



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 25, 2013 Government Records Council Meeting

Lynn Markarian
Complainant

Complaint No. 2011-312

v.

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

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the terms of the Council’s May 28, 2013 Interim Order because the Custodian provided to the Complainant the responsive regulations and provided certified confirmation of same to the Executive Director within the required five (5) business days.
2. The Custodian’s failure to provide a date certain on which he would respond when seeking an extension of time resulted in an insufficient response and a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the Complainant’s OPRA request item Nos. 11, 13 and 16 and failed to fully comply with the Council’s March 22, 2013 Interim Order. However, the Custodian lawfully denied access to all remaining OPRA request items for various reasons and fully complied with the Council’s May 28, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s “deemed” denial did 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 25th Day of June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting**

**Lynn Markarian¹
Complainant**

GRC Complaint No. 2011-312

v.

**New Jersey Department of Law & Public Safety,
Division of Consumer Affairs²
Custodian of Records**

Records Relevant to Complaint:

1. Date of incident associated with disciplinary action, date of filing of administrative complaint, date of trial for all disciplinary actions from 2000 to 2011;
2. All complaints or reports filed with the Board of Medical Examiners (“BME”) or Office of the Attorney General (“AG”) by Monmouth Medical Center, its staff, or its attorneys, about Monmouth Medical Center physicians from 1995 to 2011;
3. All notices or advisories by the BME from 1988 to 2000;
4. All written recommendations, advisories or other materials distributed by or available from the BME regarding office surgical facilities of any type;
5. All written recommendations, advisories, or other materials distributed by or available from the BME regarding preoperative pregnancy assessment;
6. All written recommendations, advisories, or other materials distributed by or available from the BME regarding intraoperative or perioperative intravenous fluid administration;
7. All written recommendations, advisories, or other materials distributed by or available from the BME regarding treatment of breast prosthesis infection;
8. A list of all approved and non-approved breast augmentation techniques;
9. The contact address and telephone number for MRAC referenced in the BME website;
10. The names and specialties of all reviewing members of alternative credentialing applications;
11. The list of objective criteria, including required number of procedures performed and specific chart review criteria, for each procedure listed in the alternate credentialing program;
12. All outpatient surgery complications reported to the BME or the AG and disposition of each reported incident from 1998 to 2011;
13. All written advisories or other materials distributed by or available from the BME which include a glossary or definitions of terms used in same;
14. All written recommendations, advisories, or other materials distributed by or available from the BME regarding breast cancer detection/screening;

¹ No legal representation listed on record.

² Robert Campanelli, Custodian. Represented by Deputy Attorney General Steven Flanzman.

15. All written recommendations, advisories, or other materials distributed by or available from the BME regarding the use of surgical drains; and
16. All written recommendations, advisories or other materials distributed by or available from the BME regarding MRAC's cessation of processing of applications for the alternate credentialing mechanism.

Request Made: September 20, 2011

Response Made: September 29, 2011

GRC Complaint Filed: September 30, 2011³

Background

May 28, 2013 Council Meeting:

At its May 28, 2013 public meeting, the Council considered the May 21, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's March 22, 2013 Interim Order by providing the Complainant with the records responsive to the Complainant's OPRA request item Nos. 11 and 16 and certified confirmation of compliance to the Executive Director within the prescribed time frame to comply. However, the Custodian failed to fully comply since he failed to provide the regulations responsive to OPRA request item No. 13. This failure, however, appears to be a result of the Custodian's confusion regarding the Council's Order as opposed to willful neglect. Therefore, the Council should grant the Custodian an opportunity to provide to the Complainant all Board of Medical Examiners' regulations containing "definitions."
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. (Footnotes omitted).**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On, May 31, 2013, the Council distributed its Interim Order to all parties.

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

Compliance:

On June 7, 2013, the Custodian responded to the Council's Interim Order. The Custodian certifies that he requested a review of all BME regulations to identify those containing definitions of terms. The Custodian certifies that this search returned 52 regulations for which access has been simultaneously provided to the Complainant by way of this certification.

