



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 8, 2010 Government Records Council Meeting

Charles Speicher
Complainant

Complaint No. 2009-79

v.

Township of Long Beach (Ocean)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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 responded in writing to the Complainant’s OPRA requests in a timely manner stating that no lists responsive to the Complainant’s January 12, 2009 OPRA request exists and subsequently certified to such in the Statement of Information, and because the Complainant has provided no credible evidence to refute the Custodian’s certification in this regard, the Custodian has not unlawfully denied access to the requested records. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. The invoices from the State Health Benefits Plan identified by the Custodian as containing information responsive to the Complainant’s January 12, 2009 OPRA request are exempt from disclosure under OPRA. See Beaver v. Township of Middletown, GRC Complaint No. 2005-243 (August 2006); N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9.a. and N.J.A.C. 17:9-1.2.
3. The communications between the Township and its insurance broker identified by the Custodian as containing information responsive to the Complainant’s January 12, 2009 OPRA request are exempt from the definition of a government record under OPRA pursuant to N.J.S.A. 47:1A-1.1.
4. Because the Custodian responded in writing to the Complainant’s OPRA requests in a timely manner stating that no lists responsive to the Complainant’s February 5, 2009 and February 17, 2009 OPRA requests exist and subsequently



certified to such in the Statement of Information, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).

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 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

**Charles Speicher¹
Complainant**

GRC Complaint No. 2009-79

v.

**Township of Long Beach (Ocean)²
Custodian of Records**

Records Relevant to Complaint:

January 12, 2009 OPRA request:

List of names of retired police personnel receiving health benefits from Long Beach Township.

February 5, 2009 OPRA request:

List of retired police personnel receiving a pension.³

February 17, 2009 OPRA request:

Current list of Long Beach Township police officers who have retired in the past twenty (20) years.

Request Made: January 12, 2009, February 5, 2009 and February 17, 2009

Response Made: January 30, 2009, February 11, 2009 and February 23, 2009

Custodian: Bonnie M. Leonetti

GRC Complaint Filed: March 5, 2009⁴

Background

January 12, 2009

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

January 20, 2009

Teresa S. Sgro's ("Ms. Sgro"), Assistant Municipal Clerk, response to the OPRA request. On behalf of the Custodian, Ms. Sgro responds in writing to the Complainant's January 12, 2009 OPRA request on the fifth (5th) business day following receipt of such request. Ms. Sgro states that she is in receipt of the Complainant's OPRA request for the list of retirees presently receiving health benefits through the Township. Ms. Sgro states

¹ No legal representation listed on record.

² Represented by Armando Riccio, Esq., of Capehart & Scatchard (Mount Laurel, NJ).

³ The Complainant requested additional records which are not at issue in the instant complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

that her initial review of personnel records subject to disclosure under OPRA does not contain the requested retiree health benefits information. Ms. Sgro also expresses concern that disclosure of the requested records would violate any rights of the participating retirees. Ms. Sgro states that she will check the availability of the information within the Township's records and contact the Complainant in ten (10) days.

January 30, 2009

Letter from Ms. Sgro to the Complainant. Ms. Sgro states that access to records containing information responsive to the Complainant's request is denied because the information requested contains various personnel information, including social security numbers, type of coverage and whether the person is a Medicare recipient, which is not subject to disclosure under OPRA for the following reasons:

- The records are not a type of personnel record authorized for disclosure under OPRA.
- Information gathered for transmittal by the Township to its insurance carrier, such as the State Health Benefits Plan, is not a government record subject to disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.
- Confidential records also include all matters related to coverage of retired participants in group health plans and are not a government record subject to disclosure pursuant to *N.J.A.C. 17:9-1.2(b)*.
- The records are confidential pursuant to the Health Insurance Portability and Accountability Act ("HIPAA") as records pertaining to a group health plan which do not fit within the disclosures permitted under said Act.

