



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

Francis LoBosco
Complainant

Complaint No. 2010-64

v.

NJ Department of Health and Human Services,
Division of Certificate of Need & Healthcare Facility Licensure
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 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 Custodian has lawfully denied access to the requested “Serious Preventable Adverse Events” report because said report is expressly exempt from the definition of a public record pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 26:2H-12.25(f).
2. The GRC has no authority over the accuracy of records or whether records were filed in accordance with existing guidelines pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004); and Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).

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: November 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Francis LoBosco¹
Complainant**

GRC Complaint No. 2010-64

v.

**New Jersey Department of Health and Human Services,
Division of Certificate of Need & Healthcare Facility Licensure²
Custodian of Records**

Records Relevant to Complaint: Copy of the “Serious Preventable Adverse Event” report submitted to the New Jersey Department of Health and Human Services (“Department”) related to the wrongful death action entitled Estate of Mark Daniel Zeigler, by its executrix, Mary Zeigler v. Somerset Medical Center, Docket No. Som-L-692-08 (Somerset County).

Request Made: December 10, 2009

Response Made: December 21, 2009

Custodian: Michele Maiello

GRC Complaint Filed: April 6, 2010³

Background

December 10, 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.

December 21, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested record is denied pursuant to the Patient Safety Act (“PSA”), which provides that:

“[a]ny documents, materials or information received by the department, or the Department of Human Services, as applicable, pursuant to the provisions of subsections c. and e. of this section concerning serious preventable adverse events, near-misses, preventable events and adverse

¹ No legal representation listed on record.

² Represented by DAG Michael Kennedy, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

events that are otherwise not subject to mandatory reporting pursuant to subsection c. ... shall not be:

- (1) subject to discovery or admissible as evidence or otherwise disclosed in an civil, criminal or administrative action or proceeding;
- (2) *considered a public record under [OPRA]...*
- (3) used in an adverse employment action (etc.)” (Emphasis added.)
N.J.S.A. 26:2H-12.25(f).

April 6, 2010

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching Exhibit A through Exhibit H.⁴

The Complainant states that this action arises from a denial of access to a report defined in the New Jersey Patient Safety Act (“PSA”) as a “Serious Preventable Adverse Event” report. N.J.S.A. 26:2H-12.25. The Complainant states that this report relates to a patient’s fall on April 29, 2006 at the Somerset Medical Center (“SMC”) that resulted in death and a subsequent wrongful death action.

The Complainant states that on April 16, 2006 the patient was admitted to SMC with orders that indicated that the patient was a fall risk. The Complainant states that the last physician’s activity order documented on April 28, 2006 directed that the patient should not be out of bed without assistance. The Complainant states that on April 29, 2006, the patient fell in his hospital room while unattended, causing severe head trauma and soon thereafter death.⁵

The Complainant states that during the discovery process attendant upon the litigation which has been commenced as a result of the patient’s death, the Complainant believes that conflicting information has been given regarding the circumstances of the patient’s death. The Complainant states that, because of this conflicting information, on December 10, 2009, he sought access to the requested report which was submitted to the Department. The Complainant states that the Custodian denied access to the requested record on December 21, 2009, citing to N.J.S.A. 26:2H-12.25(f) of the PSA.

The Complainant contends that the Custodian’s denial of access is based on an incomplete reading of the PSA. The Complainant contends that the PSA actually excludes from confidentiality mandatory reports of a “serious preventable adverse event,” which is the record at issue in this complaint. The Complainant contends that this position is consistent with the plain language rule of statutory interpretation, providing that the plain meaning of the language of a statute as written governs its interpretation. The Complainant asserts that upholding the Custodian’s denial of access in the face of

⁴ The Complainant’s exhibits relate directly to Zeigler. The Complainant did not attach any documents relevant to the filing of this OPRA request, *i.e.*, a copy of the OPRA request or the Custodian’s response. The two (2) aforementioned documents were subsequently obtained from the Complainant on August 5, 2010.

⁵ The GRC acknowledges that the Complainant includes a detailed account of the incident that led to the patient’s death; however, the GRC sets forth only those details relevant to issues of access under OPRA. Francis LoBosco v. New Jersey Department of Health and Human Services, Division of Certificate of Need & Healthcare Facility Licensure, 2010-64 – Findings and Recommendations of the Executive Director 2

unequivocal language providing otherwise would contravene the aforementioned rules of statutory interpretation.

The Complainant states that the PSA defines a “serious preventable adverse event” as “... an adverse event that is a preventable event and results in death or loss of a body part, or disability or loss of bodily function lasting more than seven (7) days or still present at the time of discharge from a health care facility.” N.J.S.A. 26:2H-12.25(a).

The Complainant further states that the PSA provides that mandatory reporting requires that:

“[a] health care facility *shall* report to the Department ... in a form and manner established by the commissioner, *every serious preventable adverse event that occurs in that facility.*” (Emphasis added.) N.J.S.A. 26:2H-12.25(c).

The Complainant states that the Custodian denied access to the requested records pursuant to the following:

“[a]ny documents, materials or information received by the department, or the Department of Human Services, as applicable, pursuant to the provisions of subsections c. and e. of this section concerning serious preventable adverse events *that are otherwise not subject to mandatory reporting pursuant to subsection c. ... shall not be:*

- (1) subject to discovery or admissible as evidence or otherwise disclosed in an civil, criminal or administrative action or proceeding;
- (2) considered a public record under [OPRA]...” (Emphasis added.) N.J.S.A. 26:2H-12.25(f).

The Complainant argues that based on the foregoing statutory language, the mandatory report of a “Serious Preventable Adverse Event” incident at a medical facility that resulted in death should be disclosed because it is not afforded confidentiality by the PSA.

The Complainant states that primary among the rules of statutory construction is the plain language canon: the language of a statute as it is written governs. Perez v. Pantasote, Inc., 95 N.J. 105, 114 (1984). The Complainant avers that when the language employed in a statute provides its meaning, no further search is necessary or generally appropriate in the absence of ambiguity in the language. Sheeran v. Nationwide Mutual Ins. Co. Inc., 80 N.J. 548, 556 (1979); Watt v. Mayor and Council of Franklin, 21 N.J. 274, 277 (1956). *See also* Bravand v. Neeld, 35 N.J. Super. 42 (App. Div. 1955)(holding that if the language of a statute is clear, a court may not ignore it in its construction process).

