



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

October 29, 2013 Government Records Council Meeting

Judith Papiez
Complainant

Complaint Nos. 2013-82 and 2013-88

v.

County of Mercer, Office of County Counsel
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 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 since the Custodian certified in the Statement of Information that no records responsive to the Complainant’s OPRA requests seeking the 2011 contract and numerical lists exist, and because the Complainant did not submit any evidence to refute the Custodian’s certifications, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer*, GRC 2005-49.

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 29th Day of October, 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: November 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**Judith Papiez¹
Complainant**

GRC Complaint Nos. 2013-82 and 2013-88²

v.

**County of Mercer, Office of County Counsel³
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:⁴

1. Numerical listing of Mercer County (“County”), Department of Transportation (“DOT”), employee referrals to Metro Assistance Employee Service (“MEAS”) from April 14, 2011 to present, including the bid, agreement or option between the County and “MEAS” for Fiscal Year (“FY”) 2010, 2011 and 2012.
2. Numerical historical listing of all County employees out on workmen’s compensation who were required to take Functional Capacity Evaluations (“FCE”) prior to returning to work from 2009 to present.

Custodian of Record: Sarah G. Crowley, Esq.
Request Received by Custodian: February 13, 2013
Response Made by Custodian: February 19, 2013
GRC Complaint Received: March 12, 2013

Background⁵

Request and Response:

On February 13, 2013, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On February 19, 2013, the Custodian responded in writing denying access to both requests under N.J.S.A. 47:1A-10 and the Health Insurance Portability and Accountability Act (“HIPAA”). On February 24, 2013, the Complainant disputed the Custodian’s denial of access noting that quantitative listings are budget-related and not exempt under HIPAA.

¹ No legal representation listed on record.

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

³ No legal representation listed on record.

⁴ The Complainant submitted two (2) OPRA requests on February 13, 2013.

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.

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Denial of Access Complaint:

On March 12, 2013, the Complainant filed Denial of Access Complaints with the Government Records Council (“GRC”).

The Complainant asserts that the Custodian partially complied with OPRA request No. 1 by providing information from January 2010 through June 2010 and for 2012. The Complainant contends that the Custodian failed to provide the agreement for 2011, the historical listing of MEAS referrals sought in OPRA request No. 1 and the historical listing of FCE referrals sought in OPRA request No. 2.

The Complainant contends that although N.J.S.A. 47:1A-10 and N.J.A.C. 17:9-1.2 exempt personnel information related to individuals, the quantitative value that the County spends to cover MEAS and FCE testing is not exempt from disclosure. Brown v. Ocean City Bd. Of Educ. (Cape May), GRC Complaint No. 2011-271 (Interim Order dated December 18, 2012). The Complainant further contends that because the quantity of MEAS referrals and quantity and cost of FCE referrals are budget-related and meet the Safe Harbor de-identification requirements of HIPAA, the Custodian should have granted immediate access to these items.

Statement of Information:

On June 24, 2013, the Custodian filed Statements of Information (“SOI”) for both complaints.⁶ The Custodian certifies that she received both OPRA requests on February 13, 2013 and responded in writing on February 19, 2013.

Regarding OPRA request No. 1, the Custodian argues that she believed the Complainant was seeking names that are protected from disclosure under N.J.S.A. 47:1A-1 and HIPAA. The Custodian certifies that the County does not maintain a numerical or name list of referrals to MEAS or its successor. The Custodian further certifies that she provided the Complainant two (2) agreements for 2010 and 2012 and that no agreement for 2011 exists.

Regarding OPRA request No. 2, the Custodian argues that she believed the Complainant was seeking names of employees on workmen’s compensation and undergoing treatment that are not subject to disclosure under N.J.S.A. 47:1A-1 and HIPAA. The Custodian asserts that rather than respond to the Custodian’s denial or clarify her OPRA request, the Complainant filed this complaint. The Custodian asserts that in the complaint, the Complainant clarified that she was seeking the number of employees by year that received an FCE. The Custodian certifies that the County does not maintain a list and is not required to do so; however, the Custodian had the information compiled and discloses same as part of the SOI notwithstanding the fact that the Complainant’s request seeks information.

⁶ On April 15, 2013, these complaints were referred to mediation. On April 22, 2013, these complaints were referred back to the GRC for adjudication.

Analysis⁷

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 Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian’s certification. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access.”

Regarding OPRA request No. 1, the Custodian initially responded denying access to a numerical list of MEAS referrals and providing contracts for 2010 and 2012. Regarding OPRA request No. 2, the Custodian responded denying access to the numerical list. However, following her review of the Denial of Access Complaint, the Custodian certified in the SOI that no 2011 contract or lists of MEAS and FCE participants exist. Further, there is no evidence in the record to refute the Custodian certification.

Thus, since the Custodian certified in the SOI that no records responsive to the Complainant’s OPRA requests seeking the 2011 contract and numerical lists exist, and because the Complainant did not submit any evidence to refute the Custodian’s certifications, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer*, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that since the Custodian certified in the Statement of Information that no records responsive to the Complainant’s OPRA requests seeking the 2011 contract and numerical lists exist, and because the Complainant did not submit any evidence to refute the Custodian’s certifications, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer*, GRC 2005-49.

Prepared By: Frank F. Caruso
Senior Case Manager
October 22, 2013

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

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.

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