



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 30, 2021 Government Records Council Meeting**

Marty Alston  
Complainant

Complaint No. 2020-43

v.

Mercer County Prosecutor's Office  
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 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)); Baker v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2014-262 (May 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 30<sup>th</sup> 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**

**Marty Alston<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-43**

v.

**Mercer County Prosecutor's Office<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopy via U.S. mail of the Complainant's Pre-Sentence ("PSI") report from Indictment No. 06-02-263-1.

**Custodian of Record:** Scott Gershman, Esq.

**Request Received by Custodian:** January 13, 2020

**Response Made by Custodian:** January 22, 2020

**GRC Complaint Received:** February 20, 2020

**Background<sup>3</sup>**

**Request and Response:**

On January 7, 2020, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 22, 2020, 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; 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)); Baker v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2014-262 (May 2015).

**Denial of Access Complaint:**

On February 20, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he unsuccessfully attempted to obtain his PSI from multiple sources over the last fifteen (15) years. The Complainant argued that N.J. Court Rules, R. 1:38-3(c)(1) was recently amended to allow parties to a trial proceeding access to discovery materials; thus, he was entitled to the requested PSI report.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> 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.

The Custodian further argued that the Custodian's reliance on DeGeorge, 113 N.J. Super. 542 was misplaced because R. 3:13-3(b)(1)(B) allows a criminal defendant to access any discovery inclusive of ". . . statements made by the defendant . . ." See State v. Phillip, 166 N.J. Super. 153 (App. Div. 1979). The Complainant noted that the PSI report was prepared based on statements he made to the preparer. The Complainant further argued that the Court Rule also entitled him to "any statements signed or unsigned . . . by co-defendant's which are within the possession or control of the prosecutor." See *e.g.* Slaughter v. Gov. Records Council, 413 N.J. Super. 544 (App. Div. 2010) (certif. denied 208 N.J. 372 (2011)).

The Complainant finally contended that the Courts have held that access to government records should be balanced on interest. K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 360-361 (App. Div. 2011). The Complainant argued that he previously possessed the PSI report but lost it during a transfer from one facility to another. The Complainant thus argued that the "Custodian's assertion of a privilege under the circumstances is dubious."

#### Statement of Information:

On May 6, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on January 13, 2020. The Custodian certified that he responded in writing on January 22, 2020 denying the Complainant's request under the ACD exemption. The Custodian maintained that he lawfully denied access to the requested PSI report based on OPRA and applicable case law. N.J.S.A. 47:1A-1.1; Pitts, GRC 2013-299 (citing DeGeorge, 113 N.J. Super. 542); Baker, GRC 2014-262.

### 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 "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, 2014-262.

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 that he properly denied access to the Complainant's request under OPRA and Pitts, GRC 2013-299 (citing DeGeorge) and Baker, GRC 2014-262. A review of the case law provided by the Custodian supports his denial of access. That is, Pitts and Baker are 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.<sup>4</sup>

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); Baker, GRC 2014-262.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that 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)); Baker v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2014-262 (May 2015).

Prepared By: Frank F. Caruso  
Executive Director

March 23, 2021

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<sup>4</sup> The GRC does not address the Complainant's discovery and common law-related arguments because they are not properly within the Council's authority to adjudicate. N.J.S.A. 47:1A-7(b); MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 543-546 (App. Div. 2005); Rowan, Jr. (O.B.O. Express Times) v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).