



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

Nia H. Gill
Complainant

Complaint No. 2007-189

v.

New Jersey Department of Banking & Insurance
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 Supplemental 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 provided the Complainant with the following records ordered for disclosure: Department of Banking & Insurance (DOBI) pages 3, 4, 190, 191, 192, 193, 225, 226 and 255, and because the Custodian provided certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of the Council’s August 24, 2010 Interim Order, the Custodian has complied with said Order.

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 October, 2010

Robin Berg Tabakin, Chair
Government Records Council



I attest the foregoing is a true and accurate record of the Government Records Council.

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: October 28, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

Nia H. Gill¹
Complainant

GRC Complaint No. 2007-189

v.

New Jersey Department of Banking & Insurance²
Custodian of Records

Records Relevant to Complaint:

- April 13, 2006 OPRA Request: The rating systems, underwriting rules and any supporting documentation presented to the New Jersey Department of Banking & Insurance, pursuant to law, for the Government Employees Insurance Company and any other private passenger automobile insurer currently utilizing, or seeking to utilize, occupation, education, or both, as underwriting factors in determining the insurers' rate level.³
- April 25, 2006 OPRA Request: Rating manuals presented to the New Jersey Department of Banking & Insurance, pursuant to law, for the Government Employees Insurance Company and any other private passenger automobile insurer currently utilizing, or seeking to utilize, either occupation or education, or both, as underwriting factors in determining the insurer's rate levels.
- August 1, 2006 Letter Request:
 1. Pursuant to *N.J.A.C. 11:3-19A.5(b)(2)*, an explanation of the reasonable and demonstrated relationship between the risk characteristic of the driver insured and the hazards insured against that the New Jersey Department of Banking & Insurance found to justify the use of levels of education and occupation in underwriting insurance.
 2. The more than twenty (20) factors the Government Employees Insurance Company testified it uses in underwriting automobile insurance which were submitted and approved by the New Jersey Department of Banking & Insurance.
 3. The statistical data upon which the New Jersey Department of Banking & Insurance relies that correlates occupations and education to driving and accidents.
 4. The statistical data upon which the New Jersey Department of Banking & Insurance relies that illustrates a cause and effect relationship between occupation or education and driving or accidents

¹ No legal representation listed on record.

² Represented by DAG Kristine A. Maurer, on behalf of the NJ Attorney General.

³ The Complainant requested additional records in her request dated April 13, 2006; however, said records are not the subject of this complaint.

Requests Made: April 13, 2006, April 25, 2006 and August 1, 2006
Responses Made: April 26, 2006, May 4, 2006 and September 29, 2006
Custodian: Gary Vogler
GRC Complaint Filed: August 21, 2007⁴

Background

August 24, 2010

Government Records Council's ("Council") Interim Order. At its August 24, 2010 public meeting, the Council considered the August 17, 2010 Supplemental 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, found that:

1. The Council accepts the Administrative Law Judge's corrected Initial Decision dated June 11, 2010 which holds that:
 - a. CURE's application for intervention in this matter is denied.
 - b. The records withheld from disclosure do not constitute "underwriting rules."
 - c. The Department of Banking and Insurance is hereby **ORDERED** to release to the Complainant DOBI pages 3, 4, 190, 191, 192, 193, 225, 226 and 255.
 - d. The Department of Banking and Insurance has properly determined that the remaining documents withheld and described above are exempt from classification as 'government records' pursuant to the exclusion contained in the definition of that term at N.J.S.A. 47:1A-1.1.
 - e. There has been no unlawful denial of access to documents that are accessible under the terms of OPRA. The vast majority of those documents withheld were properly not provided to the requestor and the very limited documents that were withheld and to which [the Complainant] should properly have been given access constitute a de minimus proportion of the withheld materials.

2. **The Custodian shall comply with item # 1.c above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.⁶**

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

August 26, 2010

Council's Interim Order distributed to the parties.

August 31, 2010⁷

Custodian's response to the Council's Interim Order.⁸ The Custodian certifies that the Council's August 24, 2010 Interim Order directed him to disclose to the Complainant the following Bates-stamped pages that were initially withheld from disclosure:

- DOBI 03-04
- DOBI 190-193
- DOBI 225-226
- DOBI 255

The Custodian certifies that attached as Exhibit A is a true and exact copy of Bates-stamped DOBI 03-04, a cover letter from Mary Kathryn Roberts, Esq., of Riker, Danzig, Scherer, Hyland and Peretti, LLP, to Harry B. Davenport, CPCU, Insurance Analyst at the Department, dated March 9, 2006, submitting tier rating information for Selective Auto Insurance Company of New Jersey.

The Custodian certifies that attached as Exhibit B is a true and exact copy of Bates-stamped DOBI 190, an undated internal Department document with two (2) GEICO rating examples, and Bates-stamped DOBI 191-193, an e-mail dated March 9, 2006 from GEICO to the Department containing the GEICO rating examples.

The Custodian also certifies that attached as Exhibit C is a true and exact copy of Bates-stamped DOBI 225-226, a letter from Hank Nayden, Vice President of GEICO, to the former Commissioner of the Department Holly C. Bakke, dated August 11, 2004.

Additionally, the Custodian certifies that attached as Exhibit D is a true and exact copy of Bates-stamped DOBI 255, a letter from Anna L. Saldan, Manager at the Department, to Jacqueline E. Pasley, FCAS, MAAA, Director of Product Management at GEICO, dated June 22, 2005, without enclosures.

Analysis

Whether the Custodian complied with the Council's August 24, 2010 Interim Order?

The Council's August 24, 2010 Interim Order directed the Custodian to release to the Complainant DOBI pages 3, 4, 190, 191, 192, 193, 225, 226 and 255. Said Order directed the Custodian to release said records to the Complainant within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified

⁷ Although the Custodian's certification is dated August 31, 2010, the GRC received said certification on September 2, 2010.

⁸ In the cover letter of the submission, the Custodian's Counsel states that said submission was simultaneously provided to the Complainant and Counsel for GEICO.

confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁹ to the Executive Director. The Council distributed its Interim Order to all parties on August 26, 2010 making the five (5) business day deadline to respond the close of business on September 2, 2010.

On September 2, 2010, the GRC received the Custodian's signed certification dated August 31, 2010. In said certification the Custodian certified that he attached true and accurate copies of the following records ordered to be disclosed:

- DOBI 03-04
- DOBI 190-193
- DOBI 225-226
- DOBI 255.

In the cover letter to said certification, the Custodian's Counsel stated that said submission was simultaneously provided to the Complainant and Counsel for GEICO.

Therefore, because the Custodian provided the Complainant with the following records ordered for disclosure: DOBI pages 3, 4, 190, 191, 192, 193, 225, 226 and 255, and because the Custodian provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's August 24, 2010 Interim Order, the Custodian has complied with said Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian provided the Complainant with the following records ordered for disclosure: Department of Banking & Insurance (DOBI) pages 3, 4, 190, 191, 192, 193, 225, 226 and 255, and because the Custodian provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's August 24, 2010 Interim Order, the Custodian has complied with said Order.

Prepared By: Dara Lownie
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



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CHRIS CHRISTIE
Governor

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INTERIM ORDER

August 24, 2010 Government Records Council Meeting

Nia H. Gill
Complainant

Complaint No. 2007-189

v.

New Jersey Department of Banking & Insurance
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 17, 2010 Supplemental 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 Council accepts the Administrative Law Judge’s corrected Initial Decision dated June 11, 2010 which holds that:
 - a. CURE’s application for intervention in this matter is denied.
 - b. The records withheld from disclosure do not constitute “underwriting rules.”
 - c. The Department of Banking and Insurance is hereby **ORDERED** to release to the Complainant DOBI pages 3, 4, 190, 191, 192, 193, 225, 226 and 255.
 - d. The Department of Banking and Insurance has properly determined that the remaining documents withheld and described above are exempt from classification as ‘government records’ pursuant to the exclusion contained in the definition of that term at N.J.S.A. 47:1A-1.1.
 - e. There has been no unlawful denial of access to documents that are accessible under the terms of OPRA. The vast majority of those documents withheld were properly not provided to the requestor and the very limited documents that were withheld and to which [the Complainant] should properly have been given access constitute a de minimus proportion of the withheld materials.
2. **The Custodian shall comply with item # 1.c above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified**



confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²

Interim Order Rendered by the
Government Records Council
On The 24th Day of August, 2010

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: August 26, 2010

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 24, 2010 Council Meeting**

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GRC Complaint No. 2007-189

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- April 25, 2006 OPRA Request: Rating manuals presented to the New Jersey Department of Banking & Insurance, pursuant to law, for the Government Employees Insurance Company and any other private passenger automobile insurer currently utilizing, or seeking to utilize, either occupation or education, or both, as underwriting factors in determining the insurer's rate levels.
- August 1, 2006 Letter Request:
 1. Pursuant to *N.J.A.C. 11:3-19A.5(b)(2)*, an explanation of the reasonable and demonstrated relationship between the risk characteristic of the driver insured and the hazards insured against that the New Jersey Department of Banking & Insurance found to justify the use of levels of education and occupation in underwriting insurance.
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³ The Complainant requested additional records in her request dated April 13, 2006; however, said records are not the subject of this complaint.

Requests Made: April 13, 2006, April 25, 2006 and August 1, 2006
Responses Made: April 26, 2006, May 4, 2006 and September 29, 2006
Custodian: Gary Vogler
GRC Complaint Filed: August 21, 2007⁴

Background

June 11, 2009

Government Records Council's ("Council") Interim Order. At its June 11, 2009 public meeting, the Council considered the May 20, 2009 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, found that:

1. Because of the sensitive and wide sweeping nature of the subject of this complaint, the issue of whether Citizens United Reciprocal Exchange ("CURE") has a right to intervene in this matter shall be afforded the due process rights of a full hearing. As such, this complaint should be referred to the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-16.2(b)*, to determine whether CURE should be permitted to intervene in this complaint.
2. This complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records.

June 12, 2009

Council's Interim Order distributed to the parties.

July 7, 2009

Complaint transmitted to the Office of Administrative Law ("OAL").

June 10, 2010

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ states that:

"[t]he GRC decided that the issue of whether to permit...intervention [by CURE] should be decided, at least initially by OAL...An Interlocutory Order Denying Intervention and Permitting Participation to file exceptions to the initial decision to be issued in this case was issued on October 28, 2009. CURE then moved for reconsideration of the Order, offering additional information in support of its position. This application was denied by Interlocutory Order dated December 9, 2009."

The ALJ also stated that:

⁴ The GRC received the Denial of Access Complaint on said date.

“under [the Automobile Insurance Reform Act of 1982], that which is properly deemed underwriting rules must be public, and, under OPRA, that which is legitimately confidential, proprietary and/or ‘if disclosed, would give an advantage to competitors...’ is not a government record and need not be disclosed...As such, the key to this matter is the proper understanding of what is and is not an underwriting rule.”

Thus, the ALJ conducted an *in camera* review of the records withheld from disclosure to determine whether the Custodian lawfully withheld said records on the basis that said records are proprietary and exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Specifically, the ALJ held a recorded *in camera* “telephone conference with counsel for DOBI and GEICO for the purpose of clarifying a limited number of concerns...as the exact nature of certain of the withheld documents and the position of those parties as to their exemption from production.”

First, the ALJ rejected the Complainant’s assertion that all of the documents filed with DOBI in regard to the review and approval of private automobile insurance rates are accessible as “underwriting rules.” Thus, the ALJ stated that “it is still necessary to determine whether the actual documents withheld by DOBI under the confidentiality and proprietary exemptions are properly characterized as within those categories.” The ALJ stated that:

“I have inspected each of the twenty-four items identified on the privilege log as not having been produced because of a claim that the item was confidential, proprietary and that disclosure would provide an advantage to competitors. The items, only some of which are related to GEICO, are described in summary fashion on the privilege log. The items include business plans, comparisons between various companies’ experience or policies, identification and analysis of factors, weights and scores to be utilized in determining rates, proposals for changes in policies, weighting, and guidelines, which were submitted for review prior to approval of the proposals. I **CONCLUDE** that these documents do not constitute underwriting rules, although in an instance or two there are some pages of such rules included as a part of the analysis for business decisions. There are some limited portions of the withheld materials that, while not themselves underwriting rules, nevertheless have not been shown to be exempt from disclosure. These are noted below.

More specifically, referring to the documents contained on the privilege log by the number assigned to each non-deliberative process item and the Bates numbers:

2. Bates numbers DOBI 03-04 ‘03/09/06 letter from Mary Kathryn Roberts at Riker Danzig to Department with information attached re: Selective rate filing’ - Cover letter for transmittal of rating tier information. This document is a government record and must be supplied to the requestor. It is not exempt. It contains no proprietary or confidential material.

3. DOBI 05-07 'Undated chart entitled: Selective Auto Insurance Company of New Jersey, Rating Tier Information, Underwriting Score Development'-Contains non-underwriting rule materials properly considered to be privileged and likely to provide an advantage for competitors.

12. DOBI 24-52 '06/02/05 email from Becky L. Roeber, AMEX Ass. Co., to Department with various attachments including Class Rating Factors used by AMEX'-This item includes numerous charts containing materials that relate to various factors utilized by the company in determining rates. The material is clearly not underwriting rule material and the series of emails at DOBI 24-28 include explanations and clarifications that are directly related to the charts. These documents are properly considered to be privileged and likely to provide an advantage for competitors.

13. DOBI 53-121 'Exhibits dated 05/12/05 sent to Department by AMEX with rating information.' The documents include graphs, charts and text detailing factors utilized in rating. These are not underwriting rule materials and are properly considered privileged and likely to provide an advantage for competitors.

22. DOBI 136 'Undated Exhibit 1.1 with Educational Analysis from Esurance Insurance Company.' This document contains calculations that are clearly proprietary in nature.

23. DOBI 137 'Undated Exhibit 1.2 with Correlation of Education with Other Variables for rating systems from Esurance Insurance Company.' This document is a compilation of factors that clearly is the result of significant analysis and is proprietary and likely to provide an advantage for competitors.

26. DOBI 141-153 '07/16/04 letter from GEICO to Department with revisions and clarifications of GEICO's underwriting and rating guidelines.' DOBI 141 is a cover letter which in itself contains some business plan/strategy information. The remaining pages contain various models based on factors and scores. All the material is clearly proprietary, confidential and would be of advantage to competitors.

27. DOBI 154-162 '07/16/04 letter from GEICO to Department containing GEICO's Business Plan for New Jersey.' These are not underwriting rule materials and are properly considered confidential, privileged and likely to provide an advantage for competitors.

28. DOBI 163-170 '08/24/04 email from GEICO to Department with the GEICO Weekly Report as of 8/21/04.' This is a report of sales and quote activity, in the nature of a review of business activity. It is legitimately confidential, privileged and likely to be of advantage to competitors.

29. DOBI 171-184 ‘08/25/05 email from GEICO to Department with the GEICO Weekly Report as of 8/20/05.’ This is a report of sales and quote activity, in the nature of a review of business activity. It is legitimately confidential, privileged and likely to be of advantage to competitors.

30. DOBI 185-189 ‘07/20/05 letter to Department with the GEICO Underwriting Model and proposed changes.’

31. DOBI 190 ‘Undated internal Department document with two GEICO rating examples.’ This page is a duplicate of DOBI 193, which is part of #32. The individual page contains no proprietary or confidential material and by itself, is unlikely to be an advantage to competitors. As such, no basis has been shown for withholding it from the requestor.