Analysis

Compliance

On May 28, 2013, the Council ordered the Custodian to disclose to the Complainant all regulations containing definitions of terms. The Council also ordered the Custodian to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 31, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On June 7, 2013, within the required five (5) business days, the Custodian provided to the Executive Director certified confirmation that he disclosed to the Complainant 52 regulations containing definitions of terms.

Therefore, the Custodian has complied with the terms of the Council's May 28, 2013 Interim Order because the Custodian provided to the Complainant the responsive regulations and provided certified confirmation of same to the Executive Director within the required five (5) business days.

Knowing & Willful

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's failure to provide a date certain on which he would respond when seeking an extension of time resulted in an insufficient response and a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the Complainant's OPRA request item Nos. 11, 13 and 16 and failed to fully comply with the Council's March 22, 2013 Interim Order. However, the Custodian lawfully denied access to all remaining OPRA request items for various reasons and fully complied with the Council's May 28, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's "deemed" denial did 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 has complied with the terms of the Council's May 28, 2013 Interim Order because the Custodian provided to the Complainant the responsive regulations and provided certified confirmation of same to the Executive Director within the required five (5) business days.
2. The Custodian's failure to provide a date certain on which he would respond when seeking an extension of time resulted in an insufficient response and a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the Complainant's OPRA request item Nos. 11, 13 and 16 and failed to fully comply with the Council's March 22, 2013 Interim Order. However, the Custodian lawfully denied access to all remaining OPRA request items for various reasons and fully complied with the Council's May 28, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's "deemed" denial did 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: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
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KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

May 28, 2013 Government Records Council Meeting

Lynn Markarian
Complainant

Complaint No. 2011-312

v.

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

At the May 28, 2013 public meeting, the Government Records Council ("Council") considered the May 21, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council's March 22, 2013 Interim Order by providing the Complainant with the records responsive to the Complainant's OPRA request item Nos. 11 and 16 and certified confirmation of compliance to the Executive Director within the prescribed time frame to comply. However, the Custodian failed to fully comply since he failed to provide the regulations responsive to OPRA request item No. 13. This failure, however, appears to be a result of the Custodian's confusion regarding the Council's Order as opposed to willful neglect. Therefore, the Council should grant the Custodian an opportunity to provide to the Complainant all Board of Medical Examiners' regulations containing "definitions."
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the
Government Records Council
On The 28th Day of May, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 31, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Lynn Markarian¹
Complainant**

GRC Complaint No. 2011-312

v.

**New Jersey Department of Law & Public Safety,
Division of Consumer Affairs²
Custodian of Records**

Records Relevant to Complaint:

1. Date of incident associated with disciplinary action, date of filing of administrative complaint, date of trial for all disciplinary actions from 2000 to 2011;
2. All complaints or reports filed with the Board of Medical Examiners (“BME”) or Office of the Attorney General (“AG”) by Monmouth Medical Center, its staff, or its attorneys, about Monmouth Medical Center physicians from 1995 to 2011;
3. All notices or advisories by the BME from 1988 to 2000;
4. All written recommendations, advisories or other materials distributed by or available from the BME regarding office surgical facilities of any type;
5. All written recommendations, advisories, or other materials distributed by or available from the BME regarding preoperative pregnancy assessment;
6. All written recommendations, advisories, or other materials distributed by or available from the BME regarding intraoperative or perioperative intravenous fluid administration;
7. All written recommendations, advisories, or other materials distributed by or available from the BME regarding treatment of breast prosthesis infection;
8. A list of all approved and non-approved breast augmentation techniques;
9. The contact address and telephone number for MRAC referenced in the BME website;
10. The names and specialties of all reviewing members of alternative credentialing applications;
11. The list of objective criteria, including required number of procedures performed and specific chart review criteria, for each procedure listed in the alternate credentialing program;
12. All outpatient surgery complications reported to the BME or the AG and disposition of each reported incident from 1998 to 2011;
13. All written advisories or other materials distributed by or available from the BME which include a glossary or definitions of terms used in same;
14. All written recommendations, advisories, or other materials distributed by or available from the BME regarding breast cancer detection/screening;

¹ No legal representation listed on record.

² Robert Campanelli, Custodian. Represented by Deputy Attorney General Steven Flanzman.

