



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

May 28, 2013 Government Records Council Meeting

Anne Davis
Complainant

v.

New Jersey Department of Health & Senior Services
Custodian of Record

Complaint Nos. 2012-94
and 2012-142

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 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 the Custodian attempted to reasonably accommodate the Complainant’s voluminous OPRA requests, an attempt that substantially disrupted the New Jersey Department of Health & Senior Services’ operations. Additionally, it is evident that the parties could not reach a reasonable accommodation without DHSS incurring additional costs to compile all responsive records to complete a privilege log and risking nonpayment for extraordinary time and effort. Therefore, the Custodian did not unlawfully deny access to the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-6; Caggiano v. NJ Department of Law & Public Safety, Division of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007); Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 28th Day of May, 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: June 11, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Anne M. Davis¹
Complainant**

GRC Complaint Nos. 2012-94 and 2012-142²

v.

**New Jersey Department of Health & Senior Services³
Custodian of Records**

Records Relevant to Complaint: Copies via pickup of:⁴

November 23, 2011 and November 30, 2011 OPRA request:⁵

1. Daily, weekly, monthly and periodic status updates/reports to, from and/or between any of the employees and/or agents regarding the New Jersey Medical Marijuana Program (“MMP”).
2. Correspondence, e-mails, memoranda and/or minutes of all communications with the Department of Agriculture (“NJDA”) and New Jersey Department of Health & Senior Services (“DHSS”) regarding the cultivation of medicinal marijuana in the State.
3. All e-mails sent to and received by any employee regarding the MMP to exclude third parties making inquiries.
4. E-mails, memoranda, or any other written communication between the DHSS Commissioner and the Review Committee charged with reviewing applications for Alternate Treatment Centers (“ATC”).
5. Documents including e-mails, memoranda, forms and documents submitted by any agency evidencing whether background checks were started, completed or processed in any manner on behalf of the ATC.
6. Written communications to and from the Office of Legal and Regulatory Compliance seeking and/or receiving guidance in drafting regulations.
7. Staff summaries regarding the MMP from January 10, 2010 to the date of the requests.
8. Staff recommendations regarding the MMP from January 10, 2010 to the date of the requests.
9. Research and/or materials referred to or relied upon by employees to draft proposed regulations governing the Compassionate Use Medical Marijuana Act.

¹ The Complainant notes in the Denial of Access Complaint that she is representing herself.

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues herein.

³ Genevieve Raganelli, Custodian of Records. Represented by Deputy Attorney General Michael J. Kennedy.

⁴ The Complainant’s November 23, 2011 and November 30, 2011 OPRA requests are the subject of GRC Complaint No. 2012-94. The Complainant’s December 20, 2011 OPRA request is the subject of GRC Complaint No. 2012-142.

⁵ The Complainant identified eleven (11) persons referred to as “employees” in her November 23, 2011 OPRA request. The Complainant identified one (1) employee in her November 30, 2011 OPRA request.

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10. Names of employees/agents that verified applications were “complete” or “incomplete.”
11. Any and all documents pertaining to whether applications were complete such as checklists, internal memoranda, e-mails and written list of criteria for evaluating whether an application was “complete” or “incomplete.”
12. List of all individuals consulted with, or involved in promulgating regulations for the MMP.
13. Minutes of all meetings of any employee/agent of DHSS regarding the MMP from January 10, 2010 to the date of the requests.
14. Internal documents reviewing and/or establishing rank and/or score sheets of ATC applicants.
15. Any recommendations and/or research materials provided by research scientists, scientists, the NJDA and/or “Division of Community Affairs” in the entire Request for Application (“RFA”) process, including but not limited to the drafting of proposed regulations.