February 5, 2009

Complainant's second (2nd) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

February 11, 2009

Ms. Sgro's response to the OPRA request. On behalf of the Custodian, Ms. Sgro responds in writing to the Complainant's February 5, 2009 OPRA request on the third (3rd) business day following receipt of such request.⁵ The Custodian states that the Township does not possess or maintain a list of retired police officers receiving a pension.

February 17, 2009

Complainant's third (3rd) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

February 23, 2009

Ms. Sgro's response to the OPRA request. On behalf of the Custodian, Ms. Sgro responds in writing to the Complainant's February 17, 2009 OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that the

⁵The Custodian received the Complainant's request on February 6, 2009.
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Township does not possess or maintain a current list of Township police officers who have retired in the past twenty (20) years.

March 5, 2009

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

- Complainant’s OPRA request dated January 12, 2009.
- Letter from Ms. Sgro to the Complainant dated January 30, 2009.
- Complainant’s OPRA request dated February 5, 2009.
- Letter from Ms. Sgro to the Complainant dated February 11, 2009.
- Complainant’s OPRA request dated February 17, 2009.
- Letter from Ms. Sgro to the Complainant dated February 23, 2009.

The Complainant states that he is a retired police officer for the Township. The Complainant states that in May, 2007 the Township informed him and other retirees that certain health benefits had been reduced. The Complainant states that this reduction precipitated a grievance filed on behalf of the Complainant’s Policemen Benevolent Association (“PBA”) Local No. 373. The Complainant states that he volunteered to compile information needed to assist other retirees while litigation is ongoing. The Complainant states that the records he requested, which should include contact information for retirees, would assist the Complainant in keeping retirees informed of PBA Local No. 373 progress.

The Complainant states that he made his first (1st) OPRA request to the Township on January 12, 2009. The Complainant states that Ms. Sgro responded in writing on January 30, 2009 denying access to records containing responsive information. The Complainant contends that Ms. Sgro’s response is puzzling because he did not request social security numbers or other information that Ms. Sgro refers to as exempt from disclosure.

The Complainant states that he submitted a second (2nd) OPRA request to the Township on February 5, 2009. The Complainant states that Ms. Sgro responded in writing on February 11, 2009 stating that the Township did not maintain or possess a list of retired police officers receiving a pension. The Complainant contends that he believes that the Township interpreted his request in such a way to block access. The Complainant asserts that it should be noted that the Township Clerk’s Office has been sending registered letters to every retiree concerning a change in health benefits since 2007.

The Complainant states that he submitted his third (3rd) OPRA request to the Township on February 17, 2009. The Complainant states that Ms. Sgro responded in writing on February 17, 2009 stating that no record responsive was maintained or possessed by the Township. The Complainant argues that Ms. Sgro again resorted to semantics in order to block access to the requested records.

The Complainant contends that Ms. Sgro's response to the Complainant's three (3) simple requests shows a clear unwillingness to comply with the Complainant's requests.

The Complainant does not agree to mediate this complaint.

March 31, 2009

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

April 6, 2009

E-mail from the Custodian to the GRC. The Custodian requests an extension of three (3) weeks to submit the requested SOI.

April 6, 2009

E-mail from the GRC to the Custodian. The GRC states that it will generally grant a five (5) business day extension of time to submit an SOI. The GRC states that the Custodian's SOI is now due by April 15, 2009.

