



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

December 15, 2020 Government Records Council Meeting

Kevin Lee
Complainant

Complaint No. 2017-206

v.

NJ Office of the State Comptroller
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 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 the Council dismisses this complaint because the Complainant withdrew it in an e-mail to the GRC on December 4, 2020. Therefore, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 15th Day of December 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: December 17, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* & Reconsideration
Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**Kevin Lee¹
Complainant**

GRC Complaint No. 2017-206

v.

**NJ Office of the State Comptroller²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all project scenarios associated with State Contract No A85103 (T-2874) (Recovery Audit Contractor: Medicaid).³

Custodian of Record: Robert Shane

Request Received by Custodian: August 22, 2017

Response Made by Custodian: August 29, 2017

GRC Complaint Received: October 25, 2017

Records Submitted for *In Camera* Examination: Health Management Services, Inc. (“HMS”)⁴ project scenarios (73 pages).

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 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.⁵ The Council, therefore, found that:

1. The Council should grant Health Management Services, Inc.’s motion to intervene, as the evidence in the demonstrates that it has a unique and significant interest in the outcome of the matter, and its inclusion will not cause an undue delay or confusion from its inclusion. N.J.A.C. 1:1-16.3(a); Gill v. N.J. Dep’t of Banking & Ins., 404 N.J. Super. 1, 10-11 (App. Div. 2008).

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Susan J. Wilkerson. Previously represented by Deputy Attorney Generals Diana E. Reynolds and Rebecca Pluckhorn.

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ Represented by Vito A. Gagliardi, Esq. of Porzio, Bromberg & Newman, P.C. (Morristown, NJ).

⁵ The Council re-voted on this complaint at its February 26, 2020 meeting to correct the record to reflect a newly discovered recusal.

2. The GRC must conduct an *in camera* review of all responsive unredacted project scenarios to determine the validity of the Custodian's assertion that the record was exempt under the exemptions cited in OPRA, as well as the Medicaid Program Integrity and Protection Act. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); N.J.S.A. 30:4d-61(b). See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), nine (9) copies of the redacted record, 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 record provided is the record 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.**
4. 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 November 14, 2019, the Council distributed its Interim Order to all parties.

On November 15, 2019, the Complainant e-mailed the Government Records Council ("GRC") asserting that it erred in allowing HMS to intervene. The Complainant disputed that HMS maintained ownership of the scenarios, arguing that they were produced in "performance of" Contract A85103 (T-2874) and thus were property of N.J. Office of the State Comptroller ("OSC"). Request for Proposal ("RFP"), Section 5.8. The Complainant further contended HMS's relationship to the responsive records was not like the intervenor in Gill, 404 N.J. Super. at 4-5. The Complainant thus asked the GRC to reconsider its approval of HMS's motion to intervene. On November 18, 2019, the GRC responded providing the Complainant an explanation of the proper process for filing a request for reconsideration and applicable deadline.

On November 19, 2019, previous Custodian's Counsel e-mailed the GRC seeking an extension of time through December 2, 2019 to respond to the Order. On the same day, the GRC granted the requested extension based on potential staffing issues coinciding with the Thanksgiving holiday.

Request for Reconsideration:

On November 21, 2019, the Complainant filed a request for reconsideration of the

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.

⁸ "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."

Council's November 12, 2019 Interim Order based on a mistake and fraud. The Complainant initially argued that the GRC failed to address his complaint expeditiously. The Complainant noted that he waited over two (2) years for an adjudication, which was unreasonable. The Complainant argued that "[t]he chronic understaffing of the GRC and resulting . . . backlog is a disservice to New Jersey's citizens . . ."

The Complainant further contended that the GRC erred by committing multiple procedural violations. The Complainant asserted that those violations included "(by its own admission) significant '*ex parte*' communications" and accepting late submissions from the Custodian without approvals from the Executive Director. The Complainant further argued that the GRC allowed the Custodian to introduce multiple denial justifications after the filing of the complaint. The Complainant requested that the Council disallow any filings the Custodian submitted after December 8, 2017 and reject any justifications not argued in the Statement of Information.