The Complainant states that the New Jersey Supreme Court provided guidance on statutory interpretation in Patel v. New Jersey Motor Vehicle Commission, 200 N.J. 418-19 (2009):

“As this appeal involves the interpretation of a statute, ‘our goal is to discern and effectuate the Legislature’s intent.’ State v. Brannon, 178 N.J. 500, 505, 842 A.2d 148 (2004) (2004). The plain language of the statute is our starting point. See State v. Lewis, 185 N.J. 363, 369, 886 A.2d 643 (2005) (citing State v. Ivory, 124 N.J. 582, 585, 592 A.2d 205 (1991)). We apply to the statutory terms the generally accepted meaning of the words used by the Legislature, *see* D’Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 119, 927 A.2d 113 (2007)(citing DiProspero v. Penn., 183 N.J. 477, 492, 874 A.2d 1039 (2005)), and strive ‘to give effect to every word.’ Med. Soc’y of N.J. v. N.J. Dep’t of Law & Pub. Safety, 120 N.J. 18, 26, 575 A.2d 1348 (1990). Because we do not assume that the Legislature used any unnecessary or meaningless language, *see id.* at 26-27, 575 A.2d 1348, we read a statute in its entirety and construe ‘each part or section ... in connection with every other part or section to provide a harmonious whole.’ Bedford v. Riello, 195 N.J. 210, 224, 948 A.2d 1272 (2008)(citing In re Distrib. of Liquid Assets, 168 N.J. 1, 17-18, 773 A.2d 6 (2001); State v. Brown, 22 N.J. 405, 415-16, 126 A.2d 161 (1956)) ... However ‘if there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, including legislative history, committee reports, and contemporaneous construction,’ for further assistance in our interpretative task. DiProspero, *supra*, 183 N.J. at 492-93, 874 A.2d 1039 (citation and internal quotation marks omitted).”

The Complainant argues that based on the clear and unambiguous statutory language, the record currently at issue is not one which is afforded confidentiality under the PSA and should be disclosed.

Moreover, the Complainant argues that the injury designation reported to the Department in the requested report is inaccurate and misleading if it is the same designation reported in the incident report. The Complainant contends that accurate information being reported should be a conditional precedent to any protection afforded by the PSA. Counsel argues that any statutory protection from disclosure is premised on the expectation that accurate information is being reported for its use by the Department in reports compiled and made available to the public. The Complainant further argues that affording protection to a report that contains inaccurate information would not further the purpose of the exemption afforded under the PSA.

Additionally, the Complainant asserts that the event report was due from the SMC no later than May 4, 2006 (or five (5) days after the fall on April 29, 2006) and the root cause analysis was due no later than June 19, 2006 (or forty-five (45) days after the initial event report). *See* Chapter 1, page 1, Section entitled Mandatory Reporting Process and Time Lines, of Interim Mandatory Patient Safety reporting Requirements for General Hospitals, dated December 6, 2004.⁶ The Complainant alleges that if the deadlines were not met, then there would be a lack of procedural compliance with the

⁶ <http://www.state.nj.us/health/ps/documents/irr.pdf>.

statute, which would be a condition precedent, the failure of which would warrant disclosure.⁷

The Complainant does not agree to mediate this complaint.

April 26, 2010

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

April 27, 2010

E-mail from the Custodian’s Counsel to the GRC. Counsel requests an extension of five (5) business days to submit the requested SOI.

April 27, 2010

E-mail from the GRC to the Custodian’s Counsel. The GRC grants an extension until May 10, 2010 to submit the requested SOI.

May 7, 2010

Custodian’s SOI with the following attachments:

- Copy of a “Request of Serious Preventable Adverse Event in a New Jersey Licensed Health Care Facility” form.
- Copy of a “Request of Serious Preventable Adverse Event in a New Jersey Licensed Health Care Facility: Root Cause Analysis” (“RCA”) form.⁸

The Custodian certifies that she received the Complainant’s OPRA request on December 10, 2009. The Custodian certifies that the Complainant’s OPRA request sought an RCA report regarding an incident that occurred at the SMC on April 26, 2006. The Custodian certifies that this report is required to be submitted to the Department pursuant to N.J.S.A. 26:2H-12.25(c). The Custodian certifies that she responded in writing on December 21, 2009 denying access to the requested record pursuant the PSA.

The Custodian argues that the requested record, detailing an event that occurred at the SMC on April 26, 2006 which resulted in the death of a patient, meets the definition of a “serious preventable adverse event” as defined under the PSA because it was an

⁷ The Complainant also argues that the record should be viewed within the scope of the self-critical analysis privilege, which was first addressed in Wylie v. Mills, 195 N.J. Super. 332, 338, 478 A.2d 1273 (Law Div. 1984). The Complainant states that the standard determining whether the need for confidentiality outweighs the public interest is “(1) the extent to which the information may be available from other sources, (2) the degree of harm that the litigant will suffer from its unavailability, and (3) the possible prejudice to the agency’s investigation.” Reyes v. Meadowlands Hosp. Med. Ctr., 809 A.2d 875, 882, 355 N.J. Super. 226 (Law Div. 2001). The Complainant argues that all three (3) factors weigh in favor of disclosure. The GRC notes that the self-critical privilege was never raised by the Department as a reason for denying access to the requested report and no present exemption for same exists within OPRA. Based on the foregoing, there is no need for the GRC to conduct a balancing test in this complaint.

⁸ The Custodian did not certify to the search undertaken to satisfy the Complainant’s OPRA request. Further, the Custodian did not certify to whether the record responsive to the request was destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”). However, the evidence of record suggests that the requested report has been located and was not destroyed.

“adverse event that [is] preventable and resulted in death...” N.J.S.A. 26:2H-12.25(a). The Custodian avers that the SMC was required to report this event to the Department pursuant to N.J.S.A. 26:2H-12.25(c), which provides that “a health care facility shall report to the Department ... in a form and manner established by the commissioner, every serious preventable adverse event that occurs in that facility.” The Custodian contends that the Department’s denial of the Complainant’s request was supported by law pursuant to the PSA, which provides that:

“[a]ny documents, materials or information received by the department, or the Department of Human Services, as applicable, pursuant to the provisions of subsections c. and e. of this section concerning serious preventable adverse events, near-misses, preventable events and adverse events *that are otherwise not subject to mandatory reporting pursuant to subsection c. ... shall not be:*

(2) considered a public record under [OPRA]...” (Emphasis added.)
N.J.S.A. 26:2H-12.25(f).

