disclosure records of another agency allocated to the Department of Corrections (“DOC”) when such records are made confidential by that agency pursuant to OPRA or other law or regulation.

Denial of Access Complaint:

On October 11, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the Custodian’s reliance

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.

upon N.J.A.C. 10A:22-2.3(a)(7) is incorrect, arguing that the exemption does not pertain to the individual for whom the court record was specifically created.

Additionally, the Complainant asserted that the New Jersey Supreme Court in State v. Kunz, 55 N.J. 128, 144-45 (1969) and N.J. Court Rules, R. 3:21-2 mandate disclosure to the defendant of a copy of his presentence report as a matter of fundamental fairness, and thus supersede the exemption under N.J.A.C. 10A:22-2.3(a)(7).

Statement of Information:

On December 16, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian claimed that since a presentence report is a court record, it is not within OPRA’s jurisdiction.

Furthermore, the Custodian argued that even if the record was subject to OPRA, the responsive record is exempt from disclosure under DOC regulations, which in part exempts:

Records of another department or agency allocated to that department in the possession of the Department of Corrections when those records are made confidential by a rule of that department or agency allocated to that department adopted pursuant to [OPRA], and Executive Order No. 9 (1963) or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.

N.J.A.C. 10A:22-2.3(a)(7). The Custodian reasoned that because presentence reports are documents created by the New Jersey Judiciary, they are subject to the court rules regarding disclosure of public records. *See infra* p. 4.

Finally, the Custodian certified that the presentence report at issue contains a confidentiality statement which provides:

This report shall remain confidential and copies thereof shall not be made nor disclosure of the contents of such reports be made to third persons, except as may be necessary in subsequent court proceedings involving the sentence imposed of or disposition made.

The Custodian concluded that because the current matter involves an OPRA request and not sentencing proceedings, the record should remain confidential.

Additional Submissions:

On December 31, 2013, the Complainant submitted a letter to the GRC in response to the Custodian’s SOI. The Complainant argued that the Presentence Report should still be disclosed pursuant to Kunz, the New Jersey Court Rules, and several Federal Circuit Court decisions.

Analysis

Presentence Reports are Government Records under OPRA

As a threshold issue the GRC examines whether the requested presentence report is a government record. A government record is defined as documents that are “made, maintained, *or kept on file* . . . or that has been *received* in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof[.]” N.J.S.A. 47:1A-1.1 (emphasis added).

In the current matter, the Complainant sought a presentence report. A presentence report is a record used by the court prior to rendering a decision on a defendant’s sentence. *See* N.J.S.A. 2C:44-6; R. 3:21-2. Subsequent to the sentencing hearing, the court transmits the presentence report to the institution where the defendant is committed, if applicable. R. 3:21-2(c). Here, the court transmitted the Complainant’s presentence report to New Jersey State Prison.

The Custodian argued that because the presentence report is a record created by the New Jersey Judiciary (“Judiciary”), it is not subject to release under OPRA. A government record, however, is not defined solely upon the originator of the record. *See* N.J.S.A. 47:1A-1.1. The GRC’s jurisdictional prohibition with the Judiciary pertains to adjudication of records requests where the Judiciary is the records custodian. The prohibition does not apply when the Judiciary created the requested record, but is sought from the custody of an Executive Branch agency or department. *See* N.J.S.A. 47:1A-7(g). Moreover, the GRC has previously adjudicated matters that involve records originating from the Judiciary. *See* Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (July 2013) (arrest warrants in possession by Essex County are government records). *See also* Paff v. Barrington School Dist. (Camden), GRC Complaint No. 2009-55 (October 2010) (settlement agreements are government records subject to OPRA, even if such records are in the possession, custody, or control of the public agency’s employees or contractors).

Notwithstanding its origination from the Judiciary, because the presentence report was received by and kept on file with the New Jersey State Prison, it meets the definition of a government record. *See* N.J.S.A. 47:1A-1.1; R. 3:21-2(c); Seabrooks, GRC No. 2012-230; Paff, GRC No. 2009-55. Thus, it is subject to OPRA unless otherwise exempt.

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.