The Complainant also argued that the GRC erred by not considering OSC's history of publishing internal project scenarios on its website with minimal redactions. The Complainant contended that OSC's postings should be relied upon as the standard by which the scenarios should have been disclosed in response to the subject OPRA request. The Complainant requested that the Council conduct a comparative analysis of the posted scenarios as part of its *in camera* review.

The Complainant finally contended that the GRC erred by granting HMS intervenor status. The Complainant reiterated his arguments from the November 15, 2019 e-mail. The Complainant asserted that the GRC should also seek guidance from the N.J. Medicaid Fraud Control Unit and/or U.S. Dep't of Human Services, Office of the Inspector General, as to whether HMS committed a "False Claims" violation under the False Claims Act. The Complainant thus requested that Council reverse its decision on the motion to intervene until HMS could provide a certification "clear[ing] title to the materials in question and [that] the material [is] free of all State and Federal ownership claims."

On November 26, 2019, HMS confirmed receipt of the Complainant's request for reconsideration and sought an extension of time through December 19, 2019 to submit objections. On November 27, 2019, the GRC responded granting the requested extension of time.

Compliance:

On December 2, 2019, previous Custodian's Counsel sought an extension of one (1) additional day due to a weather-related closing. On the same day, the GRC granted an additional day, or until December 3, 2019, to submit a response to the Council's Interim Order.

On December 3, 2019, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that he was providing nine (9) copies of the redacted and unredacted scenarios as required by the Order. The Custodian further certified that he included a document index addressing the redactions.

Request for Reconsideration (Cont'd):

On December 19, 2019, HMS submitted objections to the request for reconsideration. HMS contended that the Complainant failed to prove that the Council acted arbitrarily and capriciously in its November 12, 2019 Interim Order. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). HMS contended that, regarding the intervenor issue, the Complainant merely rehashed prior arguments and failed to provide new facts or law demonstrating that the Council's decision was improper. HMS argued that even if the Council were to reconsider the intervenor issue, its decision should stand in accordance with N.J.A.C. 1:1-16.3(b) (providing that even if a third party's interests are represented by a State agency, a movant shall not be denied intervenor status solely for that reason).

HMS further asserted that the Custodian properly disclosed the responsive scenarios with redactions and the Council's *in camera* review will find as such. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); N.J.S.A. 30:4D-61(d). HMS also disputed the Complainant's argument that it "forfeited all of its intellectual property rights by entering into a contract with the State."

HMS finally contended that the Complainant failed to address the "fundamental public interest" in withholding the scenarios. HMS argued that the public has an interest in ensuring that Medicaid is protected from abuse, fraud, wasteful spending. HMS contended that unredacted disclosure of the scenarios could provide individuals with a road map to avoid fraud detection. HMS asserted that instead of addressing this issue, the Complainant simply reiterated arguments already considered by the GRC.

Additional Submissions:

On December 4, 2020, the Complainant e-mailed the GRC withdrawing this complaint on the basis that the complaint has been resolved to his satisfaction.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that dismiss this complaint because the Complainant withdrew it in an e-mail to the GRC on December 4, 2020. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

December 8, 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

November 12, 2019 Government Records Council Meeting

Kevin Lee
Complainant

Complaint No. 2017-206

v.

NJ Office of the State Comptroller
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 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 Council should grant Health Management Services, Inc.’s motion to intervene, as the evidence in the demonstrates that it has a unique and significant interest in the outcome of the matter, and its inclusion will not cause an undue delay or confusion from its inclusion. N.J.A.C. 1:1-16.3(a); Gill v. N.J. Dep’t of Banking & Ins., 404 N.J. Super. 1, 10-11 (App. Div. 2008).
2. The GRC must conduct an *in camera* review of all responsive unredacted project scenarios to determine the validity of the Custodian’s assertion that the record was exempt under the exemptions cited in OPRA, as well as the Medicaid Program Integrity and Protection Act. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); N.J.S.A. 30:4d-61(b). See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), nine (9) copies of the redacted record, 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 record provided is the record 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.**

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."

4. 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.

Interim Order Rendered by the
Government Records Council
On The 12th Day of November 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: November 14, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Kevin Lee¹
Complainant**

GRC Complaint No. 2017-206

v.

