



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

Peter M. Heimlich
Complainant

Complaint No. 2011-274

v.

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

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 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. Because the requested initial licensing application submitted to Board of Medical Examiners and biennial license renewal for John Drulle, M.D., license #25MA04289300, are not government records subject to access under OPRA pursuant to *N.J.A.C. 13:1E-3.2(a)(2)*, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to *N.J.S.A. 47:1A-9.a.*, the Custodian did not unlawfully deny the Complainant access to the initial licensing application submitted to Board of Medical Examiners and the biennial license renewal for John Drulle, M.D., license #25MA04289300. Therefore, the Custodian has met his statutory burden of proving that the denial of access to the requested licensing application and biennial license renewal was lawful. *N.J.S.A. 47:1A-6.*
2. Because the Custodian certified in the Statement of Information that no records exist which are responsive to the Complainant’s request for Dr. Drulle’s disciplinary records, and because the Complainant has not submitted any evidence to refute the Custodian’s certification in this regard, the Custodian did not unlawfully deny the Complainant access to the requested disciplinary records. See *Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005); *N.J.S.A. 47:1A-6.*

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**

Peter M. Heimlich¹
Complainant

GRC Complaint No. 2011-274

v.

NJ Department of Law & Public Safety,²
Division of Consumer Affairs
Custodian of Records

Records Relevant to Complaint:

Any and all publicly available records from the State Board of Medical Examiners for the late John Drulle, M.D., of Jackson, NJ.

Request Made: July 4, 2011

Response Made: July 22, 2011

Custodian: Robert Campanelli

GRC Complaint Filed: August 16, 2011³

Background

July 4, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA.

July 5, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the same business day the request was received.⁴ The Custodian requests that the Complainant clarify his request because it is unclear. The Custodian states that he cannot provide the requested records until this clarification is received.

July 9, 2011

E-mail from the Complainant to the Custodian. The Complainant states that he received a voice message from an employee of the Division of Consumer Affairs ("Division"). The Complainant asserts that he returned the call and explained exactly

¹ No legal representation listed on record.

² Represented by Steven Flanzman, Esq. (Newark, NJ).

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

⁴ The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on July 5, 2011.

what records he is requesting. The Complainant maintains that the employee informed him that his request would be fulfilled.

July 13, 2011

E-mail from the Custodian to the Complainant. The Custodian states that he will need a seven (7) day extension to complete the request.

July 22, 2011

Letter from the Custodian to the Complainant. The Custodian states the Complainant seeks the following:

1. An initial application submitted to Board of Medical Examiners along with biennial license renewal for John Drulle, M.D., license #25MA04289300” and
2. Disciplinary records for Dr. John Drulle.

The Custodian further states that access to the initial application is denied because applications and renewal applications are confidential pursuant to *N.J.A.C.* 13:1E-3.2(a)(2), Executive Order 47 (Gov. Christie, 2010) and N.J.S.A. 47:1A-1, because records concerning background investigations or evaluations for public employment and appointment to public office or licensing, whether open, closed, or inactive.

The Custodian further asserts that the disciplinary records responsive to the Complainant’s request are not made or maintained by the Division.

August 16, 2011

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

- Complainant’s OPRA request dated July 4, 2011
- Letter from the Custodian to the Complainant dated July 22, 2011

The Complainant asserts that he was unlawfully denied access to the requested records. The Complainant does not agree to mediate this complaint.

August 25, 2011

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

August 30, 2011

E-mail from the Custodian’s Counsel to the GRC. Counsel requests that the GRC grant him a five (5) business day extension to submit the SOI.

August 30, 2011

E-mail from the GRC to Custodian’s Counsel. The GRC grants Counsel’s request for a five (5) business day extension to submit the SOI.

September 8, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 4, 2012
- Letter from the Custodian to the Complainant dated July 5, 2012
- E-mail from the Complainant to the Custodian dated July 9, 2012
- E-mail from the Custodian to the Complainant dated July 13, 2012
- Letter from the Custodian to the Complainant dated July 22, 2012

The Custodian certifies that the request sought any and all publicly available records from the State Board of Medical Examiners for the late John Drulle, M.D., of Jackson, NJ. The Custodian maintains that the Complainant sought:

1. Initial licensing application submitted to Board of Medical Examiners along with biennial license renewal for John Drulle, M.D., license #25MA04289300.
2. Disciplinary records for Dr. John Drulle.

The Custodian certifies that applications for licensure have a retention schedule of 65 years after initial licensing or seven (7) years after the death of the licensee. The Custodian certifies that Dr. Drulle is now deceased. The Custodian also certifies that renewal applications have a seven (7) year retention schedule.

The Custodian argues that access to the first record responsive was denied because applications and renewal applications are confidential pursuant to *N.J.A.C. 13:1E-3.2(a)(2)* and E.O. 47 (Gov. Christie, 2010). In addition, the Custodian contends that N.J.S.A. 47:1A-1 exempts from disclosure records concerning background investigations or evaluations for public employment and appointment to public office or licensing, whether open, closed, or inactive.