The Custodian argues that the language of the statute is clear: “[i]f the statute is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than the act’s literal terms to divine the Legislature’s intent.” State v. Butler, 89 N.J. 220, 226 (1982). The Custodian asserts that only if the statute is not clear and unambiguous that “we consider the sources other than the literal words of the statute to guide our interpretative task ... such as the statute’s purpose, legislative history, and statutory context to ascertain the legislature’s intent.” Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 323 (2000), quoting Township of Pennsauken v. Schad, 160 N.J. 156, 170 (1999). The Custodian contends that because the language of the statute is clear, it should not be subjected to anything other than the literal interpretation of its language. The Custodian notes that the Department has prepared forms in accordance with N.J.S.A. 26:2H-12.25(c) for use by facilities when reporting an incident and its “root cause analysis.” The Custodian notes that these forms, provided as part of the SOI, contain a disclaimer that all information on the forms will remain confidential pursuant to N.J.S.A. 26:2H-12.25(f).

The Custodian asserts that because N.J.S.A. 26:2H-12.25(f) exempts from disclosure under OPRA mandatory and voluntary reports submitted to the Department (as required under N.J.S.A. 26:2H-12.25(c)), the Department lawfully denied access to the requested record.

May 5, 2010

The SMC’s request to intervene. Counsel for the SMC states that the SMC, the author of the record at issue, was recently notified of this complaint. Counsel states that it is the position of the SMC that the requested record is exempt under OPRA pursuant to N.J.S.A. 26:2H-12.25(f).

Counsel requests that the SMC be permitted to intervene in these proceedings to protect the interests of the SMC. Counsel requests that she be given until May 11, 2010 to submit opposition papers.

May 7, 2010

E-mail from the GRC to the SMC. The GRC grants the SMC's request to intervene⁹ and confirms that opposition papers may be submitted no later than May 11, 2010.

May 11, 2010

Letter brief from Counsel for the SMC. Counsel states that the Complainant has filed a Denial of Access Complaint in the interest of compelling disclosure of a report made by the SMC to the Department pursuant to the PSA and corresponding regulation at *N.J.A.C. 8:43E-10.6*. Counsel states that the PSA mandates disclosure of certain "serious preventable adverse events" to the Department:

"A health care facility shall report to the department or, in the case of a State psychiatric hospital, to the Department of Human Services, in a form and manner established by the commissioner, every serious preventable adverse event that occurs in that facility." N.J.S.A.26:2H-12.25(c).

Counsel states that the PSA also provides for voluntary disclosure of "adverse events" that do not meet the standard of a "serious preventable adverse event." *See N.J.S.A. 26:2H-12.25(e)*. Counsel argues that regardless of whether a report is made pursuant to N.J.S.A. 26:2H-12.25(c)(concerning serious preventable adverse events) or N.J.S.A. 26:2H-12.25(e)(concerning near-misses, preventable events and adverse events), it is clearly protected from disclosure by the PSA:

"[a]ny documents, materials or information received by the department, or the Department of Human Services, as applicable, pursuant to the provisions of subsections c. and e. of this section concerning serious preventable adverse events, near-misses, preventable events and adverse events *that are otherwise not subject to mandatory reporting pursuant to subsection c. ... shall not be:*

(2) considered a public record under [OPRA]..." (Emphasis added.) N.J.S.A. 26:2H-12.25(f).

Counsel states that Department's regulations provide that:

"[d]ocuments, materials, and information received by the Department or the Department of Human Services, as applicable, in accordance with *N.J.A.C. 8:43E-10.6* and *N.J.A.C. 8:43E-10.8 shall not be ... considered a public record under [OPRA]...*" (Emphasis added.) *N.J.A.C. 8:43E-10.9(a)(2)*.

Counsel states that the Legislature enacted the PSA after conducting extensive hearings on the policy implications and requirements of the PSA. *See Patient Health and*

⁹ The precedent for acceptance of intervenors in the GRC adjudication process was set in Gill v. New Jersey Department of Banking & Insurance, GRC Complaint No. 2007-189 (May 2009).
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Safety Act: Hearings on S. 577 Before S. Comm. On Health, Human Services and Senior Citizens (“Patient Safety Act Hearings”), 210th Leg. (N.J. 2004). Counsel states that the Legislature specifically considered the confidentiality of the reports made pursuant to the PSA, which serves to exemplify the Legislature’s recognition of the significant policy implications of the requirement. Counsel states that during the hearings, Commissioner Clifton R. Lacy, M.D. (“Commissioner”), testified that the goal of the PSA was to “change the punitive environment to one that creates a culture of safety, and encourages and enhances the sharing and the self-report and the self-disclosure of errors,” to determine the root cause of those errors and prevent their reoccurrence. Counsel states that although the Commissioner noted that the reports would continue to be subject to requests under discovery, the PSA would protect the report and the self-critical analysis underlying same. Counsel states that the Commissioner noted that significant under-reporting of medical errors attributable to a punitive system and testified that the shielding of reports under the PSA is a, “key element in promoting disclosure of errors and thorough analyses that lead to the determination of root causes” and that “[t]he focus on who did wrong rather than why things go wrong is a major obstacle to patient safety. Health care professionals need to be able to safely engage in a full and free exchange of information to truly make patients safer.” See Patient Health and Safety Act: Hearing.

Counsel states that the Legislature clearly recognized the importance of the provision in the PSA exempting from access reports made pursuant to said act:

“a. Adverse events, some of which are the result of preventable errors, are inherent in all systems, and the health care literature demonstrates that the great majority of medical errors result from systems problems, not individual incompetence...

e. To encourage disclosure of these events so that they can be analyzed and used for improvement, it is critical to create a non-punitive culture that focuses on improving processes rather than assigning blame. Health care facilities and professionals must be held accountable for serious preventable adverse events; however, punitive environments are not particularly effective in promoting accountability and increasing patient safety, and may be a deterrent to the exchange of information required to reduce the opportunity for errors to occur in the complex systems of care delivery. Fear of sanctions induces health care professionals and organizations to be silent about adverse events, resulting in serious under-reporting; and

f. By establishing an environment that both mandates the *confidential disclosure* of the most serious, preventable adverse events, and also encourages the *voluntary, anonymous and confidential disclosure* of less serious adverse events, as well as preventable events and near-misses, the State seeks to increase the amount of information on systems failures, analyze the sources of these failures and disseminate information on effective practices for reducing systems failures and improving the safety of patients.” (Emphasis added.) N.J.S.A. 26:2H-12.24.

