



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 31, 2018 Government Records Council Meeting

Kevin Brasler
Complainant

Complaint No. 2016-56

v.

NJ Department of Banking & 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:

1. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request seeking a report detailing the complaint numbers relating to multi-peril homeowner’s insurance over a three (3) year period. N.J.S.A. 47:1A-6. The certifications from the Custodian and AC Simon reflect that no responsive records exist. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Accordingly, the Council declines to address the remaining defenses set forth by the Complainant on this matter.
2. The Complainant’s OPRA request for homeowner’s insurance premium information is invalid because the request lacks sufficient identifying information. Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012). Because there were no responsive records to the first item of the Complainant’s request, the second item lacks a date or range of dates to be sufficiently specific. See Love v. Spotswood Police Dep’t (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015). Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

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**

**Kevin Brasler¹
Complainant**

GRC Complaint No. 2016-56

v.

**N.J. Dep't of Banking & Insurance²
Custodial Agency**

Records Relevant to Complaint:

1. A report that shows, on a company by company basis, the total number of complaints related to homeowners insurance (multi-peril) filed with [Department of Banking & Insurance (“DOBI”)] for each company during the most recent three-year period for which data are available (for example, 2012, 2013, and 2014). We’d like separate counts of complaints for each year.
2. A report that shows, on an insurance company by insurance company basis, the total amount of homeowners insurance premiums written by each insurance company writing homeowners insurance policies in New Jersey for each of the years for which you are able to provide complaint counts.

Custodian of Record: Matthew Noumoff

Requests Received by Custodian: September 8, 2015

Response Made by Custodian: September 17, 2015; September 22, 2015

GRC Complaint Received: February 16, 2016

Background³

Request and Response:

On September 8, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 17, 2015, the Custodian sought an extension of time to respond to the Complainant’s OPRA request, to until October 2, 2015. On September 22, 2015, the Custodian responded in writing, stating that DOBI does not maintain the reports sought, and to fulfill the request would require the Custodian to conduct research and create a record, referencing MAG Entm’t, LLC v. Div. of Alcoholic

¹ No representation listed on record.

² Represented by Deputy Attorney General Nicholas Kant.

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

Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2006). Furthermore, the Custodian stated that even if DOBI maintained the requested record, any information and investigation files that do not stem from a formal disciplinary action would be confidential and exempt from OPRA under N.J.A.C. 11:17-2.16(b)6 and N.J.S.A. 47:1A-9.

Denial of Access Complaint:

On February 16, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he represents a non-profit consumer advocacy organization which in part evaluates the quality of insurance companies for consumer benefit. The Complainant stated that part of its evaluations of these companies is analyzing complaint histories with state government insurance departments. The Complainant stated that it sought these complaint histories from DOBI since the organization serves the greater Philadelphia area, which includes several New Jersey counties. The Complainant asserted that the requested information would allow the organization to calculate complaint ratios for each company, and contended that DOBI has issued these complaint ratios itself. On that claim, the Complainant asserted that DOBI’s contention that no responsive records exist is ‘bizarre.’

The Complainant also asserted that neither MAG, 375 N.J. Super. 534, nor N.J. Builders Ass'n, 390 N.J. Super. 166 are applicable to the current matter. The Complainant contended that unlike the circumstances in those cases, the OPRA request was not broad, cumbersome, or nonspecific. The Complainant asserted that in 2010, the organization made a non-OPRA request for the same records to DOBI, and was fulfilled by DOBI’s spokesperson. Additionally, the Complainant asserted that in 2006 the organization made an OPRA request for the same records and was fulfilled by DOBI.

The Complainant also contended that DOBI routinely provides this data to the National Association of Insurance Commissioners, who in turn reports the data on its website. Thus, the Complainant asserted that DOBI cannot claim the OPRA request is burdensome when it provides the data to another nonprofit organization. Although the Complainant conceded that DOBI hasn’t produced a report “exactly” as requested, the Complainant contended that the request does not require the Custodian to collect or seek new data, nor conduct new research. The Complainant asserted that the OPRA request only seeks output data that DOBI has maintained and displayed in its own reporting.

