



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 31, 2019 Government Records Council Meeting

Jackson T. Horowitz
Complainant

Complaint No. 2016-280

v.

NJ Office of the Comptroller
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council (“Council”) considered the January 22, 2019 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. The evidence of record supports that the Custodian never received the Complainant’s October 12, 2016 OPRA request and there is no credible evidence in the record to contradict the Custodian’s Statement of Information certification. Thus, the Custodian did not unlawfully deny access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. See Valdes v. N.J. Dep’t of Educ., GRC Complaint No. 2012-19 (April 2013).
2. The portion of the Complainant’s October 20, 2016 request seeking information for all unidentified direct acting antiviral drugs was invalid. Regardless of whether a search for names of all approved direct acting antiviral drugs would take “less than five (5) minutes,” a custodian is not required to engage in such actions to respond to an OPRA request. The Custodian thus had no legal duty to research his files, or cause research, to locate records potentially responsive to the request. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007). The Custodian thus lawfully denied access to this portion of the Complainant’s October 20, 2016 OPRA request.
3. The portion of the Complainant’s October 20, 2016 OPRA request seeking the specific electronic information relevant to Harvoni was valid. See Paff v. Twp. of Galloway, 229 N.J. 340 (2017). Specifically, and based on Ms. Livingston’s certification, the New Jersey Office of the State Comptroller would have been required to correlate and amass the responsive electronic data for this specifically identified direct acting antiviral drug. Such an action would not require research as discussed in Donato v. Twp. of Union,



GRC Complaint No. 2005-182 (February 2007), and Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015). Thus, the Custodian unlawfully denied access to this portion of the OPRA request. N.J.S.A. 47:1A-6. Notwithstanding, the GRC declines to order any action on the part of the Custodian because the Complainant confirmed in writing on November 9, 2016 that he received the requested information from New Jersey Department of Human Services in response to a separate OPRA request.

4. The Custodian unlawfully denied access to a portion of Complainant's October 20, 2016 OPRA request seeking certain electronic information. However, no violation of OPRA occurred because the Custodian never received the Complainant's October 12, 2016 OPRA request. Further, the Custodian lawfully denied access to the remainder of the Complainant's October 20, 2016 request because it required research. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 31st Day of January, 2019

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: February 5, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
January 31, 2019 Council Meeting**

**Jackson T. Horowitz¹
Complainant**

GRC Complaint No. 2016-280

v.

**New Jersey Office of the Comptroller²
Custodial Agency**

Records Relevant to Complaint:

October 12, 2016 OPRA request: Electronic copies via e-mail or fax of:

1. Names and/or the exact number of beneficiaries covered by the Medicaid Health Plan and/or Medicaid Health Maintenance Organizations (“HMO”) that applied for treatment of Hepatitis C with new direct acting antiviral drugs (“DAA”).
2. Names and/or numbers of beneficiaries that attempted to obtain approval for treatment of chronic Hepatitis C from 2014 to present.
3. Names and/or numbers of beneficiaries approved for treatment of Hepatitis C with DAAs by Medicaid or HMOs.³

October 20, 2016 OPRA request: Electronic copies via e-mail or fax of:

1. The number of Medicaid beneficiaries from October 10, 2014 to present attempting to obtain Harvoni or any other new DAAs available to treat Hepatitis C.
2. The number of individuals denied access to these medications during the same time frame.
3. The number of individuals provided access to these medications, whether through initial approval or successful appeal.

Custodian of Record: Robert P. Shane⁴

Request Received by Custodian: N/A, October 25, 2016

Response Made by Custodian: N/A, October 26, 2016

GRC Complaint Received: October 31, 2016

¹ No legal representation listed on record.

² The OPRA requests were served on the Office of the Medicaid Inspector General, which was consolidated into the New Jersey Office of the State Comptroller. N.J.S.A. 52:15C-23. Represented by Deputy Attorney General Diana E. Reynolds. Previously represented by Deputy Attorney General John A. Lo Forese and Deputy Attorney General Paul Davis before him.

³ The Complainant noted that he understood that names would be exempt under the Health Insurance Portability and Accountability Act; thus, he stated that the names should be redacted and replaced with initials

⁴ In the Denial of Access Complaint, the Complainant identified Alternate Custodian Kia King as the person who denied him access.

Background⁵

Request and Response:

On October 12, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request via facsimile to Office of the Medicaid Inspector General (“MIG”) seeking the above-mentioned records.