15. All written recommendations, advisories, or other materials distributed by or available from the BME regarding the use of surgical drains; and
16. All written recommendations, advisories or other materials distributed by or available from the BME regarding MRAC's cessation of processing of applications for the alternate credentialing mechanism.

Request Made: September 20, 2011

Response Made: September 29, 2011

GRC Complaint Filed: September 30, 2011³

Background

March 22, 2013 Council Meeting:

At its March 22, 2013 public meeting, the Council considered the March 15, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's response is insufficient under OPRA because he failed to provide a date certain on which he would grant or deny the Complainant access to the requested records. N.J.S.A. 47:1A-5(i). Moreover, the Custodian's failure to respond sufficiently resulted in a "deemed" denial of access to the requested records pursuant to Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), because the Custodian's response extending the time frame to comply was invalid.
2. Because the Custodian certified in the Statement of Information that on October 28, 2011, he provided to the Complainant two Excel lists of disciplinary actions responsive to request No. 1 and informed the Complainant that the remainder of the records requested were not available in list format, the Custodian did not unlawfully deny the Complainant access to the records responsive to request No. 1.
3. Because N.J.S.A. 45:1-36 prevents access to open complaint records responsive to this request and to records involving investigations where no basis for disciplinary action was found, and because such records are confidential and not subject to disclosure under OPRA pursuant to N.J.S.A. 45:1-36, the Custodian has borne his burden of proving a lawful denial of access to the records responsive to request No. 2 under N.J.S.A. 47:1A-6.
4. Because the Custodian herein requested in writing clarification of request No. 3, and because the Complainant failed to provide such clarification, the Custodian has borne her burden of proving a lawful denial of access to the requested records under N.J.S.A. 47:1A-6. Herron v. New Jersey Department of Education, GRC Complaint No. 2011-

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

363 (December 2012); *See Moore v. Township of Old Bridge*, GRC Complaint No. 2005-80 (August 2005).

5. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's request Nos. 4, 5, 6, 7, 8, 9, 10, 12, 14 or 15 exist, and because the Complainant did not submit any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
6. The Custodian in this matter unlawfully denied the Complainant access to the records responsive to request Nos. 11 and 13 when he referred the Complainant to the agency's website to review and download responsive records. Thus, the Custodian must disclose copies of the records responsive to these request items to the Complainant. However, with regard to the glossary requested at No. 13, the Custodian bore his burden of proof that the denial of access was lawful because he certified that no records responsive to this item exist and the Complainant provided no evidence to refute the Custodian's certification. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
7. The Custodian certified in the Statement of Information that he made no response at any time to the Complainant's request No. 16. Thus, the Custodian has failed to bear his burden of proof under N.J.S.A. 47:1A-6 that the denial of access to the records responsive to this request was authorized by law. Therefore, the Custodian must disclose the records responsive to this request to the Complainant or certify that no records responsive to this request exist.
8. **The Custodian shall comply with paragraphs #6 and #7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Procedural History:

On March 25, 2013, the Council distributed its Interim Order to all parties. On April 1, 2013, the Custodian responded to the Council's Interim Order certifying that an attached copy of *N.J.A.C. 13:35-4A.12* (Alternative Privileging Procedure) is responsive to the Complainant's OPRA request Item No. 11. The Custodian certifies that this is the only regulation promulgated by the State BME that sets forth the criteria for granting alternative privileges and is the only record responsive to OPRA request Item No. 11. The Custodian further certifies that an attached letter from MRAC to the Director of Medical Examiners dated January 14, 2007, advising that as of January 15, 2008, MRAC will no longer accept new referrals for physician competency evaluations, is the only record responsive to OPRA request Item No. 16. The Custodian did not provide records responsive to the first part of Item No. 13 as required in the Council's Order.

On April 11, 2013, the Custodian submitted a legal certification indicating that he initially responded to the Complainant advising that no records exist that include a "glossary of terms" distributed by or available from the BME. The Custodian certifies that he was, however, aware of many individual regulations promulgated by the BME that contained "definitions of terms." The Custodian certifies that *N.J.A.C. 13:35-6.22* and *N.J.A.C. 13:35-6.3* are examples of the numerous regulations that incorporate definitions. The Custodian certifies that in an effort to fully respond, he referred the Complainant to the BME's website for a complete and current compilation of the BME regulations.