In conclusion, Counsel argues that any documents submitted to the Department pursuant to N.J.S.A. 26:2H-12.25(c) and/or N.J.S.A. 26:2H-12.25(e) are protected from disclosure and exempted from disclosure under OPRA pursuant to N.J.S.A. 26:2H-12.25(f). Counsel requests that the GRC uphold the Custodian's denial of access to the requested report.

May 19, 2010

New Jersey Hospital Association's ("NJHA") request to intervene. Counsel for the NJHA requests to be permitted to participate as *amicus curiae* in the instant complaint. Counsel states that the NJHA represents seventy-three (73) acute care hospitals (including the SMC) and numerous other healthcare providers throughout New Jersey and was instrumental in helping craft the PSA to include the disclosure safeguards set forth in N.J.S.A. 26:2H-12.25(f). Counsel states that the NJHA is thus intimately familiar with the implementation of the reporting system created by the PSA and the crucial importance of the safeguards contained therein. Counsel requests that the GRC advise whether the request is approved and, if so, provide a due date for the NJHA's legal brief.¹⁰

May 20, 2010

E-mail from the GRC to Counsel for the NJHA. The GRC grants the NJHA's request to intervene¹¹ and confirms that Counsel's legal brief may be submitted no later than May 26, 2010.

May 26, 2010

Letter brief from Counsel for the NJHA. Counsel states that the NJHA has been New Jersey's premier healthcare association since its inception in 1918. Counsel states that membership included hospitals, home healthcare, hospice care, etc., which work with the NJHA to promote a common interest in providing quality, accessible and affordable healthcare to New Jersey communities. Counsel states that in furtherance of NJHA's mission of improving community health and accessible, affordable and quality healthcare, the NJHA participates in development of state policy, fosters public understanding of healthcare issues, and undertakes pilot programs designed to improve clinical outcomes and enhance patient safety. Counsel states that the NJHA, through its Institute on Quality and Patient Safety ("Institute"), has also been a leading force in the patient safety movement.¹²

Counsel states that the NJHA and the Institute were deeply involved in the legislative process that led to the enactment of the PSA and have since been intimately

¹⁰ Counsel initially contacted the GRC on May 12, 2010; however, Counsel recalled this message that same day. The Complainant sent an e-mail to the GRC on May 13, 2010 requesting that he be allowed to respond to the intervenors' submissions and proceeded to set forth four (4) questions regarding accuracy and content of the requested report. The Complainant later noted that he received the recall message. On May 19, 2010, the GRC e-mailed Counsel for the NJHA requesting that Counsel confirm whether he still intends to request to intervene in this matter. This communication is a culmination of the foregoing interaction.

¹¹ See FN No. 7.

¹² Counsel notes that the Institute was recently certified as a federal Patient Safety Organization pursuant to the provisions of the Patient Safety and Quality Improvement Act of 2005, Pub. L. 1090-41, 42 U.S.C. 299b-21-b-26.

involved in its implementation, including providing extensive input on the regulations promulgated shortly after the PSA's enactment.

Counsel avers that based on the foregoing, the NJHA is in a unique position to comment on the importance to the overall structure and success of the PSA through the absolute exemptions from disclosure (under OPRA) of mandatory reports by hospitals of "serious preventable adverse events" made to the Department.

Counsel states that the instant complaint arises out of a medical malpractice action currently pending in New Jersey Superior Court against the SMC relating to the death of a patient for which the Complainant is serving as counsel to plaintiff. Counsel states that despite the fact that the Complainant has already received extensive material through discovery, he filed an OPRA request to the Department seeking the report at issue.

Counsel states that under the PSA, hospitals are required to report occurrences of "serious preventable adverse" events to the Department. N.J.S.A. 26:2H-12.25(c). Counsel states that the Custodian denied access to the Complainant's OPRA request on December 21, 2009, citing that the PSA exempts access to the requested report pursuant to N.J.S.A. 26:2H-12.25(f). Counsel states that the Complainant filed a Denial of Access Complaint on April 6, 2010, or more than four (4) months after the Custodian's denial.¹³

Counsel argues that the Complainant not only misinterpreted the PSA's exemption to the requested report, but the Complainant has misquoted it. Counsel states that in the Denial of Access complaint, the Complainant states that:

"The pertinent provision involved in subsection [N.J.S.A. 26:2H-12.25(f)], which provides as follows:

'[a]ny documents, materials or information received by the department, or the Department of Human Services, as applicable, pursuant to the provisions of subsections c. and e. of this section concerning serious preventable adverse events *that are otherwise not subject to mandatory reporting pursuant to subsection c. ... shall not be:*

(2) considered a public record under [OPRA]...' (Emphasis added.) *See* Denial of Access complaint letter brief pg. 5.

Counsel avers that the bulk of the remainder of the Complainant's argument contends that, under the plain language canon of statutory construction, the clear and unambiguous language of the PSA, "while offering confidentiality to *many* other types or classifications of reports submitted to the Department, mandatory reporting per

¹³ Counsel notes that although the court in Mason v. City of Hoboken, 196 N.J. 51, 951 A.2d 101 (Supreme Court 2008) held that a 45 day statute of limitation applies to actions brought in Superior Court to challenge a denial of access, NJHA submits that the limitation should also apply to actions brought before the Council. However, the court's holding in regards to this issue specifically applied only to Superior Court and there is no provision within OPRA allowing for the imposition of a statute of limitation. Francis LoBosco v. New Jersey Department of Health and Human Services, Division of Certificate of Need & Healthcare Facility Licensure, 2010-64 – Findings and Recommendations of the Executive Director

Subsection C of a ‘serious preventable adverse event’ is not one of them per the statutory text.” See Denial of Access Complaint letter brief at pg. 7.

Counsel contends that in misquoting the statute and making this argument, the Complainant is misleading the GRC into thinking that there are two (2) classes of the “Serious Preventable Adverse Event” reports under the PSA: those for which reporting is mandatory (for which the PSA’s OPRA exemption does not apply) and those for which reporting is optional (for which the PSA’s OPRA exemption does apply). Counsel argues that this summation is simply not correct: there is only one category of “Serious Preventable Adverse Event” reports, all must be reported to the Department and none of them are public records under OPRA.