On October 20, 2016, the Complainant submitted an OPRA request to the MIG via facsimile and first-class mail seeking the above-mentioned records. On October 26, 2016, Alternate Custodian Kia King responded in writing on behalf of the Custodian stating that the New Jersey Office of the State Comptroller (“OSC”) received the Complainant’s October 20, 2016 request on October 25, 2016. Ms. King denied the Complainant’s OPRA request as overly broad and thus invalid. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007). Ms. King stated that the request would have required the OSC to conduct research. Gannett New Jersey P’ship v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). Additionally, Ms. King stated that the Complainant’s request was invalid because it sought information and not an identifiable record. MAG, 375 N.J. Super. at 549.

On the same day, the Complainant responded noting that he submitted similar OPRA requests because the OSC failed to respond to the initial request. The Complainant also advised that he would be filing a complaint challenging Ms. King’s denial of access.

Denial of Access Complaint:

On October 31, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he originally faxed an OPRA request to the MIG on October 12, 2016. The Complainant asserted that the MIG failed to respond within seven (7) business days; thus, he submitted another OPRA request, worded slightly different, to the MIG on October 20, 2016. The Complainant contended that he was unlawfully denied access, noting that Ms. King never explained why OSC failed to respond to his October 12, 2016 OPRA request.

Additional Submissions:

On November 4, 2016, the Complainant e-mailed the GRC advising that he received the records he sought from the New Jersey Department of Human Services (“DHS”) pursuant to a separate OPRA request. The Complainant nonetheless asserted that he wished to have the GRC “take punitive actions” against MIG for failing to comply with OPRA.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

On November 7, 2016, the Custodian's Counsel submitted a letter of representation. Therein, Counsel stated that MIG was abolished, and all functions transferred to OSC pursuant to N.J.S.A. 52:15C-23. Counsel requested that, due to this statutory change, the caption for this complaint be changed accordingly.

On November 10, 2016, the Complainant e-mailed the GRC reasserting that MIG's actions, inclusive of Ms. King's denial, were knowing and willful in nature. The Complainant thus requested that the GRC levy the civil penalty on Ms. King and/or "her representatives." On November 19, 2016, the Complainant objected to Counsel's request to change the caption. The Complainant contended that he believed he was submitting his request to MIG, whose website was active until after Custodian's Counsel submitted a letter of representation. The Complainant also contended that Ms. King's failure to advise him of N.J.S.A. 52:15C-23 was intentional and resulted in him being put in a position of "false pretense, false promise, and misrepresentation of the facts."⁶

Statement of Information:

On December 5, 2016, the Custodian filed a Statement of Information ("SOI") including legal certifications from Ms. King and Supervising Medical Review Analyst ("MRA") Tracy Livingston.

The Custodian initially certified that OSC never received the Complainant's October 12, 2016 OPRA request. The Custodian certified that he received the Complainant's October 20, 2016 OPRA request on October 25, 2016. The Custodian certified that his search included contacting the Director of OSC's Medicaid Fraud Division ("MFD") to search for responsive records. The Custodian affirmed that MFD advised that they did not maintain any of the specific records requested; MFD would have to conduct substantial research, correlate data, and siphon materials from various databases to compile the lists sought. The Custodian certified that he worked with Ms. King to respond in writing on October 26, 2016.

The Custodian contended that he lawfully denied access to the Complainant's October 12, 2016 OPRA request because he never received it. The Custodian also argued that in addition to not receiving the request, no records responsive to it existed anyway. The Custodian thus argued that there could not have been an unlawful denial of access. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

The Custodian further contended that OSC properly denied the Complainant's OPRA request in accordance with all relevant case law cited in its response, as well as the Appellate Division's decision in Paff v. Galloway Twp., 444 N.J. Super. 495 (App. Div. 2016). Further, the Custodian argued that OSC's Data Mining Unit ("DMU") would be required to conduct research to create a responsive record. See Livingston Cert. at ¶ 7. The Custodian averred that the DMU would have to first identify all possible medication contemplated by the request. Id. The Custodian averred that the DMU would then have to search through two (2) "data warehouses" and other systems to locate claims paid, paid adjusted, and denied for each medication. Id. at 7-8. The Custodian finally averred that upon collection of the data, another DMU employee would have to

⁶ After review of the facts and arguments presented by the parties, the GRC changed the caption to reflect the consolidation of MIG within the OSC in accordance with N.J.S.A. 52:15C-23 (enacted June 29, 2010).

attempt to duplicate the process to ensure the gathered information was correct. Id. at 8. The Custodian contended that OPRA did not require such actions; thus, OSC's denial was proper.

In closing, the Custodian certified that on October 27, 2016 he confirmed that the Complainant subsequently submitted an OPRA request to DHS. The Custodian certified that DHS provided the request and their response to him. Therein, DHS provided some information responsive to the Complainant's request, but required a special service charge for the remainder of the information.

