



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

February 23, 2016 Government Records Council Meeting

Abdiel F. Avila
Complainant

Complaint No. 2015-153

v.

NJ State Parole
Custodian of Record

At the February 23, 2016 public meeting, the Government Records Council (“Council”) considered the February 16, 2016 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 Custodian did not unlawfully deny access to records pertaining to a petition for executive clemency, notwithstanding the Complainant’s being a “party in interest” in the petition, as such records are not public or government records available for inspection or copying. Executive Order #9 (Hughes, 1963); N.J.S.A. 47:1A-9(a). 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 23rd Day of February, 2016

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: February 25, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2016 Council Meeting**

**Abdiel F. Avila¹
Complainant**

GRC Complaint No. 2015-153

v.

**New Jersey State Parole Board²
Custodial Agency**

Records Relevant to Complaint: All records of investigations made regarding the current petition for executive clemency and all documents in such file “[to] be provided to N.J.S.P. parole supervisor to schedule inspection of the entire clemency file including electronic records [to] be printed” (*sic*).

Custodian of Record: Dina I. Rogers
Request Received by Custodian: December 24, 2014
Response Made by Custodian: January 6, 2015
GRC Complaint Received: June 1, 2015

Background³

Request and Response:

On December 24, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 6, 2015, the 7th business day following the receipt of the request, the Custodian responded in writing, denying the request because the records relate to a petition for executive clemency, and thus are exempt from disclosure pursuant to N.J.S.A. 47:1A-9, Executive Order (“EO”) #9 (Hughes, 1963), EO #21 (McGreevey, 2002), and EO # 26 (McGreevey, 2002). In addition, the Custodian noted that the Parole Board does not permit onsite inspections when the requestor is in the custody of the Department of Corrections (“DOC”).

Denial of Access Complaint:

On June 1, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that since he is “a party of

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Christopher C. Josephson.

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.

interest” in the petition for Executive Clemency, he is entitled to access the records. He further asserted that his agent could perform the onsite inspection at the Parole Board. Lastly, he argued that the Custodian violated N.J.S.A. 47:1A-5.1, because the Custodian failed to sign and date the records request form and instead denied access by letter.⁴

Statement of Information:

On July 10, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 24, 2014, and that she timely responded in writing on January 6, 2015. She also certified that she denied access to the request because EO #9 provides that “[r]ecords relating to petitions for executive clemency” shall not be deemed public records subject to inspection and examination.” She cited N.J.S.A. 47:1A-9(a), noting that OPRA specifically does not abrogate exemptions of public or government records made pursuant to Executive Orders of the Governor. Finally, she contended that onsite inspections at the Parole Board are not available for those in the custody of the DOC.

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.

OPRA further provides that:

[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 . . . 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).

EO #9 provides that:

[t]he following records shall not be considered to be government records subject to public inspection and examination and available for copying pursuant the provisions of Chapter 73, P.L. 1963 (N.J.S.A. 47:1A-1) . . . Records relating to petitions for executive clemency.

⁴ The GRC summarily dismisses the Complainant’s final concern. The GRC has long recognized the validity of a custodian’s response that is not on the official request form. Valdes v. NJ Dep’t of Educ., GRC Complaint No. 2010-256 (March 2012), citing Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009).

The Complainant argues that his request concerns his own petition, or one in which he is “a party in interest,” and that EO #9 should therefore not apply to him. However, where categories of records are deemed not to be public records subject to disclosure, the specific party seeking access, or any interest he may have in the records, is not relevant, unless his or her status is recognized as an exception to the statutory exemption.

For example, 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 where the complainant sought his 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 Corr., GRC Complaint No. 2010-294 (June 2012), 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.

Id. at 4. *See also* McLawn v. NJ Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013), and Spillane v. NJ Parole Bd., GRC Complaint No. 2014-169 (March 2015).

Similarly, “criminal investigative records” remain exempt, regardless of the requestor’s personal involvement or interest in the records. *See* Massoni v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2014-253 (February 2015); Hockensmith v. Atlantic Cnty. Prosecutor’s Office, GRC Complaint No. 2014-288 (March 2015); and Camarata v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2014-127 (June 2015).

Accordingly, the Custodian did not unlawfully deny access to records pertaining to a petition for executive clemency, notwithstanding the Complainant’s being a “party in interest” in the petition, as such records are not public or government records available for inspection or copying. EO #9; N.J.S.A. 47:1A-9(a); Farrad, GRC 2013-215.⁵

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access to records pertaining to a petition for executive clemency, notwithstanding the Complainant’s being a “party in interest” in the petition, as such records are not public or government records available for inspection or copying. Executive Order #9 (Hughes, 1963); N.J.S.A. 47:1A-9(a). Farrad v. State Parole Bd., GRC Complaint No. 2013-215 (July 2014).

Prepared By: Ernest Bongiovanni
Staff Attorney

February 16, 2016

⁵ Because the records are exempt from inspection, the GRC need not review the Parole Board’s statement that inmates are not permitted to view records onsite nor the Complainant’s contention that he could send an agent.