April 15, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 12, 2009.
- Letter from Ms. Sgro to the Complainant dated January 20, 2009.
- Certified mail receipt dated January 20, 2009 with the Complainant's signature thereon dated January 22, 2009.
- Letter from Ms. Sgro to the Complainant dated January 30, 2009.
- Certified mail receipt dated January 30, 2009 with the Complainant's signature thereon dated January 31, 2009.
- Complainant's OPRA request dated February 5, 2009.
- Letter from the Ms. Sgro to the Complainant dated February 11, 2009.
- Certified mail receipt with the Complainant's wife's signature thereon dated February 12, 2009.
- Complainant's OPRA request dated February 17, 2009.
- Letter from Ms. Sgro to the Complainant dated February 23, 2009.
- Certified mail receipt dated February 23, 2009 with the Complainant's signature thereon dated February 24, 2009.⁶

The Custodian certifies that no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

Ms. Sgro certifies that she handled each request as follows:

⁶The Custodian attaches additional records that are not relevant to the instant complaint.
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Complainant's January 12, 2009 OPRA request:

Ms. Sgro certifies that she received the Complainant's first (1st) OPRA request on January 12, 2009 and responded in writing on January 20, 2009 requesting an additional ten (10) days to check the availability of the requested records because they may be exempt from disclosure pursuant to OPRA. Ms. Sgro certifies that her search involved checking with the Human Resources ("HR") clerk for any records responsive. Ms. Sgro certifies that she responded on January 30, 2009 denying access to the records containing responsive information, which comprised monthly invoices from the State Health Benefits Plan and communications exchanged with the Township's insurance broker of record, Connor Strong, pursuant to N.J.S.A. 47:1A-1.1., *N.J.A.C. 17:9-1.2(b)* and HIPAA.

Complainant's February 5, 2009 OPRA request:

Ms. Sgro certifies that she received the Complainant's second (2nd) OPRA request on February 6, 2009. Ms. Sgro certifies that her search involved asking the payroll clerk, HR clerk and Deputy Police Chief if a list of all retired police personnel receiving a pension exists. Ms. Sgro certifies that her search yielded no records and that she responded in writing to the Complainant on February 11, 2009 stating that the Township did not possess or maintain any record responsive to the Complainant's request.

Complainant's February 17, 2009 OPRA request:

Ms. Sgro certifies that she received the Complainant's third (3rd) OPRA request on February 17, 2009. Ms. Sgro certifies that her search involved checking with the payroll clerk, HR clerk, Police Department and Deputy Police Chief to ascertain whether a list of police officers retiring over the last 25 years exists. Ms. Sgro certifies that her search yielded no records responsive and she responded in writing to the Complainant on February 23, 2009 stating that the Township did not possess or maintain any record responsive to the Complainant's request.

Additionally, the Custodian's Counsel submitted a legal brief in support of the Township's position. Counsel asserts that Ms. Sgro's two (2) responses to the Complainant's requests were lawful under OPRA. Counsel asserts that Ms. Sgro initially contacted the Complainant in writing on the fifth (5th) business day after receipt of the Complainant's request expressing concern that the requested list of police personnel receiving health benefits may be exempt from disclosure and needed additional review. Counsel points out that Ms. Sgro stated that she would respond within ten (10) days and did so on January 30, 2009 upon completion of her review. Counsel asserts that the results of said review yielded that no list of retired police personnel existed, but that information responsive to the request was contained within two (2) types of records containing significant health plan information: a monthly invoice from the State Health Benefits Plan and communications exchanged with the Township's insurance broker of record, Connor Strong.

Counsel contends that the records deemed to be responsive to the Complainant's January 12, 2009 OPRA request were not subject to disclosure because they constituted

communications exchanged between a public agency and its insurance broker or pertained to all retirees and family members receiving benefits, and production of said records would violate certain laws. Counsel asserts that Ms. Sgro notified the Complainant that the records would not be produced because information gathered for transmittal by the Township to its insurance carrier, such as State Health Benefits Plan, is not a government record subject to disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1., confidential records include matters related to coverage of retired participants in group health plans pursuant to *N.J.A.C.* 17:9-1.2(b) and the records are confidential pursuant to HIPAA as records pertaining to a group health plan which do not fit within the disclosures permitted under said Act.