December 20, 2011 OPRA request:

1. All letters and memoranda of recusal and conflicts of interest pertaining to the present and all past Commissioners of DHSS relating to the MMP.
2. All letters and memoranda of recusals and conflicts of interest pertaining to any past or present employees of DHSS relating to the MMP.
3. All letters and memoranda of resignations for all past Commissioners of DHSS from January 1, 2010 to December 20, 2011.
4. All letters and memoranda of resignations for all past employees of DHSS from January 1, 2010 to December 20, 2011.
5. All documents, including but not limited to letters and memoranda, regarding the appointment and reappointment of the present Commissioner and all past Commissioners of DHSS from January 1, 2010 to December 20, 2011.
6. All correspondence, memoranda and/or notes between any and all employees, Commissioners or agents of the DHSS regarding “The Physician Registry” (“Registry”) to include but not limited to all memoranda between employees and the Commissioner on the procedure on handling the Registry for the MMP.
7. A full list of physicians registered to participate in the MMP through the date of the Custodian’s response to this request item.
8. All correspondence, memoranda and/or notes between any and all employees, Commissioners or agents of the DHSS and its IT Department to create and maintain the Registry for the MMP.
9. All correspondence, memoranda and/or notes between any and all employees, Commissioners or agents of DHSS including the IT Department regarding patient identification cards for the MMP.
10. Any and all documents relating to changes in regulations regarding the 10% THC limit.
11. Any and all drafts of the regulations pertaining to medical marijuana from January 18, 2010 to December 20, 2011.
12. Any and all documents including but not limited to letters and memoranda relating to the creation of the scoring system for ATC selections.

13. Any and all drafts of scoring documents, notes, memoranda, etc. pertaining to the ATC applicants and the scoring and rating of samples to include the score sheets used for each applicant.
14. An outline of the rating system of the ATC applicants and any and all drafts of documents used in the rating of the ATC applicants including but not limited to ratings sheets for each applicant as completed by DHSS employees and/or agents.
15. All documents relating to selection of personnel to provide oversight and maintenance of the MMP.
16. Minutes of all meetings of employees or any agent of DHSS as it relates to the MMP from January 1, 2010 to December 20, 2011.
17. Any and all documents regarding a system for background checks on all ATC applicants.
18. Any and all opinion letters and opinion memoranda of the Attorney General (“AG”) on the viability of the MMP and its administration.
19. Any and all regulations and/or memoranda of the administration of the MMP to, from and by Mr. Devon Graf.

Request Made: November 23, 2011, November 30, 2011 and December 20, 2011

Response Made: December 2, 2011 and January 6, 2012

GRC Complaint Filed: March 26, 2012 and May 9, 2012⁶

Background⁷

Requests and Responses:

On November 23, 2011, the Complainant submitted an Open Public Records Act (“OPRA”) request to DHSS seeking the above-listed records. On November 30, 2011, the Complainant submitted a second (2nd) OPRA request for the same records but amending to whom the term “employee” referred. On December 2, 2011, the Custodian responded to both OPRA requests in writing, the fifth (5th) and second (2nd) business day respectively, advising that DHSS needed additional time to respond because the Custodian was on vacation the week of December 5, 2011 and would respond upon her return.

On December 12, 2011, the Complainant called DHSS seeking a status update and was advised by Walter C. Kowalski, Legal Specialist, that DHSS would need additional time to respond because the Custodian was out sick. On December 13, 2011, the Complainant called DHSS again and Mr. Kowalski informed the Complainant that the Custodian was still out. On December 14, 2011, Mr. Kowalski e-mailed the Complainant confirming that the Complainant accepted an extension until December 23, 2011, to provide the first (1st) set of records at a charge of \$50.00 for 1,000 pages of records. Mr. Kowalski further stated that DHSS will continue to search for records and provide a second (2nd) set by January 13, 2012. Mr. Kowalski further stated that the Complainant advised she was seeking records from January 18, 2010 to the present. Mr. Kowalski advised that because the Complainant’s OPRA requests are overly broad

⁶ The GRC received the Denial of Access Complaints on said date.

⁷ 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.

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and burdensome, DHSS cannot fulfill same in the statutorily mandated seven (7) business days without causing a substantial disruption to agency operations. Mr. Kowalski finally advised that DHSS would notify the Complainant on January 13, 2012, if additional time was necessary and would notify the Complainant beforehand if a special service charge were assessed.

On December 20, 2011, the Complainant submitted a third (3rd) OPRA request seeking the above-listed records.