Analysis

Compliance

At its March 22, 2013 meeting, the Council ordered the Custodian to disclose the records responsive to the Complainant's OPRA request item Nos. 11, 13 and 16 "... **within five (5) business days from receipt of the Council's Interim Order ... and simultaneously provide certified confirmation of compliance ... to the Executive Director.**" The Custodian responded on April 1, 2013, providing access to records responsive to items No. 11 and 16 along with certified confirmation of compliance to the Executive Director; however, the Custodian did not provide all records responsive to item No. 13.

Since the Custodian identified in his initial response to the Complainant records responsive to OPRA request item No. 13 (BME's regulations containing definitions), the Council found that the Custodian unlawfully denied access to said records and ordered disclosure of same. *Kaplan v. Winslow Township's Board of Education*, Complaint No. 2009-148 (Interim Order dated June 29, 2010). On April 10, 2013, the GRC contacted Custodian's Counsel regarding the Custodian's failure to provide the Complainant the records responsive to item No. 13. Counsel advised that he believed no action on item No. 13 was necessary. Thus, the Custodian did not provide the records responsive to item No. 13 based on apparent confusion regarding the Council's Order. The Custodian subsequently submitted a legal certification attesting that although he advised the Complainant that no glossary of terms existed, he was aware of many BME regulations containing definitions, thus he referred the Complainant to the BME's website.

Therefore, the Custodian complied with the Council's March 22, 2013 Interim Order by providing the Complainant with the records responsive to the Complainant's OPRA request item Nos. 11 and 16 and certified confirmation of compliance to the Executive Director within the prescribed time frame to comply. However, the Custodian failed to fully comply since he failed to provide the regulations responsive to OPRA request item No. 13. This failure, however, appears to be a result of the Custodian's confusion regarding the Council's Order as opposed to willful neglect. Therefore, the Council should grant the Custodian an opportunity to provide to the Complainant all BME regulations containing "definitions."

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's March 22, 2013 Interim Order by providing the Complainant with the records responsive to the Complainant's OPRA request item Nos. 11 and 16 and certified confirmation of compliance to the Executive Director within the prescribed time frame to comply. However, the Custodian failed to fully comply since he failed to provide the regulations responsive to OPRA request item No. 13. This failure, however, appears to be a result of the Custodian's confusion regarding the Council's Order as opposed to willful neglect. Therefore, the Council should grant the Custodian an opportunity to provide to the Complainant all Board of Medical Examiners' regulations containing "definitions."
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

March 22, 2013 Government Records Council Meeting

Lynn Markarian
Complainant

Complaint No. 2011-312

v.

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

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 2013 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’s response is insufficient under OPRA because he failed to provide a date certain on which he would grant or deny the Complainant access to the requested records. N.J.S.A. 47:1A-5(i). Moreover, the Custodian’s failure to respond sufficiently resulted in a “deemed” denial of access to the requested records pursuant to Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), because the Custodian’s response extending the time frame to comply was invalid.
2. Because the Custodian certified in the Statement of Information that on October 28, 2011, he provided to the Complainant two Excel lists of disciplinary actions responsive to request No. 1 and informed the Complainant that the remainder of the records requested were not available in list format, the Custodian did not unlawfully deny the Complainant access to the records responsive to request No. 1.
3. Because N.J.S.A. 45:1-36 prevents access to open complaint records responsive to this request and to records involving investigations where no basis for disciplinary action was found, and because such records are confidential and not subject to disclosure under OPRA pursuant to N.J.S.A. 45:1-36, the Custodian has borne his burden of proving a lawful denial of access to the records responsive to request No. 2 under N.J.S.A. 47:1A-6.
4. Because the Custodian herein requested in writing clarification of request No. 3, and because the Complainant failed to provide such clarification, the Custodian has borne her burden of proving a lawful denial of access to the requested records under N.J.S.A. 47:1A-6. Herron v. New Jersey Department of Education, GRC Complaint No. 2011-363 (December 2012); *See* Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005).



5. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's request Nos. 4, 5, 6, 7, 8, 9, 10, 12, 14 or 15 exist, and because the Complainant did not submit any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. The Custodian in this matter unlawfully denied the Complainant access to the records responsive to request Nos. 11 and 13 when he referred the Complainant to the agency's website to review and download responsive records. Thus, the Custodian must disclose copies of the records responsive to these request items to the Complainant. However, with regard to the glossary requested at No. 13, the Custodian bore his burden of proof that the denial of access was lawful because he certified that no records responsive to this item exist and the Complainant provided no evidence to refute the Custodian's certification. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
7. The Custodian certified in the Statement of Information that he made no response at any time to the Complainant's request No. 16. Thus, the Custodian has failed to bear his burden of proof under N.J.S.A. 47:1A-6 that the denial of access to the records responsive to this request was authorized by law. Therefore, the Custodian must disclose the records responsive to this request to the Complainant or certify that no records responsive to this request exist.
8. **The Custodian shall comply with paragraphs #6 and #7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of March, 2013

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: April 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Lynn Markarian¹
Complainant**

GRC Complaint No. 2011-312

v.

**New Jersey Department of Law & Public Safety,
Division of Consumer Affairs²
Custodian of Records**

Records Relevant to Complaint:

1. Date of incident associated with disciplinary action, date of filing of administrative complaint, date of trial for all disciplinary actions from 2000 to 2011;
2. All complaints or reports filed with the Board of Medical Examiners (“BME”) or Office of the Attorney General (“OAG”) by Monmouth Medical Center, its staff, or its attorneys, about Monmouth Medical Center physicians from 1995 to 2011;
3. All notices or advisories by the BME from 1988 to 2000;
4. All written recommendations, advisories or other materials distributed by or available from the BME regarding office surgical facilities of any type;
5. All written recommendations, advisories, or other materials distributed by or available from the BME regarding preoperative pregnancy assessment;
6. All written recommendations, advisories, or other materials distributed by or available from the BME regarding intraoperative or perioperative intravenous fluid administration;
7. All written recommendations, advisories, or other materials distributed by or available from the BME regarding treatment of breast prosthesis infection;
8. A list of all approved and non-approved breast augmentation techniques;
9. The contact address and telephone number for MRAC referenced in the BME website;
10. The names and specialties of all reviewing members of alternative credentialing applications;
11. The list of objective criteria, including required number of procedures performed and specific chart review criteria, for each procedure listed in the alternate credentialing program;
12. All outpatient surgery complications reported to the BME or the OAG and disposition of each reported incident from 1998 to 2011;
13. All written advisories or other materials distributed by or available from the BME which include a glossary or definitions of terms used same;
14. All written recommendations, advisories, or other materials distributed by or available from the BME regarding breast cancer detection/screening;

¹ No legal representation listed on record.

² Robert Campanelli, Custodian. Represented by DAG Steven Flanzman, on behalf of the NJ Attorney General.
Lynn Markarian v. New Jersey Department of Law & Public Safety, Division of Consumer Affairs, 2011-312 – Findings and Recommendations of the Executive Director

15. All written recommendations, advisories, or other materials distributed by or available from the BME regarding the use of surgical drains;
16. All written recommendations, advisories or other materials distributed by or available from the BME regarding MRAC's cessation of processing of applications for the alternate credentialing mechanism.

Request Made: September 20, 2011

Response Made: September 29, 2011

GRC Complaint Filed: September 30, 2011³

Background⁴

The Complainant filed her OPRA requests in electronic format on September 20, 2011, seeking the records listed above. The Custodian responded in writing to the Complainant's requests on September 29, 2011, the seventh (7th) business day following receipt of the request, stating that the BME is still reviewing the requests to determine if responsive records exist, and further stating that the Custodian will contact the Complainant as soon as the review is complete.

The Complainant filed the Denial of Access Complaint with the Government Records Council ("GRC") on September 30, 2011. The Complainant asserted that she never received a response to her OPRA requests.

