



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

April 30, 2013 Government Records Council Meeting

Ken Schilling
Complainant

Complaint No. 2011-293

v.

Township of Little Egg Harbor (Ocean)
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 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 that this complaint be dismissed because the Complainant’s Counsel withdrew this complaint on behalf of the Complainant in a letter to the GRC dated April 22, 2013. Therefore, no further adjudication is required.

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 30th Day of April, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 2, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

**Ken Schilling¹
Complainant**

GRC Complaint No. 2011-293

v.

**Township of Little Egg Harbor (Ocean)²
Custodian of Records**

Records Relevant to Complaint:³

1. The names of all parties provided health care insurance, dental insurance and/or vision care insurance by the Township of Little Egg Harbor (“Township”) for 2007, 2008, 2009, 2010 and 2011.
2. The cost, individually, to the Township for each of the above parties covered.
3. Current contribution by all parties, individually, currently insured by the Township.

Request Made: March 24, 2011

Response Made: March 30, 2011

GRC Complaint Filed: September 15, 2011⁴

Background

At its March 22, 2013 public meeting, the Council considered the March 15, 2013 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. Because the Complainant has requested individual employee health benefit information that is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 160.103, *N.J.A.C.* 17:9-1.2, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See Michelson v. Wyatt*, 379 N.J. Super. 611 (App. Div. 2005).

¹ Represented by Christopher D’Amore, Esq., Alterman & Associates, LLC (Marlton, NJ).

² Diana McCracken, Township Clerk, Custodian. Represented by Robin LaBue, Esq., Gilmore & Monahan, PC (Toms River, NJ).

³ The Complainant requested additional records which are not relevant to the adjudication of this complaint.

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

2. While *N.J.A.C. 17:9-1.2* makes confidential “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,” the sum total amount of money the Board spends to provide its employees with health benefits is not exempt from disclosure. Nor is the disclosure of such a sum prohibited by the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.A. Section 1301 and OPRA. *See, e.g., Brown v. Ocean City Board of Education (Cape May)*, GRC Complaint No. 2011-271 (December 2012). In the absence of such exemptions, the Custodian must disclose the amount of money the Board spends to provide its employees with health benefits and the costs the Board contributes towards its employee’s life insurance plans.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4.6 to the Executive Director.**
4. Because the Custodian herein requested in writing clarification of request Item No. 3, and because the Complainant failed to provide such clarification, the Custodian has borne her burden of proving a lawful denial of access to the requested records under N.J.S.A. 47:1A-6. *Herron v. New Jersey Department of Education*, GRC Complaint No. 2011-363 (December 2012); *Moore v. Township of Old Bridge*, GRC Complaint No. 2005-80 (August 2005).
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

On March 25, 2013, the Council distributed its Interim Order to all parties. On April 8, 2013, the Custodian responded to the Council’s Interim Order. On April 9, 2013, the Custodian’s Counsel filed a request for reconsideration. On April 22, 2013, the Complainant’s Counsel sent a letter to the GRC withdrawing this complaint on behalf of the Complainant.

Analysis

No analysis required.⁵

⁵ The GRC declines to rule on the Custodian Counsel’s request for reconsideration because the Complainant withdrew the instant complaint.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant's Counsel withdrew this complaint on behalf of the Complainant in a letter to the GRC dated April 22, 2013. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

March 22, 2013 Government Records Council Meeting

Ken Schilling
Complainant

Complaint No. 2011-293

v.

Township of Little Egg Harbor (Ocean)
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 2013 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 Complainant has requested individual employee health benefit information that is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 160.103, *N.J.A.C.* 17:9-1.2, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See Michelson v. Wyatt*, 379 N.J. Super. 611 (App. Div. 2005).
2. While *N.J.A.C.* 17:9-1.2 makes confidential “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,” the sum total amount of money the Board spends to provide its employees with health benefits is not exempt from disclosure. Nor is the disclosure of such a sum prohibited by the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.A. Section 1301 and OPRA. *See, e.g., Brown v. Ocean City Board of Education (Cape May)*, GRC Complaint No. 2011-271 (December 2012). In the absence of such exemptions, the Custodian must disclose the amount of money the Board spends to provide its employees with health benefits and the costs the Board contributes towards its employee’s life insurance plans.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4.6 to the Executive Director.**
4. Because the Custodian herein requested in writing clarification of request Item No. 3, and because the Complainant failed to provide such clarification, the Custodian has



borne her burden of proving a lawful denial of access to the requested records under N.J.S.A. 47:1A-6. Herron v. New Jersey Department of Education, GRC Complaint No. 2011-363 (December 2012); Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005).