Counsel states that the full text of N.J.S.A. 26:2H-12.25(f) provides as follows:

“[a]ny documents, materials or information received by the department, or the Department of Human Services, as applicable, pursuant to the provisions of subsections c. and e. of this section *concerning serious preventable adverse events, near-misses, preventable events and adverse events that are otherwise not subject to mandatory reporting pursuant to subsection c.* ... shall not be:

(2) considered a public record under [OPRA]...” (Emphasis added.)
N.J.S.A. 26:2H-12.25(f).

Counsel argues that as correctly quoted above, the “clear and unambiguous language” of the PSA means exactly the opposite of what the Complainant says it means: all of the reports of serious preventable adverse events and all non-mandatory reports of near misses, preventable events and adverse events are not to be considered public records under OPRA. Counsel argues that the phrase “not otherwise subject to mandatory reporting pursuant to subsection c.” does not modify “serious preventable adverse events” (all of which are subject to mandatory reporting under the PSA), as the Complainant argues, but rather modifies the terms “near misses, preventable events and adverse events,” which are not subject to mandatory reporting.¹⁴

Counsel contends that the above reading of the OPRA exemption not only makes logical and grammatical sense, but is supported by the plain language and structure of the full PSA and extensive legislative history. Counsel avers that as an example, the Legislative findings set forth N.J.S.A. 26:2H-12.24 state that “[a]n important component of a successful patient safety strategy is a feedback mechanism that allows detection and analysis not only of adverse events, but also of ‘near-misses.’” Counsel states that to the end of encouraging disclosure of these events, the Legislature found that “it is critical to create a non-punitive culture that focuses on improving process rather than assigning blame.” Counsel further states that in passing the PSA, the Legislature was intent on “establishing an environment that both mandates the *confidential* disclosure of the most

¹⁴ Counsel notes that the Department’s regulations, which implement the PSA underscore that the exemption applies to mandatory reports of “serious preventable adverse events,” as well as volunteer reports of any less severe events. See *N.J.A.C. 8:43E-10.9*.
Francis LoBosco v. New Jersey Department of Health and Human Services, Division of Certificate of Need & Healthcare Facility Licensure, 2010-64 – Findings and Recommendations of the Executive Director

serious, preventable adverse events, and also encourages the voluntary, anonymous and *confidential* disclosure of less serious events, as well as preventable events and near misses.” (Emphasis added.) N.J.S.A. 26:2H-12.24(e) and (f). Counsel states that N.J.S.A. 26:2H-12.25(f) implements the Legislature’s intent that confidentiality applies to reports both of serious preventable adverse events and of “less serious events” by categorically exempting both from discovery or introduction into evidence in judicial or administrative proceedings, and from disclosure through OPRA.”¹⁵

Counsel avers that to a similar effect are the Committee statements that accompanied the “substitute” or final versions of the bill passed by Senate and Assembly. Counsel states that the Assembly Health and Human Services Committee (“Assembly Committee”) wrote that “the substitute establishes a system that requires *confidential disclosure to the [Department] ... of the most serious preventable adverse events*, and also encourages voluntary, anonymous and confidential disclosure to [the Department] of less serious adverse events, as well as near-misses.” (Emphasis added.) Assembly Health and Human Services Committee Statement to Senate Committee Substitute for Senate, No. 557 (March 4, 2004) at 1. Counsel states that in order to implement the requirement of confidentiality, “the substitute provides that *any documents, materials or information received by [the Department] ... concerning serious preventable adverse events, near-misses, preventable events and adverse events that are otherwise not subject to mandatory reporting, will not be ... considered a public record under N.J.S.A. 47:1A-1 et seq. or N.J.S.A. 47:1A-5 et al.*” (Emphasis added.) *Id.* at 2-3. Counsel states that the Senate Health, Human Services and Senior Citizens Committee (“Senate Committee”) Statement to the substitute bill used language identical to that of the Assembly Committee Statement. See Senate Health, Human Services and Senior Citizens Committee Statement to Senate Committee Substitute for Senate, No. 557 (January 26, 2004 at 1, 2-3).

Counsel argues that beyond the Complainant’s misinterpretation of the plain language of the PSA, the Complainant attempts to add additional requirements that exist nowhere in the PSA or in its legislative history. Counsel states that the Complainant contends that “accurate information being reported should be a condition precedent to any protection afforded by the statute.” See Denial of Access complaint letter brief at pg. 8. Counsel avers that the statute contains no such condition. Moreover, Counsel states that the Complainant alleges that the initial report and root cause analysis report may have been filed beyond the deadlines set forth by regulations and that “if these deadlines were not adhered to, then there would be a lack of procedural compliance with the statute, which should be a condition precedent, the failure of which would warrant disclosing the report.” *Id.* Counsel avers that the PSA OPRA exemption protects all reports, regardless of whether they were timely filed or not.¹⁶

Counsel asserts that based on the foregoing arguments, the Department correctly denied access to the requested report pursuant to the PSA. Counsel argues that the plain

¹⁵ Counsel notes that the Federal Patient Safety Act, 42 U.S.C. 299b-22(a)(3) likewise provides a categorical exemption comparable to the exemptions afforded in the PSA.

¹⁶ Counsel notes that an exclusive sanction for failure to submit a serious preventable adverse event report to the Department is outlined in *N.J.A.C. 8:43E-3.4(a)(14)*.

language of the statute, supported by its legislative history, provides a lawful basis for the Department's denial. Counsel respectfully urges the Council to affirm the denial of access.¹⁷

June 1, 2010

E-mail from the Complainant to the GRC. The Complainant requests that he be given an opportunity to submit a response to the intervenors' submissions.

June 2, 2010

E-mail from the GRC to the Complainant. The GRC states that the Complainant may submit a response to the intervenors' submissions.

June 11, 2010

The Complainant's response to the intervenors' submissions. The Complainant states that the opposition has rightly indicated that he failed to include the excerpt "... near-misses, preventable events and adverse events ..." in the quotation of N.J.S.A. 26:2H-12.25(f). The Complainant states that an ellipsis should have been indicated; however, same was inadvertently omitted and was subsequently omitted from the text. The Complainant alleges that if the opposition interprets the excerpt "... that are otherwise not subject to mandatory reporting pursuant to subsection c. of this section ..." as qualifying the missing excerpt, the opposition's interpretation is reasonable given that the same language is used in subsection e. The Complainant asserts that if the full language in the relevant text is as clear and unambiguous as the opposition interprets it to be, there would be no need to resort to legislative history per the plain language canon of statutory construction. The Complainant argues that the opposition undermines its own position by including extensive legislative history as part of its argument.

