



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**JON S. CORZINE**  
Governor

**CHARLES A. RICHMAN**  
Acting Commissioner

**FINAL DECISION**

**November 4, 2009 Government Records Council Meeting**

Deborah Cummins Sandlaufer  
Complainant

Complaint No. 2008-88

v.

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

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 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, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant’s request fails to identify with reasonable clarity the specific government records sought, the Complainant’s request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied the Complainant access to the records requested.
3. Although the Custodian’s failure to provide a written response to the Complainant’s request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian, under no legal obligation, created and disclosed records responsive to the Complainant’s request, it is concluded that the Custodian’s actions do not rise to the level of a knowing and



willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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 4<sup>th</sup> Day of November, 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, Secretary  
Government Records Council

**Decision Distribution Date: November 9, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 4, 2009 Council Meeting**

**Deborah Cummins Sandlaufer<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-88**

**v.**

**New Jersey Department of Human Services,  
Division of Medical Assistance and Health Services<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. A list or computer print-out of all providers debarred from the Medicaid program who, during the last five years, and have received an early reinstatement from their debarment. Please provide copies of the original correspondence setting forth the reasons for the original debarment and the date of debarment. Also provide copies of any and all correspondence, e-mails, court orders or other documents demonstrating the reasons for early reinstatement.
2. A list or computer print-out of all Medicaid providers, who during the last five years were placed on pre-pay status or some other form of monitoring by the Medicaid program to ensure compliance with rules and regulations of the program. Provide also all documents, letters, correspondence, e-mails, or agreements which would explain why these providers have been placed on some conditional form of participation in the program.
3. Copies of all correspondence relating to suspension and debarment of Dr. Edward Anduhar.
4. Investigative file for Dr. Claxton Crowder, M.D., including but not limited to all documents which demonstrate that Dr. Crowder knew, and when he knew, that Dr. Anduhar was no longer a Medicaid provider; all documents which demonstrate that Dr. Crowder knew, and when he knew, that Dr. Anduhar's office, the Vineland Development Center, was excluded as a Medicaid provider; and all documents which demonstrate that Dr. Crowder failed to comply with the Medicaid program's request for records.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Michael Kennedy, on behalf of the NJ Attorney General.

**Request Made:** April 4, 2008<sup>3</sup>  
**Response Made:** May 2, 2008  
**Custodian:** Dominic Magnolo  
**GRC Complaint Filed:** April 25, 2008<sup>4</sup>

### **Background**

#### **April 4, 2008<sup>5</sup>**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

#### **April 25, 2008**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated April 3, 2008. The Complainant states that the Custodian failed to respond to her records request. The Complainant agrees to mediate this complaint.

#### **April 28, 2008**

Offer of Mediation sent to both parties. The Custodian did not respond to the Offer of Mediation.

#### **May 2, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's records request on the twentieth (20<sup>th</sup>) business day following receipt of such request. The Custodian states that an initial review of this request indicates that it would take a substantial amount of time and resources to fulfill. The Custodian states that the cost associated with this request exceeds the maximum authorized cost of \$250.00. The Custodian states that no further action will be taken until the Complainant increases the authorized amount to at least \$1,000.00. The Custodian suggests that the Complainant visit the New Jersey Division of Purchase and Property web site to search the consolidated debarment report for free.

#### **July 30, 2008**

E-mail from the Custodian to the Complainant. The Custodian advises the Complainant of the copying fees associated with Request Items Nos. 2 and 4. The Custodian states that the Complainant's request will be closed if payment is not received by August 15, 2008.

#### **April 9, 2009**

Request for the Statement of Information ("SOI") sent to the Custodian.

#### **May 4, 2009**

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<sup>3</sup> The Custodian certified in the Statement of Information that he did not receive the Complainant's OPRA request until April 4, 2008.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The Custodian certified in the Statement of Information that he did not receive the Complainant's OPRA request until April 4, 2008.

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on April 9, 2009 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

**May 12, 2009**

E-mail from the Custodian to the GRC. The Custodian states that fulfilling the Complainant's request was complicated and required a request for an Attorney General opinion. The Custodian further states that the Division of Medical Assistance and Health Services ("DMAHS") is in the process of moving offices. The Custodian requests that the GRC extend the filing deadline for the SOI to June 1, 2009.

