



**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**

**May 24, 2011 Government Records Council Meeting**

Christopher Cicero  
Complainant

Complaint No. 2009-201

v.

New Jersey Department of Children & Family Services,  
Division of Child Behavioral Health Services  
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 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 the Custodian certified in her March 14, 2011 legal certification that in response to Cicero v. N.J. Division of Youth and Family Services, Docket No. C-122-08 (Superior Court, Mercer Co. – Chancery Division, May, 2009), the New Jersey Division of Youth and Family Services provided all records that exist regarding the Complainant to Judge Sypek for review. Additionally, the Custodian certified that those records provided to Judge Sypek included records that were responsive to the Complainant’s OPRA request at issue here. Although the Complainant has raised questions regarding the possible existence of additional records responsive to the Complainant’s OPRA request, the Complainant has failed to present competent, credible evidence in the record sufficient to support this contention. Thus, the evidence of record shows that New Jersey Division of Youth and Family Services does not have in its custody, possession or control any additional records responsive to the Complainant’s OPRA request.

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 24<sup>th</sup> Day of May, 2011

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: June 1, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 24, 2011 Council Meeting**

**Christopher Cicero<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-201**

v.

**New Jersey Department of Children & Family Services,  
Division of Child Behavioral Health Services<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copy of the Complainant's medical records from the New Jersey Division of Youth and Family Services ("DYFS") case.
2. Copy of the Complainant's medical records compiled during the Complainant's stay in foster homes.

**Request Made:** May 29, 2009

**Response Made:** June 2, 2009

**Custodian:** Aileen Williams

**GRC Complaint Filed:** June 19, 2009<sup>3</sup>

**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 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 requested medical records from New Jersey Department of Youth and Family Services and medical records compiled during the Complainant's stay in foster care are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-9.a. and Executive Order No. 26, paragraph 4.b.1 (McGreevey 2002) as "information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation." As such, the Custodian lawfully denied access to said records, despite the fact that the Custodian raised a different exemption to the records requested. *See Hamilton*

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<sup>1</sup> Represented by Jeffrey P. Blumstein, Esq., of Szaferman, Lakind, Blumstein & Lader, P.C. (Lawrenceville, NJ).

<sup>2</sup> Represented by DAG Christian A. Arnold, on behalf of the NJ Attorney General.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

v. NJ Department of Corrections, GRC Complaint No. 2007-196 (March 2008), Kamau v. NJ Department of Corrections, GRC Complaint No. 2004-175 (February 2005), and Caban v. NJ Department of Corrections, GRC Complaint No. 2004-174 (March 2005).

2. While the GRC acknowledges that the Complainant is attempting to obtain his own medical records from Division of Child Behavioral Health Services, the identity of a requestor is not a consideration when deciding whether an exemption to disclosure applies to a government record requested pursuant to OPRA except for those specific provisions set forth at N.J.S.A. 47:1A-2.2. and N.J.S.A. 47:1A-10.

### **August 30, 2010**

Council's Interim Order distributed to the parties.

### **October 6, 2010**

The Complainant's Notice of Appeal to the New Jersey Superior Court, Appellate Division. The Complainant appeals the Council's August 24, 2010 Final Decision.

### **March 3, 2011**

Order of the New Jersey Superior Court, Appellate Division, on a motion for remand filed by the New Jersey Division of Children & Family Services ("DCF") on January 25, 2011. The court denies DCF's motion to remand this matter to the GRC for the purpose of expanding the record to include the record on appeal of the full proceedings before the Honorable Maria M. Sypek, P.J.Ch., in Cicero v. N.J. Division of Youth and Family Services, Docket No. C-122-08 (Superior Court, Mercer Co. – Chancery Division, May, 2009), which was commenced by the Complainant in the Chancery Division of Superior Court, Mercer County.<sup>4</sup>

### **March 3, 2011**

Order of the New Jersey Superior Court, Appellate Division, on a cross motion for remand filed by the GRC on February 2, 2011. The court grants the GRC's cross motion for remand to resolve the issue of whether DCF has in its custody, possession or control any additional records responsive to the Complainant's OPRA request that were previously not disclosed pursuant to Cicero v. N.J. Division of Youth and Family Services, Docket No. C-122-08 (Superior Court, Mercer Co. – Chancery Division, May, 2009). The Appellate Division notes that this limited remand shall be completed within sixty (60) days of the issuance of such Order.<sup>5</sup>

### **March 9, 2011**

E-mail from the GRC to the Custodian. The GRC states that this matter has been remanded to the GRC from the Superior Court of New Jersey, Appellate Division, in order to resolve the issue of whether DCF has in its custody, possession or control any additional records responsive to the Complainant's OPRA request that were not

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<sup>4</sup> The record does not disclose the date that the Complainant filed action with the Chancery Division of Superior Court, Mercer County.

