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August 28, 2013

Hainesport Township
Attn: Paul J. Tuliano, Municipal Clerk
One Hainesport Centre
Hainesport, NJ 08036

Re: OPRA request of John Paff

Dear Mr. Tuliano:

Your office has asked the undersigned to review the Open Public Records Act request of one John Paff dated August 24, 2013, which seeks certain personal health insurance information of a township official. Mr. Paff has made at least one prior request for similar health-related information a few years ago, and his request was denied at that time as the requested documents were deemed confidential by the local custodian, and which did not constitute government records, an opinion which I shared.

I have noted that Mr. Paff's new request does not reveal his address or identify his organizational affiliation, but only his email address. Nor is Mr. Paff an attorney. Instead, he is apparently a resident of a different County who has taken it upon himself to make this request, without disclosing the entity for whom he is acting. Mr. Paff's specific requests are for:

1. "The record that shows portion of the 2012 health insurance premium the Township paid on Committeeman Bruce MacLachlan's behalf" and
2. "The record that shows the reimbursements Committeeman Bruce MacLachlan paid to the Township during calendar year 2012."

Thus, said OPRA request seeks documents evidencing certain coverage election for health insurance for a Township Committeeman. To be brief, such documents are considered confidential under New Jersey law, and are thus not considered “government records” under the New Jersey Open Public Records Act (OPRA), N.J. S. A. §§ 47:1A-1 to -13. My analysis follows.

OPRA specifically authorized the duly elected Governor to exempt certain government records from public access by Executive Order by virtue of N.J.S.A. 47:1A-9. Executive Order 26 was signed by Governor McGreevey in year 2002, which did broadly exempt “Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.” Said Executive Order dictates that:

The following records shall not be considered to be government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

* * *

(b) Information concerning individuals as follows:

(1) Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation;

[Executive Order No. 26, par. 4(b)(1) (2002).]

Subsequent litigation has clarified Executive Order 26, while applying OPRA, and other applicable laws, such as the federal Health Insurance Portability and Accountability Act (HIPAA).

One most relevant case is **William H. Michelson, Plaintiff-appellant, v. Laddie Wyatt and the City of Plainfield**, 379 N.J. Super. 611 (App. Div. 2005). In **Michelson**, a local citizen sought records, both under OPRA and under common law, broadly dealing with health insurance coverage provided to public employees, their families, and their claims history under those coverages, based on the professed goal of preventing “government fraud and waste.” The Appellate Division found, first, that the information fell within exclusions from the definition of “public records” set forth at N.J.S.A. 47:1A-1.1 and -10, and furthermore, that the Governor’s Executive Order emphasized the confidentiality of the information. *The Court felt it was not even necessary to further consider the federal HIPAA legislation to rebuff the broad demands of the OPRA request.* (The Court stated that it was unable at the time to conclude that the City was subject to the HIPAA Privacy Rule in light of the limited record presented).

The **Michelson** Court did give very limited relief to the complaining citizen by applying the common law right to inspect records. Particularly, the Court did find for the petitioner only for the limited right to discover whether a given employee has elected to include others in his/her insurance coverage, ie., whether an individual plan or a family plan was chosen. **Michelson**, 379 N.J. Super. at 626.

The common law right of records inspection has not been limited by OPRA (although it is still limited by the federal laws). N.J.S.A. 47:1A-8. The common law right had been earlier reviewed by the Supreme Court in the case of **Board of Educ. of Newark**, 145 N.J. 269 (1996), where a citizen sought certain claims history experience for the large health insurance plan of the Board of Education. Citing an earlier case, **Higg-A-Rella Inc. v. County of Essex**, 141 N.J. 35 (1995), the Supreme Court recognized that a citizen's common law right of access is not absolute. Rather, the condition precedent for such a common law request is that the citizen who requests the public record must establish an interest in the subject matter of the material, especially if that interest involves a demonstrable public outrage of some type. Second, the citizen's interest must be balanced against the State's interest in confidentiality (on behalf of its officials/employees). **Id.** at 279-280. In **Newark**, it was found that the City Board of Education's health insurance premiums had ballooned from \$25 million to \$40 million in a relatively short period of time, making it the largest line item in its total budget, and bringing into question whether the particular health plan was "an effective use of its funds." **Id.** at 273. The **Newark** Court applied the "balancing of interests" test and easily found sufficient "public importance" against the governmental entity, arguably since even a gullible citizen would question whether the City was wasting money in such an extreme situation of accelerating costs. In the case of Hainesport Township, however, there has been no similar outrageous ballooning of the aggregate health care costs, and moreover, said costs are far from the largest item in the budget, a far cry from the obvious money-wasting situation in **Newark**.

