



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

April 27, 2021 Government Records Council Meeting

Larry S. Loigman, Esq.
Complainant

Complaint No. 2019-245

v.

Ocean County Board of Social Services
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 2021 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 proving a lawful denial of access to any records potentially responsive to the subject OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian provided a sufficient legal certification proving that acknowledging the existence of responsive records would run contrary to numerous statutes, regulations, executive orders, and policies. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182 (App. Div. 2016). Thus, the Custodian’s use of the “Glomar” response with respect to the subject OPRA request is valid.

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 27th Day of April 2021

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: April 29, 2021

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Larry S. Loigman, Esq.¹
Complainant**

GRC Complaint No. 2019-245

v.

**Ocean County Board of Social Services²
Custodial Agency**

Records Relevant to Complaint: Applications, correspondence, grants, reports, investigations, or “similar documents” relating to assistance provided to Rosalie Cohen by the Ocean County Board of Social Services (“OCBSS”) including county, State, or Federal funding for Family Care, “New Jersey Supplemental Nutrition Assistance Program” (“SNAP”), or any other assistance.

Custodian of Record: Linda Murtagh
Request Received by Custodian: December 4, 2019
Response Made by Custodian: December 6, 2019
GRC Complaint Received: December 9, 2019

Background³

Request and Response:

On November 12, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 6, 2019, Custodian’s Counsel responded in writing on behalf of the Custodian denying the subject OPRA request. Counsel stated that both OPRA and a “multitude of Federal and State statutes prohibit disclosure of information about applicants and recipients of public assistance. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-9(a)-(b). Counsel noted that a list of thirty-six (36) applicable Federal and State statutes, regulations, executive orders, and policy documents was attached to the OCBSS’s response. Counsel further stated that based on the forgoing, OCBSS could neither confirm nor deny the existence of records related to Ms. Cohen, as doing so would “directly or indirectly lead to client identification” otherwise considered confidential.

¹ The Complainant indicated in his Denial of Access Complaint that he was representing himself.

² Represented by Colleen R. Golin, Esq. (Toms River, NJ).

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.

Denial of Access Complaint:

On December 9, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied access to the subject OPRA request on the grounds that she could neither confirm nor deny the existence of any responsive records.

Statement of Information:

On December 24, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 4, 2019. The Custodian certified that her search included accessing the New Jersey State eligibility systems to determine if Ms. Cohen was enrolled in any programs. The Custodian noted that access to these systems is limited to authorized OCBSS employees and is classified as confidential. The Custodian certified that Custodian’s Counsel responded in writing on her behalf on December 6, 2019 denying the OPRA request under multiple bases.

The Custodian contended that her denial is supported by OPRA’s privacy exemption and through the existence of many statutes prohibiting disclosure of public assistance benefit information. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-9(a)-(b). The Custodian argued that, regarding the privacy interest exemption, public assistance records fall within the privacy interest. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009). The Custodian argued that public assistance applicants and recipients are required to provide detailed personal information and OCBSS “pledges to preserve and protect” that information on applications. The Custodian noted that the Complainant made multiple attempts to obtain the responsive information and has been denied each time. The Custodian further noted that on December 18, 2019, Ms. Cohen wrote the OCBSS “vehemently” objecting to “*anything* attached to [her] name, nor any member of [her] household.” (emphasis in original).⁴

The Custodian further argued that the list of Federal and State statutes prohibiting disclosure is included in the SOI. The Custodian stated that for example, N.J.A.C. 10:49-9.7(a) and (c) maintains confidentiality of records connected to the New Jersey FamilyCare Program. The Custodian further stated that N.J.A.C. 10:87-1.14 prohibits disclosure of SNAP information. The Custodian contended that all other public assistance programs contain similar exemptions. The Custodian further asserted that OCBSS is legally prohibited from even acknowledging whether individual public assistance records exist, regardless of whether an individual ever applied for or received public assistance.