<sup>5</sup> The sixty (60) day time frame expires on May 2, 2011.

previously disclosed pursuant to Cicero v. N.J. Division of Youth and Family Services, Docket No. C-122-08 (Superior Court, Mercer Co. – Chancery Division, May, 2009).

The GRC states that during the initial adjudication of this complaint, the Custodian’s Counsel noted in the Statement of Information (“SOI”) that the Complainant already litigated this matter in Cicero, supra, and that some records were provided to him during the pendency of that case. The GRC states that Counsel stated that, in Cicero, the Honorable Maria M. Sypek, P.J.Ch., reviewed DCF’s records *in camera* and ordered release of redacted copies of some of those records to the Complainant. The GRC states that Counsel further stated that Judge Sypek was satisfied that DCF could not locate any additional records regarding the Complainant.

The GRC requests that the Custodian submit a legal certification responding to the following:

1. Were all records that exist at DCF regarding the Complainant provided to the court for an *in camera* review in Cicero, supra?
2. Were all records responsive sought by the Complainant in his June 2, 2009 OPRA request relevant to GRC Complaint No. 2009-201 included in those records sent to the court for an *in camera* review in Cicero, supra?
3. If the answer to question No. 2 is no, please list individually in a document index each of those records that were not provided to the court. Please also include any privileges or exemptions which DCF asserts render such records non-disclosable, if applicable.

The GRC requests that the Custodian provide the requested legal certification by March 14, 2011.

### **March 11, 2011**

Letter from the Complainant’s Counsel to the GRC. Counsel states that he is in receipt of the GRC’s request for a legal certification from the Custodian. Counsel requests that he be given an extension until March 18, 2011 to provide comments on the GRC’s request for a legal certification.

Counsel states that the Appellate Division denied DCF’s motion to remand the appeal to the GRC to supplement the record with the prior proceedings before Judge Sypek. Counsel notes that the GRC requested that such a remand be denied.

Counsel contends that the GRC’s cross-motion, unlike DCF’s motion to remand, was not limited to what occurred before Judge Sypek, which was a different matter and does not affect the Complainant’s OPRA request to DCF for medical and psychological records. Counsel states that the GRC’s cross-motion was to explore the “unresolved issue as to whether [DCF] even has in its custody, possession or control any additional documents and/or records that are responsive to [the Complainant’s] request.” Counsel states that it was indicated to the Appellate Division that, “[t]he GRC will require on remand that [DCF] establish whether it is *currently* in possession of any further documents that are responsive to [the Complainant’s] request.” (Emphasis added.)

Counsel contends that the certification request restricts the GRC's inquiry solely to records provided to Judge Sypek for an *in camera* review several years ago and allows DCF to simply respond "yes" to the first two questions. Counsel argues that the certification request ignores the Complainant's argument that DCF never gave Judge Sypek medical and psychological records, or that DCF never indicated that it did a complete search and did not have such records.

Counsel asserts that there also appears to be some confusion on the part of the GRC regarding the type of remand granted by the Appellate Division. Counsel notes that the Appellate Division's Order states that "[t]he limited remand shall be completed within sixty days." Counsel states that the Appellate Division has not relinquished its jurisdiction over the case nor has the Appellate Division ordered a full remand.

Counsel further questions whether the GRC has authority to specify the type of search that DCF must conduct. Counsel argues that the GRC has not allowed enough time to have DCF conduct a thorough search of their records.

#### **March 14, 2011**

Custodian's legal certification attaching the following:

- Legal certification from the Custodian dated December 11, 2008.
- Letter from Judge Sypek to the Complainant dated April 15, 2009.
- Superior Court of New Jersey, Mercer County – Chancery Division Civil Order dated May 19, 2009.<sup>6</sup>

The Custodian certifies that she, along with several other employees of DCF, handled a records request that resulted in Cicero v. N.J. Division of Youth and Family Services, Docket No. C-122-08 (Superior Court, Mercer Co. – Chancery Division, May, 2009). The Custodian certifies that at the time of the litigation, all records that DCF was able to locate regarding the Complainant and his family were provided to Judge Sypek. The Custodian certifies that this includes all records that would have been responsive to the Complainant's OPRA request at issue in this complaint.

#### **March 15, 2011**

Letter from the Complainant's Counsel to the GRC. Counsel states that he is in receipt of the Custodian's legal certification and requests that the GRC only consider the Custodian's response to the GRC's request for a legal certification.