**NJ Office of the State Comptroller²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all project scenarios associated with State Contract No A85103 (T-2874) (Recovery Audit Contractor: Medicaid).³

Custodian of Record: Robert Shane

Request Received by Custodian: August 22, 2017

Response Made by Custodian: August 29, 2017

GRC Complaint Received: October 25, 2017

Background⁴

Request and Response:

On August 22, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 29, 2017, the Custodian responded in writing obtaining an extension until September 22, 2017.

On September 13, 2017, Health Management Services, Inc. (“HMS”) sent a letter to the Custodian stating that its project scenarios contain extensive proprietary and trade secret information not made public or shared externally (except with current and potential clients). HMS stated that, “in the spirit of maximizing public access,” it reviewed the project scenarios and provided a document index indicating which portions should be withheld from disclosure. HMS further noted that it was providing the project scenarios with redactions as outlined in the document index. HMS noted that these redactions were necessary because of the extensive financial, technical, and staff resources annually expended to develop and safeguard the information. HMS further noted that disclosure would adversely affect its future ability to procure services by creating a chilling effect on the company.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Diana E. Reynolds.

³ The Complainant sought additional records that are not at issue in this complaint.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

On September 21, 2017, the Custodian responded in writing disclosing the responsive project scenarios with redactions. (Citing N.J.S.A. 47:1A-1.1; Commc'n Workers of America v. Rousseau, 417 N.J. Super. 341, 355-363 (App. Div. 2010)). On September 25, 2017, the Complainant e-mailed the Custodian disputing the redacted project scenarios. The Complainant noted that the Request for Proposal ("RFP") Section 5.8 provided that anything submitted would "be and remain the property of the State . . ." The Complainant argued that HMS was aware that it "retained no residual proprietary . . . or ownership interest in contract materials." The Complainant thus requested unredacted copies of the responsive scenarios.

On October 3, 2017, the Custodian responded advising the Complainant that the Office of the State Comptroller ("OSC") maintained its position regarding the redacted project scenarios. On October 4, 2017, the Complainant e-mailed the Custodian asserting that OSC appeared to be engaging in actions that "delayed and hampered reasonable right to know expectations." The Complainant demanded that the Custodian disclose the scenarios without redactions. On October 10, 2017, the Custodian responded via e-mail restating that it maintained its position regarding the project scenarios.

Denial of Access Complaint:

On October 25, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he was unlawfully denied access to unredacted copies of the project scenarios based on RFP Section 5.8. The Complainant argued that any proprietary and trade secret redactions were "inappropriate and contrary" to the RFP stipulations. The Complainant thus argued that any redactions were without justification. The Complainant argued that any he brought this to the Custodian's attention but failed to achieve any remedies on the issue.

Statement of Information:

On November 17, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on August 22, 2017. The Custodian affirmed that he contacted personnel in the Medicaid Fraud Division ("MFD") to search for responsive records. The Custodian noted that he also obtained an extension of time to respond to the Complainant. The Custodian certified that he then contacted HMS for comment and potential redactions, which he received on September 14, 2017. The Custodian certified that he responded in writing on September 21, 2017 disclosing the responsive project scenarios (69 pages) with redactions per HMS.

The Custodian contended that he lawfully redacted the responsive project scenarios under OPRA's trade secret and proprietary commercial or financial information exemption. N.J.S.A. 47:1A-1.1. The Custodian noted that these redactions were made in consultation with HMS, who provided a detailed explanation of the reasons for said redactions in a September 13, 2017 letter. The Custodian noted that therein, HMS responded to each of the six (6) criteria established in Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609, 637 (1988). The Custodian also argued that the redactions aligned with the Appellate Division's decision in CWA, 417, N.J. Super. at 360-363. See also Gill v. N.J. Dep't of Banking & Ins., 404 N.J. Super. 1, 4-5 (App. Div. 2008). The

Custodian further asserted that the redactions were consistent with the Council's decisions on this issue. See Renna v. Cnty. of Union, GRC Complaint No. 2003-100 (March 2004); Albrecht v. N.J. Dep't of Treasury, GRC Complaint No. 2006-191 (July 2008); Martinez v. N.J. Dep't of Human Servs., GRC Complaint No. 2012-156 (July 2013).