32. DOBI 191-193 ‘03/09/06 email from GEICO to Department with GEICO rating examples.’ These pages include the aforementioned examples and a limited question about them. It has not been demonstrated that they are confidential, privileged or likely to be of advantage to a competitor. As such, they must be provided to the requestor.

35. DOBI 198-200 ‘Letter dated 12/29/04 from GEICO to Department re: revisions to the Underwriting and Rating Guidelines for GEICO.’ As described, this proposes changes in the business model and details of the Underwriting Guidelines that are submitted for approval. As such, they are legitimately considered to be confidential, proprietary and likely to be of advantage to competitors.

36. DOBI 201-206 ‘Letter dated 10/31/05 from GEICO to Department concerning revisions to the Underwriting and Rating Guidelines for GEICO.’ As described, this proposes changes in the business model and details of the Underwriting Guidelines that are submitted for approval. As such, they are legitimately considered to be confidential, proprietary and likely to be of advantage to competitors.

37. DOBI 207-211 ‘07/20/05 Letter from GEICO to Department concerning revisions to the Underwriting and Rating Guidelines for GEICO.’ As described, this proposes changes in the business model and details of the Underwriting Guidelines that are submitted for approval. As such, they are legitimately considered to be confidential, proprietary and likely to be of advantage to competitors.

38. DOBI 212-224 ‘Copy of Underwriting and Rating Guidelines for the GEICO group.’ Material contains rating elements and scores that are proprietary, confidential and likely to be of advantage to competitors.

39. DOBI 225-226 ‘08/04 Confidential Underwriting and Rating Guidelines for GEICO.’ These pages are a cover letter transmitting a

Business Plan and Operations Plan submitted for approval by DOBI. The letter itself is not exempt under OPRA and must be provided.

40. DOBI 227-232 ‘GEICO Plan of Operation.’ This is a Business Plan, submitted for approval as part of the larger submission described in the August 4, 2004, letter (39). It is legitimately confidential and proprietary and likely to assist competitors.

41 and 42. DOBI 233-243 ‘Internal Department document entitled: New Jersey Private Passenger Automobile Insurance Companies Education and Occupation Credit, with excerpts from the rating manuals of various insurance companies.’ This document contains a Department compilation of various information and documents gathered from what are clearly confidential and proprietary materials submitted to DOBI for regulatory purposes by several insurance companies. All of the material is within the spectrum of confidential and proprietary materials covered by the statutory exemption and is likely to be of assistance to the competitors of the several insurers whose information is digested herein.

43. DOBI 244-248 ‘Letter dated 7/6/04 from GEICO to Department re: filing of confidential Underwriting and Rating Guidelines including specific weights and cut scores with attachments.’ This material, which, as described includes significant internal evaluative information used in the writing of insurance, is clearly proprietary and would be likely to assist competitors.

45. DOBI 250-254 ‘Letter dated 6/17/05 from GEICO re: revisions to confidential underwriting and rating guidelines with attachment.’ The letter itself reveals some proposed changes and as such, is confidential and could assist competitors.

46. DOBI 255-270 ‘Letter dated 6/22/05 from the Department to GEICO approving 6/17/05 revisions to GEICO’s confidential underwriting and rating guidelines with attachment.’ The letter itself (DOBI) 255 is not properly deemed to be exempt, as it does not reveal anything that is privileged, confidential or likely to assist competitors. However, the remaining pages are properly deemed to be exempt, as they contain details of scoring and values that are proprietary, confidential and likely to be of advantage to competitors. DOBI 255 shall be supplied to the requestor.”

Further, the ALJ stated that:

“DOBI is hereby **ORDERED** to release to [the Complainant] DOBI pages 3, 4, 141, 190, 191, 192, 193, 225, 226 and 255. I **CONCLUDE** that DOBI has properly determined that the remaining documents withheld and described above are exempt from classification as ‘government records’ pursuant to the exclusion contained in the definition of that term at N.J.S.A. 47:1A-1.1. I further **CONCLUDE** that there has been no

unlawful denial of access to documents that are accessible under the terms of OPRA. The vast majority of those documents withheld were properly not provided to the requestor and the very limited documents that were withheld and to which [the Complainant] should properly have been given access constitute a de minimus proportion of the withheld materials and are certainly not materials which, by not being supplied, in any way obstructed the [Complainant] or her committee from their work. As such, with the limited exceptions noted, the complaint is **DISMISSED**.

It is also **ORDERED** that the entire binder of forty-six documents which were withheld under OPRA for in camera review are **SEALED** pending the final determination by the Government Records Council. Thereafter, those documents deemed appropriate for release, if any, may be provided to the petitioner.”

June 11, 2010

ALJ issues a corrected version of the Initial Decision dated June 10, 2010. The ALJ states that the Decision contained a typographical error. The ALJ states that the correction is as follows: “DOBI is hereby **ORDERED** to release to [the Complainant] pages 3, 4, ~~141~~, 190, 191, 192, 193, 225, 226 and 255.”

June 21, 2010

Complainant files Exceptions to the ALJ’s Initial Decision with the GRC. The Complainant states that underwriting rules are unequivocally subject to public inspection pursuant to N.J.S.A. 17:29A-46.2. The Complainant asserts that the GRC must reject the ALJ’s Initial Decision because it fails to follow a clear, statutory mandate.

Specifically, the Complainant contends that the Initial Decision erroneously defined the term “underwriting rules.” The Complainant asserts that the ALJ’s analysis of the definition ignores the reading of the plain language of the statutory definition and fails to recognize the relationship between the 1997 statutory enactment and the development of the Department’s 2008 regulations.

The Complainant asserts that underwriting rules consist of both the criteria used to accept or reject an individual’s application for automobile insurance coverage and the carrier’s determination of the individual risk. The Complainant states that “rating system” is defined as:

“every schedule, class, classification, rule, guide, standard, manual, table, rating plan, or compilation, by whatever name described, containing the rates used by any rating organization or by any insurer, or used by any insurer or by any rating organization in determining or ascertaining a rate and includes any policy form, or part thereof, used therewith.” N.J.S.A. 17:29A-1(d).

The Complainant contends that because a plain reading of the statute provides that a rating system is defined as “every...rule...by whatever name described” that is used by an insurance carrier “in determining or ascertaining a rate,” a rating system is an

underwriting rule. Additionally, the Complainant claims that the practice of rate making is an underwriting rule because the statute includes the phrase “determining or ascertaining a rate,” commonly known as the practice of “rate making.” The Complainant states that rate making is:

“the examination and analysis of factors and influences related to and bearing upon the hazard and risk made the subject of insurance; the collection and collation of such factors and influences into rating-systems; and the application of such rating-systems to individual risks.” N.J.S.A. 17:29A-1.

Based on the above, the Complainant asserts that underwriting rules are defined as both the collection of factors into a rating system and the application of the rating system to an individual.

Additionally, the Complainant contends that the statutory reading is consistent with DOBI’s application of the term “underwriting rule” in regulations concerning private passenger automobile insurance. The Complainant states that pursuant to DOBI’s 2008 rule adoptions, published in 40 N.J.R. 6790 (b), the term “underwriting rule” was replaced to more clearly denote the two different parts making up an insurer’s risk exposure. The Complainant states that the term “underwriting rule” was replaced in two sections: N.J.A.C. 11:3-8, concerning acceptance or rejection criteria, and N.J.A.C. 11:3-19A, concerning tier placement criteria. The Complainant asserts that these changes underscore the fact that underwriting consists of both parts of rating.

Further, the Complainant states that the term “underwriting rules” was first found in regulations adopted pursuant to the 1997 legislative reform that subjects underwriting rules to public inspection. The Complainant states that the regulations appeared at N.J.A.C. 11:3-19A and the term “underwriting rules” is used interchangeably to mean “acceptance criteria” and “tier placement criteria” depending on the context of the particular regulation. *See* 40 N.J.R. 3572 (A) (showing the use of the term and proposed replacement by more specific references to “acceptance criteria” and “tier placement criteria”).

The Complainant also claims that the ALJ’s Initial Decision erroneously withheld certain records from disclosure when said records are deemed to be related to “underwriting rules.” The Complainant states that OPRA provides that its parameters do not abrogate any other statute. N.J.S.A. 47:1A-9.a. Thus, the Complainant asserts that the mandate that all underwriting rules are available for public inspection pursuant to N.J.S.A. 17:29A-46.2(b), is in no way diluted by OPRA.

As such, the Complainant contends that a proper review of the requested records is a two-step process. First, the Complainant asserts that the court should review all records to determine which are related to underwriting rules, and order disclosure of said records based on N.J.S.A. 17:29A-46.2(b). The Complainant claims that only after the first review should the court then take a second review to determine whether said records are subject to public access under OPRA. The Complainant states that the ALJ failed to follow this reasoning during his *in camera* review. The Complainant contends that the

ALJ improperly withheld underwriting records that he deemed to be proprietary information. The Complainant claims that the ALJ's erroneous analysis ignores the insurance law's clear statutory mandate and results in any petitioner only receiving a cover letter noting the enclosure of substantive documents related to underwriting rules, without actually having access to the substantive documents. *See* Initial Decision at 18 (discussing DOBI's documents 255-270).

Additionally, the Complainant asserts that the ALJ misconstrued the Appellate Division's decision in HIP v. NJ Department of Banking & Insurance, 309 N.J. Super. 538 (App. Div. 1998). The Complainant states that the court held that when a statute does not provide a specific exemption to disclosure laws for proprietary information, the information is deemed public. The Complainant contends that the ALJ erroneously compared the HMO Act to OPRA. The Complainant claims that the proper comparison is between the HMO Act, which requires that documents contained in an application to amend a Certificate of Authority are subject to public access, and the automobile insurance statute, which subjects all underwriting rules to public access. The Complainant states that in HIP, *supra*, the court held that the HMO Act's mandate was dispositive and not the State's Right to Know Law. The Complainant contends that a similar conclusion applies here; the State's automobile insurance law is dispositive, not OPRA. The Complainant claims that the ALJ's determination ignores the Appellate Division's instructions that public records laws can "not create...an exemption where the Legislature, by its silence, has not created one." HIP, *supra*, at 555.

June 23, 2010

GEICO files Exceptions to the ALJ's Initial Decision with the GRC. GEICO disagrees with the ALJ's determination that documents DOBI 190 and DOBI 191-193 should be disclosed to the Complainant. GEICO states that in its privilege log, DOBI described document DOBI 190 as "Undated internal Department document with two GEICO rating examples." GEICO states that DOBI described document DOBI 191-193 as "3/09/06 email from GEICO to Department with GEICO rating examples." GEICO respectfully disagrees with the ALJ's decision that said records do not contain confidential or proprietary information, and would not give an advantage to GEICO's competitors, if disclosed.

GEICO states that the records at issue contain rating examples that show what GEICO's premiums would be, and how these premiums would change, based on various assumptions and then changing those assumptions in numerous ways. GEICO contends that competitors often try to reverse engineer GEICO's rating system to determine how GEICO rates its insureds. GEICO contends that if it provided a sufficient number of rating examples, a competitor could reverse engineer the data and determine how GEICO rates its insureds. GEICO asserts that it does not have to determine the precise tipping point at which release of proprietary data causes it irreparable injury because that is not the legal test.

GEICO analogizes the situation currently under review to one wherein if a company that makes a product using several secret ingredients released one secret ingredient to competitors, the release of that ingredient may not itself cause irreparable injury, but the ingredient is still proprietary and should not be disclosed. GEICO asserts

that competitors could take that information and, with other information, create the secret formula or a close enough approximation of it.

GEICO contends that the exemptions contained in N.J.S.A. 47:1A-1.1 were created to prevent such a scenario. As such, GEICO requests that the GRC reverse the portion of the ALJ's Initial Decision regarding disclosure of DOBI documents 190-193.

June 24, 2010

Letter from DOBI to GRC. DOBI requests an extension of time to respond to the Complainant's filed exceptions.

June 25, 2010

Letter from GEICO to GRC. GEICO requests an extension of time to respond to the Complainant's filed Exceptions.

June 29, 2010

GRC requests an Order of Extension from OAL. The GRC seeks an extension until September 9, 2010 to issue a decision in this complaint in order to provide adequate and appropriate consideration to the filed Exceptions and replies to said Exceptions.

June 29, 2010

E-mail from GRC to all parties. The GRC grants an extension of time until the close of business on July 2, 2010 for all parties to respond to the Complainant's filed Exceptions.

June 30, 2010

OAL executes the GRC's requested Order of Extension until September 9, 2010.

July 1, 2010

Counsel for DOBI's reply to the Complainant's filed Exceptions. Counsel asserts that the ALJ correctly determined that there is no definition of the term "underwriting rules" in the statutes or regulations (Initial Decision at 7). However, Counsel states that both N.J.S.A. 17:29A-46.1 and -46.2 use the term "underwriting rules." Counsel states that the ALJ found that the plain language of said statutes and regulations make it clear that the Complainant's definition of "underwriting rules" is overly broad. Counsel cites the following:

"[e]very insurer transacting or proposing to transact private passenger automobile insurance may file one or more rating plans in the voluntary market. Every insurer...shall file the rates and underwriting rules applicable to each rate level." N.J.S.A. 17:29A-46.1.

"Insurers shall put in writing all underwriting rules applicable to each rate level...no underwriting rule shall be formulated in such a manner as to assign any named insured to a rating tier other than the standard rating tier applicable...[or] operate in such a manner as to assign a risk to a rating plan on the basis of territory..." N.J.S.A. 17:29A-46.2(a) (Emphasis added).

“All underwriting rules applicable to each rate level...shall be filed [for approval]...[and] shall be subject to public inspection.” N.J.S.A. 17:29A-46.2(b).

Counsel states that the term “underwriting rules” used in the above statutes was replaced in the applicable regulations with the more descriptive terms of “acceptance criteria” and “tier placement.” However, Counsel states that the scope of underwriting rules has not changed. Specifically, Counsel states that underwriting rules are still:

1. The “written standards by which an insurer accepts or rejects new business” – now known as acceptance criteria under N.J.A.C. 11:3-8.2; and
2. The “written rules by which an insurer assigns a risk to a rating tier” – now known as tier rating criteria under N.J.A.C. 11:3-19A-2. *See also* N.J.S.A. 17:29A-46.2.

Counsel states that, as raised by the Complainant, documents that constitute such approved underwriting rules, namely, acceptance criteria and tier placement criteria, are subject to public inspection pursuant to N.J.S.A. 17:29A-46.2. Counsel asserts that DOBI provided the Complainant with said records in response to her OPRA request and that the ALJ correctly determined, after an *in camera* inspection of the records withheld from disclosure, that said records did *not* constitute underwriting rules and thus were not subject to public access pursuant to N.J.S.A. 17:29A-46.2 (Initial Decision at 14). Additionally, Counsel contends that the ALJ correctly determined that the records withheld from disclosure are insurer submissions in support and analysis of the insurer’s rating systems, which are not statutorily deemed public records.

Further, Counsel asserts that the ALJ correctly determined that the records withheld from disclosure were properly withheld because said records contain proprietary information. Counsel states that in New Jersey, certain private passenger automobile insurers, such as GEICO, use occupation and/or education as one of many self-developed rating factors in determining the premium to be charged. Counsel states that GEICO used 27 rating factors and that all insurers which use such unique rating systems, with different rating factors and weights applied to each factor, file such information with DOBI with the expectation that this information was, and would remain, proprietary.