On October 6, 2011, the Custodian responded to request Nos. 4, 5, 6, 7, 8, 9, 14, and 15, stating that the records responsive to these request Items are not made, maintained or kept on file by the agency. The Custodian further stated that request Items No. 11 and 13 refer to the BME's regulations maintained on the Board's website at www.state.nj.us/lps/ca/bms/index.html.

Also on October 6, 2011, the Custodian e-mailed the Complainant requesting clarification of request Items No. 1 and 3. The Complainant responded to the Custodian's e-mail on the same date, reiterating request Items No. 1 and 3 verbatim.

The Custodian submitted the Statement of Information ("SOI") to the GRC on November 21, 2011. The Custodian certifies that the Complainant submitted her OPRA requests on September 20, 2011 and that the requests were logged into the system and forwarded to the BME for a response. The Custodian also certifies that on September 29, 2011, the Custodian telephoned the Complainant and sent an e-mail to her, requesting additional time to complete the review of the requests, based upon the volume of records requested.⁵ The Custodian also certifies that on September 29, 2011, the Complainant filed this Denial of Access Complaint with the GRC. The Custodian certifies that on October 6, 2011, he sent a response to the Complainant,⁶ denying access to eight (8) of the requests on the grounds that no records responsive exist. The

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

⁴ The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁵ The Custodian attached to the SOI a copy of the September 29, 2011 e-mail to the Complainant.

⁶ The Custodian attached to the SOI a copy of this response.

Custodian further asserts that he directed the Complainant to the BME website, which contains links to the records responsive to her requests could be viewed and printed. The Custodian asserts that these ten (10) requests were closed as of October 6, 2011.

The Custodian also certifies that on October 6, 2011, he e-mailed the Complainant seeking clarification on request Nos. 1 and 3. The Custodian certifies that although the Complainant responded to the request for clarification, she merely repeated verbatim the requests and failed to provide any clarification thereof. The Custodian certifies that on October 14, 2011, he received an e-mail from the Complainant requesting an update on these request items.

The Custodian also certifies that on October 28, 2011, he responded to the Complainant by providing two (2) Excel lists of disciplinary actions responsive to request No. 1 and informing the Complainant that the remainder of the records requested was not available in list format.

The Custodian certifies that he did not provide the Complainant with a response to request No. 2 due to the pendency of this complaint. The Custodian asserts that any records responsive to this request are not disclosable pursuant to N.J.S.A. 45:1-36. The Custodian further certifies that no public disciplinary actions were taken based on any records identified as responsive to this request Item.

The Custodian certifies that he did not provide the Complainant with a response to request No. 3 due to the lack of clarification from the Complainant and the pendency of this complaint.

The Custodian certifies that on October 6, 2011, he informed the Complainant that there are no records responsive to request Nos. 4, 5, 6, 7, 8, 9.

The Custodian certifies that he did not provide the Complainant with a response to request No. 10 due to the pendency of this complaint. However, the Custodian certifies that no records responsive to this request Item exist.

The Custodian certifies that he responded to the Complainant's request No. 11 on October 6, 2011, informing her that any records responsive to this request item could be reviewed and printed from the BME's website, and providing a link thereto.

The Custodian certifies that he did not provide the Complainant with a response to request No. 12 due to the pendency of this complaint. The Custodian further certifies that outpatient surgery facilities do not report to the BME, but rather to the Department of Health and Senior Services.

The Custodian certifies that he provided a response to the Complainant's request No. 13 on October 6, 2011 stating that a glossary does not exist and that any records responsive to the request could be reviewed and printed from the BME's website, and providing a link thereto.

The Custodian certifies that he provided a response to the Complainant's request No. 14 on October 6, 2011, stating that files were not maintained by the BME in a manner that segregates information regarding breast cancer screening/detection.

The Custodian certifies that he provided a response to the Complainant's request No. 15 on October 6, 2011, stating that files were not maintained by the BME in a manner that segregates information regarding surgical drains.

The Custodian certifies that he provided no response to the Complainant's request No. 16 due to the pendency of this complaint.

Analysis⁷

Sufficiency of the Custodian's Response

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).⁸ 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 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).

Additionally, a custodian's response if requesting an extension of time, must provide a date certain when the requestor may expect that access to the requested records will be granted or denied. See Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009), and N.J.S.A. 47:1A-5(i).

