



State of New Jersey
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 28, 2022 Government Records Council Meeting

Robert J. Fogg, Esq. (o/b/o
Henry J. Austin Health Center)
Complainant

Complaint No. 2020-216

v.

NJ Department of Human Services
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 2022 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 lawfully denied access to the Complainant’s OPRA request. Specifically, the request sought medical information of individuals receiving services at Henry J. Austin Health Center, a medical care provider under contract with the Division of Mental Health and Addiction Services, and such information are exempt from disclosure under OPRA. See N.J.S.A. 47:1A-9(a); Executive Order No. 26 (McGreevey 2002) (“EO 26”). Because the records were lawfully denied pursuant to EO 26, the Council declines to address the other defenses raised by the Custodian.
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

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 28th Day of June 2022

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 30, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2022 Council Meeting**

**Robert J. Fogg, Esq. (on Behalf of ¹
Henry J. Austin Health Center)
Complainant**

GRC Complaint No. 2020-216

v.

**New Jersey Department of Human Services²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all data, information and reports submitted by the Henry J. Austin Health Center [“HJA”], and/or personnel thereof, a Federally-Qualified Health Center located at 321 N. Warren Street, Trenton, NJ 08618, into the New Jersey Substance Abuse Monitoring System (“NJSAMS”) for the Screening, Brief Intervention and Referral treatment (“SBIRT”) program, related to Contract # 14-779-ADA-0 for the time period between January 2013 through October 2015. This would include all information, in an organized format, from the following sections of the SBIRT module: A (record management), B (drug and alcohol use), C (family and living conditions), D (education, employment, and income), E (criminal justice status), F (mental and physical health problems and treatment), G (social connectedness), I (follow-up status), J (discharge status), and K (services received). Note that [HJA] is the covered entity under [Health Insurance Portability and Accountability Act (“HIPAA”)] that provided any associated [Protected Health Information (“PHI”)] data being requested to the NJSAMS program by requirement of the grant.”

Custodian of Record: James Patterson

Request Received by Custodian: September 3, 2020; September 10, 2020

Response Made by Custodian: September 9, 2020; September 16, 2020

GRC Complaint Received: October 16, 2020

Background³

Request and Response:

On September 3, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 9, 2020, the Custodian responded in writing stating that the records were not held at the Department of Human

¹ The Complainant represents the Henry J. Austin Health Center.

² Represented by Deputy Attorney General Patrick Jhoo.

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.

Robert J. Fogg, Esq. (on Behalf of Henry J. Austin Health Center) v. New Jersey Department of Human Services, 2020-216 – Findings and Recommendations of the Executive Director

Service's ("DHS") central office. The Custodian stated that the records were not made, maintained, or kept on file by the Department and that the records may be held by the Division of Mental Health and Addiction Services ("DMHAS"). The Custodian stated that the Complainant should resubmit the OPRA request directly to that agency.

On September 10, 2020, the Complainant submitted the same OPRA request to DMHAS. On September 16, 2020, the Complainant received a response from Jeff Nielson, the Custodian of Record for DMHAS. Mr. Nielson stated that the request was denied since the request sought PHI, which could not be released under OPRA. Mr. Nielson added that PHI could only be released after DMHAS receives a signed release.

Denial of Access Complaint:

On October 16, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that HJA is a covered entity under HIPAA per 45 C.F.R. 160.103 and was contracted with DMHAS to provide healthcare services and exchange health information. The Complainant stated that the contract permitted HJA access to the NJSAMS SBIRT database. The Complainant further asserted that § 3.04 of the contract stated that records may not be disclosed except under certain circumstances, including those "necessary to carry out the work of this contract." The Complainant argued that one circumstance would be an audit from DHS.

The Complainant asserted that in 2018, DHS initiated such an audit on HJA. The Complainant contended that HJA needed access to its own records from DMHAS or else they could not effectively respond to the audit. The Complainant argued that DMHAS did not consider that the request was coming directly from the provider that submitted the information rather than a member of the public. The Complainant asserted that simply stating that the requested records contained PHI was an insufficient response and ultimately an unlawful denial of access.

Statement of Information:

On December 7, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on September 3, 2020. The Custodian certified that he responded in writing on September 9, 2020, stating that DHS's central office did not make, maintain, or keep on file the requested records and stated that the requestor should submit the request directly to DMHAS.

The Custodian certified that on September 10, 2020, the Complainant submitted the OPRA request to DMHAS, and on September 16, 2020, Mr. Nielson responded to the Complainant stating that the request sought records containing PHI and could not be released under OPRA without patient authorization.

