



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

March 25, 2014 Government Records Council Meeting

Sally Herships
Complainant

Complaint No. 2013-202

v.

Statewide Joint Insurance Fund
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 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 lawfully denied access to the requested records. The checks are not government records that were made, maintained, kept on file, or received by a public agency in the course of its official business, or as records that have been made on behalf of Statewide, in the course of official business, by one of its agents or contractual partners. N.J.S.A. 47:1A-1.1; Burnett v. City of Gloucester, 415 N.J. Super. 506, 512-13 (2010); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Further, the Custodian has certified, and the Complainant has not refuted, that no responsive records exist. 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 25th Day of March, 2014

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: March 27, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 25, 2014 Council Meeting**

**Sally Herships¹
Complainant**

GRC Complaint No. 2013-202

v.

**Statewide Joint Insurance Fund²
Custodial Agency**

Records Relevant to Complaint: The Complainant requested “copies of the checks for every claim paid out on the list that [the Custodian] sent [the Complainant] in response to [the Complainant’s] previous OPRA request.”

Custodian of Record: Caroline Conboy
Request Received by Custodian: June 11, 2013
Response Made by Custodian: June 14, 2013
GRC Complaint Received: July 11, 2013

Background³

Request and Response:

On June 11, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 14, 2013, three (3) business days later, the Custodian responded in writing stating that the Statewide Joint Insurance Fund (“Statewide”) “does not possess copies of the checks in any form[,] electronic or otherwise.”

Denial of Access Complaint:

On July 11, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that she requested copies of checks for claims paid out by Statewide in the name of its member municipalities, and that she had already obtained a list of these claims from Statewide through an earlier OPRA request. The Complainant further states that Statewide denied her access to these copies because the checks were issued by the National Casualty Insurance Company (“National”) and, as such, are not records of Statewide for the purposes of OPRA. The Complainant argues, however, that any

¹ No legal representation is listed in the record.

² The Custodian is represented by Richard P. Cushing, Esq. (Clinton, NJ).

³ 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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documents created by a third party, while under contract with a government organization, are subject to OPRA even if those documents are housed elsewhere. *Citing Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009).

Statement of Information:

On November 4, 2013, the Custodian filed a Statement of Information (“SOI”) wherein she certifies that she received the Complainant’s OPRA request on June 11, 2013, and responded on June 14, 2013. The Custodian states that the Complainant filed a previous OPRA request for information relating to insurance claims made against law enforcement entities. The Custodian notes that, in response, Statewide created a spreadsheet of responsive insureds, claimants, dates, and losses, and that this is the “list” referred to in the OPRA request at issue here. The Custodian elaborates that Statewide only insures municipalities for general liability and workers’ compensation claims. The Custodian additionally states that all law enforcement claims are adjusted, settled, and paid by National. Moreover, the Custodian provides that Statewide does not have a contractual or agency relationship with National.

The Custodian argues that Schuler expands OPRA’s definition of a “public record” to include documents made by a third party agent on behalf of a public agency. She argues, however, that the records here were neither made on behalf of Statewide nor by a contractual agent of it. *Citing Burnett v. City of Gloucester*, 415 N.J. Super. 506 (2010); Schuler, GRC 2007-151. The Custodian contends that Statewide cannot compel National to turn over the records because Statewide does not own, maintain, or possess the records.

Additional Submissions

On January 31, 2014, the GRC sought additional information from the Custodian regarding Statewide’s relationship with National in the form of the following questions:

1. Does Statewide maintain any contractual or agency relationship with National?
2. If not, what, if any, is the relationship between Statewide and National?
3. Does Statewide in any way direct member municipalities to National to obtain police or law enforcement liability coverage?
4. If so, does Statewide solely recommend National to municipalities seeking such liability coverage, or does Statewide recommend other insurance providers as well?
 - a. If Statewide does recommend other providers of police or law enforcement liability coverage, please provide the names of such providers.
5. Regarding the spreadsheet provided to the Complainant prior to the request at issue here, what “insureds, claimants, dates and losses” were detailed? (SOI, Item 12 at pg. 2).

6. If any of the above-referenced “insureds, claimants, dates and losses” arose from law enforcement liability claims made by member municipalities, did Statewide obtain such information from National?

On February 4, 2014, the GRC granted the Custodian an extension of time to respond until February 18, 2014. The Custodian provided her response on February 18, 2014, certifying, in relevant part, that:

In response to questions 1 and 2, Statewide does not maintain a contractual or agency relationship with National Casualty. Statewide is a joint insurance fund, a statutorily created agency that allows for municipalities to join together to obtain more cost-effective insurance coverage. . . . For certain risks that Statewide does not self-insure, such as professional liability, Statewide arranges for insurance for its members using the services of an insurance broker. For professional liability insurance, National Casualty issues policies in the name of the individual member municipalities. The member municipalities are the named insureds. The individual member municipalities and National Casualty are the contracting parties. Accordingly, there is no contract between National Casualty and Statewide relating to the professional liability policies

In response to questions 3 and 4, under Statewide’s program, Statewide makes available to municipalities the ability to secure a policy of insurance from National Casualty. Statewide does not “direct” the municipalities to National Casualty. . . . Statewide does not direct member municipalities as to which types of coverage to select. . . . [E]ach member municipality is represented by a risk manager (insurance agent) who is qualified and required to advise the municipal member of the types of coverages available, coverage limits, whether to obtain coverage from Statewide and whether to secure coverage from other sources. For members of Statewide that qualify for National Casualty’s policies Statewide only encourages them to secure coverage from National Casualty. . . . Nothing in Statewide’s Bylaws or Risk Management Plan mandates that members secure professional liability coverage from National Casualty.

