



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 29, 2021 Government Records Council Meeting

Jonathan Meyers, Esq.
(o/b/o Brenda Sanchez)
Complainant

Complaint No. 2020-127

v.
NJ Office of the State Long-Term Ombudsman
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council (“Council”) considered the June 22, 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:

1. The New Jersey Long-Term Care Ombudsman (“LTCO”) is a “public agency” for the purposes of OPRA, and its records may be subject to disclosure unless an exemption applies. N.J.S.A. 47:1A-1.1. Specifically, the Custodian certified that the LTCO was created by the Legislature to investigate and adjudicate matters involving the rights and welfare of elderly citizens. See N.J.S.A. 52:27G-1; Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013).
2. The Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. The evidence in the record demonstrates that the requested records were protected under The New Jersey Long-Term Care Ombudsman confidentiality provisions, and the Complainant failed to provide written consent from Brenda Sanchez to disclose such records. N.J.S.A. 57:1A-9(a); N.J.S.A. 52:27G-13(a).

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 29th Day of June 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: July 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 29, 2021 Council Meeting**

**Jonathan Meyers, Esq. (on behalf of Brenda Sanchez)¹
Complainant**

GRC Complaint No. 2020-127

v.

**New Jersey Office of the State Long-Term Ombudsman²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. The investigation file regarding any allegations of resident abuse (“Allegations”) made against “Ave Care at Newton” (or any of its employees or owners), filed with the New Jersey Long-Term Care Ombudsman [(“LTCO”)], including but not limited to allegations made by Brenda Sanchez (to Field Investigator Jennifer McMahon) in or about October or November 2019.
2. All documents relating to any Allegations;
3. Any determinations made with respect to any Allegations;
4. Any transcripts or records of hearings relating to any Allegations;
5. Any documents that the [LTCO] provided to or received from Brenda Sanchez regarding any Allegations;
6. Any documents that the LTCO provided to or received from Ave Care At Newton regarding any Allegations;
7. All documents related to any Allegations.

Custodian of Record: Audrey L. Anderson

Request Received by Custodian: June 2, 2020

Response Made by Custodian: June 3, 2020

GRC Complaint Received: July 13, 2020

Background³

Request and Response:

On June 2, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 3, 2020, the Custodian

¹ The Complainant represents Brenda Sanchez.

² No 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.

Jonathan Meyers, Esq. (on behalf of Brenda Sanchez) v. New Jersey Office of the State Long-Term Care Ombudsman, 2020-127 – Findings and Recommendations of the Executive Director

responded in writing denying the request in total, stating generally that LTCO was not a government agency in the context of OPRA. The Custodian stated that LTCO was created by the Legislature to aid in the protection of the rights and welfare of the elderly. N.J.S.A. 52:27G-1. The Custodian stated that under 42 U.S.C. 3058g(d), LTCO was required to maintain the confidentiality of identities and identifying information of residents and complainants participating in investigations. The Custodian also stated that New Jersey required investigation files to remain confidential unless identified individuals authorized the release of their information. N.J.S.A. 52:27G-13(a).

The Custodian also stated that as a “resident-centered” agency, LTCO’s records should not be classified as government records under OPRA. The Custodian stated that the information LTCO collects comprises health care information, and social records, and therefore the residents providing same have an expectation of privacy. See N.J.S.A. 47:1A-1. Lastly, the Custodian stated that access to resident records were prohibited under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”).

Denial of Access Complaint:

On July 13, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted an unlawful denial of access to his request.

Statement of Information:

On August 28, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 2, 2020. The Custodian certified that she responded in writing on June 3, 2020, denying access to the requested records.

In the SOI, the Custodian asserted that the request was lawfully denied, relying on the arguments put forth in her June 3, 2020 response.

Analysis

Public Agency

OPRA defines a public agency as:

Any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; *the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch*; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political

subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

[N.J.S.A. 47:1A-1.1 (emphasis added).]

