



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

August 11, 2009 Government Records Council Meeting

Michelle Ewing
Complainant

Complaint No. 2007-119

v.

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

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 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 no further adjudication is necessary since the parties settled the matter between themselves.

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 11th Day of August, 2009

Robin Berg Tabakin, Chair
Government Records Council

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



Janice L. Kovach
Government Records Council

Decision Distribution Date: August 17, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Michelle Ewing¹
Complainant**

GRC Complaint No. 2007-119

v.

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

Records Relevant to Complaint:

Letter of Assurance of Voluntary Compliance (“AVC”) sent by the Board to the Complainant’s former psychologist regarding file #06-024.³

Request Made: April 25, 2007

Response Made: May 4, 2007

Custodian: Robert J. Campanelli

GRC Complaint Filed: May 10, 2007

Background

May 28, 2008

Government Records Council’s (“Council”) Interim Order. At its May 28, 2008 public meeting, the Council considered the May 21, 2009 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. Based on the clarification provided by the Custodian, it is now clear to the GRC that the determination that the AVC letter was subject to an *in camera* inspection as advisory, consultative and deliberative material was erroneous and that the AVC letter is not considered “advisory” as that term is utilized in N.J.S.A. 47:1A-1.1.
2. Because it is now clear that the Custodian does not assert that the AVC letter is exempt from disclosure pursuant to OPRA as advisory, consultative and deliberative material, no *in camera* review of the letter by the GRC is necessary to confirm the applicability of that exemption.

¹ Represented by Thomas Cafferty, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

² Represented by DAG Carmen A. Rodriguez, on behalf of the NJ Attorney General.

³ The Complainant originally requested file #06-024 as numbered by the Board of Psychological Examiners, but in her Denial of Access Complaint she indicated that, during a conversation with the office assistant on April 25, 2007, the Complainant reduced her request to only the AVC letter.

3. Because the new evidence the Custodian seeks to introduce before the Council may be probative on the issue of whether the AVC letter should be considered confidential under N.J.S.A. 45:1-36, and because the Custodian has requested the opportunity for oral argument in support of this contention, this matter should be referred to the Office of Administrative Law for a hearing to develop the record in this regard.

June 4, 2008

Council's Interim Order distributed to the parties.

July 8, 2009

This matter was transmitted to the Office of Administrative Law.

July 15, 2009

Letter from Complainant's Counsel to the GRC. Counsel indicates that the matter was settled between the parties and there is no need for a hearing before the Office of Administrative Law.

Analysis

No analysis is necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that no further adjudication is necessary since the parties settled the matter between themselves.

Prepared &

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

May 28, 2008 Government Records Council Meeting

Michelle Ewing
Complainant

Complaint No. 2007-119

v.

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

At the May 28, 2008 public meeting, the Government Records Council (“Council”) considered the May 21, 2008 *Reconsideration* 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. Based on the clarification provided by the Custodian, it is now clear to the GRC that the determination that the AVC letter was subject to an *in camera* inspection as advisory, consultative and deliberative material was erroneous and that the AVC letter is not considered “advisory” as that term is utilized in N.J.S.A. 47:1A-1.1.
2. Because it is now clear that the Custodian does not assert that the AVC letter is exempt from disclosure pursuant to OPRA as advisory, consultative and deliberative material, no *in camera* review of the letter by the GRC is necessary to confirm the applicability of that exemption.
3. Because the new evidence the Custodian seeks to introduce before the Council may be probative on the issue of whether the AVC letter should be considered confidential under N.J.S.A. 45:1-36, and because the Custodian has requested the opportunity for oral argument in support of this contention, this matter should be referred to the Office of Administrative Law for a hearing to develop the record in this regard.

Interim Order Rendered by the
Government Records Council
On The 28th Day of May, 2008



Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: June 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
May 28, 2008 Council Meeting**

**Michelle Ewing¹
Complainant**

GRC Complaint No. 2007-119

v.

