



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

July 23, 2013 Government Records Council Meeting

Rafael Martinez
Complainant

Complaint No. 2012-156

v.

New Jersey Department of Human Services,
Division of Medical Assistance and Health Services
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 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 the Custodian lawfully denied access to the responsive records as trade secret or proprietary information. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Further, the Council need not address whether the Custodian knowingly and willfully violated OPRA because no unlawful denial of access occurred.

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 23 Day of July 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: July 26, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Rafael Martinez¹
Complainant**

GRC Complaint No. 2012-156

v.

**New Jersey Department of Human Services,
Division of Medical Assistance and Health Services²
Custodial Agency**

Records Relevant to Complaint: Regarding LogistiCare Solutions, LLC, via e-mail or on CD in Excel format:

1. Provider contact information (name, address telephone number, email and fax), owner or manager information;
2. Provider insurance coverage information (insurance carrier, policy number, expiration date, liability limits, policy inception and certificates of insurance);
3. Provider contract information (contract number, date of contract, type of contract, fees being paid, and types of services).³

Custodian of Record: Dianna Rosenheim
Request Received by Custodian: March 14, 2012
Response Made by Custodian: May 15, 2012
GRC Complaint Received: May 24, 2012

Background

May 28, 2013 Council Meeting:

At its May 28, 2013 public meeting, the Council considered the May 21, 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 GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the records constitute trade secrets or

¹ No legal representation listed on record.

² Charlotte Vrancart, Deputy Custodian, responded to the Complainant's OPRA request. Represented by Deputy Attorney General Jennifer Simons.

³ The Complainant requested and received additional records that are not at issue in this Denial of Access Complaint.

proprietary information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see # 1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 outcome of the *in camera* review.

Procedural History:

On June 3, 2013, the Council distributed its Interim Order to all parties. On June 7, 2013, Mr. Salvador P. Simao, Esq., Counsel for LogistiCare Solutions, LLC, requested a stay of the Council's Order and requested to intervene in this matter. On June 10, 2013, the GRC granted LogistiCare's request to intervene and stated that it would review its Interim Order in light of the arguments submitted by LogistiCare. The GRC also stated that LogistiCare has until June 17, 2013 to submit additional correspondence and the Complainant must submit any responses by June 24, 2013.⁷ Finally, the GRC extended the deadline to comply with the Interim Order until August 10, 2013.

Analysis

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.

OPRA excludes from the definition of a government record "trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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 The Complainant did not submit a response to LogistiCare's request to intervene.

paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure.” N.J.S.A. 47:1A-1.1.

The Council’s May 28, 2013 Interim Order required that the Custodian provide the responsive records to the Council for an *in camera* review. Subsequent to the Council’s Order, LogistiCare’s June 7, 2013 letter provided a substantively detailed defense of the Custodian’s denial of access to the responsive records based on the trade secret and proprietary information exemption. The Council is satisfied that, based on LogistiCare’s submission, the Custodian lawfully denied access to the responsive information as trade secret and proprietary information. N.J.S.A. 47:1A-1.1. Therefore, it is unnecessary for the Council to conduct an *in camera* review.

Thus, the Custodian lawfully denied access to the responsive records as trade secret or proprietary information. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Further, the Council need not address whether the Custodian knowingly and willfully violated OPRA because no unlawful denial of access occurred.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to the responsive records as trade secret or proprietary information. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Further, the Council need not address whether the Custodian knowingly and willfully violated OPRA because no unlawful denial of access occurred.

Prepared By: Frank F. Caruso
Senior Case Manager

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

July 16, 2013



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

INTERIM ORDER

May 28, 2013 Government Records Council Meeting

Rafael Martinez
Complainant

Complaint No. 2012-156

v.

New Jersey Department of Human Services,
Division of Medical Assistance and Health Services
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council ("Council") considered the May 21, 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 GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the records constitute trade secrets or proprietary information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see # 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 outcome of the *in camera* review.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "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."

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: June 3, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Rafael Martinez¹
Complainant**

GRC Complaint No. 2012-156

v.

**New Jersey Department of Human Services,
Division of Medical Assistance and Health Services²
Custodian of Records**

Records Relevant to Complaint: Regarding LogistiCare Solutions, LLC, via e-mail or on CD in Excel format:

1. Provider contact information (name, address telephone number, email and fax), owner or manager information;
2. Provider insurance coverage information (insurance carrier, policy number, expiration date, liability limits, policy inception and certificates of insurance);
3. Provider contract information (contract number, date of contract, type of contract, fees being paid, and types of services).³

Request Made: March 14, 2012

Response Made: May 15, 2012

GRC Complaint Filed: May 24, 2012⁴

Background⁵

Request and Response:

On March 14, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request. The Complainant clarified and narrowed his request numerous times, the last time dated April 11, 2012, wherein the above listed records were sought. On May 15, 2012, the 24th business day following the Custodian’s receipt of the clarified request, the Deputy Custodian responded that she has previously provided information regarding the provider network, responsive to request item no. 1, but that she will not provide any further information because

¹ No legal representation listed on record.

² Dianna Rosenheim, Custodian of Records. Charlotte Vrancart, Deputy Custodian, responded to the Complainant’s OPRA request. Represented by Deputy Attorney General Jennifer Simons.

³ The Complainant requested and received additional records which are not at issue in this Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ 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.

