



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

April 30, 2013 Government Records Council Meeting

James E. Howell
Complainant

Complaint No. 2012-141

v.

New Jersey Department of Homeland Security
And Preparedness
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 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 Complainant’s request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹ New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), because it seeks information and not specific, identifiable government records. *See also* Kulig v. Cumberland County Board of Freeholders, GRC Complaint No. 2008-263 (November 2009). The GRC declines to address the proposed exemptions raised by the Custodian because the request is deemed to be invalid.

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 30th Day of April, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).



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: May 3, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

James E. Howell¹
Complainant

GRC Complaint No. 2012-141

v.

**New Jersey Department of Homeland Security
and Preparedness²**
Custodian of Records

Records Relevant to Complaint: Copies of information regarding threat or hazard assessments by any consultant, advisor or citizen to include any corporation that provides investigations for maritime security, emergency management, such as TetraTech, which may have submitted information about the Complainant.

Request Made: April 16, 2012

Response Made: April 24, 2012

GRC Complaint Filed: May 7, 2012³

Background⁴

Request and Response:

On April 16, 2012, the Complainant submitted his Open Public Records Act (“OPRA”) request to the Custodian. On April 24, 2012, the Custodian responded in writing stating the following:

1. Information about the Complainant submitted or reported by TetraTech – no records responsive exist.
2. Information regarding threat and hazard assessments related to maritime security and emergency management – responsive records contain exempt information pursuant to OPRA, the Domestic Security Preparedness Task Force statute; Executive Order No. 21 (Gov. McGreevey, 2002)(“EO 21”) and Executive Order No. 5 (Corzine, 2006)(“EO 5”).

¹ No legal representation listed on record.

² Dominic Rota, Custodian of Records. Represented by DAG Mary Beth Wood, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

⁴ 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.

James E. Howell v. New Jersey Department of Homeland Security and Preparedness, 2012-141 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On May 7, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”) disputing the Custodian’s denial of access because the responsive information is necessary to aid in possible litigation regarding a previous job.

Statement of Information:

On June 29, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 16, 2012 and responded on April 24, 2012 in writing via e-mail denying access to the Complainant’s OPRA request.

The Custodian certifies that regarding the first (1st) item in his response, he searched internal records and databases for information submitted by TetraTech about the Complainant and found no responsive records. The Custodian contends that regarding the second (2nd) item in his response, the Complainant’s request was clearly overly broad and thus the Custodian did not conduct a search.

Counsel submits a letter brief contending that although the Custodian’s denial of access was appropriate, the Complainant’s OPRA request is flawed because it fails to identify specific government records. Counsel contends that the Appellate Division determined that OPRA makes identifiable government records readily accessible to the public and does not require custodians to identify and siphon useful information. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). *See also* Reda v. Township of West Milford, GRC Complaint No. 2002-58 (July 2004). Counsel contends that the Complainant’s OPRA request seeks information and not identifiable government records.

Counsel asserts that should the GRC consider the Custodian’s denial of access based on his cited exemptions, the denial of access was nonetheless appropriate. Counsel asserts that the Custodian searched for and found no records regarding the Complainant and TetraTech, thus no unlawful denial of access occurred. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Counsel argues that assessments of maritime security and emergency management are clearly domestic security records exempt from disclosure for multiple reasons. N.J.S.A. 47:1A-1.1.; *N.J.A.C.* 13:1E-3.2(a); *N.J.A.C.* 13:1E-3.2(a)(3); *N.J.A.C.* 13:1E-3.2(a)(5); EO 5; N.J.S.A. App. A:9-74. Counsel asserts that certain homeland security, emergency management or preparedness reports maintained by the Department are exempt from disclosure. Counsel asserts that even if the Complainant’s OPRA request sought identifiable government records, same would be exempt.

Analysis⁵

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 Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court reasoned that:

“[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” [Emphasis added]. *Id.* at 549.

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” (Emphasis added.) *Id.* See also Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Here, the Complainant’s request sought “information in regards to threat or hazard assessments by any consultant, advisor or citizen to include any corporation that provides investigations for maritime security, emergency management, such as TetraTech, which may have submitted information.” Notwithstanding the Custodian’s denial of access based on the fact that no records responsive exist and pursuant to N.J.S.A. 47:1A-1.1.; N.J.A.C. 13:1E-3.2(a); N.J.A.C. 13:1E-3.2(a)(3); N.J.A.C. 13:1E-3.2(a)(5); EO 5; N.J.S.A. App. A:9-74, the Complainant’s request seeks information regarding himself and not identifiable government

⁵ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).
James E. Howell v. New Jersey Department of Homeland Security and Preparedness, 2012-141 – Findings and Recommendations of the Executive Director

records, thus forcing the Custodian to conduct an open-ended search of all records in his possession to determine if any were responsive. OPRA does not require a custodian to perform such a search.

Therefore, the Complainant's request is invalid pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra, because it seeks information and not specific, identifiable government records. *See also* Kulig v. Cumberland County Board of Freeholders, GRC Complaint No. 2008-263 (November 2009). The GRC declines to address the proposed exemptions raised by the Custodian because the request is deemed to be invalid.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant's request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁷ New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), because it seeks information and not specific, identifiable government records. *See also* Kulig v. Cumberland County Board of Freeholders, GRC Complaint No. 2008-263 (November 2009). The GRC declines to address the proposed exemptions raised by the Custodian because the request is deemed to be invalid.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004). James E. Howell v. New Jersey Department of Homeland Security and Preparedness, 2012-141 – Findings and Recommendations of the Executive Director