**NJ Office of the Attorney General, Division of Consumer Affairs²
Custodian of Records**

Records Relevant to Complaint:

Letter of Assurance of Voluntary Compliance (“AVC”) sent by the Board to the Complainant’s former psychologist regarding file #06-024.³

Request Made: April 25, 2007

Response Made: May 4, 2007

Custodian: Robert J. Campanelli

GRC Complaint Filed: May 10, 2007

Background

February 28, 2008

Interim Order of the Government Records Council. At the February 28, 2008 public meeting, the Government Records Council (“Council”), considered the Executive Director’s Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. Therefore, the Council found that:

1. Because the Custodian certified that the letter of Assurance of Voluntary Compliance (“AVC”) is considered advisory by the Board, the Council should conduct an *in camera* review of the AVC letter to determine if said document, or portions therein are exempt from disclosure as advisory, consultative, or deliberative material.
2. The Custodian must deliver to the Council in a sealed envelope six copies of the requested unredacted documents (see #1 above), a document or redaction index detailing the documents and/or each redaction asserted and the Custodian’s legal certification under penalty of perjury that the documents provided are the

¹ Represented by Thomas Cafferty, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

² Represented by DAG Carmen A. Rodriguez, on behalf of the NJ Attorney General.

³ The Complainant originally requested file #06-024 as numbered by the Board of Psychological Examiners, but in her Denial of Access Complaint she indicated that, during a conversation with the office assistant on April 25, 2007, the Complainant reduced her request to only the AVC letter.

documents requested by the Council for the *in camera* no later than five (5) business days from the distribution date 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.

March 3, 2008

The Council's February 28, 2008 Interim Order is distributed to the parties.

March 10, 2008

Custodian files a Motion for a Stay and Reconsideration of the Council's Interim Order, attaching a letter brief and Legal Certifications of Lawrence DeMarzo and Robert J. Campanelli. The Custodian requests the opportunity to present oral argument to the Council in support of the Motions.

In the Letter Brief in support of the Motion for Stay filed by the Custodian's Counsel, the Custodian argues that the Council's determination that N.J.S.A. 45:1-36 would not afford confidentiality to a private letter sent by a disciplinary board at the conclusion of an investigation where the board elects not to take disciplinary action against the licensee would immediately and irreparably damage the current practices followed by health care boards.⁴ The Custodian argues that the letter which is the subject of the Denial of Access Complaint references otherwise confidential information provided to the board concerning the conduct of a health care professional, and disclosure of not only this letter but letters of this type would prohibit the boards from communicating concerns identified during investigations to their licensees in a private, confidential fashion. The Custodian contends that such a result "will compromise the ability of the boards to communicate with their licensees, and ultimately compromise the ability of the Division to promote its paramount obligation to protect public health, safety and welfare."

The Custodian suggests that the balance of the equities supports the issuance of a stay of the Interim Order, during which time the Division will have an opportunity to supplement the record in this matter in order to fully apprise the Council of the ordinary and customary practices of the Division and the effect that the Council's proposed decision "will have on the Division, its constituent boards, licensees of those boards, and ultimately the public at large." The Custodian contends that the stay, if granted, will permit the outlined practices adopted by the boards to continue, and the boards will continue to have available to them a mechanism to inform licensees regarding points of concern identified during investigations. The Custodian notes that the Complainant in this

⁴ The Custodian's letter brief sets forth facts which were not raised in the Custodian's Statement of Information, including facts of the investigation forming the foundation for the letter which is the subject of the Denial of Access Complaint, as well as additional facts surrounding the general practices of health care boards within the Division of Consumer Affairs (as set forth in the Certifications of Lawrence DeMarzo and Robert J. Campanelli).

matter is already aware of the contents of the letter in question and will not, therefore, be harmed by a stay of the Council's Interim Order.⁵

In support of its Motion for Reconsideration, the Custodian contends that the Council erred when it concluded that a viable distinction could be drawn between information provided to a board concerning the conduct of a health care professional, which information is clearly confidential pursuant to N.J.S.A. 45:1-36, and a private letter issued to the licensee at the conclusion of an investigation. The Custodian argues that deeming the letter to be a public record would necessarily erode the confidentiality protection afforded by N.J.S.A. 45:1-36 by effectively informing the public that a complaint was filed against a licensee and that an investigation ensued. The Custodian further argues that members of the public would thus be privy to otherwise confidential information, which is at odds with the legislative intent reflected in N.J.S.A. 45:1-36.