Counsel reiterates that the Appellate Division denied DCF's motion to remand to the GRC to supplement the record with prior proceedings before Judge Sypek: a motion which the GRC opposed. Counsel states that the GRC's cross-motion was granted. Counsel states that the GRC subsequently requested a legal certification responding to three (3) discrete and pointed questions. Counsel states that the Custodian provided her response to those three (3) questions in her legal certification dated March 14, 2011.

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<sup>6</sup> Additional certifications were submitted which are not relevant to this decision on remand. Christopher Cicero v. New Jersey Department of Children & Family Services, Division of Child Behavioral Health Services, 2009-201 – Supplemental Findings and Recommendations of the Executive Director

Counsel argues that in an attempt to circumvent the Appellate Division's denial of DCF's motion for remand, DCF has submitted additional items regarding the proceedings before Judge Sypek intended to supplement the record. Counsel contends that this information is not what the GRC requested nor what the Appellate Division ordered.

Counsel notes that the Custodian's legal certification indicated that the records that DCF was "able to locate regarding [the Complainant]," and which were supposedly provided to Judge Sypek, "included all records that would have been responsive to [the Complainant's] OPRA request that resulted in this matter." Counsel notes that the Complainant's OPRA request was specific and limited to medical and psychological treatment records while the Complainant was in the custody of the New Jersey Division of Youth and Family Services ("DYFS") as a juvenile.

Counsel argues that based on the foregoing, the certification in no way indicates that the matter is moot. Counsel argues that to the contrary, the only reasonable conclusion is that records regarding the Complainant's medical and psychological treatment do currently exist.

### Analysis

**Whether, after remand, the evidence of record indicates that the New Jersey Division of Children & Families provided all records responsive to the Complainant's request to the Chancery Division for review in the matter of Cicero v. N.J. Division of Youth and Family Services, Docket No. C-122-08 (Superior Court, Mercer Co. – Chancery Division, May, 2009) and that no additional records responsive exist?**

On March 3, 2011, the Appellate Division granted the GRC's cross motion for remand to resolve the issue of whether DCF has in its custody, possession or control any additional records responsive to the Complainant's OPRA request that were previously not disclosed pursuant to Cicero v. N.J. Division of Youth and Family Services, Docket No. C-122-08 (Superior Court, Mercer Co. – Chancery Division, May, 2009). The Appellate Division ordered that the limited remand be completed within sixty (60) days, or by May 2, 2011.

Subsequent to the remanding of this complaint, the GRC requested that the Custodian certify to the following:

1. Were all records that exist at DCF regarding the Complainant provided to the court for an *in camera* review in Cicero, *supra*?
2. Were all records responsive sought by the Complainant in his June 2, 2009 OPRA request relevant to GRC Complaint No. 2009-201 included in those records sent to the court for an *in camera* review in Cicero, *supra*?
3. If the answer to question No. 2 is no, please list individually in a document index each of those records that were not provided to the court. Please also include any privileges or exemptions which DCF asserts render such records non-disclosable, if applicable.

On March 14, 2011, the Custodian legally certified that all records that DCF was able to locate regarding the Complainant and his family were provided to Judge Sypek. The Custodian further certified that this includes all records that would have been responsive to the Complainant's OPRA request at issue in this complaint.

The Complainant initially filed the instant complaint with the GRC after the Custodian responded to his OPRA request denying access to responsive records and citing N.J.S.A. 9:6-8.10(a), which exempts from access all records of child abuse or neglect and all information obtained by DCF, Division of Child Behavioral Health Services ("DCBHS"), in investigating such reports. In the Denial of Access Complaint, the Complainant himself noted that DCF's Deputy Attorney General ("DAG") told the court that all the records provided to Judge Sypek for an *in camera* review and that no other records regarding the Complainant existed. The Complainant further stated that the records provided in Cicero, supra, did not include records pertaining to six (6) years of foster care and also did not include psychological care and testing documentation that was done while the Complainant was in foster care; this led the Complainant to submit the OPRA request at issue in this complaint. The Complainant essentially argued that the Custodian's denial of access to the requested medical and psychological records appears to contradict the DAG's statement to the Chancery Division that no other records responsive existed.