Additional Submissions:

On January 19, 2020, the Complainant submitted a letter brief refuting the SOI. The Complainant contended that the Custodian failed to complete a document index and instead asserted a blanket exemption to all records. The Complainant argued that the GRC could not “make a determination in the absence of” the index. The Complainant further argued that Ms. Cohen’s letter should not be given any weight in this complaint, other than “as a waiver of her right to

⁴ Ms. Cohen’s letter identified a corresponding courts case: Cohen v. Loigman, Docket No. OCN-L-1625-16.

contend that the agency cannot confirm her status” as a public assistance recipient. The Complainant contended that the public has a right to know if someone is committing public assistance fraud and allowing for a blanket denial of access only assists the perpetration of such.

On January 31, 2020, Custodian’s Counsel submitted a letter brief responding to the Complainant’s January 19, 2020 letter brief. Counsel stated that OCBSS’s response meets all the requirements for a “Glomar” response. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182 (App. Div. 2016). Counsel argued that OCBSS “acted in compliance” with all available statutory exemptions regarding public assistance applicant and recipient information. Counsel noted that OCBSS’s response satisfied the two-prong “Glomar” test set forth in N. Jersey Media Grp., Inc. Specifically, Counsel argued that OCBSS’s response satisfied the first prong by setting forth the applicable statutes in a three (3)-page list sent to the Complainant. Counsel asserted that those statutes expressly exempt access to public assistance information without exceptions. Counsel additionally argued that OCBSS satisfied the second prong because the grant of confidentiality is inherent in the many statutes requiring confidentiality of individual public assistance information. Counsel also argued that because OCBSS properly employed the “Glomar” response, no document index was required. N. Jersey Media Grp., Inc., 447 N.J. Super. at 201.

Counsel also disputed the Complainant’s claim that he had a right to the requested information due to a potential for “fraud and the administration of public assistance programs.” Counsel argued that this stated need is of no moment here; OCBSS encourages anyone with information regarding fraud to contact its Investigations and Recovery Unit for investigation. Counsel thus requested that the GRC uphold OCBSS’s lawful denial of access.

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.

The New Jersey Appellate Division has previously ruled on the issue of whether an agency can “neither confirm nor deny” the existence of records in response to an OPRA request. N. Jersey Media Grp., Inc., 447 N.J. Super. 182. In that case, the plaintiff sought records under OPRA concerning an individual who was not charged with a crime. The court established a two-part test to determine when an agency may employ a “Glomar”⁵ response to an OPRA request:

[T]he agency [must] (1) rel[y] upon the exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents

⁵ The moniker stems from Phillippi v. CIA, 546 F.2d 1009, 1011 (D.C. Cir. 1979), where the CIA responded to a Freedom of Information Act request regarding the *Hughes Glomar Explorer*, an oceanic ship allegedly owned by the federal government but officially listed as a private vessel.

and (2) present[] a sufficient basis for the court to determine that the claimed exemption applies.

[N. Jersey Media Grp., Inc., 447 N.J. Super. at 188.]

In N. Jersey Media Grp., Inc., the defendant's initial response to the OPRA request argued that a confirmation of whether or not the subject of the request has been arrested, charged, or involved in an investigation could cause "irreparable harm" to the subject and open the defendant and its employees to civil liability. Id. at 205. It was not until after the plaintiff challenged the defendant in court that they listed specific OPRA exemptions: the criminal investigatory records exemption and the ongoing investigation exemption. Id. The court rejected those exemptions because they only applied where government records actually existed. Id. at 207.

However, N. Jersey Media Grp., Inc. noted that N.J.S.A. 47:1A-9(b) protected a preexisting grant of confidentiality for records if established by, among other authorities, judicial case law. Id. at 202. The court then highlighted pre-OPRA precedent, demonstrating the need for confidentiality pertaining to whether an individual has been arrested or charged. Id. at 203. According to the court, the grant of confidentiality benefited law enforcement in conducting investigations as well as protects the privacy interests of individuals. Id. at 203-204. Therefore, the court held that the defendant satisfied its two-part test and found that its "Glomar" response was valid. Id. at 206.