The Custodian noted that he provided as part of his disclosure to the Complainant a redaction index consistent with the court's guidance in Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354 (App. Div. 2005). The Custodian noted that the index provided to the Complainant could not include any further detail without revealing the secrets the redactions were intended to protect.

The Custodian also contended that the Complainant misinterpreted RFP Section 5.8 by glossing over the term "performance." The Custodian asserted that the State only obtained ownership of the material a vendor developed "during the performance of the contract." The Custodian argued that HMS provided its project scenarios as part of the bidding process, and not in performance of the subsequent contract. The Custodian asserted that there was a compelling public interest in encouraging healthy competition between vendors vying for government contracts. The Custodian argued that it was necessary for the State to ensure confidentiality of the vendors' proprietary and confidential information. The Custodian further argued that the exemptions set forth in OPRA ensured that vendors would not be placed at risk of divulging trade secret and proprietary information simply because they chose to conduct business with the State.

Additional Submissions:

On November 20, 2017, the Complainant e-mailed the GRC refuting the SOI. Therein, the Complainant argued that he did not misinterpret RFP Section 5.8, as asserted by the Custodian. The Complainant contended that, to the contrary, he agreed with OSC's interpretation of the section. The Complainant argued that the Custodian instead conflated the procurement period RFP response with the post-contract generated project scenarios at issue here.

The Complainant argued that the sole focus of this complaint is the post-procurement documents created during the contract period. The Complainant contended that the responsive records were "1) required by the contract, 2) generated in the performance of the contract, and 3) clearly fall within the . . . scope of the contract's State [o]wnership rights." The Complainant noted that Section 3.3.1 and 3.3.2 of Contract A85103 (T-2874) required the successful bidder to submit project scenarios and audits. The Complainant argued that the State could have included different language in the contract that allowed the vendor to retain certain rights or, alternatively, remain silent on the issue. The Complainant argued that this is not the case here: the State explicitly mandated that it took ownership of any contractual work-product. The Complainant thus argued that the Custodian's SOI argument should be dismissed in total.

The Complainant finally argued that upholding OSC's denial of access would "create an unfair post facto contract amendment" of transferring rights back to the vendor; thereby unfairly benefiting HMS. The Complainant further contended that this "irregular contract modification" would "inflict irreparable harm on the procurement process and its participants." The Complainant argued that potential bidders were aware of RFP Section 5.8 and likely accounted for same when

determining whether to submit a bid. The Complainant also argued that a “proper functioning OPRA process” would allow State-owned contract assets to be available to all future bidders, thereby alleviating any advantage to a single bidder. The Complainant argued that full disclosure was advantageous because it could promote novel and innovative solutions for the State’s challenges.

Motion to Intervene:

On November 27, 2017, HMS⁵ submitted a motion to intervene in this complaint. N.J.A.C. 1:1-1.6(a); Gill, 404 N.J. Super. 1. HMS asserted that it should be granted intervenor status because the responsive project scenarios were part of its proposal submission and the information therein belongs to it. HMS asserted that it was in the best position to articulate how disclosure would “irreparably harm its business” (citing Gill 404 N.J. Super. at 12). HMS stated that its motion was timely, as the New Jersey Administrative Procedures Act (“APA”) provided that intervenors may file a motion at any point “after a case is initiated.” N.J.A.C. 1:1-16.3(a). HMS further noted that its inclusion in this complaint would not cause “confusion or undue delay.” Id. HMS asserted that although its interests may generally align with OSC, the APA did not allow denial of intervenor status simply because said “interest may be represented in part by [OSC].” N.J.A.C. 1:1-16.3(b).

HMS noted that the responsive records contained a variety of confidential and proprietary information. HMS argued that the instant complaint was similar to Gill in that, much like Gieco there, HMS would be “adversely affected” if their proprietary records were disclosed here. HMS asserted that disclosure would substantially harm it due to the amount of confidential and proprietary information included in the responsive records. HMS further argued that the records contained information that could negatively impact HMS’ ability to function under the current (and any future) contracts. HMS also argued that full disclosure of the responsive records would result in a severe competitive disadvantage. HMS stated that the records contained a range of confidential information about their “computer programs, systems, processes, and/or methodologies developed, offered and used” to meet its contractual obligations.

