



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

May 19, 2020 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2017-170

v.

NJ Department of Human Services,
Division of Medical Assistance and Health Benefits
Custodian of Record

At the May 19, 2020 public meeting, the Government Records Council (“Council”) considered the May 12, 2020 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 complied with the Council’s August 27, 2019 Interim Order because she responded in the prescribed time frame providing nine (9) copies of unredacted responsive records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access to the requested records because some contain proprietary and trade secret information, the disclosure of which could give an advantage to competitors. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Newark Morning Star Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 168-69 (App. Div. 2011). Additionally, because there has been no unlawful denial of access, the Council need not address whether a knowing and willful violation of OPRA occurred.

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 19th Day of May 2020

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: May 20, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 19, 2020 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2017-170

v.

**N.J. Department of Human Services,
Division of Medical Assistance and Health Benefits²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. All contracts, from their inception to present, between the Division of Medical Assistance and Health Services and Xerox for the latter to serve as the state's Medicaid Health Benefits Coordinator.
2. All reports provided the Division of Medical Assistance and Health Services by Xerox since the inception of the latter having first served as the state's Medicaid Health Benefits Coordinator to present.
3. All instruments of payments provided Xerox for the latter to serve as the state's Medicaid Health Benefits Coordinator since the inception of that arrangement to present.

Custodian of Record: Dianna Rosenheim

Request Received by Custodian: June 26, 2017

Response Made by Custodian: June 29, 2017; July 28, 2017; July 31, 2017

GRC Complaint Received: August 17, 2017

Records Submitted for *In Camera* Examination: Nine (9) unredacted copies of the "weekly reports" dated from September 26, 2014 through May 26, 2017.

Background

August 27, 2019 Council Meeting:

At its August 27, 2019 public meeting, the Council considered the August 20, 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, found that:

¹ No legal representation listed on record.

² No legal representation listed on record.

1. The GRC must conduct an *in camera* review of the withheld weekly reports to determine the validity of the Custodian's assertion that such reports are exempt from disclosure under OPRA's trade secrets and proprietary information exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On August 28, 2019, the Council distributed its Interim Order to all parties on. On September 5, 2019, the Custodian responded to the Council's Interim Order. The Custodian provided nine (9) unredacted copies of records entitled "NJ HBC Weekly Score Card" dated between September 26, 2014 through May 26, 2017 for *in camera* review. The Custodian maintained that the records were withheld from disclosure under OPRA's exemption for proprietary information and/or trade secrets. N.J.S.A. 47:1A-1.1.

Analysis

Compliance

At its August 27, 2019 meeting, the Council ordered the Custodian to provide nine (9) unredacted copies of the withheld weekly reports for *in camera* review within five (5) business days from receipt of the Council's Interim Order. The Council also ordered the Custodian to provide a document index and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On August 28, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on September 5, 2019.

On September 5, 2019, the fifth (5th) business day after receipt of the Council's Order, the

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Custodian delivered nine (9) unredacted copies of the responsive records to the GRC for *in camera* review. Additionally, the Custodian provided a document index, as well as a certified confirmation of Compliance to the Executive Director.

Therefore, the Custodian complied with the Council's August 27, 2019 Interim Order because she responded in the prescribed time frame providing nine (9) copies of unredacted responsive records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.

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. N.J.S.A. 47:1A-6.

The Custodian asserted that the records were withheld to protect information considered to be trade secrets or proprietary information. See N.J.S.A. 47:1A-1.1. In Newark Morning Star Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 168 (App. Div. 2011), the Appellate Division elaborated on defining proprietary information in an OPRA request:

Relying on the Court's guidance set forth in Lamorte Burns & Co. v. Walters, 167 N.J. 285, 299-301, 770 A.2d 1158 (2001), we considered "the key elements" to determine when commercial financial information was proprietary. [Commc'ns Workers of America v. Rousseau, 417 N.J. Super. 341, 356, 9 A.3d 1064 (App. Div. 2010)]. Lamorte suggested we must analyze "the relationship of the parties at the time of disclosure[,] . . . the intended use of the information[.]" and "the expectations of the parties." Ibid. (citing Lamorte, supra, 167 N.J. at 299-300, 770 A.2d 1158). "[U]nder OPRA, if the document contains commercial or proprietary information it is not considered a government record and not subject to disclosure." Id. at 358, 9 A.3d 1064. We concluded the investment agreements sought by the plaintiffs were proprietary as their content was not intended for wide dissemination, the "[d]efendants' expectation of confidentiality [was] manifest" and the agreements delineated the specific terms and specific persons who may review the information. Id. at 359, 9 A.3d 1064. Further,

[e]ach agreement contains specific information about the capitalization of the partnership, its commencement and termination date, and other information pertinent to the operational fortunes of the partnership. Finally, each agreement is a complex document. Each reflects years of experience and expertise by trained legal and financial professionals. Id. at 359-60, 9 A.3d 1064.