The Complainant also objected to the Custodian’s claim that New Jersey’s regulations prevent the release of relevant complaints unless they resulted in formal disciplinary action by DOBI. The Complainant stated that N.J.A.C. 11:17-2.16(b)6 references “investigative files” but not aggregate counts of complaints when determine what is or is not confidential information.

Statement of Information:⁴

On June 25, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian

⁴ On February 29, 2016, this complaint was referred to mediation. On July 19, 2016, this complaint was referred back to the GRC for adjudication.

certified that he received the Complainant's OPRA request on September 8, 2015. The Custodian certified that he responded in writing on September 17, 2015, seeking an extension of time to until October 2, 2015 to provide a complete response. On September 22, 2015, the Custodian responded in writing, asserting that no responsive records exist, and that fulfilling the Complainant's request would require the Custodian to conduct research and create a new record.

The Custodian argued that denial of the Complainant's OPRA request was proper because DOBI does not make or maintain a report as requested by the Complainant, and to create one would violate DOBI's rule protecting disclosure of such information. See N.J.A.C. 11:17-2.16(b)6. The Custodian contended that to create a report as requested by the Complainant would be contrary to the obligations set forth under OPRA. The Custodian referenced MAG, 375 N.J. Super. at 546, stating "OPRA does not required public agencies to create records." The Custodian added, "[t]he request should not require the records custodian to undertake a subjective analysis to understand the nature of the request. Seeking particular information from the custodian is permissible; expecting the custodian to do research is not." Paff v. Galloway Twp., 229 N.J. 340, 355 (2017).

As to the Complainant's second item in the request, the Custodian stated that because the request's time frame is contingent upon what could be provided in the first item, it was not addressed when the Custodian responded to the OPRA request. The Custodian stated that such premium information could be provided, but cannot do so unless the Complainant specifies the years sought.

The Custodian's SOI included a certification from Gale Simon, Assistant Commissioner ("AC Simon") with DOBI's Division of Insurance ("Division"), Consumer Protection Services sections. AC Simon certified that her duties are supervising the receipt, investigation, and enforcement of consumer complaints against entities licensed by the Division. AC Simon certified that there are no documents in DOBI's possession that contain the information sought by the Complainant. AC Simon certified that to provide such information would require the Custodian to research and create a new record.

AC Simon certified that complaints received by consumers are logged into a nationwide database owned by the National Association of Insurance Commissioners ("NAIC"). She also certified that neither the Division nor DOBI directly provides NAIC with reports or information that they use to display on their website. Rather, the AC Simon certified that the NAIC obtains that information from the database. AC Simon certified that the Division uses the database to track the progress and outcome of complaints filed, but the database is under the control of the NAIC. AC Simon certified that she cannot customize the entry fields in the database to accommodate a particular state, or to distinguish complaints with the particularity requested by the Complainant.

AC Simon then certified that once an investigation is completed, the outcome is recorded in the database as either being "confirmed" or "not confirmed." AC Simon certified that "confirmed" can mean that a regulated entity may have committed a violation of New Jersey's insurance law, a federal requirement, the terms of a particular policy, or that based upon the entity's response, the entity was in error. However, AC Simon certified that an entity whose complaint is "confirmed" may be contacted by DOBI and resolve the issue amicably without being subject to discipline, or that no disciplinary action is taken against the entity regardless. Thus, AC Simon

certified that the indication that a complaint has been “confirmed” does not mean that the information can be disclosed pursuant to N.J.A.C. 11:17-2.16(b)6, which states that investigative files in any matter pending investigation, or in any completed investigation in which no formal disciplinary action was taken, are nonpublic records under OPRA. AC Simon certified that in order to determine which “confirmed” complaints resulted in disciplinary action and therefore can be disclosed, the Custodian would have to manually review each “confirmed” complaint filed and determine if it also contains an enforcement file that was closed with formal disciplinary action.