The Custodian certifies that there are no records responsive to the Complainant's second request item because the Board of Medical Examiners ("Board") never took any disciplinary action against Dr. Drulle.

In addition, the Custodian states that pursuant to N.J.S.A. 45:1-36, all information provided to the Board concerning the conduct of any licensee is confidential pending final disposition of the inquiry or investigation.

Analysis

Whether the Custodian unlawfully denied the Complainant access to the request records?

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.

In addition, 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.

OPRA also 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; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9.a.

N.J.A.C. 13:1E-3.2 states that:

“records concerning background investigations for public employment, appointment to public office, or *licensing*, whether open, closed, or inactive” will be deemed confidential. (Emphasis added) *N.J.A.C. 13:1E-3.2(a)(2)*.⁵

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant matter, the Complainant’s request sought “[a]ny and all publicly available records from the State Board of Medical Examiners for the late John Drulle, M.D., of Jackson, NJ.” On its face, such a request is an overly broad, blanket request. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30

⁵ As effectuated by E.O. 47 (Gov. Christie, 2010).

(App. Div. 2005). As such, upon receipt of the Complainant's request, the Custodian informed the Complainant that the request was unclear and required further clarification. At some time between the Custodian's request for further clarification and the Custodian's submission of the Statement of Information to the GRC, the Custodian was able to identify certain responsive records.⁶

Accordingly, the Custodian was able to ascertain that the Complainant sought:

1. The initial licensing application submitted to Board of Medical Examiners along with biennial license renewal for John Drulle, M.D., license #25MA04289300.
2. Disciplinary records for Dr. John Drulle.

In the SOI, the Custodian asserted that the public licensing application and biennial license renewal is not disclosable under OPRA pursuant to *N.J.A.C. 13:1E-3.2*, as this provision makes licensing applications confidential.

The Department of Law and Public Safety's regulations at *N.J.A.C. 13:1E-3.2(a)(2)* provides that records concerning background investigations for public employment, appointment to public office, or licensing, whether open, closed, or inactive, are not considered government records subject to access under OPRA.

The provisions of *N.J.A.C. 13:1E-3.2(a)(2)* are applicable to OPRA pursuant to N.J.S.A. 47:1A-9.a., which 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...regulation promulgated under the authority of any statute...” N.J.S.A. 47:1A-9.a.

Accordingly, because the requested initial licensing application submitted to Board of Medical Examiners and biennial license renewal for John Drulle, M.D., license #25MA04289300, are not government records subject to access under OPRA pursuant to *N.J.A.C. 13:1E-3.2(a)(2)*, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to *N.J.S.A. 47:1A-9.a.*, the Custodian did not unlawfully deny the Complainant access to the initial licensing application submitted to Board of Medical Examiners and the biennial license renewal for John Drulle, M.D., license #25MA04289300. Therefore, the Custodian has met his statutory burden of proving that the denial of access to the requested licensing application and biennial license renewal was lawful. N.J.S.A. 47:1A-6.

In addition, the Complainant also sought disciplinary records for Dr. Drulle. In response, the Custodian certified in the SOI that no records exist that are responsive to

⁶ The Custodian's ability to resolve the Complainant's broad request appears to be the product of some undocumented correspondence between the Complainant and the Custodian that is not in the evidence in record.

the Complainant's request for Dr. Drulle's disciplinary records, as no disciplinary investigation for Dr. Drulle took place. The Complainant has submitted no evidence to refute the Custodian's certification in this regard.

The Council has consistently held that no denial of access occurs when a custodian has demonstrated that no records responsive to a complainant's request exist. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed and the complainant submitted no evidence to refute said certification. The GRC held the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the Statement of Information that no records exist which are responsive to the Complainant's request for Dr. Drulle's disciplinary records, and because the Complainant has not submitted any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny the Complainant access to the requested disciplinary records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005); N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the requested initial licensing application submitted to Board of Medical Examiners and biennial license renewal for John Drulle, M.D., license #25MA04289300, are not government records subject to access under OPRA pursuant to *N.J.A.C. 13:1E-3.2(a)(2)*, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to *N.J.S.A. 47:1A-9.a.*, the Custodian did not unlawfully deny the Complainant access to the initial licensing application submitted to Board of Medical Examiners and the biennial license renewal for John Drulle, M.D., license #25MA04289300. Therefore, the Custodian has met his statutory burden of proving that the denial of access to the requested licensing application and biennial license renewal was lawful. N.J.S.A. 47:1A-6.
2. Because the Custodian certified in the Statement of Information that no records exist which are responsive to the Complainant's request for Dr. Drulle's disciplinary records, and because the Complainant has not submitted any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny the Complainant access to the requested disciplinary records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005); N.J.S.A. 47:1A-6.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012⁷

⁷ This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.
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