Counsel contends that requiring DOBI to publicly disclose the proprietary aspects of rating systems that reveal how a company’s rating factors affect its rates is tantamount to a mandate that each insurer reveal how its product is made and priced. Moreover, Counsel asserts that disclosure of such information would have an overall chilling effect on competition in the insurance marketplace by providing a competitive advantage to competitors looking to emulate those systems that make money for the carrier.

Additionally, Counsel contends that the Complainant’s discussion of the court’s holding in HIP, *supra*, is overly broad and not applicable to the issue at hand. Specifically, Counsel states that the court was not analyzing disclosure of records under OPRA, but rather the old Right to Know Law. Counsel states that the Right to Know Law did not contain a specific exemption for proprietary commercial or financial information, as does OPRA. As such, Counsel states that the court held that the records

at issue did not fall outside the definition of a government record. Counsel contends that the ALJ correctly determined that the court's holding does not apply to the Complainant's OPRA request.

July 2, 2010

GEICO's reply to the Complainant's filed Exceptions. GEICO states that the Complainant contends the records withheld from disclosure must be produced pursuant to N.J.S.A. 17:29A-46.2(b). GEICO asserts this claim must be rejected because DOBI already provided the Complainant with all of the public underwriting rules four (4) years ago. GEICO contends that while the Complainant claims that the records withheld should be produced because they are "underwriting rules," the Complainant has not offered any facts to contest DOBI's longstanding position that rating systems and rating criteria are not "underwriting rules," are not statutorily deemed public, and can be withheld if the information contained therein is confidential and proprietary. GEICO states the Complainant's position is that every document filed by an insurance company with DOBI is a public underwriting rule, and that rating systems are public underwriting rules.

GEICO states that the ALJ determined that not all records submitted to DOBI by an insurer, nor rating systems are underwriting rules. GEICO notes that the ALJ stated, "[h]ad the Legislature intended that each and every element of the entire manner and method of an insurer's rate-making decision be publicly available, it could have said so." (Initial Decision, at 10-11).

Additionally, GEICO states that the Complainant contends that the records withheld from disclosure must be produced under N.J.S.A. 17:29A-46.2(b) even if said records are trade secrets. However, GEICO asserts that nothing in the statute or Legislative history suggests that the Legislature's decision to make underwriting rules public records also intended to subject all of an insurance company's proprietary information to public inspection. GEICO states that the Appellate Division already recognized that "insurance companies doing business in New Jersey submit a great deal of proprietary information *that is not intended for public dissemination*" (Emphasis added). Gill v. NJ Department of Banking and Insurance, 404 N.J. Super. 1, 13 (App. Div. 2008). GEICO also states that the Appellate Division noted the public policy that would be frustrated if an insurance company's confidential trade secret and proprietary information were to become public merely because an insurer sought to do business in New Jersey.

GEICO also stated that in In Re Solid Waste Util. Cust., 106 N.J. 508, 523 (1987), the Supreme Court held that the Board of Public Utilities (BPU) was required to keep trade secret information confidential. GEICO states that the court held so even though the Solid Waste Utility Control Act provided that regulated entities had to submit even privileged information to the BPU and there were no provisions in the Solid Waste Act that any information submitted was to be kept confidential. Id. at 515. GEICO states that the court did so, in part, because it was in the public interest and also because the disclosure of the information could constitute a taking of the regulated entities' property without just compensation. Id. at 524-5.

Further, GEICO asserts that the case cited by the Complainant, HIP, *supra*, is unremarkable because the Appellate Division held that the governing statute required DOBI to make specific information public and there were no counter-veiling statutes at issue. However, GEICO states that in this instant complaint, DOBI already provided the Complainant with the public underwriting rules and both OPRA and other statutes and procedures mandate that the information GEICO submitted is to be kept confidential. *See N.J.S.A. 47:1A-1.1; Gill, supra*, 404 *N.J. Super.* at 13. *See also N.J.S.A. 17:23-1.14; N.J.A.C. 11:1-36.6.* GEICO asserts that N.J.S.A. 17:29A-46.2(b) must be read *in pari materia* to all these statutes and prevent the disclosure of trade secrets and other proprietary information. GEICO states that DOBI has interpreted N.J.S.A. 17:29A-46.2(b) that way and its long standing interpretation of its own statutes is entitled to great weight. *See Matturri v. Board of Trustees*, 173 *N.J.* 368, 381 (2002).

Also, GEICO contends that the question of whether its confidential information constitutes public underwriting rules under an insurance statute entrusted to DOBI is not a matter within the jurisdiction or expertise of the GRC. GEICO states that pursuant to N.J.S.A. 47:1A-6, the GRC is to adjudicate the Complainant's Denial of Access Complaint regarding whether DOBI unlawfully denied access to government records on the basis that said records are exempt from disclosure as trade secrets and proprietary information, or because they contain information which, if disclosed, would give an advantage to GEICO's competitors. *See N.J.S.A. 47:1-1.1.* GEICO contends that OPRA does not give the GRC the authority to determine whether the records withheld from disclosure constitute public underwriting rules under the insurance statutes. GEICO asserts that said determination lies with DOBI, and that DOBI has expressly determined that the records the Complainant now seeks are not underwriting rules and are exempt from disclosure as proprietary and trade secret information that is exempt from public access pursuant to N.J.S.A. 47:1A-1.1.

GEICO contends that once it is determined that the records at issue are not government records, the GRC is without jurisdiction to determine whether the Complainant has a right to obtain said records under N.J.S.A. 17:29A-46.2(b). In support of its assertion, GEICO cites Botta v. Borough of Ramsey, GRC Complaint No. 2003-94 (February 2004) in which the GRC held that the requested record was exempt from public access because it contained personnel information. GEICO states that the GRC further held that it lacked "jurisdiction to determine whether the requestor, by virtue of his status as a member of the municipal government, has a right to the requested document pursuant to law or rule unrelated to OPRA."

Analysis

Whether the Council should accept, reject or modify the Administrative Law Judge's corrected Initial Decision dated June 11, 2010?

In making a determination of whether the Custodian unlawfully denied access to the records withheld from disclosure in this matter, the ALJ conducted an *in camera* review of said records. During this process, the ALJ first determined that the records withheld from disclosure are not underwriting rules and therefore are not specifically subject to public access pursuant to the insurance statute. The ALJ next determined that

all but nine (9) of the records withheld from disclosure were properly withheld as proprietary records, or records which, if disclosed, would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1. The ALJ ordered disclosure of the nine (9) records which he concluded do not fall under any of OPRA's exemption categories.

However, the Complainant takes exception to the ALJ's finding that the records withheld from disclosure do not constitute underwriting rules and are therefore not specifically subject to public access under the insurance statutes. Specifically, the Complainant contends that because a plain reading of the statute provides that a rating system is defined as "every...rule...by whatever name described" that is used by an insurance carrier "in determining or ascertaining a rate," a rating system is an underwriting rule. Additionally, the Complainant claims that the practice of rate making is an underwriting rule because the statute includes the phrase "determining or ascertaining a rate," commonly known as the practice of "rate making." The Complainant asserts that underwriting rules are defined as both the collection of factors into a rating system and the application of the rating system to an individual.

Conversely, Counsel for DOBI states that the ALJ found that the plain language of the insurance statutes and regulations make it clear that the Complainant's definition of "underwriting rules" is overly broad. Counsel states that, as raised by the Complainant, documents that constitute such approved underwriting rules, namely acceptance criteria and tier placement criteria, are subject to public inspection pursuant to N.J.S.A. 17:29A-46.2. Counsel asserts that DOBI provided the Complainant with said records in response to her OPRA request, and that the ALJ correctly determined, after an *in camera* inspection of the records withheld from disclosure, that said records did not constitute underwriting rules and thus were not subject to public access pursuant to N.J.S.A. 17:29A-46.2 (Initial Decision at 14). Additionally, Counsel contends that the ALJ correctly determined that the records withheld from disclosure are insurer submissions in support and analysis of the insurer's rating systems, which are not statutorily deemed public records.

Also, GEICO contends that the question of whether GEICO's confidential information constitutes public underwriting rules under an insurance statute entrusted to DOBI is not a matter within the jurisdiction or expertise of the GRC. GEICO states that pursuant to N.J.S.A. 47:1A-6, the GRC is to adjudicate the Complainant's Denial of Access Complaint regarding whether DOBI unlawfully denied access to government records on the basis that said records are exempt from disclosure as trade secrets and proprietary information, or because they contain information which, if disclosed, would give an advantage to GEICO's competitors. *See* N.J.S.A. 47:1-1.1. GEICO contends that OPRA does not give the GRC the authority to determine whether the records withheld from disclosure constitute public underwriting rules under the insurance statutes. GEICO asserts that said determination lies with DOBI, and that DOBI has expressly determined that the records the Complainant now seeks are not underwriting rules and are exempt from disclosure as proprietary and trade secret information that is exempt from public access pursuant to N.J.S.A. 47:1A-1.1.

GEICO contends that once it is determined that the records at issue are not government records, the GRC is without jurisdiction to determine whether the Complainant has a right to obtain said records under N.J.S.A. 17:29A-46.2(b). In support of its assertion, GEICO cites Botta v. Borough of Ramsey, GRC Complaint No. 2003-94 (February 2004) in which the GRC held that the requested record was exempt from public access because it contained personnel information. GEICO states that the GRC further held that it lacked “jurisdiction to determine whether the requestor, by virtue of his status as a member of the municipal government, has a right to the requested document pursuant to law or rule unrelated to OPRA.”

In its May 20, 2009 Findings and Recommendations of the Executive Director regarding this current matter, the Council discussed the GRC’s authority, or lack thereof, to interpret statutes other than OPRA. Specifically, the Council held that:

“the evidence of record indicates that this complaint is contested regarding whether the records withheld from disclosure constitute underwriting rules pursuant to N.J.S.A. 17:29A-46.2b, or other records that are exempt as trade secrets, proprietary information obtained from any source, or information which, if disclosed, would give an advantage to competitors or bidders, pursuant to N.J.S.A. 47:1A-1.1. The Complainant asserts that the records at issue here are subject to public access pursuant to said statute...However, both DOBI and GEICO claim that the records at issue are not underwriting rules but are proprietary rating criteria, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. GEICO claims that the interpretation of said statute is not properly within the jurisdiction of the GRC. However, *to determine whether the Custodian unlawfully denied access to the requested records, said statute must be interpreted.*” (Emphasis added).

The Council continued to conclude that:

“OPRA states that if the GRC is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the [GRC] shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the Administrative Procedures Act [APA]. N.J.S.A. 47:1A-7.e.

The APA further provides that the Office of Administrative Law ‘shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the Office of Administrative Law...’ *N.J.A.C.* 1:1- 3.2(a).”

Thus, the Council determined that it could not properly determine whether the records at issue in this Denial of Access Complaint were considered “underwriting rules” pursuant to a statute other than OPRA. As such, the Council referred this complaint to OAL for a full hearing to resolve the facts. Having already made the determination that it could not rule on whether the records withheld from disclosure are considered

underwriting rules, the Council need not analyze said issue again, and thus defers to the ALJ's findings of fact in this regard.

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties.

"The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Board of Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." *Id.* at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

As such, the Council accepts the ALJ's Initial Decision regarding his conclusion that the records withheld from public access are not underwriting rules pursuant to the insurance statutes.

However, GEICO also filed Exceptions to the ALJ's Initial Decision. GEICO disagrees with the ALJ's determination that documents DOBI 190 and DOBI 191-193 should be disclosed to the Complainant.

GEICO states that the records at issue contain rating examples that show what GEICO's premiums would be, and how such premiums would change, based on various assumptions and then changing those assumptions in numerous ways. GEICO contends that competitors often try to reverse engineer GEICO's rating system to determine how GEICO rates its insureds. GEICO contends that if it provided a sufficient number of rating examples, a competitor could reverse engineer the data and determine how GEICO rates its insureds. GEICO asserts that it does not have to determine the precise tipping point at which release of proprietary data causes it irreparable injury, because that is not the legal test.

GEICO analogizes that if a company that makes a product using several secret ingredients released one secret ingredient to competitors, that release may not itself cause irreparable injury, but the ingredient is still proprietary and should not be disclosed. GEICO asserts that competitors could take that information and with other information create the secret formula or a close enough approximation of it.

GEICO contends that the exemptions to disclosure contained in N.J.S.A. 47:1A-1.1 were created to prevent just such a scenario. As such, GEICO requests that the GRC reverse the portion of the ALJ's Initial Decision regarding disclosure of DOBI documents 190-193.

However, as previously stated, the ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties. Here, the ALJ not only conducted an *in camera* review of the records withheld from disclosure, but did so in a recorded telephone conference with Counsel for DOBI and GEICO "for the purpose of clarifying a number of concerns...as the exact nature of certain of the withheld documents and the position of those parties as to their exemption from production" (Initial Decision at 3). GEICO was therefore provided a full opportunity to be heard regarding the non-disclosure of such records. Still, the ALJ found that documents DOBI 190 and DOBI 191-193 should be disclosed to the Complainant.

As such, the Council accepts the ALJ's Initial Decision regarding the disclosure of the nine (9) records withheld from disclosure deemed to be government records subject to public access.

Therefore, the Council accepts the ALJ's corrected Initial Decision dated June 11, 2010 which holds that:

1. CURE's application for intervention in this matter is denied.
2. The records withheld from disclosure do not constitute "underwriting rules"
3. DOBI is hereby **ORDERED** to release to the Complainant DOBI pages 3, 4, 190, 191, 192, 193, 225, 226 and 255
4. DOBI has properly determined that the remaining documents withheld and described above are exempt from classification as 'government records' pursuant to the exclusion contained in the definition of that term at N.J.S.A. 47:1A-1.1.
5. There has been no unlawful denial of access to documents that are accessible under the terms of OPRA. The vast majority of those documents withheld were properly not provided to the requestor and the very limited documents that were withheld and to which [the Complainant] should properly have been given access constitute a de minimus proportion of the withheld materials.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council accepts the Administrative Law Judge's corrected Initial Decision dated June 11, 2010 which holds that:

- a. CURE's application for intervention in this matter is denied.
 - b. The records withheld from disclosure do not constitute "underwriting rules."
 - c. The Department of Banking and Insurance is hereby **ORDERED** to release to the Complainant DOBI pages 3, 4, 190, 191, 192, 193, 225, 226 and 255.
 - d. The Department of Banking and Insurance has properly determined that the remaining documents withheld and described above are exempt from classification as 'government records' pursuant to the exclusion contained in the definition of that term at N.J.S.A. 47:1A-1.1.
 - e. There has been no unlawful denial of access to documents that are accessible under the terms of OPRA. The vast majority of those documents withheld were properly not provided to the requestor and the very limited documents that were withheld and to which [the Complainant] should properly have been given access constitute a de minimus proportion of the withheld materials.
2. **The Custodian shall comply with item # 1.c above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.⁶**

Prepared By: Dara Lownie
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.
Executive Director

August 17, 2010

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

June 11, 2009 Government Records Council Meeting

Nia H. Gill
Complainant

Complaint No. 2007-189

v.