The Complainant asserts that truthful and accurate reporting is the lynchpin to efficacy of the PSA. The Complainant contends that the opposition's position on accuracy is not credible. The Complainant argues that if events and reporting processes are not accurate, the information compiled and made available to the public would put at a disadvantage those making choices about healthcare providers. *See Patient Safety Reporting System: 2008 Report*. The Complainant reiterates that accuracy and truthfulness should be a conditional precedent to any asserted confidential protection afforded by the PSA. The Complainant argues that to this end, the position that no such "requirements ... exist ... in the [PSA], or in its legislative history" discredits the movement for patient safety and offends logic and common sense.¹⁸

The Complainant argues that the estate of the patient is seeking to obtain medical information leading to the truth regarding the patient's medical care, treatment, fall and death. The Complainant asserts that the family is entitled to access such information

¹⁷ Counsel also provides an argument to refute the Complainant's allegations that an employment of the self-critical privilege standard would compel disclosure. Counsel argued that even if the Council were to employ the balancing test in this complaint and decide in favor of the disclosure, the Complainant would still not be able to use the requested record as part of the suit against SMC pursuant to N.J.S.A. 26:2H-12.25(f).

¹⁸ The Complainant points out several instances in which he believes the requested report contains inaccurate information.

pursuant to the New Jersey Hospital Bill of Rights Act. N.J.S.A. 26:2H-12.7 to N.J.S.A. 26:2H-12.11. The Complainant asserts that the Bill of Rights grants the patient broad rights as the SMC's patient. N.J.S.A. 26:2H-12.8. The Complainant avers that included among those rights are the rights to access information with respect to the patient's care, treatment, diagnosis, prognosis, whether sound nursing and medical practices were followed, informed consent, as well as the right to obtain his medical records in this matter. N.J.S.A. 26:2H-12.8. The Complainant avers that when a patient is unable to make a request for information, the Bill of Rights authorizes a designated person (here, the estate) to do so. N.J.S.A. 26:2H-12.8(c). The Complainant argues that the opposition does not address the Bill of Rights and merely assumes that a select confidentiality provision within the PSA should override the broad statutory right granted the patient to access medical records and information.

Moreover, the Complainant asserts that the estate is not seeking to read New Jersey case law into OPRA exemptions because the two are mutually exclusive. The Complainant asserts that the estate is urging that OPRA and the PSA be read together to effectuate their stated purposes. The Complainant asserts that in doing so, the estate urges that the patient's right to know in the circumstances presented outweighs any grant of confidentiality otherwise afforded. The Complainant asserts that the Supreme Court's approach in Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997) should provide a reasonable method of guidance in this complaint. The Complainant argues that Payton allows the confidentiality privilege to be overcome based on meeting a standard of particularized need demonstrated on a case by case basis. The Complainant argues that the estate believes it has satisfied the requisite standard because the information is otherwise not available from another source and the discovery obtained from the SMC is not accurate.

The Complainant asserts that the opposition invokes a blanket exemption over the requested report that is afforded to no other statutory or work product privilege. The Complainant asserts that the opposition does not put any significant weight in whether fundamental requirements were met to establish due compliance with the PSA, nor does it matter whether the information is accurate and complete. The Complainant argues that there is, however, a legal obligation to be met in order to invoke a privilege, even in the context of the attorney-client privilege. *See* N.J. Court Rule 4:10-3(e)(requiring production of a privilege log and pertinent information for the parties to assess whether the privilege or protection is properly invoked). The Complainant asserts that an appropriate log would avoid the guesswork to determine what, if any, of the information at issue should be disclosed.¹⁹

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

¹⁹ The Complainant briefly refutes the NJHA's comparison of the Federal Patient Safety Act, 42 U.S.C. 299b-22(a)(3).

“...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.

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.

The Complainant’s OPRA request in this complaint sought a copy of “the ‘Serious Preventable Adverse Event’ report submitted to the New Jersey Department of Health and Human Services (“Department”) related to the wrongful death action entitled [Zeigler].” The Custodian timely responded denying access to the requested report and citing to the PSA, which provides that:

“[a]ny documents, materials or information received by the department, or the Department of Human Services, as applicable, *pursuant to the provisions of subsections c. and e. of this section concerning serious preventable adverse events, near-misses, preventable events and adverse events that are otherwise not subject to mandatory reporting pursuant to subsection c. ... shall not be:*

- (1) subject to discovery or admissible as evidence or otherwise disclosed in an civil, criminal or administrative action or proceeding;
- (2) *considered a public record under [OPRA]...*” (Emphasis added.) N.J.S.A. 26:2H-12.25(f).

The Complainant filed a Denial of Access Complaint on April 6, 2010, arguing that the Custodian’s denial of access to the requested record was based on an incomplete reading of the PSA. The Complainant argued that the PSA actually excludes from

confidentiality mandatory reports of a “serious preventable adverse event,” and that his position is consistent with the plain language rule of statutory interpretation. The Complainant stated that the PSA provides that mandatory reporting requires that:

“[a] health care facility *shall* report to the Department ... in a form and manner established by the commissioner, *every serious preventable adverse event that occurs in that facility.*” (Emphasis added.) N.J.S.A. 26:2H-12.25(c).

The Complainant stated that the Custodian denied access to the requested records pursuant to the following:

“[a]ny documents, materials or information received by the department, or the Department of Human Services, as applicable, pursuant to the provisions of subsections c. and e. of this section concerning serious preventable adverse events *that are otherwise not subject to mandatory reporting pursuant to subsection c. ... shall not be:*

- (1) subject to discovery or admissible as evidence or otherwise disclosed in an civil, criminal or administrative action or proceeding;
- (2) considered a public record under [OPRA]...” (Emphasis added.) N.J.S.A. 26:2H-12.25(f).

The Complainant argued that based on the foregoing statutory language, the mandatory report of a “Serious Preventable Adverse Event” incident at a medical facility that resulted in death should be disclosed because it is not afforded confidentiality by the PSA. The Complainant asserted that upholding the Custodian’s denial of access in the face of unequivocal language providing otherwise would contravene the aforementioned rules of statutory interpretation.

Further, the Complainant argued that he believed that information within the requested report is inaccurate and misleading. The Complainant contended that accurate information being reported should be a conditional precedent to any protection afforded by the PSA. Counsel argued that any statutory protection from disclosure is premised on the expectation that accurate information is being reported. The Complainant further argued that affording protection to a report that contains inaccurate information would not further the purpose of the exemption afforded under the PSA. The Complainant also contended that if deadlines for filing the requested report were not met, then there would be a lack of procedural compliance with the statute, which would be another condition precedent, the failure of which would warrant disclosure.