The Custodian argues that members of the public who are provided access to such letters would draw adverse inferences against the practitioner because such letters contain information regarding the underlying complaint filed against the licensee, as well as specific admonitions to the licensee regarding concerns identified by the investigating board; the release of such letters would unfairly compromise reputational interests of licensees. The Custodian further argues that facts adduced during investigations of licensees, which would otherwise be confidential and within the scope of protection afforded by N.J.S.A. 45:1-36 would become matters of public record if the letter in question were deemed to be a government record. The Custodian contends that this would eviscerate the confidentiality of a psychologist-patient relationship, because the disclosure of such a letter would make the existence of such a relationship a matter of public record. Moreover, the Custodian asserts, "the public would have a window opened into the substance of the complaint that was filed against [the licensee], as well as perhaps some insight into matters that may have been addressed in what otherwise would be the sacrosanct confidential relationship between therapist and patient[.]"

The Custodian therefore urges the Council to recognize that any private letter issued by the board at the conclusion of an investigation where no basis for action is found should be considered to be protected by N.J.S.A. 45:1-36, and thus not a "government record." The Custodian specifically notes that the Division did not intend to suggest that the letter which is the subject of the Denial of Access complaint should be exempt from OPRA pursuant to the statutory exemption for inter-agency or intra-agency advisory, consultative or deliberative material. The Custodian urges that, even if the Council does not elect to modify its Interim Order that the letter is a government record, it should nevertheless find that the Division Custodian's position was reasonable and that he therefore neither knowingly nor willfully violated OPRA.

⁵ The Custodian recognizes that the Division's practices as outlined in its letter brief were not in fact followed in this case, and admits that the Board of Psychological Examiners deviated from its usual and customary practices when it specifically informed the Complainant of the specific concerns which were identified during its investigation and communicated to the licensee via the letter in question. The Custodian also admits that the Board deviated from its usual and customary practices when it failed to inform the Complainant that the letter was considered confidential.

March 17, 2008

The Complainant's Counsel files a letter brief in response to the Custodian's Motion for Stay and Reconsideration of the Council's Interim Order.

The Complainant's Counsel contends there is no reason to conduct an *in camera* inspection of the letter in question because the State does not argue that the letter is exempt from disclosure as advisory, consultative and deliberative material. Thus, the Complainant's Counsel asserts that the Council's Interim Order is moot and no *in camera* review need be conducted.

The Complainant's Counsel also contends that there is no basis for reconsideration of the Council's Interim Order because the Council's analysis and conclusion that N.J.S.A. 45:1-36 and N.J.A.C. 13:4-13.1 do not apply to the letter which is the subject of the Denial of Access complaint is correct, and the Custodian has provided no new evidence or change in the law to support reconsideration of the Interim Order nor any reason that the facts and arguments presented in its Motion for Stay and Reconsideration could not have been provided to the Council in the first instance. The Complainant's Counsel asserts that the State is attempting to get a "second bite of the apple" by advancing facts and arguments not presented earlier. The Complainant's Counsel notes that there are no GRC rules currently in effect which govern the standard of review on a motion for reconsideration, but argues that motions for reconsideration filed in a court action are governed by R. 4:49-2. This rule states, in pertinent part:

"4:49-2. Motion to Alter or Amend a Judgment or Order

Except as otherwise provided by R. 1:13-1 (clerical errors), a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." R. 4:49-2.

The Complainant's Counsel further argues that New Jersey courts have determined that reconsideration should be utilized only for those cases which fall into that 'narrow corridor' in which either 1) the court has expressed its decision based upon a palpably incorrect or irrational basis; or 2) it is obvious that the court either, did not consider, or failed to appreciate the significance of probative, competent evidence. The Complainant's Counsel states that, if parties to a GRC complaint were permitted to make a second round of arguments after the close of evidence, without having to show why those arguments could not have been previously asserted, the result would be devastating both to the litigants themselves as well as the system based upon the additional costs of litigation, extended waiting periods to adjudications, a backlog of the system with reconsideration requests, and the unnecessary expenditure of State money and time on specious arguments.

The Complainant's Counsel contends that the State has not argued that the GRC misapplied existing law but merely asserts a policy argument as to why the letter should

be exempt from disclosure, *i.e.*, because it affects the current practice of the health care boards – a practice which the boards are under no obligation to undertake or continue.

The Complainant's Counsel further contends that the GRC must apply statutory and regulatory law as it is written, and N.J.S.A. 45:1-36 specifically provides that only information provided to the Division or Board is confidential. The Complainant's Counsel asserts that the Custodian's interpretation that N.J.S.A. 45:1-36 confers confidentiality upon letters sent by the board to licensees is a tortured interpretation belied by the plain language of the statute. The Complainant's Counsel notes that if the Division wishes to change the statute or attendant regulations to effectuate the policy considerations it now advances, the Division is free to attempt to do so through appropriate statutory and regulatory legislative channels.