New Jersey Department of Banking & Insurance
Custodian of Record

At the June 11, 2009 public meeting, the Government Records Council (“Council”) considered the May 20, 2009 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. Because of the sensitive and wide sweeping nature of the subject of this complaint, the issue of whether Citizens United Reciprocal Exchange (“CURE”) has a right to intervene in this matter shall be afforded the due process rights of a full hearing. As such, this complaint should be referred to the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-16.2(b)*, to determine whether CURE should be permitted to intervene in this complaint.
2. This complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records.

Interim Order Rendered by the
Government Records Council
On The 11th Day of June, 2009

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.



Janice L. Kovach
Government Records Council

Decision Distribution Date: June 12, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 11, 2009 Council Meeting**

Nia H. Gill¹
Complainant

GRC Complaint No. 2007-189

v.

New Jersey Department of Banking & Insurance²
Custodian of Records

Records Relevant to Complaint:

- April 13, 2006 OPRA Request: The rating systems, underwriting rules and any supporting documentation presented to the New Jersey Department of Banking & Insurance, pursuant to law, for the Government Employees Insurance Company and any other private passenger automobile insurer currently utilizing, or seeking to utilize, occupation, education, or both, as underwriting factors in determining the insurers' rate level.³
- April 25, 2006 OPRA Request: Rating manuals presented to the New Jersey Department of Banking & Insurance, pursuant to law, for the Government Employees Insurance Company and any other private passenger automobile insurer currently utilizing, or seeking to utilize, either occupation or education, or both, as underwriting factors in determining the insurer's rate levels.
- August 1, 2006 Letter Request:
 1. Pursuant to *N.J.A.C. 11:3-19A.5(b)(2)*, an explanation of the reasonable and demonstrated relationship between the risk characteristic of the driver insured and the hazards insured against that the New Jersey Department of Banking & Insurance found to justify the use of levels of education and occupation in underwriting insurance.
 2. The more than twenty (20) factors the Government Employees Insurance Company testified it uses in underwriting automobile insurance which were submitted and approved by the New Jersey Department of Banking & Insurance.
 3. The statistical data upon which the New Jersey Department of Banking & Insurance relies that correlates occupations and education to driving and accidents.
 4. The statistical data upon which the New Jersey Department of Banking & Insurance relies that illustrates a cause and effect relationship between occupation or education and driving or accidents

¹ No legal representation listed on record.

² Represented by DAG Kristine A. Maurer, on behalf of the NJ Attorney General.

³ The Complainant requested additional records in her request dated April 13, 2006; however, said records are not the subject of this complaint.

Requests Made: April 13, 2006, April 25, 2006 and August 1, 2006
Responses Made: April 26, 2006, May 4, 2006 and September 29, 2006
Custodian: Gary Vogler
GRC Complaint Filed: August 21, 2007⁴

Background

April 13, 2006

Complainant's first Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

April 24, 2006

Custodian's response to the Complainant's first OPRA request. The Custodian responds in writing on the seventh (7th) business day following receipt of the Complainant's request. The Custodian requests a ten (10) day extension of time to fulfill the Complainant's OPRA request in order to locate the records responsive, which are off site, and to identify records, if any, which may be privileged and proprietary.

April 25, 2006

E-mail from Complainant to Custodian. The Complainant grants the Custodian's request for a ten (10) day extension of time. However, the Complainant requests that the Custodian immediately provide any records not being reviewed for privileged and proprietary information. The Complainant also requests that the Custodian indicate which records are being reviewed as having a potential privilege or proprietary interest.

April 25, 2006

Complainant's second OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

April 26, 2006

Custodian's response to the Complainant's second OPRA request. The Custodian responds in writing to the Complainant's request on the first (1st) business day following receipt of such request. The Custodian states that because this request is similar to the Complainant's first OPRA request, which is currently under legal review, this request will be closed.

May 4, 2006

Custodian's subsequent response to the Complainant's first OPRA request. The Custodian responds in writing to the Complainant's request on the eighth (8th) business day of the ten (10) day extension of time to fulfill said request. The Custodian states that the Complainant's request is granted in part and denied in part.⁵ The Custodian states that certain records provided to the New Jersey Department of Banking & Insurance ("DOBI") by the insurers contain proprietary financial information and/or information which, if disclosed, would provide an advantage to the insurer's competitors. As such,

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Custodian provided the Complainant with more than 3,000 records.

the Custodian denied the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1.

May 11, 2006

Letter from Custodian to Complainant. The Custodian states that the records withheld from disclosure contain trade secrets and/or proprietary commercial or financial information from insurers which, if disclosed, would provide an advantage to competitors.

August 1, 2006

Letter from Complainant to Commissioner of DOBI.⁶ The Complainant states that she submitted an OPRA request on April 13, 2006 and received redacted records in which the Custodian asserted a proprietary claim of trade secrets. The Complainant also states that she did not receive any documentation filed in compliance with federal law which indicates a specific claim of intellectual property such as copyright, patent or trademark.

The Complainant states that during a Senate Commerce Committee hearing DOBI testified that it did not conduct an independent review and did not rely upon any independent study or otherwise seek information which indicates a correlation between occupation or education and driving. The Complainant asserts that this is not proprietary information. The Complainant also states that counsel for the Government Employee Insurance Company (“GEICO”) testified that education and occupation were two of more than twenty (20) factors GEICO uses in underwriting insurance which were submitted and approved by DOBI. The Complainant states that the Custodian did not provide said information in response to her OPRA request.

Thus, on behalf of the Senate Commerce Committee, the Complainant requests the following information and supporting documents:

1. Pursuant to *N.J.A.C. 11:3-19A.5(b)(2)*, an explanation of the reasonable and demonstrated relationship between the risk characteristic of the driver insured and the hazards insured against that DOBI found to justify the use of levels of education and occupation in underwriting insurance.
2. The more than twenty (20) factors GEICO testified it uses in underwriting automobile insurance which were submitted and approved by DOBI.
3. The statistical data upon which DOBI relies that correlates occupations and education to driving and accidents.
4. The statistical data upon which DOBI relies that illustrates a cause and effect relationship between occupation or education and driving or accidents.

Additionally, the Complainant requests that the Commissioner permit the Senate Commerce Committee to conduct an *in camera* review of the asserted proprietary information that was redacted from the Complainant’s OPRA request. The Complainant asks that the Commissioner respond by September 15, 2006.

⁶ Complainant’s letter request.

September 29, 2006

Letter from Commissioner of DOBI to Complainant. The Commissioner contends that a proprietary claim does not need to be protected by a federal patent or copyright. The Commissioner states that government records shall not include trade secrets and proprietary commercial or financial information obtained from any source pursuant to N.J.S.A. 47:1A-1.1. The Commissioner states that proprietary information is information that belongs exclusively to an individual company. The Commissioner states that DOBI treats certain records as proprietary because it is information that demonstrates how a company conducts its business and would provide an advantage to competitors, if disclosed.

In response to the Complainant's requests, the Commissioner states that he has enclosed "Exhibit A" which is GEICO's demonstration of a correlation between education level and occupation in terms of higher loss ratios. The Commissioner states that DOBI does not maintain any data which demonstrates a cause and effect relationship between education or occupation and driving or accidents. The Commissioner also states that enclosed as "Exhibit B" is a list of GEICO's twenty-seven (27) rating factors and seven (7) discount factors.

Further, the Commissioner states that when GEICO filed its records with DOBI, said records were marked proprietary and confidential. The Commissioner states that although GEICO authorized the release of the attached exhibits in the spirit of cooperation, GEICO does not waive any rights to assert the confidentiality of any other proprietary records or information filed with DOBI.

August 20, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's first OPRA request dated April 13, 2006
- Custodian's response to Complainant's first OPRA request dated April 24, 2006
- E-mail from Complainant to Custodian dated April 25, 2006
- Complainant's second OPRA request dated April 25, 2006
- Custodian's response to the Complainant's second OPRA request dated April 26, 2006
- Custodian's OPRA request receipt regarding the Complainant's first request dated May 5, 2006
- Letter from Custodian to Complainant dated May 11, 2006
- Senate Commerce Committee Public Hearing transcript dated June 12, 2006
- Letter from Complainant to Commissioner of DOBI dated August 1, 2006⁷
- Letter from Commissioner of DOBI to Complainant dated September 29, 2006

The Complainant states that in preparation for a Senate Commerce Committee hearing on June 12, 2006 regarding the use of education and occupation as factors in underwriting insurance, the Complainant submitted an OPRA request on April 13, 2006. The Complainant contends that pursuant to *N.J.A.C.* 11:3-19A.5(b)(2), an explanation of the reasonable and demonstrated relationship between the risk characteristic of the driver

⁷ Complainant's letter request.

insured and the hazards insured against that DOBI found to justify the use of education and occupation in underwriting insurance must be provided. The Complainant states that this is the information she sought in her OPRA request.

Additionally, the Complainant states that she received an e-mail from the Custodian dated April 24, 2006 in which the Custodian requested a ten (10) business day extension of time to respond to the Complainant's OPRA request because the Custodian was attempting to locate records off site and needed to identify any records that may contain privileged or proprietary information. The Complainant states that she e-mailed the Custodian on April 25, 2006 and granted the ten (10) business day extension of time and requested that the Custodian immediately release all records not being reviewed on any privilege or proprietary claim. The Complainant states that in said e-mail to the Custodian she also requested that the Custodian indicate which records he was reviewing as having a potential privilege or proprietary interest.

The Complainant also states that due to the Custodian's response to her initial OPRA request, she submitted another OPRA request on April 25, 2006 for GEICO's rating manuals utilizing occupation or education as underwriting factors in determining insurer rate levels. The Complainant states that the Custodian called her office on April 26, 2006 and spoke to the Complainant's Legislative Director, Vince Matthews, and informed him that the Complainant's second OPRA request will be closed because said request is included in the Complainant's first OPRA request dated April 13, 2006. The Complainant states that the Custodian informed Mr. Matthews that he would send written confirmation of the denial and also stated that the Complainant's initial request had been forwarded to the Insurance Department which needed more time to fulfill the request. The Complainant also states that the Custodian informed Mr. Matthews that he could not provide any records immediately and that all records would be provided at the same time.

The Complainant states that the Custodian denied portions of her first OPRA request under the assertion that the records contain trade secrets and/or commercial or financial information from insurers which, if disclosed, would provide an advantage to competitors. The Complainant states that the Custodian released redacted records but did not provide any documentation filed in compliance with federal law which indicates a specific claim of intellectual property such as copyright, patent or trademark. The Complainant states that on August 1, 2006 she made an additional request to the Commissioner of DOBI for the requested records and was again denied access to such records.⁸

Further, the Complainant states that she has not received a list of records reviewed as having a potential privilege or proprietary interest, nor has she received a list of the specific records that the Custodian withheld from disclosure, if any, under either claim.

The Complainant asserts that the requested records are subject to public access and claims that there is no legal basis for the Custodian's contention that said records are exempt as trade secrets or proprietary information. The Complainant states that pursuant to N.J.S.A. 17:29A-46.2, all underwriting rules shall be subject to public inspection. The Complainant also states that the claim of confidentiality the Custodian asserted in this

⁸ Complainant's letter request.

matter on behalf of GEICO was rejected by DOBI in 2004 when it considered proposed rule adoptions for the use of alternate underwriting rules for private passenger automobile insurance. The Complainant states that as published in the New Jersey Register, commenters suggested that the rules should be amended to state that underwriting rules would be confidential as trade secrets. The Complainant states that DOBI specifically rejected this suggestion by stating the following:

“[w]ith respect to concerns of confidentiality, an insurer’s alternate underwriting rules, **as well as its primary underwriting rules**, are utilized in determining whether to decline or non-renew a risk. Insureds **must** be provided with the rationale and the basis for such a determination. Accordingly, an insurer may be called upon to provide a copy of its underwriting rules. In any event, the Department does not believe it appropriate to define by this rule that an insurer’s alternate underwriting rules are confidential. The Department notes that N.J.A.C. 11:3-35, governing standard underwriting rules for private passenger automobile insurance, does not so provide.” (Emphasis added). 36 NJR 1929(a).

Thus, the Complainant contends that there is no provision under State law or DOBI regulation that provides for a claim of confidentiality for underwriting rules.

August 22, 2007

Offer of Mediation sent to both parties.

August 23, 2007

The Complainant declines mediation of this complaint. The Custodian did not respond to the Offer of Mediation.

August 23, 2007

Request for the Statement of Information (“SOI”) sent to the Custodian.

August 23, 2007⁹

Custodian’s SOI with the following attachments:

- Complainant’s first OPRA request dated April 13, 2006
- Custodian’s response to the Complainant’s first OPRA request dated May 4, 2006
- Custodian’s OPRA request receipt dated May 5, 2006
- Letter from Custodian to Complainant dated May 11, 2006
- Letter from Commissioner of DOBI to Complainant dated September 29, 2006

The Custodian certifies that he received the Complainant’s first OPRA request on April 13, 2006 and provided a written response on May 3, 2006.¹⁰ The Custodian’s Counsel states that DOBI provided the Complainant with all records responsive to her

⁹ Although the Custodian’s SOI is dated August 23, 2007, it was submitted under cover letter dated September 7, 2007.

¹⁰ However, the Custodian’s response to the Complainant, wherein the Custodian informed the Complainant of the legal basis for the denial of access to records, is dated May 4, 2006.

request that do not contain proprietary or privileged information. Counsel states that the issue in this complaint is whether DOBI must disclose records which private passenger automobile insurance companies in New Jersey deem to be proprietary and would provide an advantage to competitors, if disclosed.

To provide some background in this matter, the Custodian's Counsel states that part of DOBI's responsibility is the review and prior approval of both underwriting rules and rating systems of automobile insurance companies pursuant to N.J.S.A. 14:29A-46.2 and N.J.S.A. 17:29A-46.6. Counsel states that in order to perform this statutory mandate, insurance carriers must submit records and data to DOBI, which the insurance companies consider proprietary because said records provide details about how the companies price their product. Counsel states that all approved underwriting rules a company uses are subject to public inspection pursuant to N.J.S.A. 17:29A-46.2b. Counsel states that said records have been disclosed to the Complainant.

Additionally, Counsel states that DOBI reviews and approves each insurer's rating system pursuant to N.J.S.A. 11:3-16.2, meaning the schedule, class, classification, rule, guide, standard, manual, table or rating plan containing the rates and rules used by any insurer in determining a rate.¹¹ Counsel states that rating criteria are often the result of proprietary actuarial analysis of the insurer on an applicant's personal circumstances relevant to his/her use of a motor vehicle and information such as the carrier's direct earned premium in New Jersey, its direct paid and/or insured losses in New Jersey, its direct paid and/or incurred claim counts and its premium trend factors. *See N.J.A.C. 11:3-16.8(a)* and N.J.S.A. 17:29A-46.1. Counsel states that rating systems vary significantly between insurers and that insurers often file rating systems with portions marked "proprietary" and "confidential" to keep their method of determining and weighing rating factors, thus pricing their product, confidential from their competitors. Counsel states that unlike underwriting rules, rating systems are not statutorily deemed public records. As such, Counsel states that the Custodian provided the Complainant with all records in rating and rule filings that were not identified by the carrier as containing proprietary or confidential information.

Regarding the Complainant's OPRA requests, Counsel states that the Complainant submitted her first request on April 13, 2006. Counsel also states that the Complainant submitted a second request on April 25, 2006 and the Custodian denied said request on April 26, 2006 because the requested records were similar to those requested in the Complainant's first request, which was under review pursuant to an extension of time granted by the Complainant. Counsel states that on May 3, 2006, the Custodian granted the Complainant's April 13, 2006 request in part and denied said request in part. Counsel states that the Custodian released 3,649 records to the Complainant but denied access to records containing trade secrets and proprietary commercial or financial information obtained from any source, as well as information which, if disclosed, would provide an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1.