Additional Submissions:

On December 6, 2016, the Complainant e-mailed the GRC a rebuttal to the SOI. Initially, the Complainant reiterated that he submitted his October 12, 2016 OPRA request in good faith based on the presence of the "defunct" MIG website and official OPRA request form. The Complainant argued that OSC had an obligation to inform the public that MIG was consolidated into it in 2010. The Complainant also argued that his transmission to the facsimile number taken from the MIG OPRA request successfully completed for both requests. The Complainant noted that he also sent his October 20, 2016 OPRA request via U.S. mail. The Complainant argued that, having provided credible evidence substantiating that he sent his OPRA request to the correct fax number and that it was received, his position that the Custodian violated OPRA's timeliness provision remained unchanged.

Next, the Complainant disputed the Custodian's assertion that his second OPRA request was invalid because it required research. The Complainant further contended that, contrary to Custodian's argument that no record existed, Ms. Livingston's certification proved otherwise. The Complainant contended that Ms. Livingston's assertion of substantial research was belied by the fact that it took him roughly five (5) minutes and a simple Google™ search to identify all relevant DAAs. The Complainant also pointed to DHS's response as compelling evidence that OSC improperly denied him access. The Complainant noted that DHS "knew it had an obligation" to provide the records and engaged in "'insignificant' research."

Analysis

Preface

Initially, the Complainant continually raised the argument that the MIG website was in operation long after the enactment of N.J.S.A. 52:15C-23 and subsequent consolidation with OSC. The Complainant contended that the presence of MIG's website on the internet should have amounted to a "knowing and willful" violation because it put him "in a position of 'false pretense, false promise, and misrepresentation of the facts.'" Neither the Custodian or Counsel addressed this argument other than to request a caption change due to the statutory change.

Notwithstanding that OSC did not address the issue, the GRC does not agree that the presence of the MIG website amounted to a per say knowing and willful attempt to mislead the public. Certainly, OSC could have (and may have) taken careful steps to ensure that the MIG page could no longer be accessed following consolidation. Ultimately, there is no evidence in the record

to prove that the MIG's defunct website was left in operation to purposely confuse potential OPRA requestors.

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 Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013), the complainant filed a complaint after not receiving a response to his OPRA request. As part of his Denial of Access Complaint, the complainant included a certified mail return receipt stamped "State of NJ – Capital Post Office." The Council determined that the custodian did not unlawfully deny access to the complainant's OPRA request because same was never received. The Council reasoned that "the Custodian did not sign the receipt and there is no indication that DOE received the request, only that the State received it . . . it is entirely possible that the Custodian never received the OPRA request." Id. at 4. See also Bey v. State of N.J., Office of Homeland Security & Preparedness, GRC Complainant No. 2013-237 (February 2014) (complainant's certified mail return receipt sufficient only to show that the State received the request, not the custodian).

Regarding the October 12, 2016 OPRA request, the Complainant argued in the Denial of Access Complaint that the Custodian failed to respond to it. The Complainant included a fax confirmation sheet with a date of "08/01/2010" on it. However, the Custodian certified in the SOI that he never received same. In a response to the SOI, the Complainant disputed the Custodian's assertion. The Complainant argued that the October 20, 2016 request was similarly faxed and received; thus, sufficient evidence existed to prove the Custodian received the October 12, 2016 OPRA request. The Complainant again attached the fax confirmation sheet as additional supporting documentation. The Complainant also noted that he mailed the October 20, 2016 OPRA request in addition to faxing it to OSC.

In reviewing the facts and arguments here, the GRC is satisfied that no violation regarding the October 12, 2016 OPRA request occurred because the Custodian never received it. Most compelling to this holding is that the Complainant mailed the October 20, 2016 OPRA request in addition to faxing it. Further, the Custodian's receipt of the October 20, 2016 OPRA request on October 25, 2016 aligns with his receipt of the mailed copy, not the faxed copy. Further, and as held in Valdes, the existence of the fax confirmation sheet does not represent competent and credible proof that the Custodian received the request. For these reasons, there is sufficient evidence in the record to support that the Custodian did not receive the October 12, 2016 OPRA request.

Therefore, the evidence of record supports that the Custodian never received the Complainant's October 12, 2016 OPRA request and there is no credible evidence in the record to contradict the Custodian's SOI certification. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. See Valdes, GRC No. 2012-19.

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.”* N.J.S.A. 47:1A-1.