A similar issue was raised in the Government Records Council case of **John Fox v. Township of Parsippany-Troy Hills**, Complaint No. 2005-109, December 8, 2005. In **Fox**, a citizen demanded to know the cost of the health insurance of particular local governing body members. The GRC reviewed the **Michelson** decision, N.J.S.A. 47:1A-1 et seq., and the common law, in addition to the federal HIPAA law, and found that the local Custodian was absolutely correct in denying this information to the requesting citizen. Unlike the Court in **Michelson**, the Council did apply HIPAA and found that HIPAA was in fact applicable to the records request issue. The Council found that Parsippany-Troy Hills is a self-insured entity subject to HIPAA, with all of its federal confidentiality protections:

Specifically, HIPAA provides that "[a] covered entity must comply with the applicable standards, implementation specifications, and requirements ... with respect to electronic protected health information." 45 CFR Sec. 164.302. HIPAA prohibits the disclosure of "individually identifiable health information" by covered entities to anyone outside the covered entity. 45 CFR Sec. 164.502(a). HIPAA defines individually identifiable health information as "information that is a subset of health information, including demographic information collected from an individual, and: (1) [i]s created by a ... health plan..., and (2) [r]elates to... the provision of health care to an individual; or the *past, present, or future payment for the provision of health care to an individual; and (i) [t]hat identifies the individual; or (ii) [w]ith respect to which there is a reasonable basis to believe the information can be used to identify the individual.*" 45 CFR Sec. 160.103.

Additionally, HIPAA provides that "[c]overed entity may not use or disclose protected health information, except as permitted or required by [HIPAA]." 45 CFR Sec. 164.502(a). Permitted uses and disclosures by covered entities under HIPAA are (1) to the individual to whom the information pertains, (2) for treatment, payment, or health care operations, (3) incident to a use or disclosure otherwise permitted or required, (4) pursuant to and in compliance with a valid authorization, (5) pursuant to an agreement, and (6) as permitted by and in compliance with this section. 45 CFR 164.502 (a)(1)(i)-(vi). Required disclosures by covered entities under HIPAA are (1) to the individual, and (2) when required by the Secretary of the Department of Health and Human Services. 45 CFR Sec. 160.502(a)(2)(i)-(ii).

(Emphasis supplied).

Thus, the GRC in **Fox**, concluded that: "Pursuant to N.J.S.A. 47:1A-9.a and HIPAA, and further supported by the decision of the Superior Court of New Jersey in **Michelson v. Wyatt and City of Plainfield**, the Custodian lawfully denied access to the requested cost of healthcare benefits supplied to each individual Council member."

The **Michelson** decision is still good law, and was in fact cited and followed in the case of **Richard Rivera v. Office of the County Prosecutor of the County of Bergen et als.** (Law Div. 2012, Bergen County, Unpub. LEXIS 1921; Docket No. BER-L-4310-12), where the Court upheld the government's claim of privilege when confronted by an OPRA request for information contained in health insurance claims.

Similarly, Hainesport Township is subject to the rigors of HIPAA. Hainesport too has a self-insured plan, managed by the New Jersey State Health Benefits Commission which functions within the Division of Pensions of the Department of the Treasury. Private health insurance companies administer the Plan under contract with the Commission. The Plan is said to be "community-rated," which means that the risk is analyzed and the premiums are set based on the overall loss experience of all the participants, instead of calculating different premiums for each employer based on its individual risk. Thus, since the costs are generally the same throughout the State for this State-sponsored health insurance, the cost of each employee's health insurance will necessarily disclose whether a given employee has elected coverage for an individual or for a family.

Since GRC has already chosen to deny access to records dealing with the cost of a township official's health insurance under HIPAA, it is reasonable to believe that GRC will equally exclude from the definition of government record any records dealing with the 2012 health insurance premium paid by or reimbursed to the Township for any specific individual.

To conclude, while the Custodian may release the lump sum figure spent for health insurance for the township as a whole, HIPAA precludes both the individual cost spent for a given employee/official's family unit, and the related question of financial reimbursements for same. Such information can be disclosed by the employee/official on a voluntary basis only.

To conclude, there is ample law, based on a full reading of the applicable State Statutes, Executive Order, federal law, and State case law, to support the Township Custodian's refusal to supply individual health insurance/healthcare information of local officials to anyone presenting an OPRA request. The Township will be obligated, however, to produce documents detailing the total cost of its health insurance, if asked, since this is general budgetary information which does not disclose protected information of any identifiable person.

Thank you for your attention to this matter.

Very truly yours,

Ted Costa

Theodore M. Costa, Esq.