[Newark Morning Ledger, 423 N.J. Super. at 168-69.]

The court also elaborated how “trade secrets” is defined:

[i]n analyzing whether information qualifies as "trade-secrets," a term not defined by OPRA, Id. at 360, 9 A.3d 1064, we considered the Court's prior reliance on Comment b of the Restatement of Torts § 757 (1939). Id. at 361, 9 A.3d 1064 (citing Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 384, 662 A.2d 546 (1995)). The comment provides: “[a] trade secret may consist of any . . . compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” Ibid. (quoting Restatement of Torts § 757 cmt. b (1939)). Other considerations include the extent to which the information is known outside of the owner's business, the extent to which it is known by employees of the owner, the measures taken to guard the secrecy of the information, the value of the information to the owner and competitors, the effort expended to develop the information, and the ease or difficulty by which the information can be duplicated. Ibid. (citing Hoffmann-LaRoche, 142 N.J. at 384, 662 A.2d 546).

“Trade secrets are a peculiar kind of property. Their only value consists in their being kept private. If they are disclosed or revealed, they are destroyed.” Trump's Castle Assocs. v. Tallone, 275 N.J. Super. 159, 163, 645 A.2d 1207 (App. Div. 1994) (quoting In re Iowa Freedom of Info. Council, 724 F.2d 658, 662 (8th Cir. 1983)).

[Newark Morning Ledger, 423 N.J. Super. at 169.]

The GRC conducted an *in camera* examination on the submitted records. The review reveals that these reports comprise weekly performance metrics from Xerox Corporation pertaining to incoming and outgoing call volume addressed in the course of its contractual duties. The reports list categories such as Total Calls This Week, Abandonment Rate, Average Speed of Answer (seconds), Answer Rate, Trunk Busy Rate, Eligibility, Total Decisions Reviewed, and Plan A Error Rate. Taken together, the reports create a valuable dataset to analyze trends in call volume during certain times of the year. The GRC agrees with the Custodian that disclosure of these reports would allow competitors to modify and improve their own procedures and organization to be more competitive in future procurements requesting the same duties.

Thus, the Custodian lawfully denied access to the requested records because some contain proprietary and trade secret information, the disclosure of which could give an advantage to competitors. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Newark Morning Ledger, 423 N.J. Super. at 168-69. Additionally, because there has been no unlawful denial of access, the Council need not address whether a knowing and willful violation of OPRA occurred.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's August 27, 2019 Interim Order because she responded in the prescribed time frame providing nine (9) copies of unredacted responsive records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access to the requested records because some contain proprietary and trade secret information, the disclosure of which could give an advantage to competitors. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Newark Morning Star Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 168-69 (App. Div. 2011). Additionally, because there has been no unlawful denial of access, the Council need not address whether a knowing and willful violation of OPRA occurred.

Prepared By: Samuel A. Rosado
Staff Attorney

May 12, 2020



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

INTERIM ORDER

August 27, 2019 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2017-170

v.

NJ Department of Human Services,
Division of Medical Assistance and Health Benefits
Custodian of Record

At the August 27, 2019 public meeting, the Government Records Council ("Council") considered the August 20, 2019 Findings and Recommendations of the Council Staff 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 GRC must conduct an *in camera* review of the withheld weekly reports to determine the validity of the Custodian's assertion that such reports are exempt from disclosure under OPRA's trade secrets and proprietary information exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 27th Day of August 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: August 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2019 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2017-170

v.

**N.J. Department of Human Services,
Division of Medical Assistance and Health Benefits²
Custodial Agency**

Records Relevant to Complaint: Copies of:

- 1) All contracts, from their inception to present, between the Division of Medical Assistance and Health Services and Xerox for the latter to serve as the state's Medicaid Health Benefits Coordinator.
- 2) All reports provided the Division of Medical Assistance and Health Services by Xerox since the inception of the latter having first served as the state's Medicaid Health Benefits Coordinator to present.
- 3) All instruments of payments provided Xerox for the latter to serve as the state's Medicaid Health Benefits Coordinator since the inception of that arrangement to present.