Counsel states that OPRA does not require a custodian to produce or compile information contained in various government records if the entity is not required by law to maintain such information in a single document.⁷

Counsel states that OPRA exempts from disclosure “information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.” N.J.S.A. 47:1A-1.1. Counsel states that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record...from public access made pursuant to [OPRA]...regulation promulgated under the authority of any statute...” N.J.S.A. 47:1A-9.a.

Counsel states that to this end, New Jersey regulations applicable to the State Health benefits Plan mandate confidential treatment of “*all matters related to the coverage of individual participants and their families, mailing addresses and retired participants* and individual files related to claims.” (Emphasis added.) *N.J.A.C.* 17:9-1.2.

Further, Counsel avers that disclosure of the requested information is also prohibited under HIPAA because the Township is a member of a group health plan. Counsel states that under HIPAA, a health plan includes “an individual or group plan that provides, or pays the costs of, medical care.” 45 *C.F.R.* § 160.103. *See also Fox v. Township of Parsippany-Troy Hills*, GRC Complaint No. 2005-109 (December 2005). Counsel avers that health plans are defined in HIPAA as several types of plans, including a group health plan, that is established or maintained for the purpose of offering or providing health benefits to employees of two (2) or more employees. *Id.* Counsel avers that HIPAA further defines a “group health plan” as:

“an employee welfare benefit plan...including items and services paid for as medical care, to employees or their dependents directly or through insurance, reimbursement, or otherwise, that: (1) [h]as 50 or more employees..., *or* (2) [i]s administered by an entity other than the employer that established and maintains the plan.” *Id.*

⁷ Counsel cites to Board of Education of Newark v. New Jersey Department of Treasury, 145 *N.J.* 269, 279 (1996) and notes that this case is cited for the propositions contained in the Custodian’s argument, but predates the enactment of HIPAA. The GRC notes that this case also predates the enactment of OPRA. *Charles Speicher v. Township of Long Beach (Ocean)*, 2009-79 – Findings and Recommendations of the Executive Director

Additionally, Counsel states that HIPAA broadly defines “health information” to include:

“any information, whether oral or recorded in any form or medium, that (A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.” *Id.*

Counsel further states that HIPAA’s regulations further define individually identifiable health information to include:

“information that is a subset of health information, including demographic information collected from an individual, and: (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) That identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.”

Counsel argues that the Township is clearly a covered entity as it provides coverage to fifty (50) or more participants through the State Health Benefits Plan,⁸ and therefore, HIPAA prohibits the disclosure of the requested health information. 45 *C.F.R.* § 160.502(a)(prohibiting the disclosure of protected health information with certain exceptions)⁹ and 45 *C.F.R.* § 160.302(application of the law to covered entities).

Counsel asserts that the primary issue in Beaver v. Township of Middletown, GRC Complaint No. 2005-243 (August 2006) was the Complainant’s request for documents regarding the health coverage provided to employees of the Township’s Sewerage Authority.¹⁰ Counsel states that the Custodian denied access to monthly invoices issued by the State Health Benefits Plan for several reasons, including limitations of access in HIPAA and its regulations and exemptions provided in N.J.S.A. 47:1A-1.1, applicable to certain personnel records and established pursuant to N.J.A.C. 17:9-1.2. Counsel states that the GRC concluded that:

“[s]ince the Complainant’s...requests do not fit within the permitted or required uses and disclosure of protected health information under

⁸ The Custodian certifies that the total number of covered participants within the monthly invoices from the State Health Benefits Plan is 83 individuals. The Custodian further certifies that the total number of participants in the State Health Benefits Plan is 174.

⁹ The stated exceptions in 45 *C.F.R.* § 160.502(a) do not include one for a state public records law.

¹⁰ Specifically, the Complainant requested that the Custodian identify whether several employees identified in the request had health coverage, type of coverage, whether any employees received a payment for not accepting coverage and whether other employees have health coverage.

HIPAA, the Custodian is proscribed from disclosing the "individual" records to the Complainant pursuant to HIPAA and N.J.S.A. 47:1A-9. ... Therefore, the Custodian has not unlawfully denied access under OPRA."