The Complainant's Counsel asserts that the GRC appropriately concluded that the record sought was a letter issued by the Board upon completion of its investigation, not information provided to the Board as contemplated by the exemption set forth at N.J.S.A. 45:1-36. The Complainant's Counsel states that based on this, the Custodian's motion for reconsideration must be denied.

The Complainant's Counsel further argues that the Custodian has waived its right to argue that the material requested by the Complainant is exempt from disclosure because the Board has already advised the Complainant of the existence of the letter and its contents. The Complainant's Counsel notes that the Division failed to follow its stated practice in the instant case by so advising the Complainant.

April 3, 2008

Letter from GRC to Custodian's Counsel, acknowledging receipt of the Motion for Stay and Reconsideration and granting a Stay of the Council's February 28, 2008 Interim Order. The GRC notes that a reconsideration of this matter will be presented to the Council members for consideration.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

In its February 28, 2008 Interim Order, the Council held that because the Custodian certified that the letter of Assurance of Voluntary Compliance ("AVC") is considered advisory by the Board, the Council should conduct an *in camera* review of the AVC letter to determine if said document, or portions therein, are exempt from disclosure as advisory, consultative, or deliberative material.

In reaching its decision, the Council reviewed the Custodian's basis for the denial of access. In the Custodian's written response to the Complainant's request dated May 4, 2007, the reason given for the denial of access to the requested record was that the

records are confidential pursuant to N.J.S.A. 45:1-36.⁶ Moreover, in the Custodian's Statement of Information dated May 31, 2007, the Custodian certified that:

“[t]he Board issued an AVC⁷ letter to the licensee, which informed the licensee that no basis for disciplinary action was found but cautioned the licensee to refrain from certain conduct. The Custodian also certifies *that the AVC letter was considered advisory by the board* and not a basis for disciplinary action; as a result of the finding of no basis for disciplinary action upon review of the conduct of a health care professional, the Division deemed the information gathered during the investigation of the matter to be confidential pursuant to N.J.S.A. 45:1-36.”

Based on the Custodian's certification in the Statement of Information that the requested AVC letter was considered “advisory,” the GRC concluded that the Custodian was asserting the letter's exemption from disclosure as advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1.⁸

However, after the Council issued its February 28, 2008 Interim Order, the Custodian's Counsel, via letter brief to the GRC dated March 10, 2008, raised new legal arguments and facts in support of the Custodian's denial of access. It should be noted that the GRC does not routinely provide Custodians with “a second bite of the apple,” but the GRC believes that it is necessary to clarify the legal points raised by the Custodian's Counsel.

In support of its Motion for Reconsideration, the Custodian specifically noted that the Division did not intend to suggest that the letter which is the subject of the Denial of Access complaint should be exempt from OPRA pursuant to the statutory exemption for inter-agency or intra-agency advisory, consultative or deliberative material. The Custodian, however, maintains that the AVC letter should be exempt from disclosure pursuant to N.J.S.A. 45:1-36, and that the letter contains confidential information the disclosure of which would necessarily erode the protection for such information afforded by N.J.S.A. 45:1-36 by effectively informing the public that a complaint was filed against a licensee and that an investigation ensued. The Custodian further argues that members of

⁶ N.J.S.A. 45:1-36 states, in part, that “any information provided to the division or a 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 information to a government agency to facilitate the discharge of its public responsibilities.

⁷ Letter of Assurance of Voluntary Compliance.

⁸ N.J.S.A. 47:1A-1.1 states in pertinent part that “... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...the terms shall not include *inter-agency or intra-agency, advisory, consultative, or deliberative material...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

the public would thus be privy to otherwise confidential information, which is at odds with the legislative intent reflected in N.J.S.A. 45:1-36.

In connection with this argument and in support of the Motion for Reconsideration, the Custodian submitted a letter brief which sets forth facts which were not raised in the Custodian's Statement of Information, including facts of the investigation forming the foundation for the AVC letter which is the subject of the Denial of Access Complaint, as well as additional facts surrounding the general practices of health care boards within the Division of Consumer Affairs (as set forth in the Certifications of Lawrence DeMarzo and Robert J. Campanelli). The Custodian also sought the opportunity to supplement the record in this matter in order to fully apprise the Council of the ordinary and customary practices of the Division and the effect that the Council's proposed decision "will have on the Division, its constituent boards, licensees of those boards, and ultimately the public at large." Finally, the Custodian requested the opportunity to present oral argument to the Council in support of the Motion for Reconsideration.

