



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 30, 2021 Government Records Council Meeting

Marvin Mathis
Complainant

Complaint No. 2020-36

v.

NJ Department of Corrections
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 2021 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:

1. The Custodian lawfully denied access to Complainant’s OPRA request seeking a Pre-Sentence report. N.J.S.A. 47:1A-6. Specifically, Pre-Sentence reports are exempt as “inter-agency, intra-agency advisory, consultative, or deliberative material” under N.J.S.A. 47:1A-1.1. 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, 544 (App. Div. 1971)).
2. The Complainant is not entitled to reasonable attorney’s fees pursuant to OPRA based on the fact that the courts have determined that the State’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not a *pro se* individual representing himself. See Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019); Pitts v. N.J. Dep’t of Corrections, GRC Complaint No. 2005-71 (April 2006).

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 30th Day of March 2021

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 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 30, 2021 Council Meeting**

**Marvin Mathis¹
Complainant**

GRC Complaint No. 2020-36

v.

**N.J. Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Hardcopy via U.S. mail of the Complainant's July 30, 1998 Pre-Sentence ("PSI") report.

Custodian of Record: John Falvey
Request Received by Custodian: November 14, 2019
Response Made by Custodian: November 27, 2019
GRC Complaint Received: February 11, 2020

Background³

Request and Response:

On November 14, 2019, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On November 27, 2019 the Custodian responded in writing denying access the requested PSI report under the "inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material" exemption. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On February 11, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted the Custodian unlawfully denied access to the responsive PSI report. The Complainant argued that criminal investigatory records are required to meet a two-prong test for disclosure. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 556 (2017). The Complainant asserted that a record required to be made by law" does not fall within the exemption. The Complainant argued that because the courts have outlined a pre-sentence process requiring a PSI report to be provided to

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Travis M. Anderson.

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.

all parties to a criminal case, the criminal investigatory exemption did not apply here. N.J. Court Rule, R. 3:21-2. The Complainant also argued that the investigation in progress exemption at N.J.S.A. 47:1A-3(b) does not apply here because all “instigations . . . have long since concluded years ago.” The Complainant argued that the PSI report is from his own case file and is needed in a separate lawsuit; thus, he is entitled to the responsive record.

The Complainant finally argued that he is entitled to an award of prevailing party attorney’s fees based on the time he spent “investigating, researching, and presenting” this complaint. N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). The Complainant noted that he completed a motion writing class offered by the Inmate Legal Association and a research and brief preparation class offered by Lexis Nexis.

Statement of Information:⁴

On July 16, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 14, 2019. The Custodian certified that he responded in writing on November 27, 2019 denying the Complainant’s request under the ACD exemption.

The Custodian contended that he lawfully denied access to the requested PSI report. N.J.A.C. 10A:22-2.3; State v. DeGeorge, 113 N.J. Super. 542 (App. Div. 1971). The Custodian stated that PSI reports are mandatory reports created by the courts pursuant to N.J.S.A. 2C:44-6. See R. 3:21-2(a). The Custodian stated that PSI reports contain multiple factors that the courts reply upon to determine sentencing, including prior criminal history, civil commitment history, and medical history. The Custodian averred that R. 1:38-3(b)(2) expressly states that PSI reports are ACD material. The Custodian argued that both OPRA and the New Jersey Department of Corrections’ (“DOC”) regulations exempt PSI reports from disclosure. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3. The Custodian further argued that both New Jersey’s courts and the GRC have determined that PSI reports were exempt from disclosure under OPRA. DeGeorge, 113 N.J. Super. 542; Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014).

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 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

⁴ On February 28, 2020, this complaint was referred to mediation. On June 29, 2020, this complaint was referred back to the GRC for adjudication.

“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.

Regarding PSI reports, the Council has previously held that same were exempt from disclosure under the ACD material exemption. In Pitts, GRC 2013-299, the Council found that the contents of PSI reports meet the definition of ACD material. Id. at 4. Most notable, the Council relied upon DeGeorge, 113 N.J. Super. at 542, holding that even if PSI reports are available to defendants in certain judicial proceedings, that in itself “does not render it a public record.” Pitts, GRC 2013-299 at 5. See also Baker v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2014-262 (May 2015).