In the instant complaint, the Custodian responded in writing within the statutorily prescribed time frame advising that the BME was still reviewing the requests to determine if responsive records exist, and further stating that the Custodian will contact the Complainant as soon as the review is complete. However, the Custodian failed to provide the Complainant with a date certain on which he would respond.

Thus, the Custodian's response is insufficient under OPRA because he failed to provide a date certain on which he would grant or deny the Complainant access to the requested records. N.J.S.A. 47:1A-5(i). Moreover, the Custodian's failure to respond sufficiently resulted in a

⁷ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

⁸ 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.

Lynn Markarian v. New Jersey Department of Law & Public Safety, Division of Consumer Affairs, 2011-312 – Findings and Recommendations of the Executive Director

“deemed” denial of access to the requested records pursuant to Kelley, *supra*, because the Custodian’s response extending the time frame to comply was invalid.

Unlawful Denial of Access

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 matter before the Council, the Custodian certified in the SOI that on October 28, 2011, he provided to the Complainant two Excel lists of disciplinary actions responsive to request No. 1 and informed the Complainant that the remainder of the records requested were not available in list format. Thus, the Custodian did not unlawfully deny the Complainant access to the records responsive to request No. 1.

Request No. 2 sought “[a]ll complaints or reports filed with the [BME] or [OAG] by Monmouth Medical Center, its staff, or its attorneys, about Monmouth Medical Center physicians from 1995 to 2011.” The Custodian asserted in the SOI that the records responsive to this request are exempt from disclosure under OPRA pursuant to N.J.S.A. 45:1-36.

The records requested by the Complainant pertain to “all complaints” about Monmouth Medical Center physicians from 1995 to 2011 filed with the BME. By definition, this request would encompass open as well as closed complaints. However, open complaints are treated as confidential until finally disposed of pursuant to N.J.S.A. 45:1-36, which states:

“[A]ny information provided to the division board concerning the conduct of a health care professional...shall be treated as confidential pending final disposition of the inquiry or investigation, except for that information required to be shared with the Attorney General, Department of Health and Senior Services or any other government agency. If the result of the inquiry or investigation is a finding of no basis for disciplinary action, the information shall remain confidential, except that the board or division, as applicable, may release the information to a government agency to facilitate the discharge of its public responsibilities.” N.J.S.A. 45:1-36.

N.J.S.A. 47:1A-(9)(a) requires that OPRA shall not abrogate any statutes or laws that will exempt a record from public access. Because N.J.S.A. 45:1-36 prevents access to open complaint records responsive to this request and to records involving investigations where no basis for disciplinary action was found, and because such records are confidential and not subject to disclosure under OPRA pursuant to N.J.S.A. 45:1-36, the Custodian has borne his burden of proving a lawful denial of access to the records responsive to request Item No. 2 under N.J.S.A. 47:1A-6.

Regarding request No. 3, the evidence of record indicates that the Custodian requested clarification in writing of this request item on October 6, 2011. Further, the evidence discloses

that the Complainant failed to provide clarification of this request, but merely reiterated the request verbatim.

In Herron v. New Jersey Department of Education, GRC Complaint No. 2011-363(December 2012), the Council determined that the custodian bore her burden of proving a lawful denial of access to the requested records because she sought clarification of the complainant's request and the complainant provided no clarification. See Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005).

Therefore, because the Custodian herein requested in writing clarification of request No. 3, and because the Complainant failed to provide such clarification, the Custodian has borne her burden of proving a lawful denial of access to the requested records under N.J.S.A. 47:1A-6. Herron, *supra*; Moore, *supra*.

The Custodian certified in the SOI that no records exist which are responsive to request Nos. 4, 5, 6, 7, 8, 9, 10, 12, 14 or 15. The Complainant submitted no evidence to refute the Custodian's certification in this regard.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access."

Thus, because the Custodian certified in the SOI that no records responsive to the Complainant's request Nos. 4, 5, 6, 7, 8, 9, 10, 12, 14 or 15 exist, and because the Complainant did not submit any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer, *supra*.