In the SOI, DCF maintained that the records requested were exempt from disclosure, but also noted that in Cicero, supra, Judge Sypek was satisfied that DCF could not locate any additional records. The Complainant responded to the SOI arguing that the exemption cited by the Custodian is in error because the Complainant was not requesting abuse records.<sup>7</sup> The Complainant again questioned how DCF previously stated that the records provided to Judge Sypek, which did not include medical and psychological records, represent all records that exist but then DCF denied access to the Complainant's request as if those records did exist. The Complainant further argued that his reasoning should provide enough evidence to conclude that DCF did not provide all records regarding the Complainant to Judge Sypek in Cicero, supra; however, the Complainant provided no competent, credible evidence sufficient to support this contention.

The Custodian certified in her March 14, 2011 legal certification that in response to Cicero, supra, DCF provided all records that exist regarding the Complainant to Judge Sypek for review. Additionally, the Custodian certified that those records provided to Judge Sypek included records that were responsive to the Complainant's OPRA request at issue here. Although the Complainant has raised questions regarding the possible existence of additional records responsive to the Complainant's OPRA request, the Complainant has failed to present competent, credible evidence in the record sufficient to support this contention. Thus, the evidence of record shows that DCF does not have in its custody, possession or control any additional records responsive to the Complainant's OPRA request.

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<sup>7</sup> The Complainant now appears to be making the opposite assertion based on the definition of a victim's rights agency provided in OPRA.



### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian certified in her March 14, 2011 legal certification that in response to Cicero v. N.J. Division of Youth and Family Services, Docket No. C-122-08 (Superior Court, Mercer Co. – Chancery Division, May, 2009), the New Jersey Division of Youth and Family Services provided all records that exist regarding the Complainant to Judge Sypek for review. Additionally, the Custodian certified that those records provided to Judge Sypek included records that were responsive to the Complainant's OPRA request at issue here. Although the Complainant has raised questions regarding the possible existence of additional records responsive to the Complainant's OPRA request, the Complainant has failed to present competent, credible evidence in the record sufficient to support this contention. Thus, the evidence of record shows that New Jersey Division of Youth and Family Services does not have in its custody, possession or control any additional records responsive to the Complainant's OPRA request.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 20, 2011



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
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Commissioner

**FINAL DECISION**

**August 24, 2010 Government Records Council Meeting**

Christopher Cicero  
Complainant

Complaint No. 2009-201

v.

New Jersey Department of Children & Family Services,  
Division of Child Behavioral Health Services  
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 17, 2010 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 requested medical records from New Jersey Department of Youth and Family Services and medical records compiled during the Complainant’s stay in foster care are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-9.a. and Executive Order No. 26, paragraph 4.b.1 (McGreevey 2002) as “information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.” As such, the Custodian lawfully denied access to said records, despite the fact that the Custodian raised a different exemption to the records requested. *See Hamilton v. NJ Department of Corrections*, GRC Complaint No. 2007-196 (March 2008), *Kamau v. NJ Department of Corrections*, GRC Complaint No. 2004-175 (February 2005), and *Caban v. NJ Department of Corrections*, GRC Complaint No. 2004-174 (March 2005).
2. While the GRC acknowledges that the Complainant is attempting to obtain his own medical records from Division of Child Behavioral Health Services, the identity of a requestor is not a consideration when deciding whether an exemption to disclosure applies to a government record requested pursuant to OPRA except for those specific provisions set forth at N.J.S.A. 47:1A-2.2. and N.J.S.A. 47:1A-10.

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 24<sup>th</sup> 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 30, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Christopher Cicero<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-201**

v.

**New Jersey Department of Children & Family Services,  
Division of Child Behavioral Health Services<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copy of the Complainant's medical records from the New Jersey Department of Youth and Family Services ("DYFS") case.
2. Copy of the Complainant's medical records compiled during the Complainant's stay in foster homes.

**Request Made:** May 29, 2009

**Response Made:** June 2, 2009

**Custodian:** Aileen Williams

**GRC Complaint Filed:** June 19, 2009<sup>3</sup>

**Background**

**May 29, 2009**

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.

**June 2, 2009**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. The Custodian states that access to the records responsive to Item No. 1 and Item No. 2 is denied pursuant to N.J.S.A. 9:6-8.10a, which exempts from access all records of child abuse or neglect and all information obtained by the New Jersey Department of Children & Family Services ("DCF"), Division of Child Behavioral Health Services ("DCBHS"), in investigating such reports.

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

<sup>2</sup> Represented by DAG Christian A. Arnold, on behalf of the NJ Attorney General.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

**June 19, 2009**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching a government records request receipt dated June 2, 2009.

The Complainant states that the instant complaint has been filed after many attempts, both individually and through OPRA, to obtain records regarding his time as a ward of the State in Essex County. The Complainant states that he was previously informally in contact with the Custodian and several other employees of DCF in an attempt to procure the requested records.