In the SOI, the Custodian argued that the Department’s denial of access was lawful based on its reading of N.J.S.A. 26:2H-12.25(f). The Custodian also argued that the language of the statute clearly exempts the requested report from disclosure. The Custodian contended that the forms created by the Department in accordance with N.J.S.A. 26:2H-12.25(c) for use by facilities when reporting an incident contain the

disclaimer that all information on the forms will remain confidential pursuant to N.J.S.A. 26:2H-12.25(f).

Subsequent to the filing of the SOI, the SMC requested to intervene because said entity was the author of the requested report. Based on a prior GRC decision, Gill v. New Jersey Department of Banking & Insurance, GRC Complaint No. 2007-189 (May 2009), the GRC granted the SMC's request to intervene. In the SMC's letter brief, Counsel stated that the PSA mandates disclosure of certain "serious preventable adverse events" to the Department pursuant to N.J.S.A. 26:2H-12.25(c). Further, Counsel stated that the PSA also provides for voluntary disclosure of "adverse events" that do not meet the standard of a "serious preventable adverse event" pursuant to N.J.S.A. 26:2H-12.25(e). Counsel argued that regardless of whether a health care facility has made a report pursuant to either provision, said report is explicitly exempt from disclosure under OPRA. See N.J.S.A. 26:2H-12.25(f).

Moreover, Counsel stated that the Department's regulations provide that:

"[d]ocuments, materials, and information received by the Department or the Department of Human Services, as applicable, in accordance with *N.J.A.C. 8:43E-10.6* and *N.J.A.C. 8:43E-10.8* shall not be ... considered a public record under [OPRA]..." (Emphasis added.) *N.J.A.C. 8:43E-10.9(a)(2)*.

Further, Counsel cited to the Patient Health and Safety Act: Hearings on S. 577 Before S. Comm. On Health, Human Services and Senior Citizens ("Patient Safety Act Hearings"), 210th Leg. (N.J. 2004), which offers additional support for the confidentiality of the requested record. Specifically, Counsel noted that the Legislature clearly recognized the importance of the confidentiality provision of the PSA:

"a. Adverse events, some of which are the result of preventable errors, are inherent in all systems, and the health care literature demonstrates that the great majority of medical errors result from systems problems, not individual incompetence...

e. To encourage disclosure of these events so that they can be analyzed and used for improvement, it is critical to create a non-punitive culture that focuses on improving processes rather than assigning blame. Health care facilities and professionals must be held accountable for serious preventable adverse events; however, punitive environments are not particularly effective in promoting accountability and increasing patient safety, and may be a deterrent to the exchange of information required to reduce the opportunity for errors to occur in the complex systems of care delivery. Fear of sanctions induces health care professionals and organizations to be silent about adverse events, resulting in serious under-reporting; and

f. By establishing an environment that both mandates the *confidential disclosure* of the most serious, preventable adverse events, and also

encourages the *voluntary, anonymous and confidential disclosure* of less serious adverse events, as well as preventable events and near-misses, the State seeks to increase the amount of information on systems failures, analyze the sources of these failures and disseminate information on effective practices for reducing systems failures and improving the safety of patients.” (Emphasis added.) N.J.S.A. 26:2H-12.24.

Following the filing of SMC’s letter brief, the NJHA also requested to intervene and was granted the ability to do so by the GRC. In the NJHA’s letter brief, Counsel stated that the NJHA and Institute of Quality and Patient Safety (“Institute”) were deeply involved in the legislative process that led to the enactment of the PSA and intimately involved in its implementation; thus, the NHJA is in a unique position to comment on the importance of the confidentiality clause present in same act.

Counsel noted that the Complainant not only misinterpreted the meaning of the statute, but also misquoted it in the Denial of Access Complaint by omitting “...near-misses, preventable events and adverse events ...” from the provision. Counsel argued that by omitting this portion of the provision, the Complainant was misleading the GRC into thinking that two (2) classes of “Serious Preventable Adverse Event” reports existed: those for which reporting is mandatory and those for which reporting is optional. Counsel contended that when quoted correctly, it is clear that the PSA exempts the requested report from access under OPRA:

“[a]ny documents, materials or information received by the department, or the Department of Human Services, as applicable, pursuant to the provisions of subsections c. and e. of this section concerning serious preventable adverse events, *near-misses, preventable events and adverse events* that are otherwise not subject to mandatory reporting pursuant to subsection c. ... shall not be:

- (1) subject to discovery or admissible as evidence or otherwise disclosed in an civil, criminal or administrative action or proceeding;
- (2) *considered a public record under [OPRA]...*” (Emphasis added.) N.J.S.A. 26:2H-12.25(f).

Counsel contends that the excerpt “... that are otherwise not subject to mandatory reporting pursuant to subsection c. ...” does not modify “... serious preventable adverse events ...,” but rather modifies “... near-misses, preventable events and adverse events ...,” which are not subject to mandatory reporting. Similarly to both the Custodian and SMC, Counsel here argued that the plain language and structure of the PSA supports the Department’s denial of the requested report. Counsel cites to the Committee statements that accompanied the final versions of the bill passed by the Senate and Assembly, which reflected the Legislature’s intent to encourage reporting of all types of incidents through confidentiality.

Counsel finally argued that in addition to the Complainant’s misinterpretation of the plain language of the PSA, the Complainant attempted to find additional reasons why

the requested report should be disclosed. Counsel argued that the confidentiality of the requested report is not conditionally based on the accuracy of information or meeting any deadline dates required by regulation.

The Complainant then requested to respond to the intervenors' submissions. In the Complainant's response, he acknowledged that he accidentally misquoted N.J.S.A. 26:2H-12.25(f) in the Denial of Access Complaint and avers that the opposition's interpretation of the statute is reasonable. However, the Complainant asserts that the intervenors' recitation of the PSA's legislative history certainly damages the argument that the plain language of the statute exempts access to the requested record.