[MAG, 375 N.J. Super. at 546 (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent, 381 N.J. Super. at 37,⁷ N.J. Builders, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

Pursuant to [MAG], the Custodian is obligated to search her files to find the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

request. The word search is defined as “to go or look through carefully in order to find something missing or lost.” The word research, on the other hand, means “a close and careful study to find new facts or information.” (Footnotes omitted.)

[Id.]

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato, GRC 2005-182. The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Regarding requests requiring research, in Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015), the court held that plaintiff’s request was invalid because it required research. In reaching this conclusion, the court reasoned that the plaintiff’s request:

. . . would have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

[Id. at 237.]

Here, the Complainant’s October 20, 2016 sought three (3) categories of information. The first was the number of Medicaid recipients attempting to access “Harvoni or any other new DAAs” on the market. The second was the number of individuals denied access to these medications. The third was the number of individuals provided access to these medicines. The request contained an overall time frame of October 10, 2014 to the date of the OPRA request. On behalf of the Custodian, Ms. King denied the request as invalid because it sought information.

After the filing of this complaint, the Custodian reiterated in the SOI his contention that the request was invalid, arguing that it would have required research and the creation of a record. Paff, 444 N.J. Super. 495. The Custodian also provided Ms. Livingston’s certification detailing what was required to ultimately produce a responsive record. In response to the SOI, the Complainant argued that he was able to obtain the unidentified DAA information with a “simple Google™ search.” Further, the Complainant argued that Ms. Livingston’s certification did not support that a record had to be created; rather, data simply had to be coalesced into one (1) report. Finally, the Complainant argued that DHS produced the information, which belied DHS’ argument that research was required.

The GRC begins by noting that in Paff, 444 N.J. Super. 495, the Appellate Court reached its conclusion by determining that producing an e-mail log was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). However, during the pendency of this complaint, the Appellate Division’s decision in Paff was reviewed by the Supreme Court and reversed.

In Paff v. Twp. of Galloway, 229 N.J. 340 (2017), the Court determined that an agency’s electronically stored information is a “government record” under OPRA, unless otherwise exempt. The Court thus reversed and remanded, holding that basic e-mail information stored electronically is a “government record” under OPRA, unless an exemption applies to that information. The Court reasoned that:

A document is nothing more than a compilation of information -- discrete facts and data. By OPRA’s language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

....

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that “OPRA only allows requests for records, not requests for information.” Paff, 444 N.J. Super. at 503, (quoting Bent, 381 N.J. Super. at 37]). That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.

[Id. at 353, 356.]

The Supreme Court’s ruling in Paff is consistent with the Council’s past decisions on the issue of coalescing information from electronic systems. Specifically, in Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014), the Council addressed the custodian’s argument that she was not required to create a record to satisfy an OPRA request for database information pursuant to Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008). Therein, the complainant sought access to a list of adjuncts to include certain information. The custodian produced a list that did not include all information sought; however, the evidence of record indicated that she could have produced a fully responsive record. Specifically, evidence existed to support that all information the complainant sought existed within a few different databases.

The Council first noted that the definition of a “government record” included “information stored or maintained electronically.” N.J.S.A. 47:1A-1.1. The Council then distinguished the facts of Morgano and held that the custodian unlawfully denied access to the responsive list containing all elements identified in the subject OPRA request. The Council reasoned that:

The Morgano decision refers to compiling certain disclosable information from a paper record and listing or creating another paper record responsive to a request. However, in terms of certain electronic filing systems, *general querying of information cannot be viewed as equal to creating a new paper record*. While information stored electronically may include additional pieces of information/fields, many programs have the capability to extract requested information/fields for disclosure . . . Further, querying electronic file systems for responsive information is not unlike searching an e-mail account for e-mails responsive to an OPRA request.

[Id. at 12 (emphasis added).]

The crux of this complaint currently before the Council is whether the October 20, 2016 request would require research and the creation of a “government record,” rendering it invalid under OPRA. The GRC has discerned the following facts from all evidence and certifications submitted during the pendency of this complaint. First, the information requested by the Complainant is held electronically in at least two (2) data warehouses; thus, said data falls within the definition of a “government record” under OPRA. See Paff, 229 N.J. at 353. Second, the information could be collated into a responsive report from those databases, albeit through the process described in the SOI. Third, beyond the Complainant’s identification of Harvoni, any other unidentified DAAs would require the Custodian and the DMU to make an independent determination as to which correspond to the Complainant’s OPRA request.