On January 6, 2012, the Custodian verbally advised the Complainant that a DHSS IT employee conducted a three (3) day search of the former Commissioner's archived e-mails using search words such as "regulation" and provided his findings to the Commissioner's secretary, who must go through the findings. The Complainant expressed her concern that records could be expunged and further noted that she never received the 1,000 pages of records Mr. Kowalski said would be provided. On January 17, 2012, the Custodian sent the Complainant a letter advising that a special service charge of \$6,475.52 would be assessed and that certain records were exempt from access. On January 30, 2012, the Complainant sent a letter to the Custodian requesting a privilege log to determine whether the costs were warranted.

Denial of Access Complaints:

On March 26, 2012, the Complainant submitted the Denial of Access Complaint relevant to GRC Complaint No. 2012-94 with the Government Records Council ("GRC"), arguing that the Custodian neither denied nor granted her access to the responsive records.

On May 9, 2012, the Complainant submitted a Denial of Access Complaint relevant to GRC Complaint No. 2012-142, similarly arguing that the Custodian neither denied nor granted access to the responsive records.

Statements of Information:

On May 9, 2012, the Custodian filed a Statement of Information ("SOI") relevant to GRC Complaint No. 2012-94. The Custodian certifies that she received the Complainant's November 23, 2011 OPRA request on the same day. The Custodian certifies that she forwarded the November 23, 2011 OPRA request to the appropriate Department staff by e-mail on November 25, 2011, and asked staff to advise if any responsive records existed. The Custodian further certifies that she received the Complainant's November 30, 2011 OPRA request on the same day. The Custodian certifies that she forwarded the November 30, 2011 OPRA request to the appropriate Department staff by e-mail on November 30, 2011, and asked staff to advise if any responsive records existed.

On May 25, 2012, the Custodian filed an SOI relevant to GRC Complaint No. 2012-142. The Custodian certifies that she received the Complainant's December 20, 2011 OPRA request on the same day. The Custodian certifies that she forwarded the December 20, 2011 OPRA request to the appropriate personnel for a response on December 22, 2011.

The Custodian certifies that upon initial receipt of the all three (3) requests, she noted that the requests sought general information and that she had substantial grounds to deny the requests as invalid. The Custodian certifies that notwithstanding this fact, the Custodian attempted to fulfill to the requests to whatever extent possible.

The Custodian certifies that regarding the November 23, 2011 and November 30, 2011 OPRA requests, DHSS began focusing on compiling responsive e-mails. The Custodian certifies that on December 2, 2011, she e-mailed the Complainant advising that additional time was necessary because the Custodian would be out of work for week. The Custodian certifies that Mr. Kowalski e-mailed the Complainant on December 14, 2011, noting that the Complainant's OPRA requests were overly broad and could not be fulfilled without a substantial disruption of agency operations. The Custodian certifies that Mr. Kowalski further advised that DHSS would compile responsive e-mails notwithstanding the nature of the Complainant's requests.

The Custodian certifies that she subsequently received the Complainant's December 20, 2011 OPRA request and similarly determined that it was invalid and could not be fulfilled without substantially disrupting DHSS operations. The Custodian certifies that notwithstanding this fact, she proceeded as she had with the November 23, 2011 and November 30, 2011 OPRA requests by trying to fulfill same.

The Custodian certifies that on January 6, 2012, she verbally advised the Complainant of the level of work involved in fulfilling all requests. The Custodian certifies that this work included IT staff searching archives for a former Commissioner, former Deputy Commissioner and former Chief of Staff using multiple broad-based keyword searches. The Custodian certifies that as an example, the IT staff used the term "regs" in a search; however, DHSS currently has more than 75 chapters of regulations in which the staff members identified in the OPRA requests had personal involvement. The Custodian certifies that the search likely yielded e-mails that were not responsive to the OPRA request. The Custodian certifies that once the search was completed, the confidential secretary for the Commissioner reviewed the results to identify potentially responsive e-mails. The Custodian certifies that the e-mails also needed to be reviewed for applicable exceptions and privileges.