When a member municipality does not qualify for or does not elect to accept coverage from National Casualty, Statewide encourages members to obtain coverage from XL. If a member declines or does not qualify for coverage from XL, Statewide, through a broker, searches the market for coverage and provides the municipality, through its risk manager, with coverage options. The amount of coverage from a carrier is also optional with the municipality. . . . Accordingly, a variety of carriers and coverage options are available for professional liability coverage, depending on the needs of the municipality.

In response to question number 5, the information provided in the spreadsheet was based upon information supplied to Statewide by its broker as an attempt to voluntarily assist the Complainant. The broker maintains loss-run data and shares its (*sic*) with Statewide to assist in both loss control and pricing. Statewide obtained this data and manipulated it into a readable form. Even though this data

was not requested by the Complainant, in an attempt to cooperate and without prejudice, Statewide provided names, dates and amounts for law enforcement claims in the form of a spreadsheet. Statewide provided all information in its possession regarding police liability claims to the Complainant

. . . Unlike those instances where Statewide self-insures[,] . . . for professional liability claims where coverage is provided by . . . another carrier, the adjustment of the loss is handled entirely by the carrier . . . who investigates the loss, evaluates the risk and, if applicable, issues a settlement check to the claimant. Complainant's OPRA request asked for copies of such checks issued on police liability claims. These checks are issued on accounts owned by the carrier and any such checks never come into the possession of Statewide. Statewide cannot compel National Casualty to produce the cancelled checks, which are the carrier's property and remain in the possession and control of the carrier. Statewide has no contractual means to compel the carrier to produce the checks. This situation is different from instances where [an individual] is in possession of documents that contractually belong to the municipality and production of which can be compelled under a contract because the [individual] is either an official of the municipality . . . or is acting as its agent Statewide has no such legal right or ability.

In response to question 6 . . . Statewide did not obtain any information contained in the spreadsheet from National Casualty. Moreover, Statewide has no ability to require the production of such information from National Casualty because it does not have a contractual relationship with National Casualty.

Certification of Caroline Conboy, dated February 17, 2014.

Analysis

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.

In Schuler, the GRC found that:

[B]ecause the work done by the Borough Engineer . . . is directly related to and arises from business done by him on behalf of the Borough . . . (even if the Borough Engineer is not an actual employee of the Borough, he maintains a contractual relationship with the Borough), the requested records maintained on file by the Borough Engineer are considered government records pursuant to N.J.S.A. 47:1A-1.1 and are subject to public access.

Schuler, GRC 2007-151.

Further, in Burnett, the court held that:

[A]greements settling claims between claimants and governmental entities such as [the County] constitute government records, made in the course of the official business of the County. . . . While those agreements may on occasion be executed by agents of the County . . . they nonetheless bind the [County] as principal, and the agreements are made on its behalf.

Burnett, 415 N.J. Super. at 512-13.

Further, the Council has consistently found there to be no denial of access when a custodian demonstrates that no records responsive to a complainant's request exist. 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. Id. The Custodian subsequently certified that no records responsive to the Complainant's request existed, and the Complainant submitted no evidence to refute said certification. Id. The GRC held the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed. Id.

Here, the Custodian certified that Statewide does not maintain a contractual or agency relationship with National, in general, or have a contract with National relating to the professional liability policies issued to member municipalities, in particular. The Custodian also certified that Statewide does not direct member municipalities to obtain coverage from National, and that Statewide encourages member municipalities to obtain professional liability coverage from other providers as well. The Custodian additionally certified that the information provided to the Complainant prior to the request at issue here was not obtained from National. Finally, the Custodian certified that Statewide is never in possession of checks issued in connection with professional liability claims.

Thus, the record indicates that the requested documents were not made, maintained, kept on file, or received by Statewide in the course of its official business. N.J.S.A. 47:1A-1.1. National, who issued and is in possession of the requested checks, is not in a contractual or agency relationship with Statewide. Burnett, 415 N.J. Super. at 512-13; Schuler, GRC 2007-151. The contracts to provide law enforcement liability coverage exist between National and the individual municipalities. Further, Statewide does not direct member municipalities to obtain professional liability coverage through National; rather, member municipalities, acting through and with the advice of their risk managers, may obtain such coverage, if desired, from a variety of providers. The Custodian has shown that Statewide had neither the obligation nor the ability to disclose the checks issued by National in connection with those claims. Additionally, the Custodian has certified that no records responsive to the Complainant's request exist, and the Complainant has not provided evidence to refute this certification. Pusterhofer, GRC 2005-49.

Therefore, the Custodian lawfully denied access to the requested records. The checks are not government records that were made, maintained, kept on file, or received by a public agency in the course of its official business, or as records that have been made on behalf of Statewide, in the course of official business, by one of its agents or contractual partners. N.J.S.A. 47:1A-1.1; Burnett, 415 N.J. Super. at 512-13; Schuler, GRC 2007-151. Further, the Custodian has certified, and the Complainant has not refuted, that no responsive records exist. Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to the requested records. The checks are not government records that were made, maintained, kept on file, or received by a public agency in the course of its official business, or as records that have been made on behalf of Statewide, in the course of official business, by one of its agents or contractual partners. N.J.S.A. 47:1A-1.1; Burnett v. City of Gloucester, 415 N.J. Super. 506, 512-13 (2010); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Further, the Custodian has certified, and the Complainant has not refuted, that no responsive records exist. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Robert T. Sharkey, Esq.
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Senior Counsel

March 18, 2014