¹¹ Counsel states that pursuant to *N.J.A.C. 11:3-16.2*, "rate" means the unit charge by which the measure of exposure or the amount of insurance specified in a policy of insurance or covered thereunder is multiplied to determine the premium.

Counsel states that the Complainant then asked the Custodian to identify the records that were withheld from disclosure. Counsel states that via letter dated May 11, 2006, the Custodian advised the Complainant that the records withheld from disclosure containing trade secrets and/or proprietary commercial or financial information, as well as information which, if disclosed, would provide an advantage to competitors or bidders include records that provide details of how insurers process and weigh factors in rating including, but not limited to, occupation and education. Counsel also states that via letter dated August 1, 2006, the Complainant submitted a non-OPRA request to DOBI's Commissioner for an *in camera* review of the records withheld from disclosure. Counsel states that the Commissioner provided a written response to the Complainant on September 29, 2006 in which the Commissioner stated that the requested records are deemed proprietary by the insurer; however the Commissioner provided a copy of GEICO's rating factors and limited historical loss experience with GEICO's consent.

Further, Counsel contends that the records were properly withheld from the Complainant because said records constitute proprietary commercial or financial information obtained from any source, as well as information which, if disclosed, would provide an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1. Counsel asserts that the formula by which an insurer develops and prices its product for the market represents a substantial investment in time and expense for the carrier. Counsel also states that data collected over several years is analyzed to achieve a rating system that most accurately prices the insurer's product based on its own business plan and objectives. Counsel contends that the disclosure of the proprietary information would have a chilling effect on competition in the automobile insurance industry and would be detrimental to the interests of New Jersey insureds. Counsel further asserts that the release of the proprietary information would provide an advantage to competitors looking to emulate the systems that make money for the carriers.

Also, Counsel contends that the Complainant's reliance on N.J.S.A. 17:29A-46.2 is misplaced because said statute applies to underwriting rules, which were released to the Complainant. Regarding the Complainant's assertion that DOBI's position is inconsistent with its approach in a 2004 rule adoption, Counsel states that DOBI's response to public comment concerned the disclosure of alternate underwriting rules and not proprietary rating criteria. Counsel also contends that the Complainant's reliance on N.J.A.C. 11:3-19A.5(b)(2) is misplaced because GEICO does not use education and occupation in deciding whether to write a given risk, but rather to determine the price an insured must pay for coverage. Counsel further asserts that the records filed by carriers that demonstrate a relationship between the risk characteristic of the driver(s) and the vehicle(s) insured and the hazards insured against is inherently proprietary as an important part of the weighing process unique to each insurer. Counsel requests that the GRC dismiss this complaint and asserts that the Custodian did not knowingly and willfully violate OPRA.

Furthermore, the Custodian certifies that the following records were withheld from disclosure for the reasons set forth below:

Item No.	Record Withheld from Disclosure	Legal Basis for Denial
1	Undated chart entitled “Selective Auto Insurance Company of New Jersey, Rating Tier Information, Underwriting Score Development”	Proprietary information which, if disclosed, would provide an advantage to competitors
2	Undated Exhibit 1.1 with education analysis from Esurance Insurance Company	Proprietary information which, if disclosed, would provide an advantage to competitors
3	Undated Exhibit 1.2 with correlation of education with other variables for rating systems from Esurance Insurance Company	Proprietary information which, if disclosed, would provide an advantage to competitors
4	Undated Exhibit 2-1 with correlation of residency with other variables for rating systems from Esurance Insurance Company	Proprietary information which, if disclosed, would provide an advantage to competitors
5	Undated internal DOBI document with two (2) GEICO rating examples	Proprietary information which, if disclosed, would provide an advantage to competitors; and deliberative process privilege
6	Undated Underwriting and Rating Guidelines for the GEICO group	Proprietary information which, if disclosed, would provide an advantage to competitors
7	Undated GEICO Plan of Operation	Proprietary information which, if disclosed, would provide an advantage to competitors
8	Undated internal DOBI document entitled “NJ Private Passenger Automobile Insurance Companies Education and Occupation Credit”	Deliberative process privilege
9	Undated internal DOBI document entitled “NJ Private Passenger Automobile Insurance Companies Education and Occupation Credit” with excerpts from the rating manuals of various insurance companies	Proprietary information which, if disclosed, would provide an advantage to competitors; and deliberative process privilege
10	Undated internal DOBI comparison of the Esurance and NJSIC Personal Auto Programs for Prior Approval Rate and Rule Revision	Deliberative process privilege
11	Letter from GEICO to DOBI dated July 16, 2004 with revisions and clarifications of GEICO’s underwriting and rating guidelines	Proprietary information which, if disclosed, would provide an advantage to competitors

12	Letter from GEICO to DOBI dated July 16, 2004 containing GEICO's business plan for New Jersey	Proprietary information which, if disclosed, would provide an advantage to competitors
13	Confidential Underwriting and Rating Guidelines for GEICO dated August 2004	Proprietary information which, if disclosed, would provide an advantage to competitors
14	Internal DOBI Recommendation and Action Form dated August 11, 2004 regarding rates, rules and forms of GEICO entering market	Deliberative process privilege
15	E-mail from GEICO to DOBI dated August 24, 2004 with GEICO's weekly report as of August 21, 2004	Proprietary information which, if disclosed, would provide an advantage to competitors
16	Internal DOBI Recommendation and Action Form dated October 21, 2004 regarding rate filing by Liberty Mutual Insurance Company	Deliberative process privilege
17	Letter from GEICO to DOBI dated December 29, 2004 regarding revisions to the Underwriting and Rating Guidelines for GEICO	Proprietary information which, if disclosed, would provide an advantage to competitors
18	Internal DOBI e-mail dated March 28, 2005 regarding the initial rate filing for Merastar Insurance Company	Deliberative process privilege
19	Internal DOBI Recommendation and Action Form dated May 2, 2005 regarding the initial rate filing of AMEX Assurance Company	Deliberative process privilege
20	Exhibits sent by AMEX to DOBI dated May 12, 2005 with rating information	Proprietary information which, if disclosed, would provide an advantage to competitors
21	E-mail from Becky L. Roever, AMEX Assurance Company, to DOBI dated June 2, 2005 with various attachments including class rating factors used by AMEX	Proprietary information which, if disclosed, would provide an advantage to competitors
22	Internal DOBI Recommendation and Action Form dated June 28, 2005 regarding Electric Insurance Company rate filing	Deliberative process privilege
23	Internal DOBI memo dated July 1, 2005 regarding NJ Skylands rate filing	Deliberative process privilege
24	Letter from GEICO to DOBI dated July 20, 2005 with GEICO's underwriting model and proposed changes	Proprietary information which, if disclosed, would provide an advantage to competitors
25	Letter from GEICO to DOBI dated July 20, 2005 regarding revisions to the Underwriting and Rating Guidelines for GEICO	Proprietary information which, if disclosed, would provide an advantage to

		competitors
26	Internal DOBI memo dated July 25, 2005 regarding Electric Insurance Co. rate filing	Deliberative process privilege
27	Internal DOBI Recommendation and Action Form dated August 1, 2005 regarding NJ Skylands rate filing	Deliberative process privilege
28	Internal DOBI Recommendation and Action Form dated August 15, 2005 regarding rate filing by NJ Skylands	Deliberative process privilege
29	E-mail from GEICO to DOBI dated August 25, 2005 including GEICO's weekly report as of August 20, 2005	Proprietary information which, if disclosed, would provide an advantage to competitors
30	Internal DOBI memo dated September 13, 2005 regarding the Electric filing	Deliberative process privilege
31	Internal DOBI memo dated September 14, 2005 regarding Electric Insurance Co. rate filing	Deliberative process privilege
32	Letter from GEICO to DOBI dated October 31, 2005 regarding revisions to the Underwriting and Rating Guidelines for GEICO	Proprietary information which, if disclosed, would provide an advantage to competitors
33	Internal DOBI memo dated December 8, 2005 regarding revised rating structure filing of Electric Insurance Company	Deliberative process privilege
34	Internal DOBI memo dated January 24, 2006 regarding the initial filing of AIG's premier rating system	Deliberative process privilege
35	Internal DOBI e-mail dated February 22, 2006 concerning GEICO's rating examples	Deliberative process privilege
36	Internal DOBI e-mail dated February 22, 2006 concerning GEICO rating	Deliberative process privilege
37	Internal DOBI memo dated March 2, 2006 regarding Selective Auto Insurance Co. of NJ rate filing	Deliberative process privilege
38	Letter from Mary Kathryn Roberts of Riker Danzig to DOBI dated March 9, 2006 with information attached regarding Selective Auto Insurance Company's rate filing	Proprietary information which, if disclosed, would provide an advantage to competitors
39	E-mail from GEICO to DOBI dated March 9, 2006 with GEICO rating examples	Proprietary information which, if disclosed, would provide an advantage to competitors
40	Internal DOBI memo dated April 7, 2006 regarding Selective Auto Insurance Co. for NJ rate filing	Deliberative process privilege
41	Internal DOBI e-mail dated April 13, 2006 regarding an Esurance rate filing	Deliberative process privilege

September 11, 2007

GEICO's Motion to Intervene. Counsel for GEICO asserts that GEICO's participation in this Denial of Access Complaint is necessary because the OPRA request at issue seeks highly confidential and proprietary records prepared by GEICO and submitted to DOBI with the explicit understanding that said records are confidential. Counsel contends that GEICO should be permitted to intervene in this matter to protect its interests and ensure that its proprietary and trade secret records remain confidential.

Counsel for GEICO states that intervention is routinely granted in accordance with R. 4:33-1 which provides that:

“[u]pon timely application anyone shall be permitted to intervene in an action if the applicant claims *an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may be as a practical matter impair or impede the ability to protect that interest*, unless the applicant's interest is adequately represented by existing parties.” (Emphasis added).

Counsel states that courts interpreting this rule have held that it is to be liberally construed. Counsel also states that the courts held that “[i]ntervention as of right under R. 4:33-1 is not discretionary. If all criteria are met, an application for intervention as of right must be approved by the court.” State v. Lanza, 39 N.J. 595, 600 (1963), cert. denied, 375 U.S. 451 (1964).

Counsel asserts that the criteria for intervention as of right under R. 4:33-1 are met in this instance. Counsel contends that GEICO has a compelling interest in this matter since the goal of this Denial of Access Complaint is to obtain and make public GEICO's proprietary information. Counsel asserts that the information sought by the Complainant consists of highly sensitive and confidential data collected and developed by GEICO over a considerable period of time. Counsel states that the development of GEICO's system required the expenditure of thousands of employee hours over a period of decades. Counsel contends that if the records were to be made public, competitors will receive an unfair, free windfall because it will save competitors millions of dollars over several years to develop their own systems. Counsel states that for this reason, GEICO guards these records extremely carefully and allows only those employees with a definite need to know to access the information and only under strict guidelines. Counsel states that no competitor or other entity, other than DOBI, has ever obtained a copy of this type of proprietary information.

Further, Counsel asserts that no other party can adequately protect GEICO's interest in this matter. Counsel states that DOBI informed GEICO that it must represent its own interest, stating “[i]f your client wishes to assure that its proprietary information is protected, it should take such action as it deems appropriate.” Counsel contends that GEICO is best suited to indicate why its records are proprietary and set forth its need to prevent the substantial harm to its competitive position if these records were to be made public. Additionally, Counsel states that the GRC has previously permitted insurers to intervene in actions against DOBI where the disclosure of proprietary information is at stake. *See Kesner v. NJ Department of Banking & Insurance*, GRC Complaint No. 2003-

67 (March 2004); Belth v. NJ Department of Banking & Insurance, GRC Complaint No. 2003-29 (March 2004).

Counsel also contends that GEICO's request to intervene is timely. Counsel states that the Complainant has not taken any action to seek these records since 2006 and filed her Denial of Access Complaint on August 21, 2007. Counsel contends that GEICO has acted quickly to assert its position in this matter and no party will be prejudiced as a result.

September 21, 2007

Letter from GRC to GEICO. The GRC states that third parties have no right to intervene in matters before the GRC. The GRC states that 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 action in Superior Court...or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...*The right to institute any proceeding under this section shall be solely that of the requestor...*” (Emphasis added). N.J.S.A. 47:1A-6.

The GRC also states that OPRA only permits a custodian to defend such action instituted by a requestor of government records. Additionally, the GRC states that N.J.S.A. 47:1A-7.c. provides that at the request of the Council, a *public agency* shall produce documents and ensure the attendance of witnesses with respect to the council's investigation of any complaint or the holding of any hearing. The GRC states that this statutory language does not anticipate the participation in the GRC's proceedings of anyone other than the requestor and the custodian, unless witnesses of the custodian are specifically requested by the GRC.

Further, the GRC states that its proposed rules specifically define a party as “a complainant or custodian.” *N.J.A.C.* 5:105-1.3 (39 N.J.R. 1557(A) (May 2007)). The GRC states that its proposed rules also set forth the types of submissions that may be made to the GRC and there are no provisions for third parties. Also, the GRC states that the Administrative Procedures Act (N.J.S.A. 52:14B-1 et seq.), which regulates administrative agency operations generally, does not allow for third party interveners.

September 25, 2007

Letter from GEICO to GRC. Counsel for GEICO states that GEICO intends to seek appellate review of the GRC's denial of GEICO's Motion to Intervene. As such, Counsel requests that the GRC stay its adjudication of this matter until the Appellate Division has an opportunity to consider whether GEICO should have been permitted to intervene.

Counsel contends that a stay of any further proceedings is warranted because GEICO satisfies all the criteria for issuing a stay. Specifically, Counsel asserts that there is a substantial likelihood that the Appellate Division will find that the GRC improperly concluded that GEICO had no right to intervene under OPRA. Counsel states that in Paff

v. NJ Department of Labor, 379 N.J. Super. 346, 355-56 (App. Div. 2005), the Appellate Division instructed that when the GRC adjudicates a dispute over access to records, “it must do so ‘in conformity with the rules and regulations provided for in hearings by a state agency in contested cases under the [APA], in so far as they may be applicable and practicable.’” (quoting N.J.S.A. 47:1A-7.e.). Counsel states that the Uniform Administrative Procedure Rules specifically allow intervention by “any person or entity not initially a party, who has a statutory right to intervene or *who will be substantially, specifically and directly affected by the outcome* of a contested case.” (N.J.A.C. 1:1-16.1(a) (emphasis added)). Counsel contends that GEICO will be directly and substantially affected by any decision to release its proprietary and trade secret business information.

Additionally, Counsel asserts that the GRC’s reliance on N.J.S.A. 47:1A-6 is misplaced. Counsel contends that said statute only applies to a party who is denied access to a government record. Counsel states that GEICO has not been denied access to a government record, but rather seeks to ensure that proprietary and trade secret records it submitted to DOBI are not disclosed to the public. Counsel also states that the New Jersey Court Rules expressly recognize that parties may intervene as a matter of right. R. 4:33-1.