In Fair Share Hous. Ctr., Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011), the Supreme Court reviewed the Appellate Division’s holding that the New Jersey State League of Municipalities (“League”) is not a public agency under OPRA. The Court acknowledged that although the Appellate Division relied on its previous holding in Times of Trenton Publishing Corp. v. Lafayette Yard Cmty. Development Corp., 183 N.J. 519 (2005), it erred in “. . . importing into OPRA’s definition of ‘public agency’ the definition of a ‘public body’ found in the Open Public Meetings Act . . . [t]he language defining a ‘public body’ . . . under OPRA [is] distinctly different.” League of Municipalities, 207 N.J. at 504-05. The Court thus held that a creation test, as opposed to a governmental-function test, controlled in determining whether an entity was a public agency for purposes of OPRA:

In Lafayette Yard, we remained faithful to the text of [OPRA] and determined that, in essence, the nonprofit corporation (an ‘instrumentality’) was *created* by a public subdivision therefore making it a ‘public agency.’ See id. at 535-36 . . . The creation test, not the governmental-function test, controlled. Our decision in this case, finding that the [League] is a ‘public agency,’ is wholly consistent with . . . Lafayette Yard.

[Id. at 507.]

Subsequently in Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278, 289-90 (App. Div. 2013), the Appellate Division reversed a Law Division decision holding that the Firemen’s Association (“FA”) was not a “public agency.” The court provided a comprehensive history of the FA, which was established in 1885 by a group of “incorporated local firemen's relief associations, whose mission was to provide assistance to indigent firefighters and their families.” Id. at 279. However, the FA “changed over time, as a result of mandatory statutes, Department of Banking and Insurance regulations, and a judicial decision, Szabo v. N.J. State Firemen's Ass'n, 230 N.J. Super. 265 (Ch. Div. 1988).” Id. at 280. Notwithstanding the Court’s movement away from the “government function” test in Lafayette Yard in favor the “creation” test in League of Municipalities, 207 N.J. 489 (2011), the Appellate Division chose to apply both tests here.

The Firemen’s Ass’n court noted that, as discussed in League of Municipalities, 207 N.J. 489, OPRA lacked a “government function” test, but that “[w]hile proof of governmental function is not necessary to qualify an entity as a public agency, the Court [in League of Municipalities] did not preclude the possibility that such proof would be relevant and perhaps sufficient to qualify the entity.” 431 N.J. Super. at 289. See also Sussex Commons Assocs., LLC v. Rutgers, the State Univ., 210 N.J. 531 (2012) (holding that Rutgers Law Clinic did not perform a government function and was not controlled by either Rutgers or any other government agency). The court thus determined that the FA was a “public agency” under OPRA, reasoning that it “owes its existence to state law, which authorized its creation, granted it powers, including powers over local associations, and barred the creation of a competing state association.” Firemen’s Ass’n, 431 N.J.

Super. at 290 (citing N.J.S.A. 43:17-41). The court noted that the FA’s financial activities implicated OPRA’s aim to shed light on the fiscal affairs of government because it received substantial tax revenues, it had authority to assure those funds were properly spent, and it both disbursed funds and oversaw such disbursement by local groups. Id. The court further reasoned that the FA served numerous government functions in addition to the receipt and management of tax revenues, including providing welfare benefits to a considerable number of public servants and regulating the activities of other corporate entities. Id. at 291.

Here, the Custodian argued that LTCO was not a public agency, on the basis that federal and state laws grant confidentiality to its investigations and related records. However, whether an entity is a public agency is an issue separate from whether the entity’s records are “government records” under OPRA. In response to the OPRA request as well as the SOI, the Custodian certified that LTCO was an entity created by the Legislature. The Legislature corroborates this affirmation in N.J.S.A. 52:27G-1 by declaring that the LTCO be “established as an agency of the State Government” and charged to “receive, investigate and resolve complaints concerning certain health care facilities . . .” Thus, in accordance with Firemen’s Ass’n, LTCO is a “public agency” subject to OPRA.

Accordingly, LTCO is a “public agency” for the purposes of OPRA, and its records may be subject to disclosure unless an exemption applies. N.J.S.A. 47:1A-1.1. Specifically, the Custodian certified that the LTCO was created by the Legislature to investigate and adjudicate matters involving the rights and welfare of elderly citizens. See N.J.S.A. 52:27G-1; Firemen’s Ass’n, 431 N.J. Super. 278.