HMS finally supported the Custodian’s position that he properly redacted the responsive project scenarios. HMS also asserted that another public interest issue involved the potential to defraud the public Medicaid system. HMS argued that a person armed with unredacted copies of the responsive records could use them against the system. HMS contended that the individual could avoid detection by utilizing the records to create a roadmap around the system’s detection practices. HMS argued that such actions invoke OPRA’s emergency and security provisions recently discussed in Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 163 (2016).

On the same day, the Complainant objected to HMS’ motion to intervene, arguing that its purported justification was “nullified 1) factually, 2) contractually, and 3) operationally.” The Complainant asserted that factually, the responsive records were created during the contractual period and covered under Contract Section 3.3 and RFP Section 5.8. The Complainant contended that contractually, and to reiterate, the records were subject to RFP Section 5.8. The Complainant finally contended that operationally, the State already published expansive details of recovery and settlements via internal audit reports.

⁵ Represented by Vito A. Gagliardi, Esq. of Porzio, Bromberg & Newman, P.C. (Morristown, NJ).

Additional Submissions (cont'd):

On December 15, 2017, Custodian's Counsel submitted a letter brief attaching a certification from MFD Director Josh Lichtblau. Counsel initially noted that OSC concurred with the Complainant's argument that the responsive project scenarios were not included as part of the RFP process. Counsel nonetheless argued that the Custodian lawfully denied access to the responsive records because they contained trade secret and proprietary information regardless of ownership considerations. Counsel noted that OSC recently located another project scenario responsive to the Complainant's OPRA request but was withholding said record based on the trade secret exemption.

Counsel further argued that in light of the Complainant's SOI rebuttal, OSC identified additional exemptions that apply to the responsive records. Counsel stated that for additional background, the Medicaid Program Integrity and Protection Act ("MPIPA") established the Office of the Medicaid Inspector, which was required to prevent, detect, and investigate Medicaid fraud and abuse. Counsel stated that the Medicaid Inspector was abolished in 2010 and its duties were transferred to the OSC. N.J.S.A. 52:15C-23. Counsel averred that the MPIPA required the State to engage in Recovery Audit Contractor ("RAC") to review claims payments and recoup overpayments where applicable. Lichtblau Cert. ¶ 4. Counsel stated that HMS was awarded an RAC contract that allowed it to make recommendations to MFD regarding its audits by way of project scenarios. Lichtblau Cert. ¶ 5-6.

Counsel first contended that the responsive records were exempt under the MPIPA. N.J.S.A. 47:1A-9(b); N.J.S.A. 30:4D-53, *et seq.* Counsel averred that the MPIPA provided the MFD with broad investigatory powers including subpoena power and information-gathering rights at all levels of government. N.J.S.A. 30:4D-57(d), 58(a). Counsel averred that project scenarios were one tool the MFD used to conduct investigations and that their confidentiality is "implicit." Counsel contended that N.J.S.A. 30:4D-61 also addressed the disclosability of MFD's records. Counsel asserted that notably, the MPIPA only required MFD to disclose records received from other government agencies that were subject to disclosure prior to the investigation or that did not refer to a specific investigation. N.J.S.A. 30:4d-61(b). Counsel thus argued that the Custodian lawfully denied access to the redacted information in the responsive records because it pertained to RAC investigations.