The Custodian certifies that because the Complainant's OPRA requests were substantially disrupting DHSS's operations, she determined that a special service charge was warranted. The Custodian certifies that the initial special service charge of \$6,475.52 was in error based on a miscalculation, which she alerted the Complainant to on January 18, 2012. The Custodian certifies the actual special service charge assessed is \$4,132.42 based on the following:

Employee	Functional Title	Task Description	Hourly Rate	Time Spent (Hours)	Cost
Robert Penn	Information Security Officer	Investigate and research former Commissioners and staff e-mail retrieval project	\$45.77	20	\$915.40
Peter	Supervisor of E-	Manage database restoration	\$54.53	2	\$109.06

Casano	mail and Desk-side Services	team			
Andrea Martinez	E-mail Administrator	E-mail access	\$44.63	1	\$44.63
Andrew McDaniel	Backup Administrator	1. Index – 45 minutes 2. Merge – 320 minutes 3. Restore – 640 minutes 4. Move folders – 10 minutes	\$42.54	16.92	\$719.78
Karen Smith	Senior Executive Administrator to the Commissioner	Assemble O’Dowd e-mail	\$34.82	13	\$452.66
Eric Lieberman	Program Manager	Compile Consumer, Environmental & Occupational Health (“CEOH”) program e-mails	\$59.11	6	\$354.66
Joseph Eldridge	Director	Compile CEOH program e-mail	\$61.17	8	\$489.36
Walter Kowalski	Legal Specialist	Review “DEEOH” program e-mail	\$44.81	7	\$313.67
Genevieve Raganelli	Regulatory Officer	Assemble and review Tan e-mail	\$56.40	13	\$733.20
					\$4,132.42

The Custodian certifies that the number of e-mails responsive to the Complainant’s OPRA requests are too numerous to list individually; however, the records require redaction of information that is considered “inter-agency or intra-agency, advisory, consultative or deliberative” (“ACD”) material.

The Custodian asserts that the Complainant’s January 30, 2012 letter requesting a privilege log put the Custodian in an untenable position. The Custodian certifies that in order to provide the Complainant with a complete privilege log, the Custodian would have to complete its search and incur the associated costs. The Custodian argues that requiring DHSS to incur additional costs to complete a privilege log only to give the Complainant the option of declining the total charge is inapposite to OPRA. The Custodian certifies that she took the Complainant’s January 30, 2012 letter as a refusal to pay the costs incurred to date and a refusal to pay any future costs incurred by DHSS to fulfill the requests. The Custodian certifies that DHSS has a collection of records responsive to the portion of the requests seeking e-mails and some other materials that she will disclose upon payment of the costs incurred to date.

Counsel submits a letter brief arguing that the Complainant’s OPRA requests were invalid because the requests represented broad discovery demands. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Gannet New Jersey Partners, L.P. v. County of Middlesex, 379 N.J. Super.

205, 211-12 (App. Div. 2005). Counsel contends that the Custodian would have been justified in denying all requests; however, the Custodian chose to work with the Complainant to fulfill the requests instead of issuing a blanket denial of access.

Counsel states that OPRA allows a custodian to charge a special service charge when responding to voluminous requests. N.J.S.A. 47:1A-5(c). See also Fisher v. Division of Law, 400, 400 N.J. Super. 61, 65 (App. Div. 2008). Counsel notes that efforts to fulfill these requests substantially disrupted agency operations and warranted a special service charge. Counsel states that the Complainant responded to the special service charge by requesting a privilege log rather than agreeing to pay the special service charge. Counsel asserts that the Complainant essentially sought to have DHSS complete its search, create a privilege log and then determine whether she wished to pay the charge for their efforts. Counsel asserts that this action is not contemplated under OPRA, rather, the Complainant is required to inform the Custodian whether she intends to pay the special service charge or abandon the request. Counsel contends that the Custodian did not unreasonably deny access to the responsive records for these reasons.

Analysis⁸

Unlawful Denial of Access

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

OPRA provides 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.” N.J.S.A. 47:1A-5(g).