Counsel further avers that in Fox, *supra*, the GRC re-enforced its position in Beaver, *supra*, holding that "the Custodian lawfully denied access to the requested cost of healthcare benefits supplied to each individual Council member."

Counsel asserts that in this complaint, similar to both Beaver, *supra*, and Fox, *supra*, the Township did not maintain a list similar to the one requested by the Complainant; however, the Custodian reviewed her records and determined that the requested information was contained in invoices from the State Health Benefits Plan. Counsel asserts that the Complainant's request does not fit within any exceptions afforded under HIPAA; further, access is not permissible pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9, N.J.A.C. 17:9-1.2 and Executive Order No. 26 (Gov. McGreevey 2002). Counsel also contends that the invoices contain additional information such as the names of all Township retirees participating, as well as family members covered, social security numbers and Medicare information. Counsel argues that the Complainant's contention that the Township has been sending registered letters to every retiree does not negate the exemptions to the requested records found in HIPAA, New Jersey State regulations or OPRA.

Additionally, Counsel argues that Ms. Sgro's responses to the Complainant's three (3) OPRA requests were timely and lawful. Counsel asserts that Ms. Sgro lawfully responded in writing to the Complainant's January 12, 2009 request within seven (7) business days requesting an extension of time and responded prior to the expiration of the extended time frame. Counsel asserts that Ms. Sgro responded in writing to the Complainant's February 6, 2009 request in a timely manner and informed the Complainant that no record responsive existed. Counsel further asserts that Ms. Sgro responded in writing to the Complainant's February 17, 2009 request within seven (7) business days stating that no record responsive exists.

Finally, Counsel asserts that the actions of Ms. Sgro establish her diligence in determining whether any records exist. Counsel requests that the GRC find that access to the records responsive to the Complainant's three (3) OPRA requests was properly denied.

April 16, 2009

E-mail from the Complainant to the GRC. The Complainant states that he has reviewed the SOI and found several items that he wants to address. The Complainant requests the chance to submit a rebuttal to the Custodian's SOI.

April 20, 2009

E-mail from the GRC to the Complainant. The GRC states that N.J.A.C. 5:105-2 sets forth the complaint process, including which submissions a party must provide to the GRC. Further, the GRC states that N.J.A.C. 5:105-2 does not expressly afford a response to the SOI. The GRC advises that, as a matter of practice, any additional submissions

which provide new information or evidence relevant to the instant complaint will be considered.

April 21, 2009

The Complainant's response to the Custodian's SOI attaching the following:

- Address list of retired employees labeled Exhibit No. 1 and dated November 6, 2007.
- Letter from the Custodian to all Township retirees labeled Exhibit No. 2 dated October 27, 2008.

The Complainant asserts that he believes the two (2) exhibits attached are important to proving that the Township is unlawfully denying access to the records requested.

The Complainant argues that Exhibit No. 1 was obtained from the Township's Clerk Office at some time prior to the Complainant's research and filing of this complaint. The Complainant asserts that the record was provided to him by a member of the Police Department, who requested that the Complainant update and obtain a complete list from the Township. The Complainant contends that Exhibit No. 1 does not contain any sensitive information other than the name and address of retirees.¹¹

The Complainant asserts that Exhibit No. 2 regarding changes in health benefits shows that the Township has a current list of retirees and that there would be no reason for the Custodian or Ms. Sgro to seek such a list from the Police Department.

April 23, 2009

E-mail from the Custodian to the GRC. The Custodian requests that if the GRC intends to consider the two (2) documents intentionally withheld at the onset of the instant complaint and provided to the GRC by the Complainant on April 21, 2009, the Township be given an opportunity to respond to the Complainant's rebuttal.