The Complainant states that he dealt with multiple departments and divisions from September 2007 to mid-October 2007; however, he was given several conflicting reasons why his records could not be provided. The Complainant states that these reasons ranged from the DCF having no record of the Complainant because records had been “reduced,”<sup>4</sup> that the records were sealed by court order and that no records responsive exist.

The Complainant acknowledges that he now knows that all of these prior events were not considered to be pursuant to OPRA since the Complainant did not think he needed to invoke OPRA at that time. The Complainant states that he did not know that he could request the records pursuant to OPRA because he supposed that he would not be able to specifically identify the records sought. Further, the Complainant avers that he did not feel that he needed to invoke OPRA because he was already dealing directly with the Custodian.

The Complainant states that in Cicero v. N.J. Division of Youth and Family Services, Docket No. C-122-08 (Superior Court, Mercer Co. – Chancery Division, May, 2009), the Complainant again asked for the records later sought in the instant complaint. The Complainant states that during the above mentioned case, the court asked the Complainant to submit a copy of all the information he possessed. The Complainant states that he submitted the forty (40) plus pages of records previously obtained from DCF to the court and received in return new copies of the forty (40) plus pages in addition to twenty (20) more pages, all containing what the Complainant classifies as “family trivia.” The Complainant questions where the extensive physical and mental health records from his time at Essex County Emergency Children’s Shelter have gone. The Complainant asserts that the records previously obtained do not encompass six (6) years of foster care and no psychological care and testing documentation that was done while the Complainant was in foster care. The Complainant states that, at the conclusion of Cicero, the DCF/DYFS deputy attorney general (“DAG”) told the court that no other records responsive existed.

The Complainant states that he formally submitted an OPRA request to the DCBHS on May 29, 2009. The Complainant states that the Custodian responded on June 2, 2009 denying access to the requested records pursuant to N.J.S.A. 9:6-8.10a.

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<sup>4</sup> The Complainant uses this word in the Denial of Access complaint; however, it is unclear whether he means that records were sent to storage or whether records were disposed of.  
Christopher Cicero v. New Jersey Department of Children & Family Services, Division of Child Behavioral Health Services, 2009-201 – Findings and Recommendations of the Executive Director 2

The Complainant questions how the DCBHS could deny access to records if the DAG told the court that no additional records existed. The Complainant further argues that his inability to specifically name records essentially allowed the Custodian to more easily deny the Complainant access to the records sought. The Complainant argues that based on the foregoing, the Custodian was able to justify not producing records both prior to his OPRA request and subsequently in response to such.

The Complainant requests that the GRC order the Custodian to provide all records responsive to the Complainant's two (2) request items.

The Complainant does not agree to mediate this complaint.

**July 1, 2009**

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

**July 10, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated May 29, 2009.
- Letter from the Custodian to the Complainant dated June 2, 2009 (with attachments).
- Cicero v. N.J. Division of Youth and Family Services, Docket No. C-122-08 (Superior Court, Mercer Co. – Chancery Division, May, 2009)

The Custodian certifies that no search was performed to locate records responsive to the Complainant's OPRA request.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that she received the Complainant's OPRA request on May 29, 2009. The Custodian certifies that she responded in writing on June 2, 2009 denying access to the requested records pursuant to N.J.S.A. 9:6-8.10a.

The Custodian's Counsel submits a legal brief in support of DCBHS's position regarding the instant complaint. Counsel argues that the Complainant has essentially requested a copy of all records from DCF regarding his stay in foster care as a minor. Counsel states that pursuant to N.J.S.A. 9:6-8.10a, "all records of child abuse reports ... and all information obtained by [DCF] in investigating such reports ... shall be kept confidential."

Counsel argues that the Appellate Division previously upheld maintaining the confidentiality of DCF child abuse records pursuant to N.J.S.A. 9:6-8.10a in the instance of a blanket request for records. Counsel states that in Kaszerman v. Manshel, 176 N.J. Super. 132 (App. Div. 1980), the court held that while persons may obtain DCF child abuse records under limited exceptions, the plaintiff's request did not meet any such

exception. Counsel contends that, similarly in this complaint, the Complainant's OPRA request does not meet any of the exceptions set forth in N.J.S.A. 9:6-8.10a; therefore, the denial of access was lawful. Counsel notes that the Complainant has already litigated this matter in Superior Court and had some records provided to him.

Counsel states that N.J.S.A. 9:6-8.10a(b)(6) provides that:

"... the Division may release the records and reports referred to in subsection (a), or parts thereof, to:

... a court upon its finding that access to such records may be necessary for the determination of an issue before it, and such records may be disclosed by the court ... in whole or in part to the law guardian, attorney or other appropriate person upon a finding that such further disclosure is necessary for determination of an issue before the court..."