Here, the Complainant sought a PSI report to which the Custodian denied access under OPRA citing N.J.S.A. 47:1A-1.1. In the SOI, the Custodian maintained his position that he properly denied access to the Complainant’s request under OPRA and cited DeGeorge, and Pitts, GRC 2013-299. A review of the case law provided by the Custodian supports his denial of access. That is, Pitts is on point with the facts here and thus the GRC must follow accordingly by determining that the requested PSI report is exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. Additionally, that the PSI report relates to the Complainant is of no moment; the exemption does not contemplate the identity of the individual seeking access to a record exempt under the ACD exemption.

Therefore, the Custodian lawfully denied access to Complainant’s OPRA request seeking a PSI report. N.J.S.A. 47:1A-6. Specifically, PSI reports are exempt as ACD material under N.J.S.A. 47:1A-1.1. See Pitts, GRC 2013-299 (citing DeGeorge, 113 N.J. Super. at 544).

Prevailing Party Attorney’s Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters, 387 N.J. Super. 423, the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

The threshold aspect in this case is whether the Complainant, who is not a licensed attorney representing a client in this matter, would qualify for reasonable attorney's fees. According to the New Jersey Supreme Court, the New Jersey Legislature has promulgated a "substantial number of statutes authorizing an award of a reasonable counsel fee *to the attorney for the prevailing party.*" (emphasis added) New Jerseyans For A Death Penalty Moratorium v. N.J. Dep't of Corr. and Devon Brown, 182 N.J. 628 (2005) (decision without a published opinion) (quoting Rendine v. Pantzer, 141 N.J. 292 (1995)). Although the underlying purpose of those statutes may vary, they share a common rationale for incorporating a fee-shifting measure: to ensure "that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens." New Jerseyans (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)). Thus, the courts of the State have determined that the state's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not a *pro se* complainant representing himself. See also Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019); Pitts v. N.J. Dep't of Corrections, GRC Complaint No. 2005-71 (April 2006).

Here, the Complainant filed the subject OPRA request and subsequently filed this complaint. Within the Denial of Access Complaint form, the Complainant noted that he completed legal writing classes offered by two (2) organizations.⁵ However, in accordance with the forgoing case law, the Complainant cannot be awarded attorney's fees in a case where he is an unlicensed attorney representing himself *pro se* before the GRC.⁶

Therefore, the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA based on the fact that the courts have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not a *pro se* individual representing himself. See Feld, 2019 N.J. Super. Unpub. LEXIS 903; Pitts, GRC 2005-71.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to Complainant's OPRA request seeking a Pre-Sentence report. N.J.S.A. 47:1A-6. Specifically, Pre-Sentence reports are exempt as "inter-agency, intra-agency advisory, consultative, or deliberative material" under N.J.S.A. 47:1A-1.1. 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, 544 (App. Div. 1971)).
2. The Complainant is not entitled to reasonable attorney's fees pursuant to OPRA based on the fact that the courts have determined that the State's fee-shifting statutes are

⁵ The GRC confirmed through the New Jersey Courts website that the Complainant is not an attorney with an active registration in the State of New Jersey. https://portalattyssearch-cloud.njcourts.gov/prweb/PRServletPublicAuth/-amRUHgepTwWWiiBQpI9_yQNuUm4oN16*/!STANDARD?AppName=AttorneySearch (accessed March 1, 2020).

⁶ The GRC notes that notwithstanding the threshold issue addressed here, the Complainant here nonetheless failed to prevail. That is, his complaint did not bring about a change in the Custodian's conduct and no relief was achieved because the requested record did not exist. N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. 432; Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

intended to compensate an attorney hired to represent a plaintiff, and not a *pro se* individual representing himself. See Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019); Pitts v. N.J. Dep't of Corrections, GRC Complaint No. 2005-71 (April 2006).

Prepared By: Frank F. Caruso
Executive Director

March 23, 2021