Having reviewed all facts and arguments before it, the GRC is satisfied that the portion of the request not identifying DAAs was invalid. In contrast, the GRC is also satisfied that the portion of the request identifying Harvoni was valid. The difference between each portion comes down to a research requirement regardless of how “insignificant” the Complainant asserted it would have been. By not identifying any DAAs beyond Harvoni, the Custodian and DMU would have had to perform research to determine the full universe of medications applicable to the Complainant’s request. The Custodian was not required to, as suggested by the Complainant, “Google™” nondescript medications and evaluate their relevance to the request at issue. Thus, the threshold action of having to identify all unidentified DAAs rendered that portion of the request fatal.

Conversely, the portion of the Complainant’s OPRA request identifying Harvoni would not require research. Based on Ms. Livingston’s certification, the Custodian and DMU would only be required to coalesce data from two (2) databases relevant to Medicaid recipients seeking Harvoni. While this may have been somewhat laborious,⁸ the Supreme Court’s decision in Paff is clear that the extraction and production of the requested “information stored . . . electronically” was not akin to research or creating a record. See also Zahler. Further, the actions required certainly would not fall within the same “research” vein as the other portion of the request.

Accordingly, the portion of the Complainant’s October 20, 2016 request seeking information for all unidentified DAAs was invalid. Regardless of whether a search for names of

⁸ OPRA’s provisions provide that a custodian may charge a “special service charge” when expending an “extraordinary amount of time and effort” to respond to an OPRA request or for “a substantial amount of manipulation or programming of information technology.” N.J.S.A. 47:1A-5(c)-(d).

all approved DAAs would take “less than five (5) minutes,” a custodian is not required to engage in such actions to respond to an OPRA request. The Custodian thus had no legal duty to research his files, or cause research, to locate records potentially responsive to the request. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Lagerkvist, 443 N.J. Super. at 236-237; Schuler, GRC 2007-151; Donato, GRC 2005-182. The Custodian thus lawfully denied access to this portion of the Complainant’s October 20, 2016 OPRA request.

However, the portion of the Complainant’s October 20, 2016 OPRA request seeking the specific electronic information relevant to Harvoni was valid. See Paff, 229 N.J. 340. Specifically, and based on Ms. Livingston’s certification, OSC would have been required to correlate and amass the responsive electronic data for this specifically identified DAA. Such an action would not require research as discussed in Donato, and Lagerkvist. Thus, the Custodian unlawfully denied access to this portion of the OPRA request. N.J.S.A. 47:1A-6. Notwithstanding, the GRC declines to order any action on the part of the Custodian because the Complainant confirmed in writing on November 9, 2016 that he received the requested information from DHS in response to a separate OPRA request.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Custodian unlawfully denied access to a portion of Complainant’s October 20, 2016 OPRA request seeking certain electronic information. However, no violation of OPRA occurred because the Custodian never received the Complainant’s October 12, 2016 OPRA request. Further, the Custodian lawfully denied access to the remainder of the Complainant’s October 20, 2016 request because it required research. Additionally, the evidence of record does

not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The evidence of record supports that the Custodian never received the Complainant's October 12, 2016 OPRA request and there is no credible evidence in the record to contradict the Custodian's Statement of Information certification. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. See Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013).
2. The portion of the Complainant's October 20, 2016 request seeking information for all unidentified direct acting antiviral drugs was invalid. Regardless of whether a search for names of all approved direct acting antiviral drugs would take "less than five (5) minutes," a custodian is not required to engage in such actions to respond to an OPRA request. The Custodian thus had no legal duty to research his files, or cause research, to locate records potentially responsive to the request. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007). The Custodian thus lawfully denied access to this portion of the Complainant's October 20, 2016 OPRA request.
3. The portion of the Complainant's October 20, 2016 OPRA request seeking the specific electronic information relevant to Harvoni was valid. See Paff v. Twp. of Galloway, 229 N.J. 340 (2017). Specifically, and based on Ms. Livingston's certification, the New Jersey Office of the State Comptroller would have been required to correlate and amass the responsive electronic data for this specifically identified direct acting antiviral drug. Such an action would not require research as discussed in Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), and Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015). Thus, the Custodian unlawfully denied access to this portion of the OPRA request. N.J.S.A. 47:1A-6. Notwithstanding, the GRC declines to order any action on the part of the Custodian because the Complainant confirmed in writing on November 9, 2016 that he received the requested information from New Jersey Department of Human Services in response to a separate OPRA request.
4. The Custodian unlawfully denied access to a portion of Complainant's October 20, 2016 OPRA request seeking certain electronic information. However, no violation of OPRA occurred because the Custodian never received the Complainant's October 12,

2016 OPRA request. Further, the Custodian lawfully denied access to the remainder of the Complainant's October 20, 2016 request because it required research. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
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