



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

March 31, 2015 Government Records Council Meeting

Richard Spillane
Complainant

Complaint No. 2014-169

v.

NJ State Parole Board
Custodian of Record

At the March 31, 2015 public meeting, the Government Records Council (“Council”) considered the March 24, 2015 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 Report, which can be categorized as medical, psychiatric, or psychological records, is exempt from disclosure under N.J.S.A. 47:1A-9(a), Executive Order No. 26 (McGreevy, 2002) and N.J.A.C. 10A:71-2.2(a)(1) as records which contain “. . . information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation . . .” As such, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6; Farrad v. State Parole Bd., GRC Complaint No. 2013-215 (July, 2014).

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 31st Day of March, 2015

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: April 2, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 31, 2015 Council Meeting**

**Richard Spillane¹
Complainant**

GRC Complaint No. 2014-169

v.

**New Jersey State Parole Board²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of the psychiatrist's report ("Report") pertaining to the Complainant.³

Custodian of Record: Dina I. Rogers

Request Received by Custodian: March 18, 2014

Response Made by Custodian: March 20, 2014

GRC Complaint Received: April 14, 2014

Background⁴

Request and Response:

On March 12, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On March 20, 2014, the Custodian responded in writing to deny access to the Report under Executive Order No. 26 (McGreevy, 2002)("EO 26") and N.J.A.C. 10A:71.2.2(a)(1).

Denial of Access Complaint:

On April 14, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed the denial of access to the Report. The Complainant noted that he attempted to access the validity of the Custodian's response but was unable to do so, based on a lack of materials in the East Jersey State Prison law library.⁵

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Christopher C. Josephson.

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ 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.

⁵ The Complainant requested that the GRC send him copies of EO 26, Executive Order No. 21 (Gov. McGreevey 2002) and Executive Order No. 47 (Gov. Christie, 2010). The GRC forwarded copies of these executive orders to the Complainant on July 11, 2014.

Statement of Information:

On May 12, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 18, 2014 and responded in writing on March 20, 2014 denying access to the Report.

The Custodian argued that OPRA allows for custodians to exempt access to records based on exemptions contained in regulations “. . . promulgated under the authority of any statute or Executive Order . . .” N.J.S.A. 47:1A-9(a). The Custodian asserted that both EO 26 and N.J.A.C. 10A:71-2.2(a)(1) exempt access to records concerning an individual’s medical, psychiatric, or psychological history, diagnosis, treatment, or evaluation. The Custodian thus contended that she lawfully denied access to the requested Report.

Additional Submissions:

On July 28, 2014, the Complainant asserted that the Custodian’s denial of access was unlawful, given past case law allowing for disclosure of a psychological report notwithstanding the State Parole Board’s concerns. State Parole Bd. v. Cestari, 224 N.J. Super. 534, 541 (App. Div. 1988); Williams v. Parole Bd., 336 N.J. Super. 1, 9 (App. Div. 2002); Trantino v. NJ State Parole Bd., 166 N.J. 113 (2001); McGowan v. NJ State Parole Bd., 347 N.J. Super. 544, 548-554, 557-558 (App. Div. 2002); Kosmin v. NJ State Parole Bd., 363 N.J. Super. 28, 34-36 (App. Div. 2003). The Complainant argued that he should receive the Report because it pertains to him and provided five (5) additional reasons for access. The Complainant also contended that, should the GRC uphold the Custodian’s denial of access, it should order disclosure of the Report with redactions.

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.

Further, 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 [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)

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: (1) *[i]nformation, files, documents, reports, records or other written materials concerning an offender's medical, psychiatric or psychological history, diagnosis, treatment or evaluation.*

N.J.A.C. 10A:71-2.2(a)(1)(emphasis added).

Mental health records are encompassed within the category of psychiatric or psychological records that are not government records subject to disclosure pursuant to N.J.A.C. 10A:71-2.2(a)(1). See also N.J.A.C. 10A:22-2.3(a)(4)(similarly exempting medical records from disclosure). Additionally, the language contained in N.J.A.C. 10A:71-2.2(a)(1), although a DOC regulation, is consistent with longstanding language contained in paragraph 4 of Executive Order 26 (McGreevey, 2002)("EO 26"), 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." Id.

The Council has held that mental health records are exempt from disclosure pursuant to EO 26 and N.J.A.C. 10A:71-2.2(a)(1), even when a complainant sought their own records. In Farrad v. State Parole Bd., GRC Complaint No. 2013-215 (July, 2014), the complainant was denied access to his Yearly Assessment Report ("YAR") under N.J.A.C. 10A:71-2.2(a)(1). Following an *in camera* review, the Council looked to Groelly v. NJ Dep't of Corrections, GRC Complaint No. 2010-294 (June 2012)(holding that the custodian lawfully denied access to the complainant's request seeking his own mental health records) in determining that:

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); [EO 26]; [Groelly, GRC 2010-294].

Id. at 4. See also McLawhorn v. NJ Dep't of Corrections, GRC Complaint No. 2012-292 (July 2013); Riley v. NJ Dep't of Corrections, GRC Complaint No. 2013-345 (July 2014).

In the matter currently before the Council, the Complainant requested his Report. The Custodian responded in a timely manner to each of the Complainant's requests, denying access to the responsive records under EO 26 and N.J.A.C. 10A:71-2.2(a)(1), which exempts from disclosure any information relating to medical, psychiatric or psychological history, diagnosis, treatment, or evaluation. Although the Council decided Farrad, GRC 2013-215, during the pendency of this complaint, the decision is instructive here. Specifically, it supports the Custodian's denial of access to the Report because same is a psychiatric or psychological record

that is exempt from disclosure. *See also* McLawhorn, GRC 2012-292; Riley, GRC 2013-345. Additionally, all of the cases cited by the Complainant relate directly to the issue of parole and not the disclosability of medical reports under OPRA. The GRC is satisfied that the Custodian lawfully denied access to the Report.

Therefore, the requested Report, which can be categorized as medical, psychiatric, or psychological records, is exempt from disclosure under N.J.S.A. 47:1A-9(a), EO 26 and N.J.A.C. 10A:71-2.2(a)(1) as records which contain “. . . information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation . . .” As such, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6; Farrad, GRC 2013-215.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the requested Report, which can be categorized as medical, psychiatric, or psychological records, is exempt from disclosure under N.J.S.A. 47:1A-9(a), Executive Order No. 26 (McGreevy, 2002) and N.J.A.C. 10A:71-2.2(a)(1) as records which contain “. . . information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation . . .” As such, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6; Farrad v. State Parole Bd., GRC Complaint No. 2013-215 (July, 2014).

Prepared By: Ernest Bongiovanni
Staff Attorney

Approved By: Dawn R. SanFilippo
Senior Counsel

March 24, 2015