OPRA also provides that:

- (a) The 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.
- (b) The provisions of [OPRA] shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, *court rule* or *judicial case law*, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

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

Additionally, DOC's regulations provide that:

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 [OPRA.]

N.J.A.C. 10A:22-2.3(a) (emphasis added).⁴

Here, the Custodian argued that because presentence reports originated from the Judiciary, they are subject to the Judiciary's rules on public records. *See* R. 1:38. Specifically, R. 1:38-3(b)(1) provides that "[n]otes, *memoranda*, draft opinions, or *other working papers* maintained in any form by or for the use of a justice, judge, or judiciary staff member in the course of performing official duties," are subject to the Judiciary rules. Additionally, the Custodian asserted that R. 1:38-3(b)(2) provides that "[r]ecords of consultative, advisory, or deliberative discussions pertaining to the rendering of decisions or the management of cases[,]" are also subject to the Judiciary rules. The Custodian concluded that falling under either definition would hold presentence reports as exempt from disclosure.

Presentence reports are created for use by courts to determine a defendant's sentence following conviction. *See* N.J.S.A. 2C:44-6; R. 3:21-2; Kunz, 55 N.J. at 144-45. Each presentence report contains a multitude of factors used to consider defendant's sentence, including but not limited to: prior criminal history, family situation, financial resources, and medical history. N.J.S.A. 2C:44-6. A plain reading of R. 1:38-3(b)(2) demonstrates that a presentence report meets the definition of a record containing consultative, advisory, or

⁴ The Custodian's reliance on N.J.A.C. 10A:22-2.3(a)(7) is inapt. Subsection (7) does not apply to records of the Judiciary, as it is not a "department or agency" within the meaning of OPRA. *Id.* *See* N.J.S.A. 47:1A-7(g).

deliberative discussions that pertain to rendering a decision. Moreover, presentence reports are mandatory records created for the court in all non-capital convictions. *See* R. 3:21-2(a); State v. Alvarado, 51 N.J. 375 (1968). Accordingly, R. 1:38-3(b)(2) informs that a presentence report meets the definition of a memoranda or working paper maintained for the use of a judge in the course of performing official duties, e.g., sentencing.

Furthermore, the Complainant's reliance on Kunz is inapposite. The current matter pertains to a denial of access of a presentence report under OPRA, versus a failure of disclosure prior to a sentencing hearing. Kunz, 55 N.J. at 129. Moreover, that a presentence report is available to the defendant does not render it a public record. *See* State v. De George, 113 N.J. Super. 542 (App. Div. 1971). In De George, the court noted that the State had included copies of the defendant's presentence reports within its brief and appendices. *See* Id. at 544. The court ordered *sua sponte* that the presentence reports "be expunged from filed document, because such reports should not be a matter of public record." Id. (citing R. 3:21-2; Kunz, 55 N.J. at 139-140). The court also suggested that presentence reports should be submitted "separately and apart from briefs or appendices in an enclosure appropriately noting that they are for the confidential use of the court." Id.

Therefore, because the presentence report contains advisory, consultative, or deliberative discussions for use by a judge in the course of rendering a decision on a defendant's sentence, it is exempt from disclosure. *See* N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a); R. 1:38(b)(1)-(2). *See also* De George, 113 N.J. Super. at 544. Accordingly, the Custodian did not unlawfully deny access to the record. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Notwithstanding its origination from the Judiciary, because the presentence report was received by and kept on file with the New Jersey State Prison, it meets the definition of a government record. *See* N.J.S.A. 47:1A-1.1; R. 3:21-2(c); Seabrooks v. Cnty. of Essex, GRC Complaint No. 2012-230 (July 2013); Paff v. Barrington School Dist. (Camden), GRC Complaint No. 2009-55 (October 2010). Thus, it is subject to OPRA unless otherwise exempt.
2. Because the presentence report contains advisory, consultative, or deliberative discussions for use by a judge in the course of rendering a decision on a defendant's sentence, it is exempt from disclosure. *See* N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a); R. 1:38(b)(1)-(2). *See also* State v. De George, 113 N.J. Super. 542 (App. Div. 1971). Accordingly, the Custodian did not unlawfully deny access to the record. N.J.S.A. 47:1A-6.

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

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

September 23, 2014