Counsel states that, in Cicero, the Honorable Maria M. Sypek, P.J.Ch., reviewed DCF's records *in camera* and ordered release of redacted copies of those records to the Complainant. Moreover, Counsel states that Judge Sypek was satisfied that DCF could not locate any additional information regarding the Complainant.

Counsel requests that the GRC find that the Custodian's denial of access was lawful because the requested records are exempt from disclosure pursuant to N.J.S.A. 9:6-8.10a and the Complainant's request for the records he now seeks pursuant to OPRA was previously litigated in Superior Court.

### **July 23, 2009**

Letter from the GRC to the Complainant. The GRC states that pursuant to telephone conversation,<sup>5</sup> an extension of time is granted until July 30, 2009 for the Complainant to submit a response to the SOI.

### **July 27, 2009**

The Complainant's response to the Custodian's SOI. The Complainant states that for purposes of this response, he will use DCF to refer to all divisions encompassed within, but acknowledges that the division that denied his OPRA request was DCBHS.

The Complainant contends that, in the SOI, DCF misrepresented his OPRA request as an attempted diversion. The Complainant avers that he was requesting medical records of all treatments and procedures he received while in custody of DCF/DYFS at the Essex County Emergency Children's Shelter and medical records of treatments and procedures received while in foster care. The Complainant asserts that he is not requesting child abuse reports.

Further, the Complainant contends that his request was not a blanket request for DCF records and that Kaszerman is irrelevant in this complaint because the Complainant

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<sup>5</sup> The record is unclear regarding the exact date that the Complainant requested an opportunity to submit a response to the Custodian's SOI.

is not alleging any abuse nor is the Complainant asking for records of abuse. The Complainant argues that he is the subject child of the records being requested.

The Complainant states that N.J.S.A. 9:6-8.10a(c) provides that:

“[t]he department may share information with a child who is the subject of a child abuse or neglect report, as appropriate to the child’s age or condition, to enable the child to understand the basis for the department’s involvement and to participate in the development, discussion, or implementation of a case plan for the child.”

The Complainant avers that he believes he is old enough to obtain his medical records, which are the only records at issue in the instant complaint. The Complainant argues that even if the Complainant were requesting records pertaining to child abuse, N.J.S.A. 9:6-8.10a(c) would allow him to obtain the records. The Complainant notes that he was never told why DCF was in custody of him or that the Complainant was abused as a child and that there was no plan developed or implemented (as referred to in the statute).

The Complainant states that OPRA provides that:

“... government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by [OPRA], shall be construed in favor of the public's right of access;

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; and nothing contained in [OPRA], shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.” N.J.S.A. 47:1A-1.

The Complainant argues that records pertaining to an on-going investigation are exempt from disclosure (N.J.S.A. 47:1A-3.b.); however, there is no risk of violating a citizen’s reasonable expectation of privacy because the records are his and there is no on-going investigation. Further, the Complainant argues that if there is another exemption that applies to the requested records, the Complainant cannot refute any arguments relating to such because DCBHS has not asserted such. The Complainant requests that, in the absence of any unknown exemptions that may apply to the requested records, the GRC determine that the Complainant is granted access to the requested records.

The Complainant states that the Custodian’s Counsel argues that the Complainant previously litigated this issue in court. The Complainant argues that the court could have similarly called his request at issue in Cicero as a blanket request. The Complainant reiterates that his request in Cicero and the instant complaint was only a blanket request in that the Custodian and other staff members of DCBHS were not



forthcoming with what specific types of records the Complainant should have identified. The Complainant reiterates that even after declaring in court that no further records responsive exist, DCBHS now asserts that exemptions apply to records. The Complainant avers that Judge Sypek even stated that the redactions made to the records provided in Cicero were for issues regarding siblings and that there was mention of child abuse; therefore, N.J.S.A. 9:6-8.10a does not apply. Moreover, the Complainant avers that medical records were not at issue in Cicero, a fact confirmed by Judge Sypek’s law clerk.

The Complainant argues that DCBHS crafted their exemption from a portion of N.J.S.A. 9:6-8.10a; however, this portion is not as pertinent as N.J.S.A. 9:6-8.10a(c). The Complainant contends that N.J.S.A. 9:6-8.10a(c) overrides the portion cited by DCBHS because it speaks to a person requesting their own records. The Complainant asserts that DCBHS’s actions are inapposite to the spirit of OPRA.