Moreover, the Complainant refuted the NJHA's argument that the confidentiality of the requested record is not conditioned on accuracy and timeliness. The Complainant argued that the position that no such conditions exist is contrary to the legislative goal of patient safety. The Complainant contended that the estate of the patient is entitled to access to the requested report pursuant to the New Jersey Hospital Bill of Rights Act. N.J.S.A. 26:2H-12.7 to N.J.S.A. 26:2H-12.11. The Complainant asserted that the Bill of Rights granted the patient broad rights as the SMC's patient, including rights to access information regarding the patient's care. N.J.S.A. 26:2H-12.8. The Complainant averred that this provision also authorized a designated person to obtain similar information if the patient was unable to do request same. The Complainant asserts that the intervenors failed to recognize the Bill of Rights and assumed that the confidentiality afforded in N.J.S.A. 26:2H-12.25(f) overrides the broad statutory right to access medical records and information.

The Complainant requested that OPRA and the PSA be read together in order to effectuate the purpose of access to government records and a patient's rights to one's own medical records and information. The Complainant asserts that in doing so, the estate's right to know outweighs the Department's need to keep the requested report confidential and cited to the court's approach in Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997) as instructive. The Complainant argued that the estate believes it has satisfied the requisite for disclosure because the information is otherwise not available from another source and the discovery obtained by the SMC is inaccurate.

Finally, the Complainant argued that the Department used a blanket exemption that is afforded to no statutory or work product privilege and put no significant weight in whether fundamental requirements of confidentiality were met. The Complainant argues that the Department had a legal obligation to provide a privilege log making it easier for the Complainant to assess whether the privilege or protection is properly invoked. *See* N.J. Court Rule 4:10-3(e).

The GRC first turns to the issue of whether the Custodian unlawfully denied access to the requested "Serious Preventable Adverse Event" report.

The Complainant argued in the Denial of Access Complaint that the plain language of N.J.S.A. 26:2H-12.25(f) clearly favored disclosure of the requested report. Conversely, the Custodian contended that the plain language of the provision clearly stated that the requested report was not a public record under OPRA.

The SMC filed a letter brief supporting the Custodian’s stance, adding that the Department’s regulations contain similar language at *N.J.A.C.* 8:43E-10.9(a)(2) and that the Legislature clearly recognized the importance of the provision. See N.J.S.A. 26:2H-12.24. The NJHA followed with a letter brief also in support of the Custodian’s position and noting that not only did the Complainant misinterpret the provision, but also misquoted said provision. Counsel for the NJHA argued that the excerpt “that are otherwise not subject to mandatory reporting pursuant to subsection c.” was meant to modify “... near-misses, preventable events and adverse events ...”

OPRA provides that:

“[t]he provisions of [OPRA], *shall not abrogate any exemption of a public record or government record* from public access heretofore made pursuant to [OPRA]; *any other statute ...*” N.J.S.A. 47:1A-9.a.

After extensive review of the provisions of the PSA, the GRC agrees with the NJHA’s position that the excerpt “that are otherwise not subject to mandatory reporting pursuant to subsection c.” modifies “...near-misses, preventable events and adverse events ...” The Complainant even confirmed this position in his response to the intervenors dated June 11, 2010, stating that based on this reading of the provision the opposition’s interpretation is reasonable.

The PSA provides that:

“A health care facility shall report to the department ... every serious preventable adverse event that occurs in that facility...

...

[a]ny documents, materials or information received by the department, or the Department of Human Services, as applicable, pursuant to the provisions of subsections c. and e. of this section concerning serious preventable adverse events, near-misses, preventable events and adverse events that are otherwise not subject to mandatory reporting pursuant to subsection c. ... shall not be:

- (1) subject to discovery or admissible as evidence or otherwise disclosed in an civil, criminal or administrative action or proceeding;
- (2) *considered a public record under [OPRA]...*” (Emphasis added.) N.J.S.A. 26:2H-12.25(c), (f).

The statutory language is clear that serious preventable adverse events are required to be reported to the Department pursuant to N.J.S.A. 26:2H-12.25(c). Moreover, the modifier “... that are otherwise not subject to mandatory reporting pursuant to subsection c. ...,” does not apply to Serious Preventable Adverse Event reports simply because said reports are required to be submitted to the Department pursuant to N.J.S.A. 26:2H-12.25(c).

Therefore, the Custodian has lawfully denied access to the requested “Serious Preventable Adverse Event” report because said report is expressly exempt from the definition of a public record in OPRA pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 26:2H-12.25(f).

The GRC notes that the Complainant argued that if a balancing test similar to that used by the court in Payton were employed in this matter, the Complainant would meet the standard for access. The Complainant further contended that the New Jersey Hospital Bill of Rights Act affords the patient’s estate the right to obtain the requested report.

However, a balancing test is unnecessary in the instant matter because the requested record is clearly exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 26:2H-12.25(f) and because no privacy interest is at issue. Moreover, the GRC notes that 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. *See Cicero v. New Jersey Department of Children & Family Services, Division of Child Behavioral Health Services*, GRC Complaint No. 2009-201 (August 2010). Therefore, the New Jersey Bill of Rights Act is not applicable in a complaint before the GRC.

The GRC next turns the issues of accuracy and timely submission of the requested report to the Department.

In the matter currently before the Council, the Complainant argued that accuracy of the requested report and whether the report was provided to the Department within the deadlines set by regulation should be conditions for the application of the PSA’s confidentiality clause. The Complainant argued that he believes there could be misinformation contained within the requested report which negates the confidentiality of the report. Moreover, the Complainant speculated that if the SMC did not meet the appropriate deadlines set forth in Chapter 1, of the Mandatory Reporting Process and Time Lines, of Interim Mandatory Patient Safety reporting Requirements for General Hospitals, dated December 6, 2004, then the requested record should not be afforded confidentiality.

N.J.S.A. 47:1A-7.b. delineates the Council’s powers and duties. Such powers and duties do not include authority over a record’s accuracy or whether a record was filed in accordance with existing guidelines. In Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), the Council held that it “does not oversee the content of documentation” but “does oversee the disclosure and non-disclosure of documents.” *See also Toscano v. NJ Dept of Labor*, GRC Complaint No. 2005-59 (September 2005)(GRC does not have authority over the condition of records provided by a Custodian); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(GRC does not have the authority to adjudicate the validity of a record); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC’s authority to adjudicate).

Therefore, the GRC has no authority over the accuracy of records or whether records were filed in accordance with existing guidelines pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa, supra; Toscano, supra; Gillespie, supra; and Katinsky, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has lawfully denied access to the requested “Serious Preventable Adverse Events” report because said report is expressly exempt from the definition of a public record pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 26:2H-12.25(f).
2. The GRC has no authority over the accuracy of records or whether records were filed in accordance with existing guidelines pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004); and Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).

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October 19, 2010