



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

May 26, 2015 Government Records Council Meeting

Joseph B. Garrett, POA
(On behalf of Regina M. Garrett)
Complainant

Complaint No. 2014-368

v.

NJ Department of Banking & Insurance
Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 2015 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 Custodian certified that Complaint No. 10001494 is a completed investigation in which no formal disciplinary action was taken, and the evidence of record supports this fact, such records are not required to be disclosed under New Jersey Department of Banking & Insurance regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 11: 11:5-1.5(g)6. Accordingly, the Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Cibrian v. NJ Dep’t of Banking & Ins., GRC Complaint No. 2012-76 (March 2013).

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 May, 2015

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 28, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 26, 2015 Council Meeting**

**Joseph B. Garrett, POA
(On Behalf of Regina M. Garrett)¹
Complainant**

GRC Complaint No. 2014-368

v.

**New Jersey Department of Banking & Insurance²
Custodial Agency**

Records Relevant to Complaint: Hard copies of the complete case file for Complaint No. 10001494.

Custodian of Record: Christine Holden
Request Received by Custodian: September 25, 2014
Response Made by Custodian: October 6, 2014
GRC Complaint Received: November 5, 2014

Background³

Request and Response:

On September 20, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 6, 2014, the Custodian responded in writing denying access to the responsive records as investigative records maintained by the New Jersey Department of Banking & Insurance (“DOBI”). The Custodian stated that records of a pending investigation or completed matter in which no formal disciplinary access was taken are exempt from access. N.J.S.A. 47:1A-3; N.J.A.C. 11:17-2.15(b)6.

Denial of Access Complaint:

On November 5, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian unlawfully denied access to records to which he believed he was entitled based on his power of attorney status.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Eleanor Heck.

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.

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Statement of Information:

On November 19, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 25, 2014. The Custodian certified that she responded in writing on October 6, 2014, denying access to the responsive records under N.J.S.A. 47:1A-3 and N.J.A.C. 11:17-2.15(b)6.

The Custodian certified that the Complainant’s OPRA request sought records contained in an investigation file concerning a licensee of the Real Estate Commission (“Commission”). The Custodian noted that the Complainant received formal written notification on May 14 and August 14, 2014, that the investigation was closed without formal disciplinary action.

The Custodian averred that, notwithstanding her initial denial based on N.J.A.C. 11:17-2.15(b)6 (governing disclosure of licensee records), her denial of access was lawful based on N.J.S.A. 47:1A-9(a) and N.J.A.C. 11:5-1.5(g)6 (governing disclosure of Commission records, including investigative files). The Custodian argued that all records responsive to the Complainant’s OPRA request fall under this exemption because the Commission’s investigation yielded no formal disciplinary action. The Custodian further asserted that the Complainant’s assertion of any facts related to Complaint No. 10001494 is of no moment here.

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:

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).

Further, DOBI’s regulations provide that “[t]he following licensee records are nonpublic in accordance with [OPRA] . . . *Investigative files* in any matter pending investigation, or *in any completed investigation in which no formal disciplinary action was taken.*” N.J.A.C. 11:5-1.5(g)6 (emphasis added).

Here, the Complainant sought the complete case file for Complaint No. 10001494.⁴ The Custodian responded denying access to the responsive records under DOBI regulations exempting access to investigative files for completed matters in which no formal disciplinary action was taken. In the Denial of Access Complaint, the Complainant argued that he was entitled to the records based on his status as power of attorney for the complaining party. In the SOI, the Custodian certified that the completed investigation yielded no formal disciplinary actions; the Complainant did not dispute this fact.

Although the Council has not previously been tasked with adjudicating a denial of access based on N.J.A.C. 11:5-1.5(g)6, it has adjudicated a complaint in which DOBI utilized a similarly-worded exemption. In Cibrian v. NJ Dep't of Banking & Ins., GRC Complaint No. 2012-76 (March 2013), the complainant filed a complaint after the custodian denied access to two (2) OPRA requests seeking records from Complaint File No. 91659. The Custodian cited N.J.A.C. 11:17-2.15(b)(providing that licensee completed investigation records in which no formal action was taken were exempt from disclosure).⁵ In the SOI, the custodian certified that the investigation for Complaint File No. 91659 was closed and that no formal action was taken. Absent any facts to the contrary, the Council determined that the custodian lawfully denied access to records “[b]ecause [he] certified that DOBI took no formal disciplinary action against AmeriHealth and such records are not required to be disclosed pursuant to N.J.S.A. 47:1A-9(a) and N.J.A.C. 11:17-2.15(b)(6)” (*citing Sallie v. NJ Dep't of Banking & Ins.*, GRC Complaint No. 2007-226 (April 2009)) Id. at 3.

The Council's decision in Cibrian, GRC 2012-76, is instructive in the current complaint. Specifically, as in Cibrian, the Custodian certified in the SOI that the investigation for Complaint No. 10001494 was completed without formal disciplinary action. Additionally, the Custodian advised that the Complainant was made aware of this fact in letters dated May 14 and August 14, 2014. The GRC was able to confirm the content of these letters because the Complainant attached copies of same to the Denial of Access Complaint. For these reasons, the evidence of record corroborates the Custodian's SOI certification, and the GRC is satisfied that the cited exemption applies to the responsive complaint file.

Therefore, because the Custodian certified that Complaint No. 10001494 is a completed investigation in which no formal disciplinary action was taken, and the evidence of record supports this fact, such records are not required to be disclosed under DOBI regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 11: 11:5-1.5(g)6. Accordingly, the Custodian lawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Cibrian, GRC 2012-76.

⁴ The GRC notes that it has previously determined that requests for entire case files are invalid requests. Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008); Randazzo-Thompson v. City of Vineland (Cumberland), GRC Complaint No. 2010-76 (May 2011); Bragg v. NJ Dep't of Corrections, GRC Complaint No. 2010-145 (March 2011); and Bradley-Williams v. Atlantic Cnty. Jail (Atlantic), GRC Complaint No. 2011-232 (December 2012). However, the GRC will proceed with the adjudication of this complaint based on the Custodian's denial based on N.J.A.C. 11:5-1.5(g)6.

⁵ The GRC notes that the Custodian here initially denied access to the Complainant's OPRA request under this regulation.

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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian certified that Complaint No. 10001494 is a completed investigation in which no formal disciplinary action was taken, and the evidence of record supports this fact, such records are not required to be disclosed under New Jersey Department of Banking & Insurance regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 11: 11:5-1.5(g)6. Accordingly, the Custodian lawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Cibrian v. NJ Dep't of Banking & Ins., GRC Complaint No. 2012-76 (March 2013).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

May 19, 2015