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.

OPRA also provides that:

[OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . any other *statute*; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Rules of Court; any *federal law*; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

Regarding investigatory files and related information maintained by LTCO, N.J.S.A. 52:27G-13 prohibits disclosure of same subject to the discretion of the ombudsman and upon written consent from complainants and other parties involved:

- a.** The office shall maintain confidentiality with respect to all matters in relation to any complaint or investigation together with identities of the complainants, witnesses or patients, residents or clients involved, unless such persons authorize, in writing, the release of such information, except for such disclosures as may be necessary to enable the office to perform its duties and to support any opinions or recommendations that may result from a complaint or investigation. The investigatory files of the office, including all complaints and responses of the office to complaints, shall be maintained as confidential information. Release of pertinent records shall be at the discretion of the ombudsman. Nothing herein contained shall preclude the use by the office of material in its files, otherwise confidential, for the preparation and disclosure of statistical, case study and other pertinent data, provided that in any such use there shall be no disclosure of the identity or the means for discovering the identity of particular persons.
- b.** Any person conducting or participating in any examination of a complaint or an investigation who shall disclose to any person other than the office, or those authorized by the ombudsman to receive it, the name of any witness examined, or any information obtained or given upon such examination or investigation is a disorderly person.
- c.** Any statement or communication made by the office relevant to a complaint received by, proceedings before, or investigative activities of, the office, and any complaint or information made or provided in good faith by any person, shall be absolutely privileged and such privilege shall be a complete defense in any action which shall allege libel or slander.
- d.** The office shall not be required to testify in any court with respect to matters held to be confidential in this section except as the court may deem necessary to enforce the provisions of this act.

In the instant matter, the Complainant sought the investigation file, along with any and all other documents related to a complaint filed by his client against Ave Care at Newton on or around October to November 2019. The Complainant also sought the same records regarding any other “Allegations” made against Ave Care at Newton. The Custodian denied the request, stating that such records were confidential pursuant to state and federal law. The Custodian maintained her position in the SOI, noting that release of the records required the written consent of “the complainants, witnesses or patients, residents or clients involved.” N.J.S.A. 52:27G-13(a).

Here, the language of N.J.S.A. 52:27G-13 is clear that the requested records were confidential unless written consent was given from complainants and other related parties. However, there is no evidence in the record demonstrating that the Complainant obtained the written consent of Ms. Sanchez to disclose records and information relating to her complaint filed against Ave Care at Newton. Nor does the Complainant provide the written consent of any other complainant or related parties Ms. Sanchez’s complaint or others. Therefore, the Complainant’s request for the investigation file, along with all other records and documents related to allegations made to Ave Care at Newton was lawfully denied pursuant to LTCO’s confidentiality provisions. N.J.S.A. 57:1A-9(a); N.J.S.A. 52:27G-13(a).

Accordingly, the Custodian lawfully denied access to the Complainant’s OPRA request.

N.J.S.A. 47:1A-6. The evidence in the record demonstrates that the requested records were protected under LTCO's confidentiality provisions, and the Complainant failed to provide written consent from Ms. Sanchez to disclose such records. N.J.S.A. 57:1A-9(a); N.J.S.A. 52:27G-13(a).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The New Jersey Long-Term Care Ombudsman ("LTCO") is a "public agency" for the purposes of OPRA, and its records may be subject to disclosure unless an exemption applies. N.J.S.A. 47:1A-1.1. Specifically, the Custodian certified that the LTCO was created by the Legislature to investigate and adjudicate matters involving the rights and welfare of elderly citizens. See N.J.S.A. 52:27G-1; Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013).
2. The Custodian lawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The evidence in the record demonstrates that the requested records were protected under The New Jersey Long-Term Care Ombudsman confidentiality provisions, and the Complainant failed to provide written consent from Brenda Sanchez to disclose such records. N.J.S.A. 57:1A-9(a); N.J.S.A. 52:27G-13(a).

Prepared By: Samuel A. Rosado
Staff Attorney

June 22, 2021