



TOMS RIVER TOWNSHIP FIRE DISTRICT No. 1

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May 1, 2019

Mr. Gavin Rossi
P.O. Box 32
Lanoka Harbor, NJ, USA

RE: OPRA REQUEST

Dear Mr. Rossi,

In response to your request for dispatch records please be advised that Toms River Fire District No. 1 is maintaining its position that the manner in which it responded to your most recent request is appropriate under the law. While an earlier request for these records included the additional information you seek, the District, in coordination with the Township of Toms River, feels that the information previously provided revealed information which involved personal medical information. The latest response protects that information from release and protects an individual's reasonable expectation of privacy.

District No. 1 takes this position based upon the fact that individual citizens have a reasonable expectation of privacy in his or her medical information. The fact that that condition resulted in the need for emergency services to be called to assist with that medical condition does not lessen that person's expectation of privacy.

N.J.S.A. 47:1A-1, provides, in relevant part, that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy."

In Alfano v. Margate City, 2012 WL 4344148, (App.Div.2012), the Appellate Division, in discussing this portion of the statute, noted that the Supreme Court has listed seven factors which a court should apply. The factors are: (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury

from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosures; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access. Citing Burnett v. County of Bergen, 198 N.J. 408, 427-28 (2009) and Doe v. Poritz, 142 N.J. 1, 88 (1995). In Burnett, the issue was the release of documents containing Social Security numbers for which an individual has an expectation of privacy. In Alfano, the information would have identified an individual who had apparently attempted suicide.

In Paff v. Galloway Township, 229 N.J. 340, 358 (2017), the Supreme Court, after citing the statutory exceptions and the above cited language, noted that “this is by no means an exhaustive list of OPRA’s exceptions and exemptions.”

In your request, you seek additional information from that which was provided. The additional information would be sufficient to identify a person and his or her medical condition. The release of medical information can be detrimental for an individual. These individuals who called for assistance did not intend that their conditions would become public knowledge. In addition, you have indicated that you intend to publish the information to the public. The need for such information seems minimal compared to the potential privacy issues which surround personal medical information.

District No. 1 also takes the position an articulated public policy exists which militates against the release of medical information and, therefore, that individual citizens do have an expectation of privacy in one’s own medical information. Such medical information would include the fact that an ambulance was called to one’s house and any information related to the reason for the call which would set forth the medical reason for the call. Initially, this public policy was set forth in Executive Order #11, issued in November of 1974, which references the non-disclosure of detailed medical or psychological information. While that order did not deal with particular record involve in this case, it does not that even public employees have an expectation of privacy in their medical information. The logical extension would be that a citizen would also have that expectation of privacy.

Executive Order No. 23, issued by Governor McGreevey, on August 13, 2002, in Paragraph 4.a.1. states that information concerning individuals relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation shall not be considered to be government records subject to public access.

These executive orders were issued long before the federal government enacting the Health Insurance Portability and Accountability Act (HIPAA). In that act the federal government has also articulated a public policy which favors the protection of a person’s medical information. HIPAA includes penalty provisions which, in part, provides that a person violates the act by using a unique health identifier, obtaining individually identifiable health information or disclosing individually identifiable health information. 42 U.S.C.A. Sec. 1320d-6(a). The definition of health care provider and health information under HIPAA is expansive. 42 U.S.C.A. Sec. 1320d(3) and (4). Individually identifiable health information means any information, including demographic information, collected from an individual that relates to the past, present or future physical or mental health or condition of an individual or the provision of health care to an individual. 42 U.S.C.A. Sec. 1320d(6). The statute continues by referring to information “to which there is a reasonable basis to believe that the information can be used to identify the individual.” 42 U.S.C.A. Sec. 1320d(6)(B)(ii). Medical

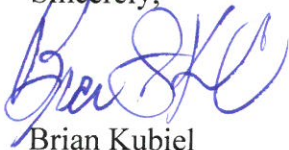
services include ambulance service. 42 U.S.C.A. Sec. 1395x(7). Thus, HIPAA provides a basis to support the position that a person does have an expectation of privacy.

Additionally, as you are aware, the District sent an inquiry to the Government Records Council. While the GRC did not give an advisory opinion since it is not currently entertaining such request, in response Frank F. Caruso, Acting Executive Director, did point out Governor McGreevey's executive order cited above which exempts access to medical information.

In his email response, Mr. Caruso noted that the GRC provides a typical guidance regarding a person's medical information contained within "government records." That guidance noted Executive Order No. 26 (Gov. McGreevey, 2002). He also referred to the case of Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated January 29, 2013), in which the Council determined that an operations report related to a medical emergency was exempt from disclosure under Executive Order No. 26 (Gov. McGreevey, 2002). The Council has also upheld a custodian's denial of access to EMS reports. Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008).

Based upon its own analysis of the request and the cited information from the Government Records Council, the District has determined that the medical information does not constitute a government record and, therefore, such records are not subject to disclosure under OPRA. Additionally, the District takes the position that the release would violate an individual's reasonable expectation of privacy. As such, the District will not provide the additional information requested.

Sincerely,



Brian Kubiel
Chief Administrator