



State of New Jersey
 DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

May 24, 2016 Government Records Council Meeting

John Martin Roth
 Complainant

Complaint Nos. 2015-306

v.

NJ Department of Corrections
 Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 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 no unlawful denial of access because the requested psychological evaluations and reports are not government records subject to access under OPRA. N.J.A.C. 10A:22-2.3(a)(4), applicable to OPRA under N.J.S.A. 47:1A-9. As such, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6; Groelly v. NJ Dep’t of Corr., GRC Complaint No. 2010-294 (June 2012). McLawhorn v. NJ Dep’t of Corr., GRC Complaint No. 2012-292 (July 2013). Sheridan v. NJ Dep’t of Corr., GRC Complaint No. 2013-122 (December 2013); Riley v. NJ Dep’t of Corr., GRC Complaint No. 2013-345 (July 2014); Spillane v. NJ Parole Bd., GRC Complaint No. 2014-159 (March 2015)

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 24th Day of May, 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: May 27, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting**

**John Martin Roth¹
Complainant**

GRC Complaint No. 2015-306

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Copies of

1. “Legible” copy of psychological evaluation of John Martin Roth, written by Staff Psychologist Fred Rogers and dated July 23, 1979.
2. “Legible” copy of a psychological report, author unknown, dated November 11, 1980, which was part of a parole evaluation.

Custodian of Record: John Falvey
Request Received by Custodian: May 5, 2015
Response Made by Custodian: May 5, 2015
GRC Complaint Received: September 25, 2015

Background³

Request and Response:

On May 5, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing to deny the request, stating that medical and mental health reports are not disclosable pursuant to N.J.A.C. 10A:22-2.3(a)4, which exempts “any information relating to medical, psychiatric, history diagnosis, treatment or evaluation.” On October 13, 2015, the Custodian wrote again to the Complainant, supplementing his May 5 response by indicating that responsive records were not located.

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.

Denial of Access Complaint:

On September 25, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records he seeks were routinely given to prisoners 35 years ago, when the requested records were first created. He stated that he had the original copies in his possession, but those records have become “nearly illegible” due to their age and method of duplication. Further, he argued that requested item No. 2 was created for a parole hearing and is therefore “not confidential.”

Statement of Information:

On October 27, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on May 5, 2015, and denied access on the same day, citing OPRA’s exemption for medical and mental health reports. N.J.S.A. 47:1A-9; N.J.A.C. 10A:22-2.3(a)4. The Custodian further advised that he amended his response on October 13, 2015, by informing the Complainant that no responsive records could be located. The Custodian explained that the OPRA liaison at the Adult Diagnostic and Treatment Center (“ADTC”) recently had conducted a search of the Complainant’s files and that the search yielded no records as described in the OPRA request. Therefore, he said, there was no denial of access, as no responsive record existed. *Citing Pusterhofer v. NJ. Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005). The Custodian also stated that even if an incorrect exemption were cited at the time of the initial denial, his actions were still proper, as another lawful reason for denying the records was subsequently found. *Citing Farra’d v. NJ Dept. of Corr.*, GRC Complaint No. 2010-47 (October 2010).

Additional Submissions:

The Complainant responded to the SOI by letter, positing that the records were not located because the Custodian likely failed to make a thorough search.

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 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 . . .

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

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:22-2.3(a)(4). Additionally, the language contained in N.J.A.C. 10A:22-2.3(a)(4), although a DOC regulation, is consistent with longstanding language contained in paragraph 4 of Executive Order No. 26 (Gov. 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. Additionally, Executive Order No. 47 (Christie, 2010) ("EO 47") specifically cited the pertinent exemption to OPRA that is listed in N.J.A.C. 10A:22-2.3(a)(4).

The Council has held that mental health records are exempt from disclosure pursuant to EO 26, even when complainants seek their own records. In Groelly v. NJ Dep't of Corr., GRC Complaint No. 2010-294 (June 2012), the complainant sought access to his personal medical, psychiatric, and psychological reports. The Council held that:

[T]he [records] requested by the Complainant are exempt from disclosure pursuant to N.J.S.A. 47:1A-9(a) and [EO 26] 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.

Id. at 7.

The Council similarly held in McLawhorn v. New Jersey Dep't of Corr., GRC Complaint No. 2012-292 (July 2013), that the custodian lawfully denied access to the responsive mental health records under N.J.S.A. 47:1A-9(a) and N.J.A.C. 10A:22-2.3(a)(4). *See also* Spillane v. NJ Parole Bd., GRC Complaint No. 2014-159 (March 2015).

In Riley v. NJ Dep't of Corr., GRC Complaint No. 2013-345 (July 2014), the Complainant had requested his personal medical, psychiatric, and psychological reports on multiple occasions. The Custodian responded to each request by timely denying access to the responsive records because EO 47 and N.J.A.C. 10A:22-2.3(a)(4) exempt from disclosure any information relating to medical, psychiatric, or psychological history, diagnosis, treatment, or evaluation. Thus, similar to the facts of Groelly, the custodian in Riley also lawfully denied access to the requested records because they are medical, psychiatric, or psychological reports and thus exempt from disclosure. *See also* McLawhorn, GRC 2012-292.

Here, the Custodian timely and properly denied the Complainant's request for two psychological reports by correctly citing to N.J.A.C.10A:22-2.3(a)(4), which declares "any information relating to medical, psychiatric, psychological history, treatment or evaluation" as not being government records and thus not accessible under OPRA. As was the case in Sheridan v. NJ Dep't of Corr., GRC Complaint No. 2013-122 (December 2013), where the Custodian denied an inmate's request for complete medical/dental records, this Complainant's request "falls squarely within the exemption outlined for '[a]ny information relating to medical . . . diagnosis, treatment or evaluation.'" Sheridan, at 4 *citing* N.J.A.C. 10A:22-2.3(a)(4). Here, after denying access to the records by citing the proper exemption, the Custodian later revised his response because he had determined that the Department of Corrections does not have the evaluation or report in any of the inmate's files, and thus there was no unlawful denial. *Citing* Pusterhofer, GRC 2005-49.

Accordingly, the GRC finds there was no unlawful denial because the requested psychological evaluations and reports are not government records subject to access under OPRA. N.J.A.C. 10A:22-2.3(a)(4); N.J.S.A. 47:1A-9. As such, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6; Groelly, GRC 2010-294; McLawhorn, GRC 2012-292; Sheridan, GRC 2013-122; Riley, GRC 2013-345; Spillane, GRC 2014-159.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find no unlawful denial of access because the requested psychological evaluations and reports are not government records subject to access under OPRA. N.J.A.C. 10A:22-2.3(a)(4), applicable to OPRA under N.J.S.A. 47:1A-9. As such, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6; Groelly v. NJ Dep't of Corr., GRC Complaint No. 2010-294 (June 2012). McLawhorn v. NJ Dep't of Corr., GRC Complaint No. 2012-292 (July 2013). Sheridan v. NJ Dep't of Corr., GRC Complaint No. 2013-122 (December 2013); Riley v. NJ Dep't of Corr., GRC Complaint No. 2013-345 (July 2014); Spillane v. NJ Parole Bd., GRC Complaint No. 2014-159 (March 2015).

Prepared By: Ernest Bongiovanni
Staff Attorney

May 17, 2016