Counsel next contended that the responsive records were exempt under the investigation in progress exemption. N.J.S.A. 47:1A-3(a). Counsel stated that OSC's statutory duty is to safeguard fiscal funds through independent and truthful oversight. N.J.S.A. 52:15C-1. Counsel stated that MFD was required by federal law to obtain an RAC to perform audits, hence OSC's contract with HMS. Lichtblau Cert. ¶ 4-6. Counsel asserted that OSC commence investigations based on HMS' project scenarios that remain ongoing through the recoupment of funds. Lichtblau Cert. ¶ 4, 7. Counsel argued that disclosure of the scenarios during an on-going investigation would be "inimical to the public interest" for a number of reasons, including a "frustr[ation] of the State's ability to collect public funds owed." Counsel further argued that the Appellate Division has also held that OSC could withhold information to the extent that disclosure "would arm auditees with the ability to hinder performance of audits." Larkin v. Solter, 450 N.J. Super. 519 (App. Div. 2017). Counsel argued that given the content within HMS' project scenarios, disclosure would provide

various bad actors with a virtual roadmap to hinder MFD's detection of fraudulent activities. Lichtblau Cert. ¶ 9. Counsel noted that the public reports Complainant referenced in his SOI rebuttal are not similar to the requested project scenarios, which are treated as highly confidential internal work-product. Lichtblau Cert. ¶ 11.

Finally, Counsel argued that the reports were considered "inter-agency or intra-agency advisory, consultative, or deliberative [("ACD")] material" exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009). Counsel argued that the project scenarios included "open and frank discussions and recommendations." Lichtblau Cert. ¶ 6-7. Counsel further argued that that records discuss those recommendations, describe appropriate data utilization standards or criteria to be tested, and audit methods. Lichtblau Cert. ¶ 6. Counsel averred that MFD staff use the project scenarios to determine the appropriate audit track, and often engages both Director Lichtblau and HMS to refine the audit process. Lichtblau Cert. ¶ 7. Counsel thus argued that is clear that the project scenarios were also exempt as ACD material.

Motion to Intervene (cont'd):

On December 15, 2017, HMS submitted a reply brief to the Complainant's motion objections. HMS argued that the GRC should reject the Complainant's objections. HMS contended that the Complainant provided no legal authority to reject its request to intervene this complaint. HMS further argued that the Custodian properly denied access to the redacted portions of the responsive project scenarios for all reasons already stated. HMS also contended that the Complainant's argument that the State gained full ownership of HMS' proprietary methods was illogical. HMS argued that the State may have ownership of the physical project scenarios, but that HMS retained full ownership of its own trade secret and proprietary information. HMS finally noted that the Complainant has repeatedly "ignored" the exemptions both itself and OSC applied to the redacted material.⁶

Additional Submissions (cont'd):

On December 16, 2017, the Complainant e-mailed the GRC alleging multiple procedural anomalies. The Complainant further argued that OSC attempted to change the basis for its denial on multiple occasions, which calls into question of the fairness of the GRC's process. The Complainant also contended that, contrary to the Custodian's argument about the published audit reports, OSC disseminates its "equivalent documents" into the "public domain virtually unredacted upon recovery or settlement." The Complainant argued that to ignore the forgoing would result in an arbitrary and capricious ruling. The Complainant thus argued that the GRC should find in his favor and require OSC to disclose the responsive project scenarios with minimal redactions.

⁶ On December 16, 2017, the Complainant again objected to HMS's motion to intervene on the basis that the State owned the responsive project scenarios under RFP Section 5.8.

Analysis

Motion to Intervene

In a motion to intervene, the GRC is guided by the court's decision in Gill, 404 N.J. Super. at 10-11, holding that:

In applying these regulations to determine whether intervention is required, the GRC must consider ‘the nature and extent of the [the party requesting intervention’s] interest in the outcome of the case’ and whether that interest is ‘sufficiently different from that of any party so as to add measurably and constructively to the scope of the case.’ N.J.A.C. 1:1-16.3(a). The GRC must also consider ‘the prospect of confusion or undue delay arising from the potential intervenor’s] inclusion, and other appropriate matters.’ Ibid.

[Id.]

Here, the Complainant sought access to unredacted copies of project scenario reports submitted to OSC by HMS. Subsequent to the filing of this complaint, HMS filed a motion to intervene, asserting that the records at issue contained its trade secret and proprietary information. HMS also addressed each of the intervenor factors in N.J.A.C. 1:1-16.1(a) and argued that it was in a similar position as Geico in Gill, 404 N.J. Super. 1. The Complainant objected, asserting that the records at issue were considered ‘property of the State’ under RFP Section 5.8. The Complainant thus argued that HMS should not be allowed to intervene here because it no longer had ownership rights to the information contained within the project scenarios.

