



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 28, 2015 Government Records Council Meeting

Elizabeth Macchiaverna
Complainant

Complaint No. 2014-324

v.

NJ Department of Banking and Insurance
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 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 the Council dismiss the complaint because the Complainant withdrew the complaint via e-mail, dated July 17, 2015. 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 28th Day of July, 2015

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: July 30, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 28, 2015 Council Meeting**

**Elizabeth Macchiaverna¹
Complainant**

GRC Complaint No. 2014-324

v.

**New Jersey Department of Banking and Insurance²
Custodial Agency**

Records Relevant to Complaint:

Request dated July 29, 2014, submitted to the Insurance Director's Staff

An electronic copy of any records concerning insurance claims disputes involving Foremost Insurance Group or Foremost Insurance Company.

Request dated July 31, 2014, submitted to Property and Casualty

An electronic copy of any records concerning insurance claims disputes involving Foremost Insurance Group or Foremost Insurance Company.

Request dated August 5, 2014, submitted to Consumer Protection Services

An electronic copy of any records concerning insurance claims disputes involving Foremost Insurance Group or Foremost Insurance Company.

Request dated August 5, 2014, Consumer Protection Services

An electronic copy of any records concerning complaints, disputes, mediations, inquiries, or investigations involving Foremost Insurance Group or Foremost Insurance Company. I am requesting such records whether the complaint, dispute, mediation, inquiry, or investigation is open or closed, and whether the complaint, dispute, mediation, inquiry, or investigation resulted in an informal or formal disciplinary action.

Custodian of Record: Christina Holden

Requests Received by Custodian: July 29, 2014, July 31, 2014, and August 5, 2014 (2)

Responses Made by Custodian: July 30, 2014, August 7, 2014, August 5, 2014, and August 13, 2014

GRC Complaint Received: September 22, 2014

¹ Sandra Zaino is represented by Complainant, Elizabeth Macchiaverna, Esq., of Friedman Kaplan Seiler & Adelman (Newark, NJ).

² Represented by Deputy Attorney General Eleanor Heck.

Elizabeth Macchiaverna v. New Jersey Department of Banking and Insurance, 2014-324 – Supplemental Findings and Recommendations of the Executive Director

Background

June 30, 2015 Council Meeting:

At its June 30, 2015, public meeting, the Government Records Council (“Council”) considered the June 23, 2015, 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 based on the conflicting and inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. As such, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. This complaint should also be referred to the Office of Administrative Law for determination of: (a) whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and (b) whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee.

Procedural History:

On July 1, 2015, the Council distributed its June 30, 2015, Interim Order to all parties. On July 15, 2015, the Custodian filed a request for reconsideration. On July 17, 2015, the Complainant withdrew the complaint in writing, via e-mail, to the GRC.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss the complaint because the Complainant withdrew the complaint via e-mail, dated July 17, 2015. Therefore, no further adjudication is required.

Prepared By: John E. Stewart

Reviewed By: Joseph Glover
Executive Director

July 21, 2015



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

June 30, 2015 Government Records Council Meeting

Elizabeth Macchiaverna
Complainant

Complaint No. 2014-324

v.

NJ Department of Banking and Insurance
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 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 based on the conflicting and inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. As such, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. This complaint should also be referred to the Office of Administrative Law for determination of: (a) whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and (b) whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee.

Interim Order Rendered by the
Government Records Council
On The 30th Day of June, 2015

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: July 1, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting**

**Elizabeth Macchiaverna¹
Complainant**

GRC Complaint No. 2014-324

v.

**New Jersey Department of Banking and Insurance²
Custodial Agency**

Records Relevant to Complaint:

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An electronic copy of any records concerning insurance claims disputes involving Foremost Insurance Group or Foremost Insurance Company.

Request dated August 5, 2014, submitted to Consumer Protection Services

An electronic copy of any records concerning insurance claims disputes involving Foremost Insurance Group or Foremost Insurance Company.

Request dated August 5, 2014, Consumer Protection Services

An electronic copy of any records concerning complaints, disputes, mediations, inquiries or investigations involving Foremost Insurance Group or Foremost Insurance Company. I am requesting such records whether the complaint, dispute, mediation, inquiry or investigation is open or closed, and whether the complaint, dispute, mediation, inquiry or investigation resulted in an informal or formal disciplinary action.

Custodian of Record: Christina Holden

Requests Received by Custodian: July 29, 2014, July 31, 2014, and August 5, 2014 (2)

Responses Made by Custodian: July 30, 2014, August 7, 2014, August 5, 2014, and August 13, 2014

GRC Complaint Received: September 22, 2014

¹ Sandra Zaino is represented by Complainant, Elizabeth Macchiaverna, Esq., of Friedman Kaplan Seiler & Adelman (Newark, NJ).

² Represented by Deputy Attorney General Eleanor Heck.

Elizabeth Macchiaverna v. New Jersey Department of Banking and Insurance, 2014-324 – Findings and Recommendations of the Executive Director

Background³

Requests and Responses:

Request dated July 29, 2014

On July 29, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 30, 2014, the first (1st) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that there are no records responsive to the request.

Request dated July 31, 2014

On July 31, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On August 7, 2014, the fifth (5th) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that there are no records responsive to the request.

Request dated August 5, 2014

On August 5, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On August 5, 2014, the same day the request was received, the Custodian responded in writing, informing the Complainant that the request is a duplicate of the Complainant’s July 29, 2014, and July 31, 2014, requests.