The Complainant's Counsel contends that there is no basis for reconsideration of the Council's Interim Order because the Council's analysis and conclusion that N.J.S.A. 45:1-36 and N.J.A.C. 13:4-13.1 do not apply to the AVC letter is correct, and the Custodian has provided no new evidence or change in the law to support reconsideration of the Interim Order nor any reason that the facts and arguments presented in its Motion for Stay and Reconsideration could not have been provided to the Council in the first instance. The Complainant's Counsel asserts that the State is attempting to get a "second bite of the apple" by advancing facts and arguments not presented earlier.

The Complainant's Counsel further argues that the Custodian has waived its right to argue that the material requested by the Complainant is exempt from disclosure because the Board has already advised the Complainant of the existence of the letter and its contents. The Complainant's Counsel notes that the Division failed to follow its stated practice in the instant case by so advising the Complainant.

Reconsideration of an administrative decision is not a matter of right. If after an administrative body enter an order litigants were entitled to a rehearing as a matter of right because of "new facts" discovered between the agency's report and the agency's hearing, "there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." In re Marvin Gastman, 147 N.J. Super. 101, 113 (App. Div. 1977)(citations omitted).

Rather, reconsideration is a matter left to the discretion of the agency making the original decision. Gastman, *supra*, 147 N.J. Super. at 113. Reconsideration is generally "affected by considerations of elapsed time, diligence and reliance, and has been granted generally when illegality of the administrative action has been shown or when there was evidence of extraordinary circumstances, illegality, fraud, mistake, new evidence or change in circumstances." Id. at 114.

Based on the clarification provided by the Custodian, it is now clear to the GRC that the determination that the AVC letter was subject to an *in camera* inspection as

advisory, consultative and deliberative material was erroneous and that the AVC letter is not considered “advisory” as that term is utilized in N.J.S.A. 47:1A-1.1.

Moreover, because it is now clear that the Custodian does not assert that the AVC letter is exempt from disclosure pursuant to OPRA as advisory, consultative and deliberative material, no *in camera* review of the letter by the GRC is necessary to confirm the applicability of that exemption.

The Custodian asserts additional facts and legal argument, not previously presented to the Council, which he believes support a conclusion that the AVC letter should be considered confidential under N.J.S.A. 45:1-36. The Custodian also requests the opportunity to present oral argument in support of the Motion for Reconsideration.

Because the new evidence the Custodian seeks to introduce before the Council may be probative on the issue of whether the AVC letter should be considered confidential under N.J.S.A. 45:1-36, and because the Custodian has requested the opportunity for oral argument in support of this contention, this matter should be referred to the Office of Administrative Law for a hearing to develop the record in this regard.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Based on the clarification provided by the Custodian, it is now clear to the GRC that the determination that the AVC letter was subject to an *in camera* inspection as advisory, consultative and deliberative material was erroneous and that the AVC letter is not considered “advisory” as that term is utilized in N.J.S.A. 47:1A-1.1.
2. Because it is now clear that the Custodian does not assert that the AVC letter is exempt from disclosure pursuant to OPRA as advisory, consultative and deliberative material, no *in camera* review of the letter by the GRC is necessary to confirm the applicability of that exemption.
3. Because the new evidence the Custodian seeks to introduce before the Council may be probative on the issue of whether the AVC letter should be considered confidential under N.J.S.A. 45:1-36, and because the Custodian has requested the opportunity for oral argument in support of this contention, this matter should be referred to the Office of Administrative Law for a hearing to develop the record in this regard.

Prepared By:

Karyn Gordon, Esq.
In House Counsel

Approved By:

Catherine Starghill, Esq.

Executive Director

May 21, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

February 27, 2008 Government Records Council Meeting

Michelle Ewing
Complainant

Complaint No. 2007-119

v.

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

At the February 27, 2008 public meeting, the Government Records Council (“Council”) considered the February 20, 2008 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. Because the Custodian certified that the letter of Assurance of Voluntary Compliance (“AVC”) is considered advisory by the Board, the Council should conduct an *in camera* review of the AVC letter to determine if said document, or portions therein are exempt from disclosure as advisory, consultative, or deliberative material.
2. **The Custodian must deliver¹ to the Council in a sealed envelope six copies of the requested unredacted document (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, that the document provided is the document 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* documents 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 document and/or each redaction asserted and the lawful basis for the denial.