The Custodian asserted that under Executive Order No. 26 (McGreevey 2002) ("EO 26"), "information relating to medical, psychiatric or psychological history, diagnosis, treatment, or evaluation" are exempt from disclosure under OPRA. The Custodian further asserted that the requested records contained information relating to an individual's past medical treatment,

substance abuse history, personal history, and referrals for additional treatment. The Custodian thus argued that the Complainant could not reasonably dispute that the requested records fell within the categories of records exempt under EO 26.

The Custodian also argued that the records constituted PHI as defined under HIPAA, and therefore could not be disclosed under OPRA. The Custodian asserted that HIPAA's privacy rules state that "[a] covered entity . . . may not use or disclose protected health information" except as otherwise permitted under the applicable regulations. 45 C.F.R. 164.502(a). The Custodian asserted that PHI means "individually identifiable health information", which in turn includes information which "relates to the past, present, or future payment for the provision of healthcare to an individual . . . that identifies the individual; or with respect to which there is a reasonable basis to believe the information can be used to identify the individual." 45 C.F.R. 160.103. The Custodian therefore argued that the records could not be sufficiently redacted to prevent the Complainant from identifying individuals as they could crossmatch the data to records already in HJA's possession. The Custodian also contended that simply because the Complainant was seeking their own records was immaterial under HIPAA.

The Custodian further asserted that PHI may only be released without authorization under certain circumstances. See 45 C.F.R. 164.512. The Custodian argued that none of the circumstances were applicable in this matter. Lastly, the Custodian argued that to the extent that the Complainant was entitled to the records under contract, that claim was beyond the scope of the instant matter.

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 also provides that:

[OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

EO 26 provides in relevant part that:

The following records shall not be considered to be government records subject to public access pursuant to . . . [i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment, or evaluation.

[Id.]

In Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated January 29, 2013), the complainant sought access to an operational report describing a police response to a medical emergency. The complainant argued that the record should be released inasmuch as it relates to criminal activity, but with redactions made to medical information pursuant to EO 26. After conducting an *in camera* review, the Council found that the requested report only contained information pertaining to a medical incident, and nothing related to criminal activity. Therefore, the Council held that the record was exempt from disclosure in its entirety under EO 26. Further, the GRC notes that OPRA and EO 26 do not include an exception to this provision allowing for individuals to obtain medical records where the individual is the requestor. See also Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017) (affirming the Council's decision in GRC Complaint No. 2014-169 that "[complainant's] claimed entitlement to a report which is exempt from disclosure under OPRA finds no support in the statute").

In the instant matter, the Complainant requested "all data, information and reports" submitted to DMHAS's database between January 2013 through October 2015. The Complainant argued that because HJA was entitled to the records under its contract with DMHAS, they should be released under OPRA. Mr. Nielson responded to the Custodian's request stating that the records were protected from disclosure under OPRA since they contained PHI, and that such records could only be disclosed after receiving signed, authorized releases from affected individuals. In the SOI, the Custodian asserted that EO 26 plainly supported the denial of access based upon the Complainant's description of the requested information.

Upon review, the GRC is satisfied that the requested records are exempt from disclosure under OPRA. Based upon the Custodian's certification and the Complainant's own description of the requested information, the requested records would contain information explicitly protected from disclosure under OPRA. Particularly, the Complainant requested records containing an individual's medical diagnosis, treatment, and services rendered, or effectively the entirety of an individual's profile as known by HJA. Lastly, EO 26 does not provide exceptions to the exemption based upon the identity of the requestor, or whether the requestor was entitled to the records based upon a contractual relationship with the custodial agency.

Therefore, the Custodian lawfully denied access to the Complainant's OPRA request. Specifically, the request sought medical information of individuals receiving services at HJA, a medical care provider under contract with DMHAS, and such information are exempt from disclosure under OPRA. See N.J.S.A. 47:1A-9(a); EO 26. Because the records were lawfully denied pursuant to EO 26, the Council declines to address the other defenses raised by the Custodian.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), the Appellate Division held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct”(quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court held that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” Id. at 603 (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL

did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[196 N.J. at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the instant matter, the Complainant filed the instant complaint asserting that the Custodian unlawfully denied access to the requested records. However, the evidence of record indicates that the requested records comprised medical information protected under EO 26, and were therefore properly withheld under OPRA. Thus, the Complainant has not achieved the desired result and is not a prevailing party in this complaint.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. at 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 71. Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the Complainant’s OPRA request. Specifically, the request sought medical information of individuals receiving services at Henry J. Austin Health Center, a medical care provider under contract with the Division of Mental Health and Addiction Services, and such information are exempt from disclosure under OPRA. See N.J.S.A. 47:1A-9(a); Executive Order No. 26 (McGreevey 2002) (“EO 26”). Because the records were lawfully denied pursuant to EO 26, the Council declines to address the other defenses raised by the Custodian.

2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

Prepared By: Samuel A. Rosado
Staff Attorney

June 21, 2022