In Caggiano v. NJ Department of Law & Public Safety, Division of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007), the complainant sought inspection of multiple records totaling 745 pages. The custodian responded granting inspection of the responsive records noting that the complainant would be required to pay the per hour rate of the employee supervising the inspection for every hour over 2 hours. The complainant filed a complaint with the GRC contending that he should not have to pay any cost for inspection. In a July 16, 2007 letter, the custodian contended that an extended inspection of the responsive records would cause a substantial disruption to agency operations. The Council agreed, determining that the “... Custodian has borne her burden of proving that the denial of access was authorized by law ...” because “the extended records inspection ... would substantially disrupt the agency’s operations, and because the Custodian made numerous attempts to reasonably accommodate the

⁸ 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.

Complainant's request ..." *Id.* at pg. 9. See Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007).

Here, the Complainant's three (3) OPRA requests submitted to DHSS encompass 49 items for countless records within a loosely defined time period based on the creation of legislation, programs, etc. In the early response stages, Mr. Kowalski noted that the Complainant's November 23, 2011 and November 30, 2011 OPRA requests were causing a substantial disruption of agency operations. Moreover, the Custodian certified in the SOI that at the onset of both these OPRA requests, and the subsequent December 20, 2011 OPRA request, the Custodian had reasonable grounds to deny the requests as invalid because they would disrupt agency operations. However, the Custodian certified that she attempted to accommodate the requests by forwarding the requests to the appropriate personnel for retrieval of e-mails.

The Custodian certified to the complex search necessary to attempt to locate, obtain and review responsive e-mails and a few other records responsive to the OPRA request. The Custodian certified that after advising the Complainant a special service charge of \$4,132.42 would be assessed, the Complainant sought a privilege log of the entire universe of responsive records and did not expressly accept or reject the fee. The Custodian certified that she was put in a difficult position of determining whether to continue to incur the costs of fulfilling the request, so she interpreted the Complainant's letter as a refusal to pay the assessed fee. Counsel supported the Custodian's position by arguing that the Custodian could have denied the requests as blanket requests similar to requests for discovery. MAG, *supra*; NJ Builders, *supra*; Gannet, *supra*.

The fulfilling of these requests, having not yet been completed, took nearly 90 hours of time. Although Mr. Kowalski expressed his concerns that the requests would substantially disrupt agency operations, the Custodian and DHSS as a whole attempted to accommodate the Complainant to the best of their ability. In fact, even prior to the filing of the December 20, 2011 OPRA request, Mr. Kowalski advised the Complainant that DHSS had already amassed 1,000 pages of records. Furthermore, the assessed charge for time already spent only encompassed e-mails and some other materials, not including possible letters, memoranda, minutes, summaries, recommendations, research materials, lists, general documents, correspondence, schedules, outlines, opinions and/or regulations.

The facts of this complaint are similar to those in Caggiano, *supra*, in that the Custodian here amassed voluminous amounts of records and assessed a special service charge for the nearly 90 hours of work needed to partially comply with the Complainant's OPRA requests. The GRC is satisfied that the Custodian reasonably attempted to accommodate the Complainant's OPRA requests before assuming the Complainant's January 30, 2012 letter represented a rejection of the proposed fee and certifying in the SOI that the requests had caused a substantial disruption of DHSS operations. Moreover, the GRC agrees that the Custodian is not required to incur additional costs in order to provide the Complainant with a complete privilege log at the risk of the Complainant declining to pay the fee.

The Custodian attempted to reasonably accommodate the Complainant's voluminous OPRA requests, an attempt that substantially disrupted DHSS's operations. Additionally, it is evident that the parties could not reach a reasonable accommodation without DHSS incurring

additional costs to compile all responsive records to complete a privilege log and risking nonpayment for extraordinary time and effort. Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-6; Caggiano, supra; Vessio, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian attempted to reasonably accommodate the Complainant's voluminous OPRA requests, an attempt that substantially disrupted the New Jersey Department of Health & Senior Services' operations. Additionally, it is evident that the parties could not reach a reasonable accommodation without DHSS incurring additional costs to compile all responsive records to complete a privilege log and risking nonpayment for extraordinary time and effort. Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-6; Caggiano v. NJ Department of Law & Public Safety, Division of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007); Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007).

Prepared By: Frank F. Caruso
Senior Case Manager

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

May 21, 2013