5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: March 25, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Ken Schilling¹
Complainant**

GRC Complaint No. 2011-293

v.

**Township of Little Egg Harbor (Ocean)²
Custodian of Records**

Records Relevant to Complaint:³

1. The names of all parties provided health care insurance, dental insurance and/or vision care insurance by the Township of Little Egg Harbor (“Township”) for 2007, 2008, 2009, 2010 and 2011.
2. The cost, individually, to the Township for each of the above parties covered.
3. Current contribution by all parties, individually, currently insured by the Township.

Request Made: March 24, 2011

Response Made: March 30, 2011

GRC Complaint Filed: September 15, 2011⁴

Background⁵

The Complainant filed an OPRA request attached to an official OPRA request form on March 24, 2011, seeking the records listed above.

The Township Administrator responded in writing to the OPRA request on March 30, 2011, the fourth (4th) business day after receipt of the OPRA request. The Township Administrator states that the only compiled, existing document that the Township can provide in response to request Item No. 1 is from September 2, 2010, which lists all employees at that time and the type of coverage. The Township Administrator states that the group insurance costs by year responsive to request Item No. 2 were provided to the Complainant in response to his OPRA request dated February 24, 2011. The Township Administrator states that insurance information of individuals is protected from disclosure by Health Insurance Portability and

¹ Represented by Christopher D’Amore, Esq., Alterman & Associates, LLC (Marlton, NJ).

² Diana McCracken, Township Clerk, Custodian. Represented by Robin LaBue, Esq., Gilmore & Monahan, PC (Toms River, NJ).

³ The Complainant requested additional records which are not relevant to the adjudication of this complaint.

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

⁵ The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Accountability Act (“HIPAA”). The Township Administrator states that individual contracts, settled or unsettled, determine the current contributions responsive to request Item No. 3. The Township Administrator asks the Complainant to advise if he is seeking contracts from specific unions or collective bargaining units. The Township Administrator states that no document exists under which individual contributions are compiled and kept. The Township Administrator states that, notwithstanding this fact, any such document would be exempt from disclosure under OPRA and HIPAA. The Township Administrator states that a cumulative total as to the amount for all employees has been supplied.

The Complainant filed the Denial of Access complaint with the Government Records Council (“GRC”) on September 15, 2011. The Complainant made no arguments in support of the complaint.⁶

The Custodian submitted the Statement of Information (“SOI”) to the GRC on January 24, 2012. The Custodian certifies that the Township Administrator responded to the OPRA request on March 30, 2011. The Custodian certifies that no search for responsive records was undertaken; the Custodian certifies that upon receipt of the OPRA request, she went to the Township Administrator for the requested records and confirmed with the Township attorney that the requested insurance costs were exempt from disclosure.

The Custodian certifies that copies of employee group insurance plans, a list of employees and types of coverage selected, were provided to the Complainant. The Custodian asserts that copies of proposals from insurance carriers and a complete breakdown of the plans were denied pursuant to HIPAA, N.J.S.A. 47:1A-1.1, -9 and -10. The Custodian asserts that on March 30, 2011, the Township Administrator sent a letter to the Complainant addressing the request for current contributions by all parties individually, who are currently insured by the Township.

Analysis⁷

Unlawful Denial of Access

The Complainant seeks health insurance policies for all Township employees, including names of insured and the costs thereof. OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA states that:

⁶ The complaint was referred to mediation on October 4, 2011; the matter was referred back to the GRC for adjudication on January 17, 2012.

⁷ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

“[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).

In accordance with HIPAA, 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*.

Furthermore, Executive Order 26 (Gov. McGreevey, 2002)(“EO 26”) also declares information regarding an individual's health history is not a government record subject to public access. EO 26 provides that “[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation” of an individual will not be considered a government record. *Id.* at par. 4(b)(1) (2002).

HIPAA, 45 C.F.R. 160.103, provides that the Privacy Rule protects all individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information “protected health information (PHI).”