In reviewing the arguments and submissions by HMS and the Complainant, the evidence favors granting HMS’ motion. While the Complainant presented evidence to show that HMS submitted the responsive project scenarios in execution of its contract with the State, HMS demonstrated its material involvement in this complaint. First, the records at issue were created by HMS based on their internal auditing methodologies; thus, it has a high level of interest in the outcome of this complaint. Second, HMS added measurably and constructively to this complaint, as it participated in the redaction process through its September 13, 2017 letter to the Custodian. Furthermore, while HMS and the Custodian both argue against disclosure under the trade secret and proprietary exemption, HMS’ submissions substantively expanded upon the Custodian’s arguments. Finally, there is no confusion or delay in allowing HMS to intervene herein. Thus, HMS has a significant interest in the outcome of the matter, and sufficiently unique to distinguish itself from the Custodian.

Therefore, the Council should grant HMS’ motion to intervene, as the evidence in the demonstrates that it has a unique and significant interest in the outcome of the matter, and its inclusion will not cause an undue delay or confusion from its inclusion. N.J.A.C. 1:1-16.3(a); Gill, 404 N.J. Super. at 10-11.

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 Council⁷ 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.

[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.]

Here, the Complainant sought access to unredacted copies of the responsive project scenarios. The Custodian responded denying access to portions of the responsive project scenarios under OPRA’s trade secret and proprietary commercial or financial information exemption. N.J.S.A. 47:1A-1.1. The Custodian included in his response the document index provided by HMS in its September 13, 2017 letter. This complaint followed, wherein the Complainant argued that cited exemption did not apply because the State retained ownership of the scenarios under RFP

⁷ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Section 5.8. In the SOI, the Custodian maintained his position that the sixty-nine (69) pages of project scenarios were properly redacted (citing N.J.S.A. 47:1A-1.1). The Custodian also noted that he located an additional project scenario responsive to the OPRA request for which he was denying access. Custodian's Counsel, in tandem with HMS' motion to intervene, subsequently advanced additional exemptions by way of the MPIPA and OPRA's "investigation in progress" and ACD exemptions. N.J.S.A. 47:1.1; N.J.S.A. 47:1A-9(b); N.J.S.A. 30:4d-61(b).

While the Custodian, Counsel, and HMS provided some information about the project scenarios and the information redacted from them, a "meaningful review" is necessary to determine whether same reasonably fall within the cited exemptions. This is because the GRC is not familiar with the records and their composition. Further, even though the document index is fairly descriptive, the GRC must take a careful approach to ensuring that the redacted material is corrected construed within the index. The GRC must thus review the reports to determine the full applicability of those exemptions. Such an action is not uncommon, as the GRC will routinely perform an *in camera* review in similar circumstances. See McCormack v. State of N.J. Dep't of Treasury, GRC Complaint No. 2013-357 (Interim Order dated September 30, 2014).

Therefore, the GRC must conduct an *in camera* review of all responsive unredacted project scenarios, including the to determine the validity of the Custodian's assertion that the record was exempt under the exemptions cited in OPRA, as well as the MPIPA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); N.J.S.A. 30:4d-61(b). 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 Executive Director respectfully recommends the Council find that:

1. The Council should grant Health Management Services, Inc.'s motion to intervene, as the evidence in the demonstrates that it has a unique and significant interest in the outcome of the matter, and its inclusion will not cause an undue delay or confusion from its inclusion. N.J.A.C. 1:1-16.3(a); Gill v. N.J. Dep't of Banking & Ins., 404 N.J. Super. 1, 10-11 (App. Div. 2008).
2. The GRC must conduct an *in camera* review of all responsive unredacted project scenarios to determine the validity of the Custodian's assertion that the record was exempt under the exemptions cited in OPRA, as well as the Medicaid Program Integrity and Protection Act. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); N.J.S.A. 30:4d-61(b). See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

3. **The Custodian shall deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), nine (9) copies of the redacted record, a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ that the record provided is the record 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.**
4. 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.

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Executive Director

October 30, 2019

⁸ 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.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "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."