INTERIM ORDER

October 30, 2018 Government Records Council Meeting

Edwin Sheppard
Complainant

v.

NJ Department of Human Services,
Division of Medical Assistance & Health Services
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 Findings and Recommendations of the Council Staff 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 redacted e-mails chains, to determine the validity of the Custodian’s assertion that the redactions were valid under OPRA as protecting ACD and attorney-client privileged material, and privacy interests. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. 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 conclusion No. 1 above), nine (9) copies of the redacted records), a document or redaction index2, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 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 Custodian’s compliance with the Council’s Interim Order.

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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 30th Day of October, 2018

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: October 31, 2018
Edwin Sheppard\(^1\)
Complainant

v.

N.J. Dep’t of Human Servs., Div. of Medical Assistance & Health Servs.\(^2\)
Custodial Agency

Records Relevant to Complaint: “I request any and all communications between the Office of Quality Assurance and the Attorney General’s Office in regards to Berge Acquisitions LLC, Berge Acquisitions LLC dba HomeCare Specialists, and/or HomeCare Specialists.”

Custodian of Record: Dianna Rosenheim
Requests Received by Custodian: May 20, 2016
Response Made by Custodian: June 16, 2016
GRC Complaint Received: June 21, 2016

Background\(^3\)

Request and Response:

On May 20, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. June 16, 2016, Deputy Custodian Kellie Pushko (“Ms. Pushko”) responded in writing, providing responsive records, with redactions made to some. Ms. Pushko asserted that the redactions were made to protect advisory, consultative, or deliberative (“ACD”) material under N.J.S.A. 47:1A-1.1. Ms. Pushko also stated that the redactions contained attorney-client privileged information and/or attorney work product, also protected under N.J.S.A. 47:1A-1.1. Finally, Ms. Pushko asserted that other redactions where made to withhold information protected under the Health Information & Patient Protection Act (“HIPPA”) and N.J.S.A. 47:1A-9(a).

Denial of Access Complaint:

On June 21, 2016, the Complainant filed a Denial of Access Complaint with the

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\(^1\) No representation listed on record.
\(^2\) Represented by Deputy Attorney General Angela Juneau Bezer.
\(^3\) 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.
Government Records Council ("GRC"). The Complainant asserted that Ms. Pushko failed to prove that any of the redactions made to protect ACD material was “pre-decisional,” and asserted that none of the information was pre-decisional. The Complainant asserted that the Office of Quality Assurance ("OQA") made a decision on the matter regarding HomeCare Specialists ("HomeCare") on April 21, 2016 and a follow up on April 27, 2016. The Complainant contended that any alleged redaction made to protect ACD material would have to be dated prior to April 27, 2016. However, the Complainant asserted that the responsive e-mails received were sent on or after April 28, 2016. Thus, the Complainant concluded that any ACD redactions would be invalid.

Similarly, the Complainant argued that redactions made to protect attorney-client communications were invalid since the matter that would solicit attorney-client communications had already passed. The Complainant also asserted that OQA was not involved in the matter in question, and would therefore have no reason to seek advice from the Office of the Attorney General ("OAG").

Next, the Complainant disputed Ms. Pushko’s redaction of an e-mail address. The Complainant contended that while he did not dispute the redaction of the e-mail’s attachment pursuant to HIPPA, no explanation was provided justify withholding the e-mail address. The Complainant contended that when he requested a rationale from Ms. Pushko, she told him that it was to protect the privacy interests of the e-mail address’s owner, as it was her personal e-mail address.

The Complainant contended that the response to his OPRA request was pushed back multiple times, and that despite providing Ms. Pushko the opportunity to cure the issues in the response, she neglected to address them.

Statement of Information:

On October 7, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that Ms. Pushko received the Complainant’s OPRA request on May 20, 2016. The Custodian certified that Ms. Pushko responded in writing on June 16, 2016, after several time extensions. The Custodian certified that all of the responsive records consist of e-mails between Vicki Mangiaracina ("Ms. Mangiaracina") and Sharon Joyce, an Assistant Attorney General ("AAG Joyce") with OAG.

The Custodian asserted that since the e-mail correspondence was between Ms. Mangiaracina and AAG Joyce, several redactions were made pursuant to the deliberative process and attorney-client privileges. The Custodian also contended that one e-mail contained a line redaction to conceal Ms. Mangiaracina’s personal e-mail address. The Custodian certified that Ms. Pushko received an e-mail from the Complainant on June 17, 2016, disputing the aforementioned redaction, and another e-mail on June 20, 2016, disputing the other redactions. The Custodian certified that Ms. Pushko responded on June 20, 2016, stating that the e-mail address was redacted because it is exempt from disclosure under OPRA’s privacy interests provision.

The Custodian argued that records which fall under the attorney-client privilege were protected under OPRA. N.J.S.A. 47:1A-1.1; Paff v. Div. of Law, 412 N.J. Super. 140, 150 (App. 

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The Custodian asserted that the records at issue were communications between OAG and OQA, specifically between Ms. Mangiaracina and AAG Joyce. The Custodian asserted that the responsive e-mails contain inquiries from Ms. Mangiaracina and responses from AAG Joyce regarding the status, legal effects and consequences of the Provisional Order issued to HomeCare from the Department of Consumer Affairs (“DCA”). The Custodian contended that although OQA had no direct involvement in issuing the order, OQA is responsible with protecting consumers receiving medical assistance benefits, including those who received treatment at HomeCare. Therefore, the Custodian asserted that OQA, in order to fulfill its duties, would seek advice from OAG regarding the repercussions of the Provisional Order. Thus, the Custodian contended that the redactions contained within the communications between Ms. Mangiaracina and AAG Joyce were justified under N.J.S.A. 47:1A-1.1.