Here, the Custodian utilized the Glomar response to deny access to the subject OPRA request. The Complainant filed this complaint challenging that denial. In the SOI, the Custodian maintained her position that OCBSS could neither confirm nor deny the existence of responsive records based on numerous statutes, regulations, executive orders, and policies. However, the Custodian also stated that Ms. Cohen sent OCBSS a letter demanding that the Complainant not be given access to "*anything* attached to [her] name, nor any member of [her] household." (emphasis in original). In response to the SOI, the Complainant argued that Ms. Cohen's letter negated the Custodian's ability to rely on a Glomar response.

In reviewing the Custodian's denial, the GRC finds her reliance on a "Glomar" response to be persuasive. As set forth in N. Jersey Media Grp., Inc., the Custodian had to meet the two-prong test evaluated in that case to qualify under the response. As to the first prong, the Custodian cited thirty-six (36) existing statutes, regulations, executive orders, and policies that set forth strict privacy standards for social program recipients. See e.g. 7 U.S.C. § 2020(e)(8); 45 C.F.R. § 205.50; 45 C.F.R. § 431.300-431.306; N.J.S.A. 44:10-47; N.J.A.C. 10:49-9.7(c); Executive Order No. 26 (Gov. McGreevey, 2002). As to the second prong, the Custodian relied upon the specific language contained in those provisions to illustrate that applicants and recipients have a high degree of privacy in obtaining social services.

As noted in N. Jersey Media Grp., Inc., "[w]hen evaluating a 'Glomar' response, federal courts must 'accord 'substantial weight' to the agency's affidavits.'" Id. at 209 (citing Wilner v. NSA, 592 F.3d 60, 68 (2d Cir. 2009) (quoting Minier v. CIA, 88 F.3d 79, 803-04 (9th Cir. 1996)). It is clear here that the exemptions cited afford a high level of personal privacy to social service applicants and recipients. Thus, the GRC gives substantial weight to the Custodian's certification submitted in response to the complaint. Further, "[f]ederal courts have ruled that, when an agency

submits a [‘]Glomar[‘] response supported by an affidavit that is ‘sufficient to establish that the requested documents should not be disclosed, a *Vaughn* index is not required.’” *Id.* at 201 (quoting *Minier, supra*, at 804). The GRC is thus satisfied that the Custodian provided a sufficient explanation to prove the “Glomar” response was proper here, and that no document index is required.

Further, the Complainant’s assertions that he had a right to the information to determine the presence of public assistance fraud does not overcome the Custodian’s denial of access. As noted by the Custodian’s Counsel, OCBSS has an Investigations and Recovery Unit that is responsible for investigating potential fraud complaints. The Complainant has also failed to indicate the existence of any provisions that afford a member of the public the opportunity to obtain individual public assistance records based on potential fraud.

Accordingly, the Custodian has borne her burden of proving a lawful denial of access to any records potentially responsive to the subject OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian provided a sufficient legal certification proving that acknowledging the existence of responsive records would run contrary to numerous statutes, regulations, executive orders, and policies. N. Jersey Media Grp., Inc., 447 N.J. Super. 182. Thus, the Custodian’s use of the “Glomar” response with respect to the subject OPRA request is valid.

In closing, the GRC notes that the Custodian included as part of the SOI a December 18, 2019 letter from Ms. Cohen demanding that no records related to her or her family be disclosed to the Complainant. It is possible that the letter could have negated the Glomar response because it appears to confirm the existence of potentially responsive records. However, said letter was not sent to OCBSS until after the filing of this complaint and relates to separate litigation between the Complainant and Ms. Cohen. Additionally, it appears the letter was submitted in relation to the Custodian’s general privacy interest argument. Notwithstanding, the GRC does not view said letter as impactful on the Custodian’s ability to rely on the Glomar response when initially denying the subject OPRA request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proving a lawful denial of access to any records potentially responsive to the subject OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian provided a sufficient legal certification proving that acknowledging the existence of responsive records would run contrary to numerous statutes, regulations, executive orders, and policies. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182 (App. Div. 2016). Thus, the Custodian’s use of the “Glomar” response with respect to the subject OPRA request is valid.

Prepared By: Frank F. Caruso
Executive Director

April 20, 2021