Interim Order Rendered by the
Government Records Council
On The 27th Day of February, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Government Records Council

Decision Distribution Date: March 3, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 27, 2008 Council Meeting**

**Michelle Ewing¹
Complainant**

GRC Complaint No. 2007-119

v.

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

Records Relevant to Complaint:

Letter of Assurance of Voluntary Compliance (“AVC”) sent by the Board to the Complainant’s former psychologist regarding file #06-024.³

Request Made: April 25, 2007

Response Made: May 4, 2007

Custodian: Robert J. Campanelli

GRC Complaint Filed: May 10, 2007

Background

April 25, 2007

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form.

May 3, 2007

E-mail from the Custodian to the Complainant. The Custodian states that he will contact the Complainant tomorrow (May 4, 2007) regarding her OPRA request.

May 3, 2007

E-mail from the Complainant to the Custodian. The Complainant states that as of tomorrow it will be seven (7) business days following her OPRA request date. The Complainant also states that the Board of Psychological Examiners has closed her inquiry and voted to issue a Letter of Assurance of Voluntary Compliance (“AVC”) to her former psychologist. The Complainant further asks that if she needs to be more specific in her inquiry, to please let her know.

¹ Represented by Thomas Cafferty, Esq. of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

² Represented by DAG Carmen A. Rodriguez, on behalf of the NJ Attorney General.

³ The Complainant originally requested file #06-024 as numbered by the Board of Psychological Examiners, but within her Denial of Access Complaint she indicated that during a conversation with the office assistant on April 25, 2007, the Complainant reduced her request to only the AVC letter.

May 4, 2007

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested records is denied because the records are confidential pursuant to N.J.S.A. 45:1-36.⁴

May 4, 2007

E-mail from the Complainant to the Custodian. The Complainant states that she thought that signed AVC letters were a matter of public record and as such should be part of the public minutes of a board meeting of the Psychological Examiners. The Complainant also states that the process is not well explained.

May 4, 2007

E-mail from the Custodian to the Complainant. The Custodian states that, in response to the Complainant's inquiry concerning why access to the requested record was denied, licensees of the Board are subject to the provisions of N.J.S.A. 45:1-36, which provides that where a health related board subject to the law determines that the result of the inquiry or investigation is a finding of no basis for disciplinary action, the information shall remain confidential. The Custodian also states that, in this case, the Board made a finding of no cause concerning the matter and as a result all information pertaining to the complaint is held confidential.

May 10, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request (not dated)
- E-mail from the Custodian to the Complainant dated May 3, 2007
- E-mail from the Complainant to the Custodian dated May 3, 2007
- Government Records Request Receipt from the Custodian to the Complainant dated May 4, 2007
- E-mail from the Complainant to the Custodian dated May 4, 2007
- E-mail from the Complainant to the Custodian dated May 4, 2007⁵

The Complainant submitted her OPRA request on April 25, 2007 and states that she had a telephone conversation with Lucie, an office assistant of the Custodian, in which the Complainant was instructed to contact the Custodian to refine her OPRA request. The Complainant asserts that she informed the office assistant that she would settle for the AVC letter and that the office assistant assured her that she was entitled to

⁴ N.J.S.A. 45:1-36 states, in part, that "any information provided to the division or a 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 information to a government agency to facilitate the discharge of its public responsibilities."

⁵ The Complainant also includes other documentation that is not relevant to the adjudication of this complaint.

the requested records. The Complainant also asserts that she received a response on May 4, 2007 indicating that the requested records are confidential pursuant to N.J.S.A. 45:1-36.

May 21, 2007

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

May 22, 2007

Request for the Statement of Information sent to the Custodian.

May 31, 2007

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated April 25, 2007
- Government Records Request Receipt from the Custodian to the Complainant dated May 4, 2007

The Custodian certifies that he received the Complainant's OPRA request on April 25, 2007 and he responded to the request on May 4, 2007. The Custodian also certifies that no documents were released because all of the documents requested are deemed confidential pursuant to N.J.S.A. 45:1-36.