Request dated August 5, 2014

On August 5, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On August 13, 2014, the sixth (6th) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that there are no records responsive to the request.

Denial of Access Complaint:

On September 22, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that she submitted three (3) requests to different entities within the New Jersey Department of Banking and Insurance, all seeking any records concerning insurance claims disputes involving Foremost Insurance Group or Foremost Insurance Company. The Complainant states that she forwarded a request dated July 29, 2014, to the Insurance Director’s Staff, a request dated July 31, 2014, to Property and Casualty, and a request dated August 5, 2014, to Consumer Protection Services.

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.
Elizabeth Macchiaverna v. New Jersey Department of Banking and Insurance, 2014-324 – Findings and Recommendations of the Executive Director

The Complainant states that the Custodian responded to the two July 2014 requests, informing her that there are no records responsive to the requests. For the August 5, 2014, request, the Complainant states that the Custodian responded by informing her that the request was a duplicate of the July 2014 requests. The Complainant states that she had a telephone conversation with the Custodian on August 5, 2014, wherein the Custodian informed her that it was not necessary for her to submit the same request to more than one division within the Department of Banking and Insurance. The Complainant states that following the telephone conversation that date, she filed another request seeking records concerning complaints, disputes, mediations, inquiries, or investigations involving Foremost Insurance Group or Foremost Insurance Company, whether open or closed. The Complainant states that the Custodian responded on August 13, 2014, denying the requests because there are no records responsive to the request.

The Complainant contends that the Custodian's response cannot be accurate because the Complainant's client submitted a complaint against Foremost Insurance with the Department of Banking and Insurance on February 27, 2013. The Complainant attached documents to the complaint revealing that a file was opened and an investigator, Thomas Stanley, was assigned to the complaint. The Complainant states that since she has personal knowledge that the Department of Banking and Insurance has some responsive records on file, the Custodian's response that there are no responsive records reveals that the Custodian failed to perform a good faith search for the requested records.

Statement of Information:

On October 20, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that she received one OPRA request from the Complainant on July 29, 2014, and one request on July 31, 2014. The Custodian also certifies that she received two OPRA requests from the Complainant on August 5, 2014. The Custodian certifies that she responded in writing to the July 29, 2014, request on July 30, 2014, the July 31, 2014, request on August 7, 2014, the first August 5, 2014, request on the same day it was received, and the second August 5, 2014, request on August 13, 2014.

Through Counsel, the Custodian argues that although she stated in the responses that there are no responsive records, she should also have stated that pursuant to N.J.A.C. 11:17-2.15(b)6, responsive documents, if any, are not subject to disclosure to the extent that they are part of an investigative file in any matter pending investigation or in any completed investigation in which no formal disciplinary action was taken. The Custodian's Counsel argues that for this reason, even if documents responsive to the request exist, to the extent such documents were part of a pending investigation or any investigative file that was closed with no formal disciplinary action by the Department, the Custodian properly denied access.

The Custodian's Counsel states that the Department cannot confirm or deny the status of any open or any closed investigative file in which no action was taken. However, a search of the Department's files and a search of the database of the National Association of Insurance Commissioners did not reveal any investigation that resulted in formal disciplinary action against

Foremost Insurance Group or Foremost Insurance Company. The Custodian's Counsel states that the Custodian cannot list any records in the document index (SOI Item 9).

Additional Submissions:

On June 16, 2015, at the request of the GRC, the Complainant's Counsel submitted an affidavit prepared by her client, Sandra Zaino. The affiant swears that she submitted a complaint against Foremost with the Department of Banking and Insurance Consumer Inquiry and Response Center on February 27, 2013. The affiant also swears that the Department of Banking and Insurance opened a file and assigned Investigator Thomas Stanley to review the complaint. The affiant further swears that in connection with the review, correspondence was exchanged between the affiant and the Department of Banking and Insurance. The affiant also swears that Foremost corresponded with the Department. The affiant attached copies of the referenced correspondence to the affidavit.

On June 17, 2015, the Custodian's Counsel forwarded a letter to the GRC in response to Ms. Zaino's affidavit. Counsel reiterates the salient parts of her legal argument that was set forth in the SOI.

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.

Here, the Complainant asserts that records responsive to the requests are known to exist because her client submitted a complaint to the Department of Banking and Insurance and subsequently exchanged correspondence with the agency regarding the complaint. The Complainant submitted to the GRC an affidavit prepared by her client affirming the Complainant's assertions.

After initially denying any responsive records existed, the Custodian certified that if responsive records do exist, to the extent such records were part of a pending investigation or any investigative file that was closed with no formal disciplinary action by the Department, she properly denied access. The Custodian further certified that she could not confirm or deny the existence of responsive records.

Because the Custodian refused to complete the GRC's required document index, and instead maintained that she could not confirm or deny the existence of responsive records, and because the evidence of record contains a certification submitted by the Custodian and an affidavit submitted by the Complainant's client that conflict in part, the GRC does not have an unequivocal record to rely upon in adjudicating this complaint.

Therefore, based on the conflicting and inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. As such, this complaint should be referred to the Office of Administrative Law (“OAL”) for a hearing to resolve the facts. This complaint should also be referred to the OAL for determination of: (a) whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and (b) whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that based on the conflicting and inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. As such, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. This complaint should also be referred to the Office of Administrative Law for determination of: (a) whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and (b) whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee.

Prepared By: John E. Stewart

Reviewed By: Joseph D. Glover
Executive Director

June 23, 2015