AC Simon certified that pursuant to N.J.S.A. 17:29A-52b, DOBI is required to post on its website showing complaint numbers for automobile insurers, and attached a copy of the report to her certification. She certified that only “confirmed” complaints are included in the report and that DOBI manually checks each complaint to ensure it was properly classified as “confirmed,” that the subject of the complaint dealt with automobile insurance coverage, and that the carrier’s name was correctly inputted into the database. AC Simon certified that the creation of the report takes several months to prepare because each “confirmed” complaint must be manually reviewed for accuracy. She certified that in order to create a similar report for homeowner’s insurance would be even more time-consuming because complaints of that nature are not as precisely coded in the database as it is for automobile insurance. She also certified that to further narrow the report down to multi-peril homeowner’s insurance as requested by the Complainant would take additional time, since there is no code for that particular type of homeowner’s insurance. AC Simon certified that if the Complainant had previously received a report from DOBI as claimed, then it was in error and should not have been provided.

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 Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

In the instant matter, the Complainant sought in part a report specifically detailing the complaint numbers relating to multi-peril homeowner’s insurance carriers for the last three (3) years. The Custodian certified that no such report exists. The Custodian also provided a certification from AC Simon, who supervises the review and adjudication of complaints filed with the Division. Therein, she also certified that no such report exists, and that DOBI has no control over the national database used to log complaints filed against insurers. In Paff, the Supreme Court

held that basic e-mail information stored electronically is a “government record” under OPRA, unless an exemption applies to that information. 229 N.J. at 353, 358. 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 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. Thus, unlike *Paff*, the Custodian is unable to produce a report applicable to the Complainant’s request by briefly manipulating the database’s parameters. *Id.* at 354-55. Rather, fulfilling the request would require DOBI to review each “confirmed” complaint manually to determine whether the complaint is related to multi-peril homeowner’s insurance.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request seeking a report detailing the complaint numbers relating to multi-peril homeowner’s insurance over a three (3) year period. N.J.S.A. 47:1A-6. The certifications from the Custodian and AC Simon reflect that no responsive records exist. *Pusterhofer*, GRC 2005-49. Accordingly, the Council declines to address the remaining defenses set forth by the Custodian on this matter.

Request Validity

As to the second item of the Complainant’s OPRA request, the Custodian certified that because the dates requested for the report on premium information was contingent upon dates provided for the first item, it was not addressed. The Custodian certified that while DOBI has such information available, he needs a date or range of dates prior to locating them.

A request for a specific type of document or subject matter must be accompanied with sufficient identifying information. See *Burke v. Brandes*, 429 N.J. Super. 169, 176 (App. Div. 2012). In *Love v. Spotswood Police Dep’t (Middlesex)*, GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015), the complainant sought “police reports and/or complaints signed against [Kristen Ellis].” The Council held that while the complainant’s request for “police reports” and “complaints” reasonably described the subject matter, the complainant failed to provide a specific date or range of dates within his request. *Id.* at 3. The Council therefore found that the complainant’s request was overly broad. *Id.*

Since it is determined that there are no responsive records to the Complainant’s first item, the second item is missing a date range through which the Custodian is able to conduct a search for records. Thus, the request item lacks sufficient identifying information. *Burke*, 429 N.J. Super. at 179.

Therefore, the Complainant’s OPRA request for homeowner’s insurance premium information is invalid because the request lacks sufficient identifying information. *Id.* Because there were no responsive records to the first item of the Complainant’s request, the second item lacks a date or range of dates to be sufficiently specific. See *Love*, GRC 2014-223. Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request seeking a report detailing the complaint numbers relating to multi-peril homeowner's insurance over a three (3) year period. N.J.S.A. 47:1A-6. The certifications from the Custodian and AC Simon reflect that no responsive records exist. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Accordingly, the Council declines to address the remaining defenses set forth by the Complainant on this matter.

2. The Complainant's OPRA request for homeowner's insurance premium information is invalid because the request lacks sufficient identifying information. Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012). Because there were no responsive records to the first item of the Complainant's request, the second item lacks a date or range of dates to be sufficiently specific. See Love v. Spotswood Police Dep't (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015). Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

July 24, 2018