The Custodian also argued that the Complainant wrongly asserted that the attorney-client privilege could not be claimed because the HomeCare matter was public knowledge. The Custodian asserted that at the time the responsive e-mails were made, the decision on HomeCare had yet to be finalized. Therefore, the Custodian argued that it was reasonable for OQA to seek legal advice in order to plan for addressing issues that may face HomeCare customers if and when a final decision occurred.

In additional to attorney-client privilege, the Custodian argued that several of the redactions was also made under the deliberative process privilege, which is recognized within OPRA as the exemption protecting ACD material. N.J.S.A. 47:1A-1.1; Ciesla v. New Jersey Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 137 (App. Div. 2012). The Custodian asserted that the e-mails containing the redactions were exchanged within the 30-day period in which the Provisional Order remained provisional. Thus, the Custodian contended that the communications were pre-decisional material. The Custodian also stated that the e-mails were deliberative because AAG Joyce shared information regarding the contents of the proposed final order on HomeCare. Therefore, the Custodian contended that the redactions qualify under the deliberative process privilege, satisfying both prongs of the test.

Furthermore, the Custodian contended that the Complainant’s claim that the e-mails demonstrated that a decision had been made by OQA regarding HomeCare is incorrect. The Custodian argued that the final decision determining the applicability of the deliberative process was DCA, and not OQA. The Custodian asserted that the redacted communications reflected internal deliberations from DCA regarding the finalization of the Provisional Order.

As to the redaction made to protect privacy interests, the Custodian asserted that the GRC need not reach this matter, as the attorney-client privilege applies to all the e-mails at issue in the matter. The Custodian contended that, according to the plain language under N.J.S.A. 47:1A-1.1, should a record contain attorney-client privileged information, the whole of the record is exempt from access, in contrast to other exemptions where only the redacted information contained in a record would be withheld.

Notwithstanding the above, the Custodian argued that the redaction was justified to safeguard the privacy interests of Ms. Mangiaracina, citing N.J.S.A. 47:1A-1. The Custodian noted that the New Jersey Supreme Court in Burnett v. County of Bergen, 198 N.J. 408, 414 (2009),
found that “OPRA’s twin aims-of ready access to government records and protection of a citizen’s personal information-require a careful balancing of the interests at stake.” The Custodian noted that the balancing test outlined in Doe v. Poritz, 142 N.J. 1 (1995), dictates whether a record should be withheld from disclosure in the interests of an individual’s reasonable expectation of privacy.

The Custodian argued that Ms. Mangiaracina’s interest in the privacy of her e-mail address outweighs the Complainant’s interest in access. The Custodian contended that no evidence has been provided to show that revealing Ms. Mangiaracina’s personal address would aid in the public interest, nor has the Complainant demonstrated a need for access to the e-mail address. The Custodian asserted that Ms. Mangiaracina copied only one e-mail to her personal account, and said e-mail was among those provided to the Complainant. Therefore, the Custodian argued that evidence does not show that the e-mail is regularly used by Ms. Mangiaracina for work-related purposes. The Custodian contended that there is no reason to provide the e-mail address to the Complainant consistent with ORPA.

The Custodian requested that the GRC dismiss the complaint and deny the requested relief.

Additional Submissions:

On August 21, 2017, the Complainant submitted an Amended Complaint to the GRC, seeking in part to add Carol Grant as a party. The Custodian submitted an objection on September 18, 2017. Pursuant to N.J.A.C. 5:105-2.3(h), the amendment is well out of time to be accepted as a matter of right, and was rejected by the Executive Director.

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.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records . . . . Whenever 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.” Id. The Court stated that:

[OPRA] 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

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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-7(f). This provision would be unnecessary if the Legislature did not intend to permit in camera review.

[Id. at 355.]

Further, the Court found that:

We 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-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the instant matter, the Custodian asserted most of the redactions were made to protect attorney-client privileged information, and under the deliberative process privilege. N.J.S.A. 47:1A-1.1. The Custodian also asserted that an additional redaction was made in the interests of privacy, as it was the personal e-mail address of Ms. Mangiaracina. The Custodian provided descriptions of the responsive records and the information redacted as part of the SOI.

Notwithstanding the Custodian’s description of the responsive records, a “meaningful review” is necessary to determine whether all withheld and redacted records reasonably fall within the ACD, attorney-client, and privacy exemptions. The GRC must thus review same in order to determine the full applicability of exemptions. Such an action is not uncommon, as the GRC will routinely perform an in camera review in similar circumstances. See Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an in camera review of the redacted e-mails chains, to determine the validity of the Custodian’s assertion that the redactions were valid under OPRA as protecting ACD and attorney-client privileged material, and privacy interests. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

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

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The Council Staff respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the redacted e-mails chains, to determine the validity of the Custodian’s assertion that the redactions were valid under OPRA as protecting ACD and attorney-client privileged material, and privacy interests. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. **The Custodian must deliver** to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4, 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 Custodian’s compliance with the Council’s Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

October 23, 2018

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

7 "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."

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