May 4, 2009

E-mail from the GRC to the Custodian. The GRC reiterates that *N.J.A.C. 5:105-2* sets forth the complaint process, including which submissions a party must provide to the GRC. Further, the GRC states that *N.J.A.C. 5:105-2* does not expressly afford additional responses following the SOI. The GRC advises that, as a matter of practice, any additional submissions which provide new information or evidence relevant to the instant complaint will be considered.

May 4, 2009

E-mail from the Complainant to the GRC. The Complainant asserts that he did not intentionally withhold the two (2) documents; rather, the Complainant did not recognize the significance of the records until after reviewing the Custodian's SOI.

¹¹ The list of retirees is not contained on a letterhead, nor does it contain any features that would prove that said list came from the Township Clerk's Office.
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May 11, 2009

E-mail from Ms. Sgro to the GRC. Ms. Sgro states that she is forwarding the following response on behalf of the Custodian.

Ms. Sgro requests that the GRC not consider the two (2) documents previously withheld by the Complainant which were in his possession prior to the filing of the instant complaint and are not new evidence. Ms. Sgro contends that the Complainant also received the Custodian's response prior to filing this complaint and cannot now claim that he failed to recognize the significance of the two (2) records until after reviewing the Custodian's SOI.

Ms. Sgro advises that, if the GRC decides to consider the two (2) documents withheld by the Complainant, the Township's response is as follows:

Ms. Sgro asserts that Exhibit No. 1 contains the names and addresses of numerous individuals receiving health benefits, well in excess of just retired police personnel. Ms. Sgro asserts that Exhibit No. 1 does not prove that the Township improperly withheld information requested by the Complainant. Ms. Sgro contends that the production of this document further proves the Custodian's argument in that the Complainant fails to identify the source of Exhibit No. 1 in order to protect the identity of that person, who improperly disclosed the confidential information.

Ms. Sgro further contends that according to the GRC's Handbook for Records Custodians (June 2002), a custodian is not authorized to provide addresses sought in response to an OPRA request. Ms. Sgro asserts that the Township relies on the arguments contained in the SOI and that the GRC should not permit or encourage the use of documentation that was obtained improperly. Ms. Sgro contends that the Complainant's submissions do not prove that the Township sought to prevent access to the records requested.

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 ... A government record shall not include ... *information* which

is a communication *between a public agency and its insurance carrier, administrative service organization or risk management office;*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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.

Moreover, OPRA provides that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record...from public access made pursuant to [OPRA]...regulation promulgated under the authority of any statute...” N.J.S.A. 47:1A-9.a.

The New Jersey Administrative Code regarding the State Health Benefits Program states in part that:

“...records considered confidential include all matters related to the *coverage of individual participants* and their families, *mailing addresses of active and retired participants* and individual files related to claims.” (Emphasis added.) *N.J.A.C. 17:9-1.2*.

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 unlawfully denied access to the records requested by the Complainant in his January 12, 2009 OPRA request.

The evidence of record indicates that Ms. Sgro responded in writing to the Complainant on January 30, 2009 denying access to records responsive to the request pursuant to N.J.S.A. 47:1A-1.1, *N.J.A.C. 17:9-1.2(b)* and HIPAA.¹² The Custodian’s Counsel asserted in the SOI that no list of retired police personnel existed but that information responsive to the request was contained within monthly invoices from the State Health Benefits Plan and communications exchanged between the Township and the Township’s insurance broker of record. Counsel further contended that the invoices and communications containing responsive information were exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1, as well as pursuant to *N.J.A.C. 17:9-1.2(b)* as confidential records including matters related to coverage of retired participants in

¹² Ms. Sgro initially responded in writing to the Complainant on behalf of the Custodian on January 20, 2009 requesting ten (10) additional days to respond because the records located may not be subject to disclosure.

group health plans, and finally, pursuant to HIPAA as records pertaining to a group health plan which do not meet the standard for disclosures permitted under said Act. Counsel also cited to the GRC's prior decisions in Fox v. Township of Parsippany-Troy Hills, GRC Complaint No. 2005-109 (December 2005) and Beaver v. Township of Middletown, GRC Complaint No. 2005-243 (August 2006) in support of his contention that the invoices containing information responsive to the request are not subject to disclosure under OPRA.

