



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 31, 2018 Government Records Council Meeting

Jackson T. Horowitz
Complainant

Complaint No. 2016-318

v.

NJ Department of Banking and Insurance
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 2018 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 Complainant’s request represents an invalid request for information that fails to seek identifiable government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian lawfully deny access to the subject request. N.J.S.A. 47:1A-6; LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Redd v. Franklin Twp. Pub. Sch. (Somerset), GRC Complaint No. 2014-185 (February 2015).

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 July, 2018

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: August 3, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**Jackson T. Horowitz¹
Complainant**

GRC Complaint No. 2016-318

v.

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

Records Relevant to Complaint: Copies of:

1. The number of “Independent Healthcare Appeal Program” (“Program”) appeals that relate to the denial of Medicaid and/or Medicaid Managed Care Organization’s (“MCO”) approval to pay for Hepatitis C treatments (addressed between December 3, 2013 and present).
2. Of the above, the number of successful appeals, appeals that an Independent Utilization Review Organization (“IURO”) decided in the beneficiaries’ favor.
3. Of the above, the number of unsuccessful appeals that the IURO decided in MCO’s favor.
4. For all three request items above, differentiate whether the payment at issue from a Medicaid “Fee-For-Service” IURO appeal or one from MCO and individually group the records by MCO (*i.e.* United HealthCare, Community Plan, Horizon Health First, Well Care, Aetna, *etc.*).

Custodian of Record: Matthew Noumoff³

Request Received by Custodian: November 18, 2016

Response Made by Custodian: November 28, 2016

GRC Complaint Received: December 12, 2016

Background⁴

Request and Response:

On November 11, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 28, 2016, the original Custodian responded in writing obtaining an extension of time until December 12,

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Eleanor Heck.

³ The original Custodian or Record was Ernest Bongiovanni.

⁴ 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.

2016 to further process the subject OPRA request. On December 12, 2016, the original Custodian responded to the Complainant in writing denying the Complainant's OPRA request as 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). The original Custodian noted that the request failed to identify specific records. Gannett New Jersey P'ship v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). The original Custodian asserted that nothing in OPRA required a custodian to conduct research and correlate data in order to respond to an OPRA request. Lagerkvist v. Office of the Governor, 443 N.J. Super. 230 (App. Div. 2015)

Denial of Access Complaint:

On December 12, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed the original Custodian's denial of access. The Complainant asserted that he requested "the medium of information" that he believed the New Jersey Department of Banking & Insurance ("DOBI") readily maintained. The Complainant further argued that his request was very specific, which obviated the need to conduct research. The Complainant also contended that the citations in the Custodian's denial letter did not apply to his OPRA request. The Complainant thus requested that the GRC find that the original Custodian unlawfully denied access to his OPRA request.

Statement of Information:⁵

On March 1, 2017, the Custodian filed a Statement of Information ("SOI") attaching a legal certification from Assistant Commissioner Gale Simon. The Custodian certified that DOBI received the Complainant's OPRA request on November 18, 2016. The Custodian certified that the original Custodian obtained an extension and then responded in writing on December 12, 2016 denying the request as invalid.

The Custodian certified that the Complainant's OPRA request referred to the Independent Health Care Appeals Program ("IHCAP"), established as part of the Health Care Quality Act ("Act"). N.J.S.A. 26:2S-11. The Custodian stated that the purpose of the IHCAP was to allow for an independent review of carriers' final decisions to reduce or terminate the benefits of a covered person. The Custodian noted that the IHCAP applied to Medicaid Health Maintenance Organizations ("HMO"), but did not include adverse benefit determinations of Medicaid fee for service programs. The Custodian averred that under the IHCAP, a consumer believing they were wrongly denied benefits may seek an internal review. N.J.A.C. 11:24-8.4(a)(1)-(2); N.J.A.C. 11:24A-3.5(e). The Custodian affirmed that if the consumer is dissatisfied with the internal review decision, the IHCAP allows the consumer to appeal to the IURO. N.J.A.C. 11:24-8.7; N.J.A.C. 11:24A-3.6. The Custodian noted that the IURO is under contract with DOBI and its decision are confidential with limited exceptions. N.J.S.A. 26:2S-12(a), (f). The Custodian certified that DOBI maintains IURO reports involving HMOs; however, it does not compile counts of consumer complaints based on type. See Simon Cert. at ¶ 6. The Custodian thus argued that DOBI's denial was appropriate for two (2) reasons.

⁵ On January 5, 2017, this complaint was referred to mediation. On February 15, 2017, this complaint was referred back to the GRC for adjudication.