The Custodian certified in the SOI that copies of employee group insurance plans, a list of employees and types of coverage selected, were provided to the Complainant. The Custodian asserts that copies of proposals from insurance carriers and a complete breakdown of the plans were denied pursuant to HIPAA, N.J.S.A. 47:1A-1.1, -9 and -10.

In Beaver v. Township of Middletown, GRC Complaint No. 2005-243 (August 2006), the custodian denied access to records responsive to the complainant’s requests for the type of health coverage being provided to certain employees of the Township’s Sewerage Authority as information exempt under OPRA, *i.e.*, 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. The GRC analyzed how the custodian’s asserted exemptions applied to the records responsive within the scope of OPRA and determined that the nature of the complainant’s requests extended into privacy information that was protected by the HIPAA Privacy Rule, and by extension *N.J.A.C. 17:9-1.2* and N.J.S.A. 47:1A-9. Accordingly, the Council found that the custodian lawfully denied the complainant’s request.

As in Beaver, the Complainant in the instant matter seeks the health insurance policies of all Township employees. There is no way that the billing information of these employees could be disclosed without infringing upon the privacy and confidentiality protections required by HIPAA. Moreover, the existing exclusionary rule prescribed in *N.J.A.C. 17:9-1.2* and further effectuated by N.J.S.A. 47:1A-9 requires that the requested information be deemed non-

disclosable upon its face. Therefore, because the Complainant has requested individual employee health benefits information that is exempt from disclosure pursuant to the Privacy Rule of HIPAA, *N.J.A.C.* 17:9-1.2, and *N.J.S.A.* 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. See Michelson v. Wyatt, 379 *N.J. Super.* 611 (App. Div. 2005).

However, while *N.J.A.C.* 17:9-1.2 makes confidential “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,” the sum total amount of money the Township spends to provide its employees with health, dental and vision benefits is not exempt from disclosure. Nor is the disclosure of such a sum prohibited by HIPAA and OPRA. See, e.g., Brown v. Ocean City Board of Education (Cape May), GRC Complaint No. 2011-271 (December 2012). The Custodian must therefore disclose the amount of money the Township spent to provide its employees with health, dental and vision benefits in 2007, 2008, 2009, 2010 and 2011.

Regarding the Complainant’s request Item No. 3, the current contribution by all parties, individually, currently insured by the Township, the evidence of record is clear that the Township Administrator requested clarification of this request item in his March 30, 2011 response to the OPRA request. There is no evidence in the record that the Complainant responded to the request for clarification of this request Item.

In Herron v. New Jersey Department of Education, GRC Complaint No. 2011-363 (December 2012), the Council determined that the custodian bore her burden of proving a lawful denial of access to the requested records because she sought clarification of the complainant’s request and the complainant provided no clarification. See Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005).

Therefore, because the Custodian herein requested in writing clarification of request Item No. 3, and because the Complainant failed to provide such clarification, the Custodian has borne her burden of proving a lawful denial of access to the requested records under *N.J.S.A.* 47:1A-6. Herron, *supra*; Moore, *supra*.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prevailing Party Attorney’s Fees

The Council defers analysis of whether the Complainant is a prevailing party 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 Complainant has requested individual employee health benefit information that is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 160.103, *N.J.A.C.* 17:9-1.2, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See Michelson v. Wyatt*, 379 N.J. Super. 611 (App. Div. 2005).
2. While *N.J.A.C.* 17:9-1.2 makes confidential “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,” the sum total amount of money the Board spends to provide its employees with health benefits is not exempt from disclosure. Nor is the disclosure of such a sum prohibited by the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.A. Section 1301 and OPRA. *See, e.g., Brown v. Ocean City Board of Education (Cape May)*, GRC Complaint No. 2011-271 (December 2012). In the absence of such exemptions, the Custodian must disclose the amount of money the Board spends to provide its employees with health benefits and the costs the Board contributes towards its employee’s life insurance plans.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4.6 to the Executive Director.**
4. Because the Custodian herein requested in writing clarification of request Item No. 3, and because the Complainant failed to provide such clarification, the Custodian has borne her burden of proving a lawful denial of access to the requested records under N.J.S.A. 47:1A-6. *Herron v. New Jersey Department of Education*, GRC Complaint No. 2011-363 (December 2012); *Moore v. Township of Old Bridge*, GRC Complaint No. 2005-80 (August 2005).
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Prepared and
Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013