



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

VINCENT P. MALTESE, Chairman
COMMISSIONER SUSAN BASS LEVIN
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

June 27, 2007 Government Records Council Meeting

Wendy Rejan
Complainant

Complaint No. 2007-90

v.

NJ Department of Law & Public Safety,
Division of Consumer Affairs
Custodian of Record

At the June 27, 2007 public meeting, the Government Records Council (“Council”) considered the June 20, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 47:1A-3.a., the records relevant to this request are exempt from disclosure as information pertaining to the conduct of a health care professional which has not been subject of a final disposition under N.J.S.A. 45:1-36.
2. The Custodian has borne his burden under N.J.S.A. 47:1A-6 of proving a lawful denial of access to copies of complaints filed against Dr. Marc Weber with the New Jersey Division of Consumer Affairs, State Board of Dentistry because the records relevant to this request are exempt from disclosure as information pertaining to the conduct of a health care professional which has not been subject of a final disposition under N.J.S.A. 45:1-36.

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 27th Day of June 2007

Vincent Maltese, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 5, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2007 Council Meeting**

**Wendy Alisa Rejan¹
Complainant**

GRC Complaint No. 2007-90

v.

**NJ Department of Law and Public Safety,
Division of Consumer Affairs²
Custodian of Records**

Records Relevant to Complaint: Copies of all complaints against Dr. Marc Weber filed with the Attorney General, Division of Consumer Affairs, State Board of Dentistry.

Request Made: February 24, 2007

Response Made: March 6, 2007

Custodian: Robert J. Campanelli

GRC Complaint Filed: March 29, 2007

Background

February 24, 2007

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

March 6, 2007

Custodian's response to the OPRA request. The Custodian responded to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian asks for an extension of the statutorily mandated response time to conduct an additional review of the records relevant to this request.

March 7, 2007

E-mail from the Complainant to the Custodian. The Complainant advises the Custodian that by law the records should be provided within seven (7) business days. The Complainant further asks the Custodian for an explanation why an extension is required and when the records will be provided.

March 7, 2007

¹No representation listed on record.

²Represented by DAG Joseph Donofrio on behalf of the NJ Attorney General (Newark, NJ).
Wendy Alisa Rejan v. NJ Department of Law and Public Safety, Division of Consumer Affairs, 2007-90 – Findings and Recommendations of the Executive Director

E-mail from the Custodian to the Complainant attaching the denial of access. The Custodian states that records responsive to the request which pertain to current complaints are denied because they are part of an ongoing investigation and are protected until the investigation has been closed pursuant to N.J.S.A. 47:1A-1.1. The Custodian also states that the records are protected by N.J.S.A. 45:1-36, which provides that any information pertaining to the conduct of a health care professional shall be confidential until final disposition of the inquiry or investigation except for the information required to be shared with the Attorney General or any other government agency. The Custodian finally states that if the Complainant would like to receive a copy of a closed 2002 complaint in storage, a copy will be provided upon Complainant's payment of copying costs.

March 11, 2007

E-mail from the Complainant to the GRC. The Complainant states that she believes that she has been unlawfully denied access to the records responsive to this request. The Complainant asserts that N.J.S.A. 47:1A-3 does not prevent access to records that pertain to an investigation currently in progress, but it restricts the release of records when such release would be "... inimical to the public interest." N.J.S.A. 47:1A-3. The Complainant also asserts that the Custodian never explained how the release of the records responsive to this request would be inimical to the public. The Complainant finally asserts that she requested an explanation from the Custodian and has not received one.

March 29, 2007

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

- Complainant's OPRA records request dated February 24, 2007
- E-mail from the Custodian to the Complainant dated March 6, 2007
- E-mail from the Complainant to the Custodian dated March 7, 2007
- E-mail from the Custodian to the Complainant dated March 7, 2007 (with attachment)

The Complainant states that she filed an OPRA request on February 24, 2007. The Complainant further states that she received an e-mail from the Custodian on March 6, 2007 requesting additional time to review the records responsive to this request. The Complainant also states that she received a telephone call from the Custodian on March 6, 2007 in which she was verbally denied access to records because they were part of an open investigation. The Complainant asserts that the Custodian informed her that one record is closed and available. The Complainant states that she received an e-mail from the Custodian on March 7, 2007 denying the requested records pursuant to N.J.S.A. 47:1A-1 et seq. and N.J.S.A. 45:1-36 but stating that one record was closed, in storage and available for access.

