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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

Dr. Darren James
Complainant

Complaint No. 2018-82

v.

NJ Department of Health, Medicinal
Marijuana Program
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 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 Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s February 21, 2018 OPRA request because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Final Decision Rendered by the
Government Records Council
On The 26th Day of February 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: March 3, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Dr. Darren James¹
Complainant**

GRC Complaint No. 2018-82

v.

**N.J. Department of Health, Medicinal Marijuana Program²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

“I would like to request a snap shot of the listing of all the doctors listed on the webpage under the medical marijuana program under find a doctor for the year 2014, and for 2015 and for 2016 in October of each year.”

Custodian of Record: Genevieve Raganelli

Request Received by Custodian: February 21, 2018

Response Made by Custodian: March 9, 2018

GRC Complaint Received: May 8, 2018

Background³

Request and Response:

On February 21, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 9, 2018, the Custodian responded in writing stating that the Department of Health (“DOH”) did not maintain records responsive to the request. The Custodian also stated that she was unaware of any other entity that may hold responsive records.

On March 9, 2018, the Complainant replied to the Custodian stating that DOH has a website for its medical marijuana program (“MMP”), and therein has a section where it displays a list of approximately 400 doctors who are members of the MMP. The Complainant also stated that the website had been listing doctors since 2015, and when the website updates, it archives the previous year’s webpages. The Complainant stated that after July 2017, someone blocked access to the archived list of doctors for the years 2015 and 2016. The Complainant stated that those

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Mark D. McNally.

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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archived pages were public information and were supposed to be available to the public. The Complainant then stated that the Custodian should ask the director of the MMP to find out where the pages are located. The Complainant also attached a screenshot of a third-party archive website listing the names of doctors participating in the MMP as of July 2017.

Denial of Access Complaint:

On May 8, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the then-director of the MMP deleted public information from the State’s archived websites to prevent him from retrieving them. The Complainant contended that those archived pages would be used to prove that the director was not telling the truth regarding knowledge of the Complainant’s occupation.

Statement of Information:⁴

On June 15, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 21, 2018. The Custodian certified that she responded in writing on March 9, 2019 stating that DOH did not possess responsive records.

The Custodian asserted that the matter should be dismissed as she conducted a proper search for records, and when none were located, advised the Complainant of the results. The Custodian maintained that when responsive records did not exist or were not in the agency’s possession, there was no unlawfully denial of access. Bent v. Stafford Police Dep’t, 318 N.J. Super. 30, 38 (App. Div. 2005); Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

The Custodian included a certification from Atul Verma, the Director of Health Information and Technology at DOH, who certified to having personal knowledge of the matter. Mr. Verma certified that the website’s list of registered doctors for the MMP were maintained by DOH in a database. Mr. Verma certified that any change in said database would be reflected on the website’s list in real-time. Mr. Verma certified that because this information was not stored directly on the DOH website, DOH would not have any archived copies of the information.

The Custodian asserted that the Complainant provided no evidence that responsive records exist. The Custodian contended that the screen capture the Complainant attached to his March 9, 2018 correspondence was obtained from a third-party Internet archival service, “Wayback Machine.” The Custodian argued that this screen capture did not prove that DOH possessed the requested information.

Analysis

Unlawful Denial of Access

⁴ This complaint was referred to mediation on May 24, 2018. This complaint was referred back from mediation on May 31, 2018.

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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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. Here, the Complainant’s OPRA request sought screenshots of the list of doctors participating in the MMP located on DOH’s website for the years 2014-2016. The Custodian responded that no responsive records exist and certified to same in her SOI. The Custodian also provided the certification from Mr. Verma, the Director of DOH’s Health Information Technology. Therein, Mr. Verma certified that DOH’s database of participating doctors are updated in real-time, and therefore would not possess records containing a list for each calendar year. Additionally, the Complainant’s screenshot of the list dated in July 2017 originates from a third-party archival service and is not associated with DOH.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s February 21, 2018 OPRA request because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s February 21, 2018 OPRA request because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado
Staff Attorney

February 19, 2020