First, the Custodian argued that the Complainant’s request was invalid because it failed to identify specific records. The Custodian asserted that the subject request was similar to the one at issue in MAG, 375 N.J. Super. 534. The Custodian stated that the MAG court found that the request was invalid because it sought “information” that the response should include instead of identifiable records. The Custodian stated that the court held that OPRA did not contemplate “[w]holesale requests for general information *to be analyzed, collated, and compiled* . . .” Id. at 549 (emphasis added). The Custodian averred that the request here similarly sought information that could not be readily identified by a routine search of the IURO’s decisions. The Custodian further averred that DOBI did not compile counts of consumer complaints in a manner requested by the Complainant; thus, no responsive records existed. Simons Cert. at ¶ 6.

Second, the Custodian argued that the Complainant’s request required research and creation of new records. The Custodian asserted that fulfilling the request would have required DOBI to review every IURO decision over almost three (3) years for the identified classification and organize findings in a document that did not exist. The Custodian argued that it is well-settled law that OPRA does not require agencies to perform such actions. See Sussex Commons Ass’n v. Rutgers, The State Univ., 201 N.J. 531 (2012). The Custodian averred that the courts have continued to maintain that agencies were not required to create records. Paff v. Galloway Twp., 444 N.J. Super. 495 (App. Div. 2016) (reversed and remanded 227 N.J. 340 (2017)). The Custodian noted that the Complainant’s request here mirrored the one in Paff, 444 N.J. Super. 495, which the court found to be invalid regardless of whether the request required minor computer manipulation.

The Custodian also disputed the Complainant’s Denial of Access assertion that DOBI readily maintained the responsive information and argued that responding to the subject OPRA request would be “disruptive, time-consuming, and onerous.” The Custodian affirmed that DOBI had access to the IURO decisions as unsearchable, .pdf documents. Simons Cert. at ¶ 5. The Custodian averred that during the identified time frame, the IURO rendered 904 decisions involving any of the six HMOs in operation. Simon Cert. at ¶ 7. The Custodian argued that in order to properly respond to the request, DOBI staff would have to manually search each decision and separately create a report listing statistics. Ibid. The Custodian asserted that DOBI would need to spend twenty (20) minutes per decision resulting in 301 staff hours, or 8.6 work weeks for one employee. Ibid. The Custodian argued that the Legislature never intended OPRA to subject public agencies to such a burden. The Custodian thus contended that no record containing the information sought existed and DOBI was not required to create one.

Analysis

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 (App. Div. 2005) (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 v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that held library cards. The GRC deemed that the complainant’s request was a request for information, holding that “. . . because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to [MAG] . . .” Id. at 6. See also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Further, in Redd v. Franklin Twp. Pub. Sch. (Somerset), GRC Complaint No. 2014-185 (February 2015), the complainant sought, among other information, the “total number of applicants” interviewed or hired by race and gender. The Council held that the request was invalid because it sought information (citing Litchult, Jr. v. Borough of Waldwick Police Dep’t (Bergen), GRC Complaint No. 2010-159 (May 2011)).

Here, the Complainant’s request sought a compilation of statistical information regarding Program appeals and IURO success rates categorized by MCO. Much like the request at issue in Redd, GRC 2014-185, the request here sought statistical information and not an identifiable “government record.” This determination is further supported by Assistant Commissioner Simon’s certification stating that DOBI only had access to a non-searchable database of .pdf decisions that would require the Custodian to perform research and create a new record. The GRC is thus satisfied that the request was invalid and that the Custodian lawfully denied access to it. See also LaMantia, GRC 2008-140.

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

Accordingly, the Complainant's request represents an invalid request for information that fails to seek identifiable government records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151. Thus, the Custodian lawfully deny access to the subject request. N.J.S.A. 47:1A-6; LaMantia, GRC 2008-140; Redd, GRC 2014-185.

Finally, the GRC briefly addresses the potential impact of Paff v. Galloway Twp., 444 N.J. Super. 495 (App. Div. 2016) in this complaint. In the SOI, the Custodian argued that DOBI was not required to create new records in accordance with Paff, 444 N.J. Super. 495. However, following the submission of the SOI, the Supreme Court reversed the Appellate Division's decision in Paff v. Galloway Twp., 227 N.J. 340 (2017). The Supreme Court held that basic e-mail information stored electronically is a "government record" under OPRA, unless an exemption applies to that information. Id. at 353, 358. Further, the Court further concluded that "electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record." Id. at 353. Notwithstanding, the Court's decision is Paff, 227 N.J. 340 does not change the GRC's analysis in this complaint. This is because the Custodian and Assistant Commissioner Simon's SOI certifications provide that the information sought by the Complainant was not readily available as electronic data. Assistant Commissioner Simon also certified that all decisions were available as non-searchable .pdf files and DOBI would have had to review each and every one manually to comply with the request. Such actions certainly go well beyond extracting electronic information from a database or e-mail system; henceforth, Paff is not applicable here.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Complainant's request represents an invalid request for information that fails to seek identifiable government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian lawfully deny access to the subject request. N.J.S.A. 47:1A-6; LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Redd v. Franklin Twp. Pub. Sch. (Somerset), GRC Complaint No. 2014-185 (February 2015).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

July 31, 2018