Further, Counsel suggests that the GRC weigh the potential harm to GEICO, the harm to the requestor if there is a delay, the public interest, and the likelihood of success. *See* General Elec. Co. v. Gem Vacuum Stores, 36 N.J. Super. 234, 237 (App. Div. 1955); *see also* Crowe v. DeGioia, 90 N.J. 126, 133-34 (1982). Counsel asserts that GEICO will suffer irreparable harm if any of its proprietary or trade secret information is released. Counsel contends that such disclosure will provide GEICO’s competitors with an unfair advantage and allow competitors to benefit from the analyses that took GEICO decades to develop.

Also, Counsel claims that the public interest weighs strongly in favor of ensuring that none of GEICO’s proprietary information is released because such disclosure will impede price competition among automobile insurers in the state to the detriment of New Jersey drivers. Counsel asserts that the harm GEICO will incur as well as the harm to competition if GEICO’s proprietary information is released without GEICO having a full and fair opportunity to protect its interests outweighs the harm, if any, to the Complainant if this matter is delayed while the Appellate Division considers the denial of GEICO’s request to intervene.

September 28, 2007

Letter from Custodian’s Counsel to GRC. Counsel states that insurers often file records with DOBI with portions marked “proprietary” and “confidential” to ensure that their unique rating criteria and weighing processes are not disclosed to their competitors. Counsel asserts that the insurer’s designation of proprietary records is important because the carriers are in the best position to know whether such information will provide an advantage to competitors, if disclosed.

Counsel states that pursuant to Sheeran v. Nationwide Mut. Ins. Co., 80 N.J. 548, 559 (1979), it is well settled that the insurance business “is strongly affected with a public

interest and therefore properly subject to comprehensive regulation in protecting the public welfare.” Counsel contends that the release of the proprietary records will have a chilling effect on the insurers’ willingness to provide such information to DOBI in the future and will have a harmful effect on DOBI’s ability to perform its regulatory responsibilities. As such, Counsel asks that the GRC rely on the Custodian’s determination that the records withheld from disclosure are proprietary and dismiss this complaint.

October 3, 2007

E-mail from GRC to Complainant, Custodian and GEICO. The GRC states that because it is the GRC’s position that GEICO may not intervene in this matter, the GRC will neither grant nor deny GEICO’s request for a stay of this matter.

October 3, 2007

Letter from Complainant to GRC. The Complainant contends that DOBI avoided addressing the primary issue in this complaint. The Complainant states that N.J.S.A. 17:29A-46.2(b) mandates that all underwriting rules applicable to each rate level shall be filed with the Commissioner of DOBI prior to approval and shall be subject to public inspection. The Complainant asserts that the underwriting rules must be subject to public inspection to ensure transparency in government. The Complainant also states that the underwriting rules must be based on a reasonable and demonstrable relationship between the risk characteristics of the driver(s) insured and the hazards insured against pursuant to N.J.A.C. 11:3-35.3(c)(2).

Additionally, the Complainant states that her request seeks the data and documents upon which DOBI relied to approve the use of education and occupation as factors in underwriting automobile insurance. The Complainant contends that there is no proprietary interest exemption under state law or regulations for underwriting rules and as such, the Custodian’s denial of the Complainant’s OPRA request contradicts N.J.S.A. 17:29A-46.2(b) and N.J.A.C. 11:3-35.3(c)(2).

October 18, 2007

GEICO’s Notice of Appeal to the Appellate Division of the New Jersey Superior Court. GEICO appeals the GRC’s denial of GEICO’s Motion to Intervene.

June 9, 2008

Appellate Division of the New Jersey Superior Court’s Order on Emergent Application. The court held that:

“GEICO has satisfied the four-prong standard of Crowe v. DeGioia, 90 N.J. 126, 132-35 (1982), necessary for the grant of its application for emergent relief pursuant to Rule 2:9-8. Accordingly, the Government Records Council (GRC) be and is hereby enjoined from acting on [the Complainant’s] denial of access complaint against the Custodian of Records of the New Jersey Department of Banking and Insurance (DOBI), as it pertains to documents filed by GEICO with DOBI in 2004 in support of GEICO’s application to re-enter the New Jersey private passenger automobile insurance market. This stay shall remain in effect pending the

court's decision of GEICO's appeal from the September 21, 2007 decision of the GRC, denying GEICO's motion to intervene in the proceedings before the GRC."

November 28, 2008

Appellate Division's decision in the matter of Gill v. NJ Department of Banking and Insurance, 960 A.2d. 397 (N.J. Super. A.D. 2008). The court held that "GEICO shall be given an opportunity to be heard in opposition to the request for release of its confidential and proprietary documents." Specifically, the court stated that:

"[a]ny person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene." *N.J.A.C. 1:1-16.1(a)*. The regulations further provide...In ruling upon a motion to intervene, the judge shall take into consideration the nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters."

The court reasoned that:

"GEICO's interests are different from the interests of the parties to the proceeding. GEICO has asserted that it supplied its documents to the DOBI with the understanding that they contained confidential information and were not subject to disclosure. If disclosed, according to GEICO, its ability to compete in the private passenger automobile insurance market in New Jersey and elsewhere will be adversely affected. It is GEICO, not the DOBI, that is at risk if the documents are made public. Indeed, the DOBI has expressed to GEICO that it is GEICO's responsibility to prove the proprietary nature of the documents subject to disclosure, not the DOBI's. GEICO must be permitted to intervene as a party to protect its interests where the DOBI itself has indicated its unwillingness to do so. GEICO is in the best position to articulate to the GRC how the disclosure of its confidential and proprietary business information may irreparably harm its business. Under these circumstances, GEICO is entitled to intervene because it will be substantially, specifically and directly affected by the outcome of the GRC proceedings."

January 12, 2009

Letter from GRC to GEICO. The GRC states that pursuant to the Appellate Division's decision in Gill v. NJ Department of Banking and Insurance, 960 A.2d. 397 (N.J. Super. A.D. 2008), GEICO was granted an opportunity to be heard in opposition of the request for release of its confidential and proprietary records in connection with this Denial of Access Complaint and the matter was remanded to the GRC for further proceedings consistent with the court's opinion. The GRC requests that GEICO submit

its legal arguments to the GRC as to why the records at issue should not be disclosed to the Complainant.

January 21, 2009

Letter from GEICO to GRC. Counsel for GEICO requests additional time to submit materials in support of GEICO's position that the documents sought by the Complainant are proprietary. Counsel states that GEICO's submission will be voluminous because it involves thirteen (13) records which encompass hundreds of pages. Additionally, Counsel states that he has an Appellate argument on January 26, 2009 and a two (2) week trial in Camden beginning February 2, 2009. Counsel requests an extension of time until February 24, 2009 to submit GEICO's position.

January 22, 2009

Letter from GRC to GEICO. The GRC states that it recognizes the large volume of records at issue in this complaint as well as Counsel's litigation schedule. As such, the GRC grants GEICO's extension of time until February 24, 2009 to submit GEICO's position in this matter.

February 24, 2009

Certification of Paul Lavrey, Assistant Vice President ("AVP") for GEICO. The AVP certifies that in 2004 GEICO submitted an application to DOBI to re-enter the New Jersey private passenger automobile insurance market. The AVP certifies that as part of the application process, GEICO was required to submit detailed information and documentation regarding its rating system, portions of which contain highly confidential and proprietary information which is unique to GEICO. Specifically, the AVP certifies that GEICO submitted to DOBI details of how GEICO rates its insureds including internal business models and marketing plans which explained how GEICO conducts business, targets its markets and determines rates for its policyholders. The AVP certifies that GEICO had a clear understanding with DOBI that said information contained proprietary, confidential information that was not subject to disclosure. The AVP certifies that GEICO submitted said records subject to DOBI's willingness and obligation to safeguard said records pursuant to N.J.S.A. 47:1A-1.1.

The AVP also certifies that it has taken GEICO's personnel decades and tens of thousands of hours to fully develop this information. The AVP asserts that if the records were to be made public, competitors will receive an unfair advantage because it will save competitors millions of dollars over several years to develop their own rating systems. The AVP contends that disclosing such information will be extremely prejudicial to GEICO and will result in GEICO's business processes losing substantial value while saving competitors millions of dollars and allowing competitors to target GEICO's best risks. The AVP asserts that the harm caused by such disclosure will extend across the country where GEICO utilizes similar business processes.

Additionally, the AVP certifies that GEICO guards this information extremely carefully and only allows employees with a definite need to know to see the information and only under strict guidelines. The AVP certifies that to the best of his knowledge, no competitor or other entity other than DOBI (or other such agencies across the country) has ever obtained a copy of GEICO's proprietary information.

The AVP further certifies that he has reviewed in detail the 13 records identified on DOBI's privilege log as records responsive to the Complainant's request for GEICO's records that the Custodian withheld from disclosure because said records contain trade secrets and/or proprietary commercial or financial information which, if disclosed, would provide an advantage to competitors or bidders. The AVP describes the records as follows:

1. Undated internal DOBI document with two (2) GEICO rating samples

The AVP asserts that this is an internal DOBI record and not a GEICO record, which the Custodian withheld under a claim of deliberative process privilege. The AVP certifies that he has not reviewed this record. The AVP suggests that said record should be treated as proprietary and should not be disclosed if said record contains information or analysis similar to which GEICO has designated as confidential.

2. Copy of Underwriting and Rating Guidelines for the GEICO group

The AVP certifies that this entry refers to four (4) separate records. The AVP certifies that the first three (3) records are:

- a. Letter from GEICO to DOBI dated July 6, 2004 enclosing GEICO's confidential underwriting guidelines
- b. Letter from GEICO to DOBI dated July 16, 2004 enclosing revisions, clarifications and additions to GEICO's confidential underwriting guidelines
- c. Letter from DOBI to GEICO dated June 22, 2005 enclosing GEICO's confidential underwriting guidelines.

The AVP contends that said records are proprietary because they contain details regarding how GEICO rates its insureds; they explain how GEICO determines rates for its policyholders; they include underlying data concerning rating factors that GEICO uses; and they show which customers GEICO considers to be good risks.

The AVP certifies that the fourth document is a letter from GEICO to DOBI dated July 22, 2004 enclosing revised underwriting guidelines.

3. GEICO Plan of Operation

The AVP contends that said record is proprietary because it contains sophisticated marketing plans; said record explains how GEICO conducts its business; said record explains how GEICO targets its markets; said record includes underlying data concerning rating factors that GEICO uses; and said record contains GEICO's business analysis of itself and its competitors.

4. Letter from GEICO to DOBI dated July 14, 2004 containing GEICO's Business Plan for New Jersey

The AVP contends that said record is proprietary because it contains sophisticated marketing plans; said record explains how GEICO conducts its business; and said record explains how GEICO targets its markets.

5. Letter from GEICO to DOBI dated July 16, 2004 with revisions and clarifications of GEICO's underwriting and rating guidelines.

The AVP asserts that said record is proprietary because it contains details regarding how GEICO rates its insureds; said record contains sophisticated internal business models; said record explains how GEICO targets its markets; said record explains how GEICO determines rates for its policyholders; said record includes underlying data concerning rating factors that GEICO uses; and said record shows which customers GEICO considers to be good risks.

6. Confidential Underwriting and Rating Guidelines for GEICO dated August 2004

The AVP certifies that said record is a letter from GEICO to DOBI dated August 4, 2004 containing revisions to the underwriting guidelines that were previously filed with DOBI.

7. E-mail from GEICO to DOBI dated August 24, 2004 containing GEICO's weekly report as of August 21, 2004

The AVP contends that said record is proprietary because it contains sophisticated marketing plans; said record explains how GEICO conducts its business; and said record explains how GEICO targets its markets.

8. Letter from GEICO to DOBI dated December 29, 2004 regarding revisions to the Underwriting and Rating Guidelines for GEICO

The AVP asserts that said record is proprietary because it contains details regarding how GEICO rates its insureds; said record contains sophisticated internal business models and marketing plans; said record explains how GEICO determines rates for its policyholders; and said record shows which customers GEICO considers to be good risks.

9. Letter from GEICO to DOBI dated July 20, 2005 including the GEICO Underwriting Model and proposed changes

The AVP contends that said record is proprietary because it contains details regarding how GEICO rates its insureds; said record contains sophisticated internal business models; said record explains how GEICO determines rates for its policyholders; said record includes underlying data concerning rating factors that GEICO uses; and said record shows which customers GEICO considers to be good risks.

10. Letter from GEICO to DOBI dated July 20, 2005 concerning revisions to the Underwriting and Rating Guidelines for GEICO

The AVP asserts that said record is proprietary because it contains details regarding how GEICO rates its insureds; said record contains sophisticated internal business models; said record explains how GEICO determines rates for its policyholders; and said record shows which customers GEICO considers to be good risks.

11. E-mail from GEICO to DOBI dated August 25, 2005 containing GEICO's weekly report as of August 20, 2005

The AVP asserts that said record is proprietary because it contains sophisticated marketing plans; said record explains how GEICO conducts its business; said record explains how GEICO targets its markets; said record includes underlying data concerning rating factors that GEICO uses; and said record shows which customers GEICO considers to be good risks.

12. Letter from GEICO to DOBI dated October 31, 2005 concerning revisions to the Underwriting and Rating Guidelines for GEICO

The AVP contends that said record is proprietary because it contains details regarding how GEICO rates its insureds; said record contains sophisticated internal business models; said record explains how GEICO determines rates for its policyholders; said record includes underlying data concerning rating factors that GEICO uses; and said record shows which customers GEICO considers to be good risks.

13. E-mail from GEICO to DOBI dated March 9, 2006 containing GEICO rating examples

The AVP contends that said record is proprietary because it contains details regarding how GEICO rates its insureds and indicates which customers GEICO considers to be good risks.

February 24, 2009

Letter from GEICO to GRC. Counsel for GEICO states that pursuant to OPRA, not all records maintained by public agencies are government records subject to public access. Counsel states that pursuant to N.J.S.A. 47:1A-1, "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Counsel states that OPRA specifically exempts from public access "trade secrets and proprietary commercial or financial information obtained from any source" as well as "information which, if disclosed, would give an advantage to competitors or bidders." N.J.S.A. 47:1A-1.1.

Counsel states that to define "trade secret," the Supreme Court relied on the broad definition in the Restatement of Torts which states that:

"[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a

process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. [Ingersoll Rand Co. v. Ciavatta, 110 N.J. 609, 636 (1988) (quoting Restatement of Torts § 757 comment b (1939))].

Counsel states that Restatement lists six (6) factors to determine whether an idea or specific information is a trade secret:

1. the extent to which the information is known outside of the business;
2. the extent to which it is known by employees and others involved in the business;
3. the extent of measures taken by the owner to guard the secrecy of the information;
4. the value of the information to the business and to its competitors;
5. the amount of effort or money expended in developing the information; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others. [*Ibid.* (quoting Restatement of Torts § 757 comment b)].

Additionally, Council states that the GRC has routinely held that proprietary commercial or financial information and information that would give an advantage to competitors is exempt from disclosure under OPRA. *See* Belth v. NJ Department of Banking & Insurance, GRC Complaint No. 2003-29 (March 2004); Kesner v. NJ Department of Banking & Insurance, GRC Complaint No. 2003-67 (March 2004); Renna v. County of Union, GRC Complaint No. 2003-100 (March 2004); and Albrecht v. NJ Department of Treasury, GRC Complaint No. 2006-191 (July 2007).