The Complainant states that she contacted the GRC for advice on the Custodian's denial. The Complainant states that the Custodian e-mailed an amended receipt with a fee for the closed record on March 12, 2007. The Complainant states that she responded to the Custodian's e-mail by asserting that OPRA does not include the right to deny

records that are part of an on-going investigation. The Complainant also states that she requested an additional explanation as to how release of the records relevant to her request would be inimical to the public interest but received no response.

April 10, 2007

Offer of Mediation sent to both parties.

April 12, 2007

Complainant agrees to mediation of this complaint.

April 17, 2007

The Custodian declines mediation of this complaint.

April 18, 2007

Request for the Statement of Information sent to the Custodian.

April 24, 2007

E-mail from the Custodian to the GRC. The Custodian requests an extension of two (2) days to submit the Statement of Information.

April 24, 2007

E-mail from the GRC to the Custodian. The GRC grants the Custodian's request for an extension.

April 26, 2007

Custodian's Statement of Information ("SOI") attaching Complainant's OPRA records request dated February 24, 2007

The Custodian states that Complainant was granted access to only one record responsive to the request because the record was a closed case from 2002. The Custodian further states that all other records requested were exempt from disclosure because the records were part of an ongoing investigation pursuant to N.J.S.A. 45:1-36. The Custodian asserts that according to N.J.S.A. 47:1A-9.a., OPRA must conform to other laws of exemption and not abrogate such laws; thus, releasing records that are still part of an investigation would abrogate the exemption stated in N.J.S.A. 45:1-36.

The Custodian also asserts that the records should be denied as investigatory records pursuant to N.J.S.A. 47:1A-3.a. The Custodian finally asserts that not only would release of the records responsive to this request be detrimental to investigations conducted by the New Jersey State Board of Dentistry against Dr. Weber, but also that disclosure would severely impede the Board's statutorily mandated investigatory power pursuant to N.J.S.A. 45:1-18 by discouraging the cooperation of witnesses.

Analysis

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 ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

Further, OPRA provides that:

“... where it shall appear that the record or records which are sought to be inspected, copied, or examined shall *pertain to an investigation in progress by any public agency*, the right of access provided for in [OPRA] may be denied if the inspection, copying or examination of such record or records shall be *inimical to the public interest*; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.” (Emphasis added.) N.J.S.A. 47:1A-3.a.

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.

OPRA also provides that:

“The provisions of this act ... shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution ...; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9.a.

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. 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 records requested by the Complainant pertain to “all complaints” against Dr. Mark Weber filed with the New Jersey Division of Consumer Affairs, State Board of

Dentistry. By definition, this request would encompass open as well as closed complaints. However, open complaints are treated as confidential until finally disposed of pursuant to N.J.S.A. 45:1-36, which states:

“[A]ny information provided to the division board concerning the conduct of a health care professional...shall be treated as confidential pending final disposition of the inquiry or investigation, except for that information required to be shared with the Attorney General, Department of Health and Senior Services or any other government agency.” N.J.S.A. 45:1-36.

N.J.S.A. 47:1A-9.a. requires that OPRA shall not abrogate any statutes or laws that will exempt a record from public access. Moreover, the Custodian has certified that release of records pertaining to open complaints could jeopardize ongoing investigations by, among other things, discouraging witness cooperation. The cooperation of witnesses in an investigation into the conduct of a health care professional is in the public interest. N.J.S.A. 47:1A-3.a. permits the non-disclosure of records where the information to be released might jeopardize an investigation in progress and where release would be inimical to the public interest. See also Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 379-380 (App. Div. 2003) and Rivera v. West New York, GRC Complaint No. 2004-201 (October 2005).

Further, because N.J.S.A. 45:1-36 prevents access to open complaint records responsive to this request, and because disclosure of these records would jeopardize investigations in progress by the State Board of Dentistry, the Custodian has borne his burden of proving a lawful denial of access under N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 47:1A-3.a., the records relevant to this request are exempt from disclosure as information pertaining to the conduct of a health care professional which has not been subject of a final disposition under N.J.S.A. 45:1-36.
2. The Custodian has borne his burden under N.J.S.A. 47:1A-6 of proving a lawful denial of access to copies of complaints filed against Dr. Marc Weber with the New Jersey Division of Consumer Affairs, State Board of Dentistry because the records relevant to this request are exempt from disclosure as information pertaining to the conduct of a health care professional which has not been subject of a final disposition under N.J.S.A. 45:1-36.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.

Executive Director

June 20, 2007