



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 31, 2018 Government Records Council Meeting

Teddy John Rose
Complainant

Complaint No. 2016-302

v.

NJ Department of Corrections
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 2018 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 because the responsive presentence reports fall within the “inter-agency or intra-agency consultative, advisory, or deliberative material” exemption, they are exempt from disclosure under OPRA. See Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014) (citing State v. DeGeorge, 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 31st Day of July, 2018

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: August 3, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**Teddy John Rose¹
Complainant**

GRC Complaint No. 2016-302

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Hardcopies of the Complainant’s two (2) presentence reports from 1985 and 1991.

Custodian of Record: John Falvey
Request Received by Custodian: October 25, 2016
Response Made by Custodian: October 27, 2016
GRC Complaint Received: November 28, 2016

Background³

Request and Response:

On October 12, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 27, 2016, the Custodian responded in writing denying access to the requested reports. The Custodian stated that the requested records, reports used by the Sentencing Court, were exempt as “inter-agency or intra-agency consultative, advisory, or deliberative [“ACD”] material.” N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.

Denial of Access Complaint:

On November 28, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”) attaching a presentence report from 1991. The Complainant disputed that the requested reports were exempt from disclosure. The Complainant contended that the requested reports were only exempt if sought by a third party. The Complainant further argued that presentence reports are not privileged per State v. Kunz, 55 N.J. 128, 144-145 (1969); N.J.A.C. 10A:71-2.1(a)(1). The Complainant contended that even if confidential, court rules allowed him access to the presentence reports. New Jersey Court Rules R. 3:13-3(a)(11), (f).

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Suzanne Davies.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Teddy John Rose v. New Jersey Department of Corrections, 2016-302 – Findings and Recommendations of the Council Staff

The Complainant also contended that the denial lacked merit because he was entitled to, in the least, certain portions of confidential reports. Williams v. Dep't of Corr., 330 N.J. Super. 197, 204-205 (App. Div. 2000); R. 2:2-3. The Complainant noted that he was aware that witness or informant information would be exempt. The Complainant asserted that any such information contained in the requested reports could be easily redacted.⁴

Additional Submissions:

On December 28, 2016, the Complainant sent a letter to the GRC again disputing the Custodian's denial of access. The Complainant disputed presentence reports were used solely by a sentencing court. The Complainant asserted that DOC's classification department used the report to administer certain inmate scores. The Complainant further asserted that the State Parole Board used presentence reports to as part of its hearings.⁵

Statement of Information:

On January 24, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on October 25, 2016. The Custodian certified that he located the responsive records in the Complainant's Inmate Classification File at South Woods State Prison. The Custodian certified that he responded in writing on October 27, 2016 denying access to the requested presentence reports under the ACD exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a). See also N.J.A.C. 10A:22-2.3(a); R. 1:38(b)(1)-(2).

The Custodian contended that he lawfully denied access to the responsive presentence reports. In support of his denial, the Custodian argued that this complaint was directly on point with the Council's prior decision in Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2013-299 (September 2014). The Custodian stated that there, the Council upheld the custodian's denial of access to presentence reports under the ACD exemption. Id. (citing N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:2.3(a); R. 1:38(b)(1)-(2); State v. DeGeorge, 113 N.J. Super. 542 (App. Div. 1971)). The Custodian thus requested that the GRC dismiss the instant complaint.

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

⁴ The Complainant included addition information regarding his "psychological examination."

⁵ The Complainant expanded his complaint to seek access to "mental health evaluations attach[ed] thereto." The Complainant argued that because he was entitled to his presentence reports comprising of "diagnostical matters," he was also entitled to multiple health evaluations reviewed during his parole hearing. However, mental health evaluations were not part of the Complainant's original request. For this reason, the GRC declines to address whether the Complainant was unlawfully denied access to these records. Notwithstanding, it should be noted that the Appellate Division recently decided such types of records are exempt from disclosure under OPRA even if the requestor were seeking their own medical reports. See Spillane v. NJ State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017).

Teddy John Rose v. New Jersey Department of Corrections, 2016-302 – Findings and Recommendations of the Council Staff

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 provides that the definition of a government record “shall not include . . . [ACD] material.” Further, the Council has previously held that presentence reports were exempt from disclosure under the ACD material exemption. For instance, in Pitts, GRC 2013-299 (September 2014) the Council found that the contents of presentence reports meet the definition of consultative, advisory, or deliberative material. Id. at 4 (citing DeGeorge, 113 N.J. Super. at 544); see also Baker v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2014-262 (May 2015) Notably, the Council rejected the complainant’s argument that Kunz, 55 N.J. 128 applied under OPRA, reasoning that “[t]he 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.” Id. at 5. The Council further relied upon DeGeorge, 113 N.J. Super. at 542 in holding that even if presentence reports were available to defendants in certain judicial proceedings, that in itself did “not render [presentence reports] a public record.” Id.

Here, the Complainant sought access to copies of his presentence reports from 1985 and 1991. In response to the Custodian’s denial, the Complainant filed this complaint arguing that he should have been given access to the responsive presentence reports. The Complainant argued that case law and court rules required DOC to disclose the responsive records to him (as opposed to a third party). In the SOI, the Custodian reiterated DOC’s position that the responsive records were exempt from disclosure under the ACD exemption. Citing Pitts, GRC 2013-299.

The Council’s decision in Pitts, GRC 2013-299 is on square with the facts of the instant complaint. The Complainant sought access to presentence reports, which the Custodian denied as ACD material. The Complainant filed the instant complaint arguing the same position as the complainant in Pitts. The Custodian subsequently argued in the SOI that Pitts controlled here. The GRC agrees, and finds that the Custodian lawfully denied access to the Complainant’s OPRA request substantially for the reasons set forth in Pitts.

Accordingly, because the responsive presentence reports fall within the ACD exemption, they are exempt from disclosure under OPRA. See Pitts, GRC 2013-299 (citing 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 Council Staff respectfully recommends the Council find that because the responsive presentence reports fall within the “inter-agency or intra-agency consultative, advisory, or deliberative material” exemption, they are exempt from disclosure under OPRA. See Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014) (citing State v. DeGeorge, 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: Frank F. Caruso

Communications Specialist/Resource Manager

July 24, 2018