INTERIM ORDER

August 27, 2019 Government Records Council Meeting

David Weiner
Complainant
v.
NJ Department of Human Services,
Division of Medical Assistance and Health Benefits
Custodian of Record

At the August 27, 2019 public meeting, the Government Records Council ("Council") considered the August 20, 2019 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 withheld weekly reports to determine the validity of the Custodian’s assertion that such reports are exempt from disclosure under OPRA’s trade secrets and proprietary information exemption. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. The Custodian shall deliver\(^1\) to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index\(^2\), 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.

\(^1\) The in camera records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them 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."

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Interim Order Rendered by the
Government Records Council
On The 27th Day of August 2019

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: August 28, 2019**
STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
August 27, 2019 Council Meeting

David Weiner¹ Complainant

v.

N.J. Department of Human Services,
Division of Medical Assistance and Health Benefits²
Custodial Agency

Records Relevant to Complaint: Copies of:
1) All contracts, from their inception to present, between the Division of Medical Assistance and Health Services and Xerox for the latter to serve as the state’s Medicaid Health Benefits Coordinator.
2) All reports provided the Division of Medical Assistance and Health Services by Xerox since the inception of the latter having first served as the state’s Medicaid Health Benefits Coordinator to present.
3) All instruments of payments provided Xerox for the latter to serve as the state’s Medicaid Health Benefits Coordinator since the inception of that arrangement to present.

Custodian of Record: Dianna Rosenheim
Request Received by Custodian: June 26, 2017
Response Made by Custodian: June 29, 2017; July 28, 2017; July 31, 2017
GRC Complaint Received: August 17, 2017

Background³

Request and Response:

On June 26, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 29, 2017, the Custodian responded in writing, providing a link to the contract requested, as well as a link where the Complainant can locate other state contracts. The Custodian added that they were still searching for responsive records. On July 11, 2017, the Custodian sought an extension of time to until July 19, 2017 to locate the remaining records.

¹ No legal representation listed on record.
² No legal representation listed on record.
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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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On July 17, 2017, the Custodian sought an additional time extension to July 21, 2017. On July 20, 2017, the Custodian sought another time extension to until July 28, 2019. On July 28, 2019, the Custodian stated that she was forwarding ten (10) e-mails containing responsive records to the Complainant, but that she could not provide a complete response until July 31, 2017. The e-mails contained monthly performance reports and other payment information.

On July 31, 2017, the Custodian responded to the Complainant, stating that his request for “all” contracts, reports, and instruments was overly broad. The Custodian asserted that she was not obligated to conduct open-ended searches of the agency’s files. See MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005). Notwithstanding, the Custodian stated that in addition to what was provided on July 28, weekly performance reports provided by the contractor spanning the previous (3) years were located.

However, the Custodian stated that the following information was redacted from those reports:

1. “Total Calls This Week (incoming, outgoing, notes)”
2. “Normal Average Calls (incoming, outgoing, notes)”
3. “Abandonment Rate (standard, last week results, this week’s results, dashboard results, notes)”
4. “Answer Rage (standard, last week results, this week’s results, dashboard results, notes)”
5. “Eligibility
   a. Total Decisions Reviewed (Plan A decisions last week, Plan A decisions this week, notes)
   b. Plan A Error Rate (Standard, last week results, this week’s results, dashboard, results, notes)”

The Custodian stated that the redactions were made pursuant to OPRA’s exemption for trade secrets and/or proprietary information. The Custodian stated that the redacted data shows adjustments recorded that are required to know for the contract work. The Custodian added that the reports “were not a deliverable of the contract.” The Custodian stated that the data shows how staff and project organization are affected based on the variations in work volume, thus the contractor would suffer competitive harm if released. See Newark Morning Ledger Co. v. New Jersey Sports and Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011).

Denial of Access Complaint:

On August 17, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that he was unlawfully denied access to the requested records, but not elaborate further on the reasons for this position.

Statement of Information:4

On October 4, 2017, the Custodian filed a Statement of Information (“SOI”). The

4 The Complaint was referred to mediation on August 25, 2017. The Complainant was referred back from mediation on September 27, 2017. David Weiner v. N.J. Department of Human Services, Division of Medical Assistance and Health Benefits, 2017-170 – Findings and Recommendations of the Executive Director
Custodian certified that she received the Complainant’s OPRA request on June 26, 2017. The Custodian certified that her search included reaching out to appropriate staff to identify all responsive documents. The Custodian then certified that the documents were sent to Xerox for review for proprietary or trade secret information. The Custodian certified that she responded in writing on June 29, 2017, providing a link where the Complainant could locate the requested contracts, and responded again on July 28, 2017, providing monthly performance reports and other payment information. The Custodian then certified that she denied access to the weekly reports as they contained trade secrets/proprietary information.

The Custodian restated that the information contained in the weekly reports demonstrate a snapshot of the how staffing and organization of the project is affected by variations in the incoming work volume. The Custodian argued that release of such information would cause irreparable harm to the contractor as it could provide competitors with insight on how to address staffing levels and procedures when faced with project variations. The Custodian asserted that competitors would be able to use this information to improve their own internal procedures and undercut the contractor. Therefore, the Custodian argued that the information was exempt from disclosure under N.J.S.A. 47:1A-1.1. Newark Morning Ledger Co., 423 N.J. Super. at 359-60.

**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 . . . . 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.” 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 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.

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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.

In the instant matter, the Custodian asserted that the responsive weekly reports were withheld because they contain trade secrets and proprietary information that is exempt from disclosure under N.J.S.A. 47:1A-1.1. In her response to the Complainant and within the SOI, the Custodian outlined the specific data protected from disclosure and how such information could cause harm to the contractor.

Notwithstanding the Custodian’s description, a “meaningful review” is necessary to determine whether the entirety of the reports should be exempt from disclosure under OPRA. The GRC must therefore review same in order to determine the full applicability of exemption.

Therefore, the GRC must conduct an in camera review of the withheld weekly reports to determine the validity of the Custodian’s assertion that such reports are exempt from disclosure under OPRA’s trade secrets and proprietary information exemption. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 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

The Council Staff respectfully recommends the Council find that:

1. The GRC must conduct an in camera review of the withheld weekly reports to determine the validity of the Custodian’s assertion that such reports are exempt from disclosure under OPRA’s trade secrets and proprietary information exemption. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. The Custodian shall deliver\textsuperscript{6} to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index\textsuperscript{7}, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,\textsuperscript{8} 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

August 20, 2019

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\textsuperscript{7} The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

\textsuperscript{8} "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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