The Complainant argues that he believes that even though Judge Sypek was satisfied with DCF’s response in Cicero, it is not grounds to negate the complaint currently before the GRC. The Complainant asserts that his arguments alone are enough to show that DCF did not provide Judge Sypek with the entire universe of records, which include those medical records at issue here.

### 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:

“[t]he provisions ... *shall not abrogate any exemption* of a public record or government record from public access heretofore *made pursuant to ... any other statute*; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court;

any federal law; federal regulation; or federal order.” (Emphasis added.)  
N.J.S.A. 47:1A-9.a.

N.J.S.A. 9:6-8.10a provides that:

“All records of child abuse reports...all information obtained by the Department of Children and Families in investigating such reports...and all reports of findings forwarded to the child abuse registry...shall be kept confidential and may be disclosed only under the circumstances expressly authorized under subsections b., [and] c... herein ...

b. The department may and upon written request, shall release the records and reports referred to in subsection a., or parts thereof, to ... (6) a court upon its finding that access to such records may be necessary for the determination of an issue before it, and such records may be disclosed by the court .. in whole or in part to the law guardian, attorney or other appropriate person upon a finding that such further disclosure is necessary for determination of an issue before the court...

c. [t]he department may share information with a child who is the subject of a child abuse or neglect report, as appropriate to the child’s age or condition, to enable the child to understand the basis for the department’s involvement and to participate in the development, discussion, or implementation of a case plan for the child.”

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 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.

In the instant complaint, the Complainant filed an OPRA request with DCBHS on May 29, 2009 requesting medical records from the DYFS case relating to him and from his time in foster care. The Custodian responded in writing on June 2, 2009 denying access to the requested records pursuant to N.J.S.A. 9:6-8.10a., which exempts disclosure of records pertaining to child abuse reports and all information obtained by the DCF in investigating such.

In the Denial of Access complaint, the Complainant set forth a series of events in which he attempted to procure records from DCF through the Chancery Division and was provided with 60 plus pages of records, none of which, Complainant asserted, were

responsive to the Complainant's subsequent OPRA request. *See Cicero v. N.J. Division of Youth and Family Services*, Docket No. C-122-08 (Superior Court, Mercer Co. – Chancery Division, May, 2009). The Custodian argued in the SOI that in *Kaszerman v. Manshel*, 176 N.J. Super. 132 (App. Div. 1980), the Appellate Division upheld the confidentiality of DCF records child abuse records; holding that the plaintiff did not meet the exceptions to such confidentiality afforded under N.J.S.A. 9:6-8.10a; the Custodian further argued that the facts of *Kaszerman* were similar to the instant complaint and that the Council should hold that the Custodian's denial of access was lawful.

The Complainant subsequently submitted a rebuttal to the SOI, arguing that neither N.J.S.A. 9:6-8.10a or *Kaszerman* apply in the instant matter because child abuse records are not at issue; rather, the Complainant requested his own medical records. Additionally, the Complainant argued that even if he were requesting child abuse records, an exception at N.J.S.A. 9:6-8.10a(c) allows for a subject child to obtain their own records, "... as appropriate to the child's age or condition, to enable the child to understand the basis for the department's involvement and to participate in the development, discussion, or implementation of a case plan for the child."

The Complainant argued that, in the absence of any other asserted exemptions by DCBHS, the Complainant cannot refute any arguments relating to such because DCBHS has not asserted such.

Notwithstanding the Custodian's assertion that N.J.S.A. 9:6-8.10a exempts access to the records requested by the Complainant, the Council is permitted to raise additional defenses regarding the disclosure of records pursuant to *Paff v. Township of Plainsboro*, Docket No. A-2122-05T2 (App. Div. 2007).<sup>6</sup> In *Paff*, the Complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the Custodian. Specifically, the Council did not uphold the basis for the redactions cited by the Custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the Custodian's denial to portions of the executive session minutes but for reasons other than those cited by the Custodian. The Complainant argued that the GRC did not have the authority to do anything other than determine whether the Custodian's cited basis for denial was lawful. The court held that:

"[t]he GRC has an independent obligation to 'render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA...The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

The court further stated that:

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<sup>6</sup> On appeal from *Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29 (March 2006).  
Christopher Cicero v. New Jersey Department of Children & Family Services, Division of Child Behavioral Health Services, 2009-201 – Findings and Recommendations of the Executive Director

“[a]side from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. Of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff’d, 24 N.J. 139 (1957).”