Counsel also states that the courts have similarly held that proprietary information and information that would give an advantage to competitors should not be disclosed. *See* In re Request for Solid Waste Utility Consumer Lists, 106 N.J. 508, 523-24 (1987) (confidential customer lists are the property of their owner and the government agency to which they were submitted should provide adequate safeguards against public disclosure); Burnett v. County of Bergen, 402 N.J. Super. 319, 324-25 (App. Div. 2008) (“[w]hen the requested material appears on its face to encompass legislatively recognized confidentiality concerns, a court should presume that the release of the government record is not in the public interest”); Markowitz v. Serio, 833 N.J.S.2d 444 (N.Y. App. Div. 2007) (denying public access to reports filed by insurance companies that revealed the insurer’s market share and growth trend because there was a “sufficient likelihood of substantial competitive injury”); Judicial Watch, Inc. v. Food & Drug Admin., 449 F.3d 141, 149 (D.C. Cir. 2006) (proprietary information should not be disclosed if to do so would allow competitors to utilize the data without having to incur the time, labor, risk and expense in developing them independently).

Further, Counsel contends that the records at issue in this instant complaint are exempt from disclosure because said records constitute trade secrets and proprietary information, and said records contain information which, if disclosed, would give an advantage to GEICO’s competitors. Counsel states that GEICO’s AVP set forth the reasons why said records are exempt in his certification dated February 24, 2009. Counsel asserts that GEICO has established that the records satisfy all six (6) of the Restatement’s factors to be trade secrets. Counsel also contends that releasing said records will violate OPRA, chill insurers’ willingness to provide similar confidential

information to DOBI, thereby frustrating DOBI's ability to perform its regulatory responsibilities, and harm the New Jersey automobile insurance market. Counsel asserts that the Complainant's request for said records should be denied.

March 17, 2009

Notice of Motion to Intervene on behalf of Citizens United Reciprocal Exchange ("CURE"). CURE states that in the Appellate Division's decision in Gill, *supra*, the court indicated that any party with an appropriate interest in this matter has a standing to intervene. CURE submits that it has a right to intervene in this complaint.

CURE states that the Complainant's OPRA request seeks records which GEICO submitted to DOBI concerning GEICO's rating systems and underwriting rules, pursuant to N.J.S.A. 17:29A-46.2(b), which mandates that such filings are "subject to public inspection." CURE states that DOBI and GEICO seek to preclude production of certain records under the claim of proprietary privilege. CURE contends that this complaint is now a matter of statutory interpretation that affects the entire insurance industry. As a member of the insurance industry and a writer of insurance policies in New Jersey, CURE seeks to intervene in this instant complaint.

CURE states that the court's decision in Gill, *supra*, recognized that the subject matter of this instant complaint is one which concerns the creation and maintenance of a fair and competitive marketplace, a consideration which CURE asserts encompassed serving the consuming public. CURE states that while GEICO has a proprietary interest at issue, CURE's interest pertains to having the matter decided in a fashion which accounts for those aspects of public policy which ensure the existence of a fair and competitive marketplace for both competitors and the consuming public. CURE contends that the decision on how to interpret N.J.S.A. 17:29A-46.2(b) within the context of an OPRA request directly impacts these considerations.

Additionally, CURE asserts that competitors possess an interest in assuring that anyone who enters the marketplace plays by the rules, especially when the statute being interpreted through the OPRA request allows for the production of information which would confirm or refute compliance with the law. CURE asserts that it complies with N.J.S.A. 17:29A-46.2(b) and any decision regarding compliance with said statute directly affects its executive business decisions which may ultimately affect its policyholders.

Further, CURE claims that the extent to which an insurer asserts proprietary interests to preclude the production of underwriting materials affects every producer of insurance and as such, CURE has a direct interest in the instant complaint. CURE contends that its rights to adopt any rating and underwriting factor approved by DOBI are at stake.

Moreover, CURE states that it is long established that New Jersey insurers may adopt rate applications/underwriting guidelines previously approved by DOBI under a process commonly referred to as "me too" filings. See In re Private Passenger and Utility Automobile Rates of Allstate Insurance Company, 161 N.J. Super. 564 (App. Div. 1978); In re Private Passenger and Utility Automobile Rates of Allstate Insurance Company, 179 N.J. Super. 581 (App. Div. 1978). CURE states that smaller insurance companies that do

not accumulate the requisite credible actuarial data to support the use of new rating criteria for regulatory approval rely on larger insurance companies which have already approved rate filings through the use of “me too” filings. CURE asserts that the purpose of a “me too” filing is to expedite regulatory approval, allow for a competitive marketplace, and serve as a mechanism for smaller insurers to utilize credible actuarial data in which they could not currently collect.

CURE contends that the assertion of privilege for submissions to DOBI which have long been subject to public disclosure gives rise to a potential radical shift in the longstanding history of insurance law, in which CURE will suffer significant and irreparable harm as a business entity. Specifically, CURE claims that failure to follow or actively avoiding these longstanding practices adversely impacts smaller insurers if GEICO and other insurers are permitted to ignore the express requirements of N.J.S.A. 17:29A-46.2(b). CURE asserts that permitting GEICO and other insurers to assert the claim of privilege for their rate filing submissions will destroy the purpose of the “me too” filings, irreparably harming companies that have relied upon it for decades. CURE contends that allowing it to intervene in this matter is the only way its competitive rights can properly be addressed.

April 23, 2009

Complainant’s Certification in support of CURE’s Motion to Intervene. The Complainant certifies that the Appellate Division made clear that intervention is permitted when a party’s rights may be “substantially, specifically and directly affected by the outcome of this case.” Gill, supra. The Complainant asserts that the outcome of this instant complaint will have a substantial, specific and direct affect on CURE’s ability to issue private passenger automobile insurance in this state because it has a statutory right to all underwriting materials. *See* N.J.S.A. 17:29A-46.2b. The Complainant states that said statute provides that “[a]ll underwriting rules...be subject to public inspection.” Additionally, the Complainant asserts that the nature and extent of CURE’s interest in the outcome of this complaint is “sufficiently different from that of any party” and will add “measurably and constructively” to the scope of this complaint. *N.J.A.C. 1:1-16.3(a)*. *See also Gill, supra*.

The Complainant certifies that she seeks the records at issue in this complaint as part of her inquiry, as Chair of the Senate Commerce Committee, into the use of education and occupation as factors in underwriting insurance. The Custodian asserts that CURE has an interest in this complaint as an insurer in this State, an interest which the Complainant contends she is unable to adequately represent. Additionally, the Complainant asserts that CURE’s interest is also distinct from GEICO’s interest. The Complainant references GEICO’s letter brief dated February 24, 2009 in which GEICO indicated that is seeks to limit public access to what the Complainant claims is statutorily available information. The Complainant states that CURE seeks to ensure access to the records at issue and thus CURE cannot rely on GEICO to protect its interests in this matter. As such, the Complainant respectfully requests that the GRC grant CURE’s Motion to Intervene.

Further, in response to GEICO’s letter brief dated February 24, 2009, the Complainant contends that GEICO’s argument, that the records at issue are proprietary,

contradicts the statutory requirement that “[a]ll underwriting rules [are] subject to public inspection.” N.J.S.A. 17:29A-46.2b. The Complainant asserts that this statutory requirement exists regardless of GEICO’s “clear understanding with DOBI.” *See* Second Certification of Paul Lavrey dated February 24, 2009. The Complainant contends that any agreement with DOBI cannot supersede clear statutory direction.

Further, the Complainant claims that GEICO’s reliance on prior GRC decisions is misleading. Specifically, the Complainant contends that none of the prior GRC decisions concerned a statutory provision expressly requiring public access to certain records. The Complainant states that in Belth v. N.J. Department of Banking & Insurance, GRC Complaint No. 2003-67 (March 2004), the Complainant sought records that were confidential pursuant to N.J.S.A. 17:23-24f, which provides that “all working papers...shall be given confidential treatment and...may not be made public...” Additionally, the Complainant states that in Kesner v. N.J. Department of Banking & Insurance, GRC Complaint No. 2003-67 (March 2004), the GRC cited N.J.S.A. 17:23-24f in upholding the Custodian’s denial of access on the basis that said statute renders all of the requested records confidential. The Complainant contends that the GRC’s prior decisions emphasize that OPRA is secondary to legislatively recognized confidentiality concerns. The Complainant states that beyond the protections of OPRA, the Legislature has specified via statute records which must be kept confidential, as well as records which must be made available to the public.

Further, the Complainant asserts that the state and federal court cases cited by GEICO have no bearing on this instant complaint. The Complainant asserts that GEICO’s reliance on OPRA is an attempt to distract the GRC from the conclusion that the insurance statute prevails and that the requested records are subject to public access. The Complainant respectfully requests that the GRC reverse the Custodian’s determination to deny access to the requested records.

April 23, 2009

Letter from DOBI to the GRC in response to CURE’s Motion to Intervene. The Custodian’s Counsel states that the court in Gill, *supra*, held that intervention in complaints filed with the GRC is permitted in limited circumstances, and the GRC must analyze intervention motions pursuant to the Administrative Procedures Act, N.J.A.C. 1:1-16.1 et seq. Counsel states that the court directed the GRC to determine whether the moving party will be substantially, specifically, and directly affected by the outcome of the complaint through analysis of the following: the nature and extent of the proposed intervenor’s interest in the outcome of the case; whether that interest is “sufficiently different from that of any party so as to add measurably and constructively to the scope of the case”; and the prospect of confusion or undue delay that may arise from the proposed intervenor’s participation in the matter.

Counsel asserts that the GRC should deny CURE’s Motion to Intervene because CURE’s arguments fail to demonstrate that it has a substantial, specific and direct interest in the outcome of this matter. Specifically, Counsel states that CURE asserted that it has an interest in the interpretation of N.J.S.A. 17:29A-46.2(b), which provides for the public inspection of underwriting rules. Counsel claims that CURE’s alleged interest is non-specific, shared by the insurance industry as a whole, and is legally inaccurate because

said statute does not apply to the records withheld from disclosure. Counsel states that DOBI released all of GEICO's approved underwriting rules to the Complainant. Additionally, Counsel states that the records at issue in this complaint were submitted to DOBI pursuant to N.J.S.A. 17:29A-6 and -7 for the approval of rating systems. Counsel states that rating systems and rating criteria are not statutorily deemed public. As such, Counsel contends that all of CURE's asserted interests which center on interpretation of N.J.S.A. 17:29A-46.2(b) are irrelevant and do not warrant intervention.

Further, Counsel states that CURE asserts an interest in this matter because the GRC's determination will decide the extent of an insurer's ability to assert proprietary interests over material filed with DOBI when requested under OPRA. Counsel contends that said assertion is a peripheral interest that is shared by all insurers in this State. Counsel also claims that said assertion is analogous to any person or company's interest in any decisions or determinations made by a regulatory body or court which establish precedent on a legal issue that may affect them. Counsel claims that said interest is subsumed by GEICO's interest in this matter.

Moreover, Counsel states that CURE asserts that it has an interest in having this complaint decided in a fashion which ensures a fair and competitive marketplace, and that all insurers play by the rules. Counsel contends that CURE incorrectly points to N.J.S.A. 17:29A-46.2(b), which Counsel claims is not at issue in this complaint. Counsel asserts that the interest of ensuring a fair and competitive marketplace, and that all insurers play by the rules is the sole province of DOBI. Counsel states that the business of insurance "is strongly affected with a public interest and therefore properly subject to comprehensive regulation in protecting the public welfare." *See Sheeran v. Nationwide Mut. Ins. Co.*, 80 N.J. 548, 559 (1979). Counsel claims that N.J.S.A. 17:29A-6 and -7, under which the records at issue in this complaint were filed, are examples of the regulatory authority granted to the Commissioner of DOBI to ensure that private passenger automobile insurers in this State do not charge rates "that are unreasonably high or excessive, or are not adequate for the safeness and soundness of the insurer, or are unfairly discriminatory between risks in this State involving essentially the same hazards and expense elements..." N.J.S.A. 17:29A-7. Counsel contends that any interest CURE has in this regard is encompassed by DOBI's participation in this complaint.

Additionally, Counsel states that CURE argues that it has an interest in the outcome of this complaint because the determination will affect the ability of smaller insurers to obtain rates and rate increases through "me too" filings. Counsel states that pursuant to N.J.S.A. 17:29A-6 et seq., insurers must file their rating systems for approval to DOBI either as an individual company or as a member/subscriber of a rating organization. Counsel states that rating organizations such as Insurance Services Office ("ISO"), file rates on behalf on all member/subscriber companies. Counsel states that "me too" rate filings concern DOBI's historical practice of extending ISO rate increases to non-subscribers that report their loss experience to ISO. *See In re Allstate Ins. Co., supra*, and *In re Allstate Ins. Co. II.*, 179 N.J. Super. 581 (App. Div. 1981). Counsel states that DOBI did not and does not permit insurers to use "me too" rate filings to obtain and use rating systems or increases filed by independent private insurance companies based upon their proprietary rate analyses. As such, Counsel contends that CURE's argument regarding "me too" filings is inaccurate. Counsel states that neither

CURE nor any other private insurer has a right to utilize rating systems or increases based upon another company's independently filed rating system when such is based on proprietary data and actuarial analyses. Counsel asserts that CURE's interest in obtaining or using a rating system based on GEICO's proprietary information and analyses is exactly the harm to competitive interests asserted by GEICO in support of the denial of access under OPRA.

Finally, Counsel contends that CURE has failed to demonstrate that its interests will be substantially, specifically, and directly affected by the outcome of this instant complaint. Counsel also contends that CURE's alleged interests are no different from the interests of all insurers who file rates in this State, are subsumed by the current parties to this matter, and surpassed by the interests of GEICO, the proprietor of the records at issue. Counsel asserts that CURE's intervention in this matter will not add measurably or constructively to the GRC's consideration of this complaint and such intervention may cause undue delay because all briefing has been completed and this matter is ripe for adjudication. Counsel respectfully requests that the GRC deny CURE's Motion to Intervene in this matter.

April 23, 2009¹²

Letter from GEICO to the GRC in response to CURE's Motion to Intervene. GEICO contends that CURE has failed to satisfy any of the intervention criteria. GEICO asserts that CURE's argument, that it should be allowed to intervene in this matter because GEICO is permitted to intervene, is not supported by the Appellate Division's decision in Gill, *supra*. Specifically, the court stated "we do not intend that our decision to be taken to mean that any affected non-party may intervene in every instance. Each application for intervention is to be decided under its own particular circumstances." GEICO asserts that CURE's interests are no different from the dozens of other small insurance companies who write private passenger automobile insurance in New Jersey. GEICO contends that if the GRC allows CURE to intervene, there is no reason to deny intervention to any other insurer.

Additionally, GEICO references CURE's assertion that it should be allowed to intervene to argue that GEICO's alleged proprietary trade secret information constitutes public underwriting rules pursuant to N.J.S.A. 17:29A-46.2(b). GEICO states that DOBI already provided the Complainant with underwriting rules. Additionally, GEICO contends that the issue of whether GEICO's alleged proprietary trade secret information constitutes public underwriting rules is not a matter within the jurisdiction or expertise of the GRC. GEICO asserts that this instant complaint concerns the GRC's determination of whether DOBI wrongfully denied access to government records, and whether the records withheld from disclosure constitute trade secrets, proprietary information, or information which, if disclosed, would give an advantage to competitors.

