



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Richard S. Gelber
Complainant

Complaint No. 2011-216

v.

City of Hackensack (Bergen)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian’s failure to *immediately* respond in writing to the Complainant’s OPRA request for immediate access records, either granting access, denying access, seeking clarification or requesting an extension of time results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011).
2. N.J.A.C. 17:9-1.2 makes confidential “*all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims.*” *Id.* [Emphasis added]. Therefore, because the Complainant has requested *individual* employee health benefits and waivers information that is exempt from disclosure pursuant to the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996, N.J.A.C. 17:9-1.2, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See* Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).
3. The Custodian failed to timely respond to the Complainant’s May 20, 2011 OPRA request for immediate access records. N.J.S.A. 47:1A-5.e. However, the Custodian did lawfully deny the Complainant access to the requested health insurance billing information as the disclosure of such information is prohibited by the Privacy Rule of the Health Insurance



Portability and Accountability Act of 1996, *N.J.A.C.* 17:9-1.2, Executive Order 26 (Gov. McGreevey, 2002), and *N.J.S.A.* 47:1A-9. Accordingly, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 20, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**Richard S. Gelber¹
Complainant**

GRC Complaint No. 2011-216

v.

**City of Hackensack (Bergen)²
Custodian of Records**

Records Relevant to Complaint:

A copy of health insurance billing as of April 1, 2011 for Karen Sasso, Jorge Meneses, Marlin Townes, Michael Melfi, and John LaBrosse.

Request Made: May 20, 2011

Response Made: June 16, 2011

Custodian: Debra Heck

GRC Complaint Filed: June 15, 2011³

Background

May 20, 2011

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. The Complainant states that the billing information should include the type of coverage and associated monthly cost.

June 15, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with an attached copy of the Complainant's OPRA request dated May 20, 2011.

The Complainant states that he submitted his request to the City on May 20, 2011. The Complainant asserts that he sent the City a reminder that his request needs to be fulfilled on June 2, 2011. The Complainant further asserts that as of the date of this complaint, his request has not been fulfilled.

The Complainant does not agree to mediate this complaint.

June 16, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the nineteenth (19th) business day

¹ Represented by John Doe, Esq., of Doe & Smith, LLC (Camden, NJ).

² Represented by Joseph Zisa, Esq. (Hackensack, NJ).

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

following receipt of such request. The Custodian states that access to the requested records is denied because the health insurance records are not disclosable under OPRA pursuant to the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C.A. Section 1301, et seq., and Executive Order 26 (Gov. McGreevey, 2002)(“EO 26”), as affirmed by the New Jersey Superior Court Appellate Division in Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).

July 8, 2011

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

July 12, 2011⁴

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated May 20, 2011
- Letter from the Custodian to the Complainant dated June 16, 2011⁵

The Custodian certifies that none of the requested records have been destroyed. The Custodian further certifies that the requested records were not provided to the Complainant because the records are health records that are not disclosable under OPRA pursuant to HIPAA and EO 26 as affirmed by the New Jersey Superior Court Appellate Division in Michelson, *supra*.

The Custodian states that the Complainant is not entitled to disclosure of information that includes the name of every person receiving city health benefits, the justification or reason for that person’s benefits, the type of coverage the entire family has, and the claims history. The Custodian asserts that EO 26 exempts the disclosure of information related to medical, psychiatric, or psychological history, diagnosis, treatment, or evaluation.

The Custodian argues that the Complainant’s request for health insurance billing compromises the privacy of the individual and additionally opposes common law and OPRA. The Custodian maintains that *N.J.A.C. 17:9-1.2* provides that “records considered confidential include all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims.” The Custodian argues that all of this information could be extracted from the requested billing records.

⁴ Amended January 17, 2012.

⁵ The Custodian has attached documentation that is not relevant to the instant complaint.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA provides that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request....The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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 mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an

⁶ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

When a Denial of Access Complaint is filed, a custodian of record bears the burden of proving a denial of access was lawful. N.J.S.A. 47:1A-6. As stated, if a custodian fails to respond in writing within the statutorily mandated time frame, said failure results in a “deemed” denial of access. In complaints where it appears that a “deemed” denial may have occurred, the burden rests on the custodian to prove that he or she responded in writing in a timely manner. *See* Gonzales v. City of Gloucester (Camden), GRC Complaint No. 2008-255 (November 2009) (holding that the custodian failed to bear his burden of proof that he properly responded to the OPRA request.)

In Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011), the complainant requested, among other records, immediate access records. The GRC determined that immediate access records required an immediate response in writing:

“There is no evidence in the record to indicate that the original Custodian provided any written response to the Complainant’s March 24, 2009 OPRA request for electric bills ... within the statutorily mandated time frame, which in this instance would be immediately upon receipt of the Complainant’s OPRA request because the requested electric bills are immediate access records pursuant to N.J.S.A. 47:1A-5.e. As in Herron, supra, the original Custodian had a duty to respond immediately because the Complainant’s OPRA request sought immediate access records, *i.e.*, bills, pursuant to N.J.S.A. 47:1A-5.e.” *Id.* at pg. 12-13.

The Council held that the custodian’s response “... [resulted] in a ‘deemed’ denial of the [c]omplainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra, ... [and] violated N.J.S.A. 47:1A-5.e.” *Id.* at pg. 13.

