



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 26, 2019 Government Records Council Meeting

Frank Hubbard
Complainant

Complaint No. 2017-48

v.

NJ State Parole Board
Custodian of Record

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 2019 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 record, a document the Board relied upon in determining the Complainant’s future eligibility date for parole, is confidential and exempt from access pursuant to N.J.A.C. 10A:71-2.2(a), which is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). As such, the Custodian has borne her burden of proving that the denial of access was lawful. 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 26th Day of March, 2019

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: March 29, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
March 26, 2019 Council Meeting**

**Frank Hubbard¹
Complainant**

GRC Complaint No. 2017-48

v.

**New Jersey State Parole Board²
Custodial Agency**

Records Relevant to Complaint: Copy of “the document classified as confidential that the Board states played a role when they established the future eligibility date, mentioned in my narrative Notice of Decision, page 6, next to last paragraph, dated December 1, 2016.”

Custodian of Record: Dina I. Rogers
Request Received by Custodian: February 13, 2017
Response Made by Custodian: February 16, 2017
GRC Complaint Received: March 3, 2017

Background³

Request and Response:

On February 6, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned record. On February 16, 2017, the third (3rd) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the document he requested is confidential pursuant to N.J.A.C. 10A:71-2.2(a), and is not subject to disclosure under OPRA.

Denial of Access Complaint:

On March 3, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the record he requested, which is “classified as confidential” was unlawfully denied because “[t]he denial is based on no legitimate penological interest.”

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Erica R. Heyer.

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.

Statement of Information:

On April 11, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 13, 2017 and responded in writing on February 16, 2017. The Custodian certified that the record the Complainant is seeking is a document the Board relied upon in determining his future eligibility date for parole. The Custodian further certified that the record is confidential pursuant to N.J.A.C. 10A:71-2.2(a) and is not subject to disclosure under OPRA. The Custodian’s Counsel argued that the complaint should be dismissed because N.J.A.C. 10A:71-2.2(a) deems the requested record confidential.

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.

Here, there is no dispute between the parties that the requested record is a document that has been classified as confidential. However, the Complainant stated that the Custodian’s denial of his request is not based upon a legitimate penological interest. Conversely, the Custodian cited N.J.A.C. 10A:71-2.2(a) as the regulation which provides for the confidentiality of the requested record.

N.J.A.C. 10A:71-2.2(a)(9) provides that:

In addition to records designated as confidential pursuant to the provisions of [OPRA] ... the following records shall be deemed confidential and shall not be subject to public access ... other information, files, documents, reports, records or other written materials *as the Board may deem confidential* to insure the integrity of the parole and parole supervision processes[.] (Emphasis added.)

[Id.]

Further, OPRA 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 . . . regulation promulgated under the authority of any statute . . .” N.J.S.A. 47:1A-9(a). As such, the provisions of N.J.A.C. 10A:71-2.2(a), designating the requested record as confidential and exempt from access, are applicable to OPRA.

Therefore, the requested record, a document the Board relied upon in determining the Complainant’s future eligibility date for parole, is confidential and exempt from access pursuant to N.J.A.C. 10A:71-2.2(a), which is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). As

such, the Custodian has borne her burden of proving that the denial of access was lawful. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the requested record, a document the Board relied upon in determining the Complainant's future eligibility date for parole, is confidential and exempt from access pursuant to N.J.A.C. 10A:71-2.2(a), which is applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). As such, the Custodian has borne her burden of proving that the denial of access was lawful. N.J.S.A. 47:1A-6.

Prepared By: John E. Stewart
Staff Attorney

March 19, 2019