

NOT FOR PUBLICATION WITHOUT APPROVAL
FROM THE COMMITTEE ON OPINIONS

LEE BREWER,

Plaintiff,

v.

THE TOWNSHIP OF MIDDLETOWN and
HEIDI BRUNT in her official
capacity as Municipal Clerk
and Records Custodian of
Middletown Township,

Defendants.

SUPERIOR COURT OF NEW
JERSEY

MONMOUTH COUNTY
LAW DIVISION

DOCKET NUMBER:
MON-L-2848-13

OPINION

Argued: January 6, 2014
Decided: January 7, 2014

Walter M. Luers, Esq., Law Offices of Walter M. Luers,
LLC., on behalf of Plaintiff Lee Brewer

Brian M. Nelson, Esq., Archer & Greiner, P.C., on behalf of
Defendants the Township of Middletown and Heidi Brunt

LAWSON, A.J.S.C.

This matter comes before the Court as an Action in
Lieu of Prerogative Writs wherein Plaintiff Lee Brewer
seeks access to government records of the Township of
Middletown under the common law right of access.

The Court has reviewed the moving papers, heard oral argument from counsel, and reserved decision. The Court now makes the following findings of fact and conclusions of law.

I. Statement of Facts

This matter concerns a request made pursuant to New Jersey's common law right of access to government records. Defendant, the Township of Middletown, is a municipal entity located in Monmouth County. Unlike many similarly-situated municipalities, Middletown does not take part in the Health Benefits Plan administered by the State of New Jersey, which provides healthcare coverage to employees of participating local governments. Nor does Middletown offer private health insurance to its employees. Rather, the Township maintains its own self-insured group health plan, which provides coverage paid directly by the Township to various providers on behalf of the 463 plan enrollees consisting of current Township employees and retirees.

On July 5, 2013, Plaintiff Lee Brewer requested, through his attorney, certain information regarding Middletown's group health plan. Specifically, Plaintiff requested the following:

1. The names of all enrollees who are receiving or have received health coverage from Middletown from January 1, 2008 to the date of Plaintiff's request;
2. The type of coverage elected by each individual (e.g. single, family, etc.); and
3. the cost on an annual basis to the Township of each type of election.¹

In response to Plaintiff's request, the Township emailed Plaintiff's counsel on July 16, 2013 a spreadsheet indicating certain information regarding the enrollees in the Township's health plan. For each enrollee, the Township produced a city, state, zip code, and date of birth, as well as the type of coverage elected. However, the Township redacted the names of each individual enrollee, citing its obligations under the privacy provisions of the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320(d), et seq. Plaintiff subsequently brought this action seeking to compel the Township to disclose the redacted names.

¹ In addition to asserting a right to the records under the common law right of access, Plaintiff additionally made his original request pursuant to New Jersey's Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq. In this action in lieu of prerogative writs, however, Plaintiff relies only on the common law right of access and does not assert a remedy under the provisions of OPRA.

II. Applicable Law

Access to public records under the common law right of access "depends on three requirements: (1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material . . . ; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure." Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (internal quotations omitted).

In Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005), the Appellate Division considered a case, the facts of which were in many ways identical to the one *sub judice*. In that matter, plaintiff William Michelson, a private citizen, filed a request for access to government records with the city clerk of the defendant, the City of Plainfield. Id. at 615. Like in the matter at hand, Michelson sought records related to the health insurance plans offered by the city to its employees, who in the case of Plainfield were covered through the State's Health Benefits Plan rather than through direct insurance. Ibid. Michelson requested, *inter alia*, the names of every City employee or official covered by the City's plans, the types of coverage available, and the cost of such coverage to the City. Id. at 615-16. When the Plainfield City Clerk failed

to provide individualized information about past or current enrollees, Michelson filed an action in lieu of prerogative writs pursuant to the common law right of access and the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq. Michelson, supra at 617.

The Court began its analysis by finding that OPRA, the New Jersey state law which governs public access to government records, does not compel a government entity to disclose the type of individualized health insurance records which were sought by Michelson. Id. at 621. The Court noted that OPRA expressly declines to compel production of such information under its provision exempting from disclosure "information which is a communication between a public agency and its insurance carrier." Id. at 621, quoting N.J.S.A. 47:1A-1.1. The Court additionally relied upon an Executive Order promulgated by the Governor of New Jersey declaring information regarding an individual's health history not a government record subject to public access under OPRA. Id. at 619-20, citing Executive Order No. 26, par. 4(b)(1) (2002). Finally, the Court cited a regulation promulgated by the State Health Benefit Commission providing that records related to the coverage of individual enrollees under the State Plan

remain confidential and not subject to disclosure. Id. at 620, citing N.J.A.C. 17:9-1.2(b).