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said information is confidential as proprietary/trade secrets. The Deputy Custodian states that the contents of the records requested contain the following:

- a) Company/owner name and all available contact information;
- b) With whom they are contracted, contract information;
- c) Total vehicles;
- d) Total drivers;
- e) Insurance company name and amount of coverage limits;
- f) Insurance expiration date;
- g) Insurance agency name;
- h) Any additional information in the data.

The Custodian states that a), c), and d) above are proprietary/trade secrets because the release of the information would disclose the network created by LogisticCare and how it conducts its business. The Custodian also states that b) is proprietary/trade secrets because all of LogisticCare's providers are contracted going forward. The Custodian states that e), f) and g) are proprietary/trade secrets because the companies used and coverage limits are part of how LogisticCare does business. The Custodian states that OPRA exempts proprietary commercial or financial information obtained from any source, trade secrets, as well as information, which if disclosed, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1. See also Newark Morning Star Ledger Co. v. New Jersey Sports & Exposition Authority, 423 N.J. Super. 140, 168 (App. Div. 2011).

Denial of Access Complaint:

On May 24, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC") alleging an unlawful denial of access to the requested records. The Complainant argues that the requested records are public records under OPRA because federal funds are used to operate a transportation system administered by the State of New Jersey. The Complainant questions why the requested records are deemed exempt as proprietary information or trade secrets when the Deputy Custodian initially indicated that she would provide the records.

Statement of Information:

On November 27, 2012, the GRC received the Custodian's Statement of Information ("SOF"). The Custodian certifies that she received the Complainant's initial OPRA request on March 14, 2012, which the Complainant clarified numerous times, ending on April 11, 2012.

The Custodian states that information is proprietary when it is not intended for wide dissemination, the expectation of confidentiality was manifest, and the parties' agreement delineates the specific terms and specific persons who are permitted to review this information. Newark Morning Star Ledger Co. v. New Jersey Sports & Exposition Authority, 423 N.J. Super. 140, 168 (App. Div. 2011). The Custodian states that trade secrets consist of information used in one's business which provides an advantage over competitors who do not know or use it. *Id.* The Custodian also states that considerations include "the extent to which the information is known outside of the owner's business, the extent to which it is known by employees of the

owner, the measures taken to guard the secrecy of the information, the value of the information to the owner and competitors, the effort expended to develop the information, and the ease or difficulty by which the information can be duplicated. *Id.*

The Custodian certifies that New Jersey contracts with one medical transportation broker, LogistiCare Solutions, LLC, who identified in its 2008 proposal to the State that the following information is intellectual property: management software, standard reports generated from the management software, operations manuals, provider manuals, business processes, driver's logs, training materials, and provider contract. The Custodian certifies that LogistiCare has asserted that the information sought by the Complainant is exempt from disclosure as proprietary and trade secret information. The Custodian certifies that under the State's standard terms and conditions for RFPs, intellectual property belongs to the bidder, not the State.⁶ The Custodian certifies that the Division of Medical Assistance and Health Services ("Division") determined LogistiCare's arguments to be reasonable and provided the Complainant with all non-exempt records.

Moreover, the Custodian contends that LogistiCare clearly had an expectation that information regarding its provider network would be kept confidential by the State. The Custodian asserts that LogistiCare developed its provider network over the 2 ½ years since it was awarded the RFP. The Custodian certifies that the provider list is not disclosed to the public and access by employees is limited. The Custodian contends that the list is a trade secret because a competitor receiving the information could capitalize on the extensive work LogistiCare has done in developing it. Specifically, the Custodian asserts that contracts with individual providers contain negotiated price information that would provide a competitor with insight into LogistiCare's network to see the rates of other providers, potentially leading to requests for rate increases that would, in turn, increase costs to the State. The Custodian also contends that insurance information would give competitors knowledge about which insurance companies offer reasonable rates to this type of provider and that providers carefully guard their insurance information because it represents a cost advantage to their business.

Additionally, the Custodian claims that the disclosure of proprietary information, which Medicaid providers file with the Division with the expectation that it will remain confidential, will have a chilling effect on the providers' willingness to provide such information to the Division in the future. The Custodian asserts such disclosure would have a deleterious effect on the ability of the Division to perform its regulatory responsibilities and to monitor the integrity of the Medicaid program.

Analysis⁷

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

⁶ See www.state.nj.us/treasury/purchase/noa/contracts/t2503_08-x-20091.shtml#documen2.

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.

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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.

OPRA excludes from the definition of a government record “trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure.” N.J.S.A. 47:1A-1.1.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁸ in which the GRC dismissed the complaint by accepting the Custodian’s legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Here, the Custodian denied the Complainant access to the requested records on the basis that said records are exempt as trade secrets, or proprietary information, which would disclose how LogistiCare conducts its business. N.J.S.A. 47:1A-1.1.

⁸ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Rafael Martinez v. New Jersey Department of Human Services, Division of Medical Assistance and Health Services, 2012-156 – Findings and Recommendations of the Executive Director

Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the records constitute trade secrets or proprietary information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. See Paff, *supra*.

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 outcome of the *in camera* review.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the records constitute trade secrets or proprietary information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see # 1 above), a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹¹ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 outcome of the *in camera* review.

Prepared By: Dara L. Barry
Communications Manager

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

May 21, 2013

⁹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁰ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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."

Rafael Martinez v. New Jersey Department of Human Services, Division of Medical Assistance and Health Services, 2012-156 – Findings and Recommendations of the Executive Director