Custodian of Record: Dianna Rosenheim

Request Received by Custodian: June 26, 2017

Response Made by Custodian: June 29, 2017; July 28, 2017; July 31, 2017

GRC Complaint Received: August 17, 2017

Background³

Request and Response:

On June 26, 2017, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 29, 2017, the Custodian responded in writing, providing a link to the contract requested, as well as a link where the Complainant can locate other state contracts. The Custodian added that they were still searching for responsive records. On July 11, 2017, the Custodian sought an extension of time to until July 19, 2017 to locate the remaining records.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

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On July 17, 2017, the Custodian sought an additional time extension to July 21, 2017. On July 20, 2017, the Custodian sought another time extension to until July 28, 2019. On July 28, 2019, the Custodian stated that she was forwarding ten (10) e-mails containing responsive records to the Complainant, but that she could not provide a complete response until July 31, 2017. The e-mails contained monthly performance reports and other payment information.

On July 31, 2017, the Custodian responded to the Complainant, stating that his request for “all” contracts, reports, and instruments was overly broad. The Custodian asserted that she was not obligated to conduct open-ended searches of the agency’s files. See MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005). Notwithstanding, the Custodian stated that in addition to what was provided on July 28, weekly performance reports provided by the contractor spanning the previous (3) years were located.

However, the Custodian stated that the following information was redacted from those reports:

1. “Total Calls This Week (incoming, outgoing, notes)”
2. “Normal Average Calls (incoming, outgoing, notes)”
3. “Abandonment Rate (standard, last week results, this week’s results, dashboard results, notes)”
4. “Answer Rage (standard, last week results, this week’s results, dashboard results, notes)
5. “Eligibility
 - a. Total Decisions Reviewed (Plan A decisions last week, Plan A decisions this week, notes)
 - b. Plan A Error Rate (Standard, last week results, this week’s results, dashboard, results, notes)”

The Custodian stated that the redactions were made pursuant to OPRA’s exemption for trade secrets and/or proprietary information. The Custodian stated that the redacted data shows adjustments recorded that are required to know for the contract work. The Custodian added that the reports “were not a deliverable of the contract.” The Custodian stated that the data shows how staff and project organization are affected based on the variations in work volume, thus the contractor would suffer competitive harm if released. See Newark Morning Ledger Co. v. New Jersey Sports and Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011).

Denial of Access Complaint:

On August 17, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that he was unlawfully denied access to the requested records, but not elaborate further on the reasons for this position.

Statement of Information:⁴

On October 4, 2017, the Custodian filed a Statement of Information (“SOI”). The

⁴ The Complaint was referred to mediation on August 25, 2017. The Complainant was referred back from mediation on September 27, 2017.

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Custodian certified that she received the Complainant's OPRA request on June 26, 2017. The Custodian certified that her search included reaching out to appropriate staff to identify all responsive documents. The Custodian then certified that the documents were sent to Xerox for review for proprietary or trade secret information. The Custodian certified that she responded in writing on June 29, 2017, providing a link where the Complainant could locate the requested contracts, and responded again on July 28, 2017, providing monthly performance reports and other payment information. The Custodian then certified that she denied access to the weekly reports as they contained trade secrets/proprietary information.

The Custodian restated that the information contained in the weekly reports demonstrate a snapshot of the how staffing and organization of the project is affected by variations in the incoming work volume. The Custodian argued that release of such information would cause irreparable harm to the contractor as it could provide competitors with insight on how to address staffing levels and procedures when faced with project variations. The Custodian asserted that competitors would be able to use this information to improve their own internal procedures and undercut the contractor. Therefore, the Custodian argued that the information was exempt from disclosure under N.J.S.A. 47:1A-1.1. Newark Morning Ledger Co., 423 N.J. Super. at 359-60.

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 Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁵ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

⁵ Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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[Id. at 355.]

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the instant matter, the Custodian asserted that the responsive weekly reports were withheld because they contain trade secrets and proprietary information that is exempt from disclosure under N.J.S.A. 47:1A-1.1. In her response to the Complainant and within the SOI, the Custodian outlined the specific data protected from disclosure and how such information could cause harm to the contractor.

Notwithstanding the Custodian’s description, a “meaningful review” is necessary to determine whether the entirety of the reports should be exempt from disclosure under OPRA. The GRC must therefore review same in order to determine the full applicability of exemption.

Therefore, the GRC must conduct an *in camera* review of the withheld weekly reports to determine the validity of the Custodian’s assertion that such reports are exempt from disclosure under OPRA’s trade secrets and proprietary information exemption. See Paff, 379 N.J. Super. at 346.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the withheld weekly reports to determine the validity of the Custodian’s assertion that such reports are exempt from disclosure under OPRA’s trade secrets and proprietary information exemption. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

August 20, 2019

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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David Weiner v. N.J. Department of Human Services, Division of Medical Assistance and Health Benefits, 2017-170 – Findings and Recommendations of the Executive Director