However, following its determination that Michelson was not entitled to the information he sought pursuant to OPRA, the Court went on to hold that Michelson could nevertheless obtain access to documents disclosing the type of coverage elected by City enrollees through the common law right of access, which was not limited by the passage of OPRA.² Id. at 624. See also N.J.S.A. 47:1A-8. The Court reached this interpretation by relying on the three-factor common law access test outlined supra. Ultimately the Court found that Michelson's goal of identifying waste and fraud was sufficient to establish an interest in the health insurance coverage information, which the Court concluded "is no more invasive than the personnel information that is expressly allowed by OPRA." Id. at 626, citing N.J.S.A. 47:1A-10. The Court decisively held that, while Michelson was not entitled to addresses, names of spouses, domestic partners and children, any personal health information and any other confidential information, "plaintiff has a common law right to access public records that reveal the type of

²The Court found that Michelson was not entitled to information related to the specific claims experiences of individual enrollees, as the privacy interests of those participants in their confidential health information outweighed Michelson's interest in eliminating fraud. Id. at 625-26. In the instant matter, Plaintiff does not seek information related to specific claim experiences.

coverage elected by eligible employees, officials, and retirees." Ibid.

In the instant case, Defendant the Township of Middletown does not attempt to distinguish the present matter from the Appellate Division's findings in Michelson. Rather, Defendant argues that federal privacy rules, collectively known as "the Privacy Rule" under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C.A. § 1320(d) et seq., and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.A § 1001 et seq., preempt New Jersey's common law right of access as interpreted by Michelson. While Defendant provides an in-depth analysis of why these federal provisions should preempt the common law, the Township fails to address precisely which elements of HIPAA or ERISA, assuming their applicability, specifically prohibit the release of a healthcare enrollees' names and coverage election. Rather, Defendant relies on a contention that "the Appellate Division [in Michelson] simply failed to address the federal preemption issues raised in the instant matter." (Def.'s brief at p. 7.)

While it should be noted that the Michelson Court considered HIPAA at great length during its analysis of Michelson's OPRA count and explicitly acknowledged its

applicability (and the limits thereof) to public records requests of the current nature, see Michelson, supra, at 617-23, this Court will rely primarily on its observation that as a lower court in relation to the Appellate Division, this Court is bound to the holdings of published Appellate Division opinions, c.f. Davidson v. Government Employees Ins., 360 N.J. Super 127, 142 (App. Div. 2003) (decisions of one panel of the Appellate Division not binding upon remaining panels); see also Pressler, Current N.J. Court Rules, comment 3 on R. 1:36.3 (2013) ("Published Appellate Division opinions are clearly binding on all lower courts in the state.") That being the case, this Court is constrained, regardless of the merits of Plaintiff's arguments, to the fact that the question of law raised in this matter has been answered conclusively by the Appellate Division in Michelson. Plaintiff seeks only the information which the Court identified as government record in Michelson, and Plaintiff's asserted aim, a quest to seek out potential fraud in the Township's healthcare enrollment system, is identical to the public interests found by the Appellate Division to outweigh the enrollees' privacy interests. In asking this Court to disregard Michelson, Defendant points out that "state laws can be preempted by federal regulations as well as federal

statutes," R.F. v. Abbott Labs, 162 N.J. 596, 619 (1998) (internal citations omitted), and that to do so is "a fact-sensitive endeavor." Ibid. While the Court does not dispute that state common law may be preempted by federal regulation, it remains that the Appellate Division has already found preemption not to be the case in situations such as the one *sub judice*.

Finally, the Court turns to Defendant's assertion, made at oral argument but not in its briefing papers, that Middletown must deny Plaintiff access to the requested records due to the ongoing risk that Plaintiff could combine the information currently sought with public records that have been released in the past, and in so doing deduce protected information offensive to individual privacy rights under HIPAA. However, Defendant failed to identify any concrete example of a past disclosure which could, in conjunction with the present request, bring about such a harm. In addition, this Court is constrained to consider each records request as it is brought, without bias towards individuals who choose to make regular requests or leniency towards localities who have received many such requests in the past. In its own research, the Court has been unable to find any example of a Defendant in an OPRA-type case prevailing on the notion that an

otherwise legitimate records request should be denied due to the potential creation of a mosaic-like pattern of multiple disclosures. Indeed, were a litigant to prevail on such a claim, it would fall to the lower courts to, on the occasion of any OPRA or right-of-access case, review every disclosure previously made by a defendant locality to determine whether some individual might possibly aggregate this disparate data in search of improper connections. The Court is not of the belief that this is its purpose. Therefore, if Defendant is to prevail on its argument that Michelson was wrongly decided, it cannot do so before this trial court.

III. Conclusion

Based on the aforementioned reasons, this Court concludes that Defendant the Township of Middletown is required to disclose unredacted coverage information of individual enrollees pursuant to the common law right of access as interpreted by Michelson.

Mr. Walter M. Luers is directed to submit a proposed Form of Order in accordance with this Opinion within seven (7) days of this Opinion.