In the instant complaint, the Complainant sought access to medical records from DYFS and medical records compiled during the Complainant’s stay in foster care. Executive Order No. 26 paragraph 4.b.1 (McGreevey 2002) specifically exempts “information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation” from public access under OPRA as follows:

“The following records shall not be considered to be government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

- a. [...]
  - b. Information concerning individuals as follows:
    1. Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;
- ...” Executive Order No. 26 paragraph 4.b.1 (McGreevey 2002).

In Hamilton v. NJ Department of Corrections, GRC Complaint No. 2007-196 (March 2008), the requestor sought access to records from the Medical Department regarding the implants in [Complainant’s] gums. The Council stated that:

“[i]n Kamau v. NJ Department of Corrections, GRC Complaint No. 2004-175 (February 2005), the Complainant requested medical records relating to his treatment by Correctional Medical Services. The Council dismissed the complaint “on the basis that the records requested are not disclosable under N.J.S.A. 47:1A-9 pursuant to Executive Order 26 as they are medical records.” The Council reached a similar conclusion in Caban v. NJ Department of Corrections, GRC Complaint No. 2004-174 (March 2005).”

As such, the Council concluded in Hamilton, *supra*, that:

“[b]ecause the requested records relating to the Complainant’s dental implants are medical records, the requested dental records are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey 2002), Kamau v. NJ Department of Corrections, GRC Complaint No. 2004-175 (February 2005), and Caban v. NJ Department of

Corrections, GRC Complaint No. 2004-174 (March 2005). As such, the Custodian has borne the burden of proving a lawful denial of access to item [No.] 1 of the Complainant's request pursuant to N.J.S.A. 47:1A-6."

This complaint is similar to Hamilton in that the Complainants in both complaints requested their own medical records. As in Hamilton, the requested records in the matter before the Council are medical records which are exempt from the definition of a government record under OPRA and are therefore not disclosable.

Therefore, the requested medical records from DYFS and medical records compiled during the Complainant's stay in foster care are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. and Executive Order No. 26, paragraph 4.b.1 (McGreevey 2002) as "information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation." As such, the Custodian lawfully denied access to said records, despite the fact that the Custodian raised a different exemption to the records requested. See Hamilton, *supra*, Kamau, *supra*, and Caban, *supra*.

Finally, the GRC notes that N.J.S.A. 47:1A-2.2. provides that "where it shall appear that a person who is convicted of any indictable offense...is seeking government records containing personal information pertaining to the person's victim or the victim's family...shall be denied." Additionally, N.J.S.A. 47:1A-10 provides that an individual may obtain personnel or pension records when authorized by an individual in interest. In Hewitt v. Borough of Longport Police Department, GRC Complaint No. 2004-148 (March 2005), the GRC establishes that: "

"N.J.S.A. 47:1A-10 is a codified version of Executive Order 11 (1974) and has been applied and understood that only individuals who have access to personnel and pension records are specific public officials and the person who is the subject of the personnel file. An "*individual in interest*" is to mean the *person who is the subject of the personnel file*, furthermore, that person may accept to waive their privacy right and authorize the disclosure of their personnel records. In considering N.J.S.A. 47:1A-10 in its entirety, the term "individual" refers to the person who is the subject of the personnel or pension record."

Apart from the two (2) provisions listed above which give effect to a requestor's identity with regard to an OPRA request, OPRA contains no specific provision regarding the relevancy of an individual's identity with regard to a request for records. Based on the foregoing, while the GRC acknowledges that the Complainant is attempting to obtain his own medical records from DCBHS, the identity of a requestor is not a consideration when deciding whether an exemption to disclosure applies to a government record requested pursuant to OPRA except for those specific provisions set forth at N.J.S.A. 47:1A-2.2. and N.J.S.A. 47:1A-10.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The requested medical records from New Jersey Department of Youth and Family Services and medical records compiled during the Complainant's stay in foster care are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-9.a. and Executive Order No. 26, paragraph 4.b.1 (McGreevey 2002) as "information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation." As such, the Custodian lawfully denied access to said records, despite the fact that the Custodian raised a different exemption to the records requested. *See* Hamilton v. NJ Department of Corrections, GRC Complaint No. 2007-196 (March 2008), Kamau v. NJ Department of Corrections, GRC Complaint No. 2004-175 (February 2005), and Caban v. NJ Department of Corrections, GRC Complaint No. 2004-174 (March 2005).
  
2. While the GRC acknowledges that the Complainant is attempting to obtain his own medical records from Division of Child Behavioral Health Services, the identity of a requestor is not a consideration when deciding whether an exemption to disclosure applies to a government record requested pursuant to OPRA except for those specific provisions set forth at N.J.S.A. 47:1A-2.2. and N.J.S.A. 47:1A-10.

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August 17, 2010