Further, GEICO states that CURE has failed to demonstrate why its interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the complaint. Specifically, GEICO contends that CURE failed to demonstrate that the Complainant is unable to represent its interests on this point. *See In*

¹² Additional correspondence submitted by the parties; however, said correspondence is not relevant to the adjudication of this complaint.

re White, 171 N.J. Super. 493 (App. Div. 1979) (affirming denial of motion to intervene where the movant's interests were "adequately represented by existing parties", holding "appellant has not advised the Commission or this court of what evidence, if any, he could adduce on the issues before the Commission...[that the parties] did not introduce or could not have introduced").

Additionally, GEICO contends that granting CURE's motion will insert extraneous issues into the proceeding that will unduly delay and confuse the issues before the GRC. GEICO states that CURE claims it needs GEICO's records to make a "me too" filing. GEICO asserts that CURE not only seeks to include the GRC into a matter over which it has no jurisdiction or expertise, but CURE's position is demonstrably false. Specifically, GEICO asserts that CURE has long accused GEICO of improperly using education and occupation as rating factors, contradicting its new assertion that it wants to copy GEICO's use of those factors in CURE's rates. GEICO also claims that CURE is incorrect in its assertion that the alleged proprietary trade secret information at issue in this complaint has long been subject to public access. GEICO contends that while the cases cited by CURE recognize the "me too" practice, said cases do not provide for the release of the alleged proprietary trade secret information. GEICO also asserts that CURE has misrepresented the "me too" filing procedure because said procedure has never allowed one insurance company to copy the rating information and underlying data of a second company.

Moreover, GEICO asserts that CURE's motion should be denied because CURE failed to provide justification for its failure to intervene at any time during the previous 2 ½ years. GEICO contends that CURE was content to watch this matter from the sidelines until the Appellate Division granted GEICO's Motion to Intervene, at which time CURE decided it wanted to participate. GEICO states that pursuant to Mobil v. Administrative Services Co. v. Mansfield Twp., 15 N.J. Tax 583 (N.J. Tax 1996):

"An essential prerequisite to intervention is timeliness, which should be equated with diligence and promptness. *One who is interested in pending litigation should not be permitted to stand on the sidelines, watch the proceedings, and express disagreement only when the results of the battle are in and he is dissatisfied.* Id. at 596. (Emphasis added).

See also Clarke v. Brown, 101 N.J. Super. 404, 411 (App. Div. 1968) ("[U]ntimeliness is sufficient ground for denying [a motion to intervene]"). GEICO states that the Appellate Division in Gill, *supra*, declared that the GRC must consider the "undue delay arising from [the potential intervenor's] inclusion." GEICO also states that pursuant to N.J.S.A. 47:1A-7, "all proceedings of the council pursuant to this subsection shall be conducted as expeditiously as possible." GEICO further states that N.J.S.A. 47:1A-6 provides that "any such proceeding shall proceed in a summary or expedited manner."

GEICO states that the Complainant filed her OPRA request on April 13, 2006 and filed her Denial of Access Complaint on August 20, 2007. GEICO states that it promptly filed its motion to intervene less than one (1) month later. GEICO states that the Appellate Division issued its decision permitting GEICO to intervene in September 2008. GEICO states that it submitted its letter brief on February 24, 2009. GEICO states that

this complaint has been before the GRC for nearly two (2) years, the issues have been fully briefed for two (2) months and it is presumable that the GRC is in the process of analyzing the submissions to make its decision. GEICO states that CURE failed to indicate why it waited so long, what role it wants to play if it is allowed to intervene, what else it wants to offer, or how long its participation will further delay resolution of this matter. As such, GEICO contends that CURE's untimely motion to intervene should be denied.

Further, GEICO claims that CURE's motion to intervene substantiates DOBI's denial of access in this matter. GEICO states that it set forth in detail the proprietary nature of the records at issue, its critical value to GEICO and the tremendous value to GEICO's competitors if they obtained this proprietary information for free. GEICO asserts that CURE's motion indicates that CURE wishes to copy GEICO's business models, rating criteria, and actuarial data. GEICO respectfully requests that the GRC deny CURE's motion to intervene.

Analysis

Whether the Government Records Council should grant CURE's Motion to Intervene in this matter?

The Administrative Procedures Act provides that:

"[a]ny person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene." *N.J.A.C. 1:1-16.1(a)*.

The Administrative Procedures Act also states that:

"The agency head may rule upon the motion to intervene or may reserve decision for action by a judge after the case has been filed with the Office of Administrative Law." *N.J.A.C. 1:1-16.2(b)*.

On March 17, 2009, Citizens United Reciprocal Exchange ("CURE") filed a Motion to Intervene in this instant complaint. CURE states that in the Appellate Division's decision in Gill v. New Jersey Department of Banking & Insurance, 960A.2d. 397 (N.J. Super. A.D. 2008), the court indicated that any party with an appropriate interest in this matter has a standing to intervene.

CURE states that the Complainant's OPRA request seeks records which GEICO submitted to DOBI concerning GEICO's rating systems and underwriting rules, pursuant to N.J.S.A. 17:29A-46.2(b), which mandates that such filings are "subject to public inspection." CURE states that DOBI and GEICO seek to preclude production of certain records under the claim of proprietary privilege. CURE contends that this complaint is now a matter of statutory interpretation that affects the entire insurance industry. As a member of the insurance industry and a writer of insurance policies in New Jersey, CURE seeks to intervene in this instant complaint.

CURE states that while GEICO has a proprietary interest at issue, CURE's interest pertains to having the matter decided in a fashion which accounts for those aspects of public policy which ensure the existence of a fair and competitive marketplace for both competitors and the consuming public. CURE contends that the decision on how to interpret N.J.S.A. 17:29A-46.2(b) within the context of an OPRA request directly impacts these considerations.

Additionally, CURE asserts that competitors possess an interest in assuring that anyone who enters the marketplace plays by the rules, especially when the specific statute interpreted through the OPRA request allows for the production of information which would confirm or refute compliance with the law. CURE asserts that it complies with N.J.S.A. 17:29A-46.2(b) and any decision regarding compliance with said statute directly affects its executive business decisions which may ultimately affect its policyholders.

Further, CURE claims that the extent to which an insurer asserts proprietary interests to preclude the production of underwriting materials affects every producer of insurance and as such, CURE has a direct interest in the instant complaint. CURE contends that its rights to adopt any rating and underwriting factor approved by DOBI are at stake.

Moreover, CURE states that it is long established that New Jersey insurers may adopt rate applications/underwriting guidelines previously approved by DOBI under a process commonly referred to as "me too" filings. See In re Private Passenger and Utility Automobile Rates of Allstate Insurance Company, 161 N.J. Super. 564 (App. Div. 1978); In re Private Passenger and Utility Automobile Rates of Allstate Insurance Company, 179 N.J. Super. 581 (App. Div. 1978). CURE states that smaller insurance companies that do not accumulate the requisite credible actuarial data to support the use of new rating criteria for regulatory approval rely on larger insurance companies which have already approved rate filings through the use of "me too" filings. CURE asserts that the purpose of a "me too" filing is to expedite regulatory approval, allow for a competitive marketplace, and serve as a mechanism for smaller insurers to utilize credible actuarial data in which they could not collect.

CURE contends that the assertion of privilege for submissions to DOBI which have long been subject to public disclosure gives rise to a potential radical shift in the longstanding history of insurance law, in which CURE will suffer significant and irreparable harm as a business entity. Specifically, CURE claims that failure to follow or actively avoiding these longstanding practices adversely impacts smaller insurers if GEICO and other insurers are permitted to ignore the express requirements of N.J.S.A. 17:29A-46.2(b). CURE asserts that permitting GEICO and other insurers the ability to assert the claim of privilege for their rate filing submissions will destroy the purpose of the "me too" filings, irreparably harming companies that have relied upon it for decades. CURE contends that allowing it to intervene in this matter is the only way its competitive rights can properly be addressed.

In support of CURE's motion to intervene, the Complainant asserts that the outcome of this instant complaint will have a substantial, specific and direct affect on CURE's ability to issue private passenger automobile insurance in this state because it

has a statutory right to all underwriting materials. *See* N.J.S.A. 17:29A-46.2b. The Complainant states that said statute provides that “[a]ll underwriting rules...be subject to public inspection.” Additionally, the Complainant asserts that the nature and extent of CURE’s interest in the outcome of this complaint is “sufficiently different from that of any party” and will add “measurably and constructively” to the scope of this complaint. *N.J.A.C. 1:1-16.3(a)*. *See also* Gill, *supra*.

Additionally, the Complainant certifies that she seeks the records at issue in this complaint as part of her inquiry, as Chair of the Senate Commerce Committee, into the use of education and occupation as factors in underwriting. The Custodian asserts that CURE has an interest in this complaint as an insurer in this State, an interest which the Complainant contends she is unable to adequately represent.

However, both DOBI and GEICO argue that CURE failed to meet the criteria established to intervene in this complaint. Further, GEICO argues that the “me too” filing does not apply here, as is asserted by CURE.

When the court in Gill, *supra*, determined that GEICO is permitted to intervene in this matter, the court concluded that GEICO met the criteria for intervention outlined in the Administrative Procedures Act. Specifically, the court stated that “[t]hose regulations include criteria to determine if third parties may participate in the hearing. ‘Any person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene.’ *N.J.A.C. 1:1-16.1(a)*.”

The Administrative Procedures Act also provides that “[t]he agency head may rule upon the motion to intervene or may reserve decision for action by a judge after the case has been filed with the Office of Administrative Law.” *N.J.A.C. 1:1-16.2(2)*.

In this instant matter, the Complainant seeks access to records which she asserts are subject to public access pursuant to N.J.S.A. 17:29A-46.2b. The Custodian contends that he provided the Complainant with copies of all records public under N.J.S.A. 17:29A-46.2b, which is limited to the underwriting rules, and that the records withheld from disclosure constitute proprietary trade secret information not deemed public under N.J.S.A. 17:29A-46.2b. GEICO also contends that the records withheld from disclosure are not statutorily required to be disclosed.

The nature of this complaint is extremely sensitive. At issue are records that are possibly trade secrets, proprietary, or records which, if disclosed, would give an advantage to competitors. The parties, GEICO, and CURE argue whether the same records are statutorily required to be disclosed pursuant to N.J.S.A. 17:29A-46.2b. The disclosure or non-disclosure of the records at issue implicates public policy concerns which may affect New Jersey’s private passenger automobile insurance industry. As such, the issue of whether CURE is entitled to intervene in this sensitive complaint should be afforded all due process rights.

Therefore, because of the sensitive and wide sweeping nature of the subject of this complaint, the issue of whether CURE has a right to intervene in this matter shall be

afforded the due process rights of a full hearing. As such, this complaint should be referred to the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-16.2(b), to determine whether CURE should be permitted to intervene in this complaint.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... *A government record shall not include* the following information which is deemed to be confidential... *trade secrets and proprietary commercial or financial information obtained from any source... information which, if disclosed, would give an advantage to competitors or bidders...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The New Jersey Automobile Insurance Reform Act of 1982 states that:

“[a]ll underwriting rules shall be filed with the commissioner and shall be subject to his prior approval. *All underwriting rules shall be subject to public inspection...*” (Emphasis added). N.J.S.A. 17:29A-46.2(b).

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.

The Complainant asserts that the requested records are subject to public access and claims that there is no legal basis for the Custodian’s contention that said records are exempt as trade secrets or proprietary information. The Complainant states that pursuant to N.J.S.A. 17:29A-46.2, all underwriting rules shall be subject to public inspection. The Complainant also states that in 2004 DOBI rejected the claim of confidentiality the *Nia H. Gill v. NJ Department of Banking & Insurance, 2007-189 – Findings and Recommendations of the Executive Director*

Custodian asserted in this matter when it considered proposed rule adoptions for the use of alternate underwriting rules for private passenger automobile insurance. The Complainant states that as published in the New Jersey Register, commenters suggested that the rules should be amended to state that underwriting rules would be confidential as trade secrets. The Complainant states that DOBI specifically rejected this suggestion by stating the following:

“[w]ith respect to concerns of confidentiality, an insurer’s alternate underwriting rules, **as well as its primary underwriting rules**, are utilized in determining whether to decline or non-renew a risk. Insureds **must** be provided with the rationale and the basis for such a determination. Accordingly, an insurer may be called upon to provide a copy of its underwriting rules. In any event, the Department does not believe it appropriate to define by this rule that an insurer’s alternate underwriting rules are confidential. The Department notes that N.J.A.C. 11:3-35, governing standard underwriting rules for private passenger automobile insurance, does not so provide.” (Emphasis added). 36 NJR 1929(a).

Thus, the Complainant contends that there is no provision under State law or DOBI regulation that provides for a claim of confidentiality for underwriting rules.

The Custodian’s Counsel contends that the Complainant’s reliance on N.J.S.A. 17:29A-46.2 is misplaced because said statute applies to underwriting rules, which the Custodian released to the Complainant. The Custodian’s Counsel asserts that the records at issue in this complaint are simply not underwriting rules. Regarding the Complainant’s assertion that DOBI’s position is inconsistent with its approach in a 2004 rule adoption, Counsel states that DOBI’s response to public comment concerned the disclosure of *alternate* underwriting rules and not proprietary rating criteria. Counsel also contends that the Complainant’s reliance on *N.J.A.C. 11:3-19A.5(b)(2)* is misplaced because GEICO does not use education and occupation in deciding whether to write a given risk, but rather to determine the price an insured must pay for coverage. Counsel further asserts that the records filed by carriers that demonstrate a relationship between the risk characteristic of the driver(s) and the vehicle(s) insured and the hazards insured against is inherently proprietary as an important part of the weighing process unique to each insurer.

Further, GEICO states that DOBI already provided the Complainant with the only records that are statutorily required to be disclosed pursuant to N.J.S.A. 17:29A-46.2b, which are the underwriting rules. Additionally, GEICO contends that the issue of whether GEICO’s alleged proprietary trade secret information constitutes public underwriting rules is not a matter within the jurisdiction or expertise of the GRC. GEICO further asserts that this instant complaint concerns the GRC’s determination of whether DOBI wrongfully denied access to government records, and whether the records withheld from disclosure constitute trade secrets, proprietary information, or information which, if disclosed, would give an advantage to competitors.

The evidence of record indicates that this complaint is contested regarding whether the records withheld from disclosure constitute underwriting rules pursuant to N.J.S.A. 17:29A-46.2b, or other records that are exempt as trade secrets, proprietary information obtained from any source, or information which, if disclosed, would give an advantage to competitors or bidders, pursuant to N.J.S.A. 47:1A-1.1. The Complainant asserts that the records at issue here are subject to public access pursuant to said statute. CURE also makes said assertion (although CURE's party status has not yet been established in this complaint). However, both DOBI and GEICO claim that the records at issue are not underwriting rules but are proprietary rating criteria, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. GEICO claims that the interpretation of said statute is not properly within the jurisdiction of the GRC. However, to determine whether the Custodian unlawfully denied access to the requested records, said statute must be interpreted.

OPRA states that if the GRC is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the [GRC] shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the Administrative Procedures Act [APA]. N.J.S.A. 47:1A-7.e.

The APA further provides that the Office of Administrative Law "shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the Office of Administrative Law..." *N.J.A.C. 1:1-3.2(a)*.

As such, this complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because of the sensitive and wide sweeping nature of the subject of this complaint, the issue of whether Citizens United Reciprocal Exchange ("CURE") has a right to intervene in this matter shall be afforded the due process rights of a full hearing. As such, this complaint should be referred to the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-16.2(b)*, to determine whether CURE should be permitted to intervene in this complaint.
2. This complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records.

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May 20, 2009