On April 21, 2009, the Complainant responded to the SOI, attaching copies of two exhibits which he asserted that he previously received through an unidentified member of the Long Beach Police Department. The Complainant contended these exhibits established that the Township possessed records responsive to the request and unlawfully denied access to same.

The Council's review of the Complainant's exhibits disclosed that the first exhibit submitted by the Complainant, which the Complainant asserts is a list of retirees from the Township of Long Beach, is not contained on letterhead nor does it contain any features that would establish that said list was made, maintained or kept on file by the Township Clerk's Office. Moreover, this list contains simply names and addresses of individual persons, without any identification of the individuals contained thereon as retired police personnel receiving health benefits from Long Beach Township. The second exhibit comprises a form letter discussing Township health benefits for retirees on Township letterhead, with no addressee.

The Custodian has certified that no records responsive to the Complainant's January 12, 2009 OPRA request exist. Although the Complainant has submitted certain records in opposition to the Custodian's certification, these records do not rise to the level of competent, credible evidence sufficient to refute the Custodian's certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian responded in writing to the Complainant's OPRA requests in a timely manner stating that no lists responsive to the Complainant's January 12, 2009 OPRA requests exist and subsequently certified to such in the SOI, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. See Pusterhofer, *supra*.

Moreover, the records identified by Ms. Sgro and Custodian's Counsel as containing information responsive to the Complainant's January 12, 2009 OPRA request are exempt from disclosure. Ms. Sgro certified in the SOI that her search for records

responsive to the Complainant's January 12, 2009 OPRA request yielded monthly invoices from the State Health Benefits Plan, as well as communications exchanged between the Township and its insurance broker. Ms. Sgro responded to the Complainant in writing in a timely manner denying access to such records pursuant to N.J.S.A. 47:1A-1.1., *N.J.A.C. 17:9-1.2(b)* and HIPAA. Custodian's Counsel contended that these invoices may contain information responsive to the Complainant's OPRA request, but are not subject to disclosure under OPRA. Custodian's Counsel cited to Beaver v. Township of Middletown, GRC Complaint No. 2005-243 (August 2006) in support of this contention.

In Beaver, the custodian denied access to records responsive to the complainant's September 23, 2005 and October 7, 2005 requests for the type of health coverage being provided to certain employees of the Township of Middletown's Sewerage Authority as information exempt under OPRA as communication with the health benefit provider. The custodian subsequently certified in the SOI that the records responsive, which included monthly invoices received by the Township from State Health Benefits Plan, were exempt under OPRA pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9, *N.J.A.C. 17:9-1.2* and HIPAA. In a letter to the GRC dated January 5, 2006, the complainant contended that he was not seeking communications between the insurance company and the Township; rather, he sought documents that indicate what type of health benefits were being provided to employees, such as a list or payroll deduction report.

The GRC analyzed how the custodian's asserted exemptions applied to the records responsive within the scope of OPRA and determined that because the nature of the complainant's requests:

“... do not fit within the permitted or required uses and disclosure of protected health information under HIPAA, the Custodian is proscribed from disclosing the "individual" records to the Complainant pursuant to HIPAA and N.J.S.A. 47:1A-9 ... Therefore, the Custodian has not unlawfully denied access under OPRA.”