The Custodian contends that in response to the Complainant's request, the request is denied because the information in question is confidential pursuant to N.J.S.A. 45:1-36 which became effective on October 30, 2005 and provides in part that:

"...any information provided to the division or a board concerning the conduct of a health care professional, pursuant to section 2 of P.L. 2005, c. 83 (C.26:2H-12.2b), section 5 of P.L. 1978, c. 73 (C.45:1-18) or any other provision of law, 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 information to a government agency to facilitate the discharge of its public responsibilities."

The Custodian also contends that the information sought by the Complainant was provided to the Board of Psychological Examiners pursuant to N.J.S.A. 45:1-18, which addressed the investigative powers of boards, the director or the Attorney General. The Custodian further contends that upon completion of the board's investigation, a determination was made that there was no basis for disciplinary action against the licensee.

The Custodian certifies that the Board issued an AVC letter to the licensee, which informed the licensee that no basis for disciplinary action was found but cautioned the licensee to refrain from certain conduct. The Custodian also certifies that the AVC letter was considered advisory by the board and not a basis for disciplinary action; as a result of the finding of no basis for disciplinary action upon review of the conduct of a health care professional, the Division deemed the information gathered during the investigation of the matter to be confidential pursuant to N.J.S.A. 45:1-36. The Custodian further certifies that the requested records are denied pursuant to N.J.S.A. 47:1A-9.a. which allows the exemptions set forth in 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.

June 8, 2007

Letter from Complainant's Counsel to the GRC. The Complainant's Counsel asserts that the purported basis for the Custodian's denial was that the requested records are confidential pursuant to N.J.S.A. 45:1-36., but N.J.S.A. 45:1-36 does not provide that the requested AVC letter is confidential. The Complainant's Counsel also asserts that the only material rendered confidential by the statute is information provided to the Board, not information or documentation created, issued, or provided by the Boards.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...the terms shall not include *inter-agency or intra-agency, advisory, consultative, or deliberative material...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also states that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA] 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; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” (Emphasis added). N.J.S.A. 47:1A-9.a.

N.J.S.A. 45:1-36 states:

“...[a]ny information provided *to the division or a board* concerning the conduct of a health care professional, pursuant to section 2 of P.L. 2005, c. 83 (C.26:2H-12.2b), section 5 of P.L. 1978, c. 73 (C.45:1-18) or any other provision of law, 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 information to a government agency to facilitate the discharge of its public responsibilities.” (Emphasis added).

N.J.A.C. 13:4-13.1 states:

“...[e]xcept as otherwise set forth in this chapter, the Division’s investigatory records shall be considered confidential and exempt from public access under [OPRA].”

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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. 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

The evidence of record shows that the Complainant requested the letter of Assurance of Voluntary Compliance (“AVC”) sent by the Board to the Complainant’s former psychologist regarding file #06-024. The Custodian denied the Complainant’s OPRA request because upon the completion of the Board’s investigation, a determination was made that there was no basis for disciplinary action against the licensee. Therefore, the Custodian asserted that the requested records are confidential pursuant to N.J.S.A. 45:1-36, which provides that where a health related board subject to the law determines that the result of the inquiry or investigation is a finding of no basis for disciplinary action the information shall remain confidential.

Pursuant to N.J.S.A. 47:1A-9.a., OPRA does not abrogate any exemption of a public record or government record from public access made pursuant to any other statute. N.J.S.A. 45:1-36 specifically deems confidential any information provided to the division or a board concerning the conduct of a health care professional, but the requested AVC letter was not provided to the board. Rather, as the Custodian certified, the letter was created by the Board and issued to the licensee indicating that no basis for disciplinary action was found and cautioning the licensee's conduct. N.J.A.C. 13:4-13.1 states that the Division's investigatory records shall be considered confidential and exempt from OPRA, but the requested AVC letter was not a part of the investigatory records because the letter was issued to the licensee following the investigation.

However, because the Custodian certified that the AVC letter is considered advisory by the Board, the Council should conduct an *in camera* review of the AVC letter to determine if said document, or portions therein, are exempt from disclosure as ACD.

Whether the Custodian's denial of access to the requested letter of Assurance of Voluntary Compliance ("AVC") rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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. Because the Custodian certified that the letter of Assurance of Voluntary Compliance ("AVC") is considered advisory by the Board, the Council should conduct an *in camera* review of the AVC letter to determine if said document, or portions therein are exempt from disclosure as advisory, consultative, or deliberative material.
2. **The Custodian must deliver⁶ to the Council in a sealed envelope six copies of the requested unredacted document (see #1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document 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

⁶ The *in camera* documents 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.

⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

February 20, 2008