The Custodian certified in the SOI that he responded to the Complainant's request Nos. 11 and 13 by informing the Complainant that the records responsive to these request Items were available for review and download on the BME website, and that he provided the specific web address thereto.

Under OPRA, a custodian must grant or deny access to government records pursuant to an OPRA request; a custodian may not direct a requestor to the agency's website to review and download records. Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006); Kaplan v. Winslow Township's Board of Education, Complaint No. 2009-148 (June 2010 Interim Order); Wolosky v. Township of Denville (Morris), GRC Complaint No. 2010-191 (Interim Order dated January 31, 2012).

Thus, the Custodian in this matter unlawfully denied the Complainant access to the records responsive to request Nos. 11 and 13 when he referred the Complainant to the agency's website to review and download responsive records. Thus, the Custodian must disclose copies of

Lynn Markarian v. New Jersey Department of Law & Public Safety, Division of Consumer Affairs, 2011-312 – Findings and Recommendations of the Executive Director

the records responsive to these request items to the Complainant. However, with regard to the glossary requested at No. 13, the Custodian bore his burden of proof that the denial of access was lawful because he certified that no records responsive to this item exist and the Complainant provided no evidence to refute the certification. See Pusterhofer, *supra*.

The Custodian certified in the SOI that he made no response at any time to the Complainant's request No. 16. Thus, the Custodian has failed to bear his burden of proof under N.J.S.A. 47:1A-6 that the denial of access to the records responsive to this request Item was authorized by law. Therefore, the Custodian must disclose the records responsive to this request to the Complainant or certify that no records responsive to this request exists.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's response is insufficient under OPRA because he failed to provide a date certain on which he would grant or deny the Complainant access to the requested records. N.J.S.A. 47:1A-5(i). Moreover, the Custodian's failure to respond sufficiently resulted in a "deemed" denial of access to the requested records pursuant to Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), because the Custodian's response extending the time frame to comply was invalid.
2. Because the Custodian certified in the Statement of Information that on October 28, 2011, he provided to the Complainant two Excel lists of disciplinary actions responsive to request No. 1 and informed the Complainant that the remainder of the records requested were not available in list format, the Custodian did not unlawfully deny the Complainant access to the records responsive to request No. 1.
3. Because N.J.S.A. 45:1-36 prevents access to open complaint records responsive to this request and to records involving investigations where no basis for disciplinary action was found, and because such records are confidential and not subject to disclosure under OPRA pursuant to N.J.S.A. 45:1-36, the Custodian has borne his burden of proving a lawful denial of access to the records responsive to request No. 2 under N.J.S.A. 47:1A-6.
4. Because the Custodian herein requested in writing clarification of request No. 3, and because the Complainant failed to provide such clarification, the Custodian has borne her burden of proving a lawful denial of access to the requested records under N.J.S.A.

47:1A-6. Herron v. New Jersey Department of Education, GRC Complaint No. 2011-363 (December 2012); *See* Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005).

5. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's request Nos. 4, 5, 6, 7, 8, 9, 10, 12, 14 or 15 exist, and because the Complainant did not submit any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny access to the requested records. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. The Custodian in this matter unlawfully denied the Complainant access to the records responsive to request Nos. 11 and 13 when he referred the Complainant to the agency's website to review and download responsive records. Thus, the Custodian must disclose copies of the records responsive to these request items to the Complainant. However, with regard to the glossary requested at No. 13, the Custodian bore his burden of proof that the denial of access was lawful because he certified that no records responsive to this item exist and the Complainant provided no evidence to refute the Custodian's certification. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
7. The Custodian certified in the Statement of Information that he made no response at any time to the Complainant's request No. 16. Thus, the Custodian has failed to bear his burden of proof under N.J.S.A. 47:1A-6 that the denial of access to the records responsive to this request was authorized by law. Therefore, the Custodian must disclose the records responsive to this request to the Complainant or certify that no records responsive to this request exist.
8. **The Custodian shall comply with paragraphs #6 and #7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁹ to the Executive Director.¹⁰**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared and

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Lynn Markarian v. New Jersey Department of Law & Public Safety, Division of Consumer Affairs, 2011-312 – Findings and Recommendations of the Executive Director

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013