**June 1, 2009**

Custodian's SOI with the following attachments:<sup>6</sup>

- Complainant's OPRA request dated April 3, 2008;
- E-mail from the Custodian to the Complainant dated May 2, 2008;
- E-mail from the Custodian to the Complainant dated July 30, 2008.

The Custodian certifies that he received a copy of the Complainant's OPRA request on April 4, 2008. The Custodian also certifies that no records responsive to Request Items Nos. 1-2 exist and such records could not be created from the existing databases. The Custodian certifies that rather than deny the Complainant's request, he conducted research and created a record responsive to Request Item No. 1.

The Custodian certifies that on April 5, 2008, he was advised that his brother had been admitted to a hospital in California for a serious medical condition. The Custodian certifies that he was in California for the week of April 8-11, 2008. The Custodian further certifies that his brother died on April 9, 2008. The Custodian also certifies that for the week of April 14-18, 2008, he only worked sporadically because he was arranging his brother's memorial service scheduled for April 19, 2008 and attending to family matters. The Custodian certifies that he returned to work full-time on April 21, 2008. The Custodian certifies that as a result of his absence, a substantial backlog of work had accumulated.

The Custodian certifies that from May 2-16, 2008, he worked with the Complainant to narrow the scope of the request. The Custodian certifies that he needed to consult with DMAHS subject matter experts to determine what information was available.

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<sup>6</sup> The Custodian included additional material that details the parties' attempts to reach a reasonable accommodation of the request. The Complainant refined her request during the course of discussions which spanned from May 20, 2008 to July 30, 2008. The Custodian provided records responsive to Request Items Nos. 1 and 3 and informed the Complainant of the copying cost for Request Items Nos. 2 and 4.

The Custodian certifies that he e-mailed the Complainant on July 30, 2008 advising of the anticipated copying cost for Request Items Nos. 2 and 4. The Custodian further certifies that he informed the Complainant that her request would be closed if payment was not received by August 15, 2008. The Custodian certifies that he has not had any further communication with the Complainant. The Custodian certifies that he made every effort to make records available to the Complainant. The Custodian certifies that, based upon the Complainant's e-mail of May 28, 2008 and subsequent discussions, he believed that the Complainant did not want to pursue this complaint.

### **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 ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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. 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.

The GRC first turns to the issue of whether the Custodian responded to the Complainant’s request in a timely manner. The Custodian received the Complainant’s request on April 4, 2008. The Custodian responded to the request on the twentieth (20<sup>th</sup>) business day following receipt thereof.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>7</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Nevertheless, the Complainant’s request is invalid. The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that “[u]nder

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<sup>7</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>8</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>9</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, *supra*, and Bent, *supra*.

The Complainant's request does not identify the specific government records sought. Instead, Request Items Nos. 1-4 identified a subject matter and sought all documents and correspondence concerning the identified subject matter. Neither "documents" nor "correspondence" identify a government record but rather are generic terms that encompass a diverse class of records. OPRA does not countenance open-ended searches of an agency's files. MAG, *supra*. Nevertheless, the Council notes that the evidence of record shows that the Custodian undertook to conduct research to determine records responsive to the request and also created records in order to respond to the request. However, the Custodian is under no legal obligation to do so pursuant to MAG, *supra*, New Jersey Builders, *supra*, and Bent, *supra*.

Therefore, because the Complainant's request fails to identify with reasonable clarity the specific government records sought, the Complainant's request is invalid pursuant to MAG, *supra*; Bent, *supra*; New Jersey Builders, *supra*; and Schuler, *supra*.

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<sup>8</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>9</sup> As stated in Bent, *supra*.



As such, the Custodian has not unlawfully denied the Complainant access to the records requested.

Because the Council has determined that the Complainant's request is invalid, the issue of any estimated copying costs is moot.

**Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

Although the Custodian's failure to provide a written response to the Complainant's request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian, under no legal obligation, created and disclosed records responsive to the Complainant's request, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful “deemed” denial of access appears negligent and heedless since he

is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant's request fails to identify with reasonable clarity the specific government records sought, the Complainant's request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied the Complainant access to the records requested.
3. Although the Custodian's failure to provide a written response to the Complainant's request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian, under no legal obligation, created and disclosed records responsive to the Complainant's request, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 21, 2009