Thus, a custodian’s response to an OPRA request for immediate access records must be in writing and made immediately upon receipt of said request in order to constitute a lawful response under OPRA. If a custodian fails to do so, said request is “deemed” denied. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Campbell, supra.

In the instant matter, the Complainant submitted his request on May 20, 2011, but the Custodian did not provide a response until June 16, 2011, the nineteenth (19th)

business day following the receipt of the Complainant's request. Accordingly, the Custodian's response to the Complainant's request for billing information is untimely.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian's failure to *immediately* respond in writing to the Complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification or requesting an extension of time results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also Campbell v. Township of Downe (Cumberland)*, GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011).

Whether the Custodian unlawfully denied the Complainant access to the requested health insurance information?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... [a] government record shall not include the following information which is deemed to be confidential ... information generated by or on behalf of public employers or public employees in connection ... with any grievance filed by or against an individual " (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.

Moreover, OPRA provides that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record...from public access made pursuant to [OPRA]...regulation promulgated under the authority of any statute...” N.J.S.A. 47:1A-9.a.

In accordance with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)⁷, New Jersey Administrative Code regarding the State Health Benefits Program states in part that:

“...records considered confidential include all matters related to the *coverage of individual participants* and their families, *mailing addresses of active and retired participants* and individual files related to claims.” (Emphasis added.) *N.J.A.C.* 17:9-1.2.

Furthermore, Executive Order 26 (Gov. McGreevey, 2002)(“EO 26”) also declares information regarding an individual's health history is not a government record subject to public access. The Order provides that “[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation” of an individual will not be considered a government record. EO 26, par. 4(b)(1) (2002).

In the instant matter, the Complainant seeks health insurance billing information related to various employees. In denying the Complainant access to the requested health insurance records, the Custodian asserted that the health insurance records are not disclosable under OPRA pursuant to the HIPAA and EO 26 , as affirmed by the New Jersey Superior Court Appellate Division in Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).

In Beaver v. Township of Middletown, GRC Complaint No. 2005-243 (August 2006), the custodian denied access to records responsive to the complainant’s requests for the type of health coverage being provided to certain employees of the Township of Middletown’s Sewerage Authority as information exempt under OPRA as communication with the health benefit provider. The custodian subsequently certified in the SOI that the records responsive, which included monthly invoices received by the Township from State Health Benefits Plan, were exempt under OPRA pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9, *N.J.A.C.* 17:9-1.2 and HIPAA. The GRC analyzed how the custodian’s asserted exemptions applied to the records responsive within the scope of OPRA and determined that because the nature of the complainant’s requests extended into privacy information that was protected by the HIPAA Privacy Rule, and by extension *N.J.A.C.* 17:9-1.2 and N.J.S.A. 47:1A-9. Accordingly, the Council found that the custodian lawfully denied the complainant’s request.

As in Beaver, the Complainant in the instant matter seeks information related to the health insurance billing of certain employees. There is no way that the billing information of these employees could be disclosed without a infringing upon the privacy

⁷ HIPAA, 45 C.F.R. 160.103, provides that the Privacy Rule protects all individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information "protected health information (PHI)." Richard S. Gelber v. City of Hackensack (Bergen), 2011-216 – Findings and Recommendations of the Executive Director

and confidentiality protections required by HIPAA. Moreover, the existing exclusionary rule prescribed in *N.J.A.C. 17:9-1.2* and further effectuated by N.J.S.A. 47:1A-9 would require that the requested information be deemed non-disclosable upon its face.

N.J.A.C. 17:9-1.2 makes confidential “*all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims.*” *Id.* (emphasis added). Therefore, because the Complainant has requested *individual* employee health benefits and waivers information that is exempt from disclosure pursuant to the Privacy Rule of HIPAA, *N.J.A.C. 17:9-1.2*, Executive Order 26 (Gov. McGreevey, 2002) and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. See Michelson, *supra*.

Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

The Custodian failed to timely respond to the Complainant's May 20, 2011 OPRA request for immediate access records. N.J.S.A. 47:1A-5.e. However, the Custodian did lawfully deny the Complainant access to the requested health insurance billing information as the disclosure of such information is prohibited by the Privacy Rule of HIPAA, *N.J.A.C.* 17:9-1.2, and N.J.S.A. 47:1A-9. Accordingly, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian's failure to *immediately* respond in writing to the Complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification or requesting an extension of time results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011).
2. *N.J.A.C.* 17:9-1.2 makes confidential "*all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims.*" *Id.* [Emphasis added]. Therefore, because the Complainant has requested *individual* employee health benefits and waivers information that is exempt from disclosure pursuant to the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996, *N.J.A.C.* 17:9-1.2, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See* Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).
3. The Custodian failed to timely respond to the Complainant's May 20, 2011 OPRA request for immediate access records. N.J.S.A. 47:1A-5.e. However, the Custodian did lawfully deny the Complainant access to the requested health insurance billing information as the disclosure of such information is prohibited by the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996, *N.J.A.C.* 17:9-1.2, Executive Order 26 (Gov. McGreevey, 2002), and N.J.S.A. 47:1A-9. Accordingly, the evidence of record does not indicate that the Custodian's violation of

OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012⁸

⁸ This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.
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