In so determining, the Council noted that OPRA provides that the definition of a government record shall not include *information which is a communication between a public agency and its insurance carrier...* N.J.S.A. 47:1A-1.1. Additionally, OPRA does not allow for the abrogation of any “... regulation promulgated by the authority of any statute...” N.J.S.A. 47:1A-9.a. Further, a promulgated regulation of the State Health Benefits Program provides that information “...related to the *coverage of individual participants* and their families, *mailing addresses of active and retired participants...*” shall be confidential. *N.J.A.C. 17:9-1.2.*

The matter before the Council concerns a request for a list of individuals receiving health benefits, to which the Custodian identified invoices from the State Health Benefits Plan as being responsive. The Council's decision in Beaver is on point with the instant matter: invoices from State Health Benefits Plan are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9, *N.J.A.C. 17:9-1.2* and HIPAA.

Therefore, the invoices from the State Health Benefits Plan identified by the Custodian as containing information responsive to the Complainant's January 12, 2009 OPRA request are exempt from disclosure under OPRA. See Beaver v. Township of Middletown, GRC Complaint No. 2005-243 (August 2006); N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9.a. and N.J.A.C. 17:9-1.2.

Further, the GRC declines to consider the applicability of HIPAA to the instant complaint, because the provisions of OPRA and N.J.C.A. 17:9-1.2. are dispositive of these issues.

Additionally, OPRA contains a specific exemption from the definition of a government record for "information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office..." N.J.S.A. 47:1A-1.1. Ms. Sgro certified in the SOI that a search for records responsive to the Complainant's January 12, 2009 OPRA request also yielded communications between the Township and its insurance broker of record. These records therefore fall within the exemption from the definition of a government record set forth at N.J.S.A. 47:1A-1.1. and are not disclosable.

Therefore, the communications between the Township and its insurance broker identified by the Custodian as containing information responsive to the Complainant's January 12, 2009 OPRA request are exempt from the definition of a government record under OPRA pursuant to N.J.S.A. 47:1A-1.1.

The GRC next considers whether the Custodian unlawfully denied access to records responsive to the Complainant's February 5, 2009 and February 17, 2009 OPRA requests.

On behalf of the Custodian, Ms. Sgro responded in writing to the Complainant's February 5, 2009 OPRA request on February 11, 2009 stating that the Township did not possess a list of retired police officers receiving a pension. Further, Ms. Sgro responded in writing to the Complainant's February 17, 2009 OPRA request on February 23, 2009 stating that the Township did not possess or maintain a current list of Township police officers who have retired in the past twenty (20) years.

Ms. Sgro subsequently certified in the SOI that after inquiring with HR, payroll and the Police Department, she was unable to locate a record responsive. Ms Sgro certified that she then responded to the Complainant's requests advising that the Township did not maintain any records responsive to the Complainant's two (2) OPRA requests.

Although the Complainant disputed the existence of records responsive to the February 5, 2009 OPRA request in the Denial of Access Complaint, the Complainant failed to submit any competent, credible evidence in support of this assertion.

As previously discussed herein, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of

Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian responded in writing to the Complainant's OPRA requests in a timely manner stating that no lists responsive to the Complainant's February 5, 2009 and February 17, 2009 OPRA requests exist and subsequently certified to such in the SOI, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See Pusterhofer, supra.*

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian responded in writing to the Complainant's OPRA requests in a timely manner stating that no lists responsive to the Complainant's January 12, 2009 OPRA request exists and subsequently certified to such in the Statement of Information, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. The invoices from the State Health Benefits Plan identified by the Custodian as containing information responsive to the Complainant's January 12, 2009 OPRA request are exempt from disclosure under OPRA. See Beaver v. Township of Middletown, GRC Complaint No. 2005-243 (August 2006); N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9.a. and N.J.A.C. 17:9-1.2.
3. The communications between the Township and its insurance broker identified by the Custodian as containing information responsive to the Complainant's January 12, 2009 OPRA request are exempt from the definition of a government record under OPRA pursuant to N.J.S.A. 47:1A-1.1.
4. Because the Custodian responded in writing to the Complainant's OPRA requests in a timely manner stating that no lists responsive to the Complainant's February 5, 2009 and February 17, 2009 OPRA requests exist and subsequently certified to such in the Statement of Information, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010