



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

April 30, 2008 Government Records Council Meeting

Robert Vessio
Complainant

Complaint No. 2006-130

v.

Township of Manchester (Ocean)
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council (“Council”) considered the April 23, 2008 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. Based upon the Appellate Division’s decision in New Jersey Builders Association v. New Jersey Council On Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), the Complainant’s voluminous November 2, 2006 OPRA request, a thirteen (13) paragraph request for numerous records, is not a valid OPRA request because bears no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that “provide[s] space for . . . a brief description of the record sought.” *Id.* at 179.
2. Because the Custodian has certified that fulfillment of the Complainant’s OPRA request would substantially disrupt the agency’s operations, and because the Custodian made an attempt to reasonably accommodate the Complainant’s request but received no response, the Custodian has not unlawfully denied access to the requested records under N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.g.
3. The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the Complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-176 (March 2007).



4. The Custodian's initial response that the Complainant's request was a duplicate of a previous request to the Complainant's June 22, 2007 request was legally insufficient because the Custodian has a duty to answer each request individually. O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005).

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, 2008

Robin Berg Tabakin , Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: May 12, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 30, 2008 Council Meeting**

**Robert J. Vessio¹
Complainant**

GRC Complaint No. 2006-130

v.

**Township of Manchester²
Custodian of Records**

Records Relevant to Complaint: The Complainant requests inspection of:

1. Summons No. MTC019320³ State v. Vessio, tape recordings of municipal trial from 12/7/2005, 1/26/2006 and 3/1/2006,
2. Names, addresses and telephone numbers of those individuals relevant to the case, including attorney notes and/or call of witnesses pertaining to Summons No. MTC019320,
3. Officer's notes and reports by officers that assisted Ptl. Brook at the incident pertaining to Summons noted above,
4. Ordinance, certification and resolution as per Summons No. MTC019320,
5. Disposition by the Municipal Court of proceedings pursuant to Summons MTC019320,
6. Manchester Township Municipal Court personnel information including title, salaries and overtime pay pertaining to 2005 contract year,
7. Manchester Township police personnel data, including officer names, titles, rank, annual pay and overtime pay by name, title and rank for 2005,
8. Manchester Township police officer awards and commendations by local, county, state and national citations, for 2005 and
9. All OPRA complaints filed against Manchester Township and disciplinary actions against Manchester Police Department within the last 10 years.

Request Made: June 15, 2006⁴

Response Made: July 18, 2006

Custodian: Marie S. Pellecchia, Municipal Clerk, Manchester Township

GRC Complaint Filed: June 30, 2006

Background

¹ No legal representation listed on record.

² Represented by Guy P. Ryan Esq., of Secare, Delanoy, Martino & Ryan (Toms River, NJ).

³ The Complainant's OPRA request refers to this as "Summons No. MTC0193Z0" while the Township's responses refer to it as "Summons MTC019320."

⁴ Complainant asserts that he filed his OPRA request on June 16, 2006, however, the official OPRA request form is date stamped June 15, 2006.

February 27, 2008

Government Records Council's ("Council") Interim Order. At its February 27, 2008 public meeting, the Council considered the February 20, 2008 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, found that:

1. Because the Custodian failed to provide a written response to the Complainant's June 15, 2006 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant's OPRA request was deemed denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Requests for records made to the Judiciary branch of New Jersey state government are not within the Council's authority to adjudicate. N.J.S.A. 47:1A-7. Because the requested tape recordings of the municipal court proceedings were made, maintained and kept on file by the Municipal Court Administrator, the Custodian should have provided a written response to the Complainant's OPRA request stating that she possessed no records responsive to this request. See N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i.
3. Because the request for names, addresses, and telephone numbers of individuals relevant to the adjudication of Summons No. MTC019320 is an invalid OPRA request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), and because the request for attorney notes and call of witnesses is a request for records which are exempt from the definition of a government record under N.J.S.A. 47:1A-1.1, the Custodian did not unlawfully deny access to these records.
4. The evidence of record further indicates that access to the requested officers' notes and reports regarding the incident that led to Summons No. MTC019320 was provided on August 2, 2006. The Custodian, therefore, did provide access to these records, although such access was not within the statutorily mandated seven (7) business days.
5. With regard to the Complainant's request to inspect the ordinance, certification and resolution in reference to Summons No. MTC019320, the Custodian certified that no certification or resolution exists because the motor vehicle incident which gave rise to the summons occurred on a county road. The Custodian further certifies that the Police Department provided a copy of the relevant ordinance on August 2, 2006. The Custodian, therefore, did provide access to these records, although such access was not within the statutorily mandated seven (7) business days.

6. As previously discussed herein, the availability of records pursuant to discovery or other court rule does not preclude the availability of the same records pursuant to OPRA. Mid-Atlantic Recycling Technologies, Inc., v. City of Vineland, 222 F.R.D. 81 (Div. NJ, 2004). Therefore, the Custodian unlawfully denied access to the disposition of the Municipal Court matter adjudicating Summons No. MTC019320. The Custodian should, therefore provide access to the requested record. **The Custodian shall disclose the requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g.**
7. **The Custodian shall comply with item #6 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
8. Because the Complainant failed to respond to the Custodian's request for clarification of the records sought, the Custodian did not unlawfully deny access to the requested records. See Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-226 (January 2006).⁵
9. Because N.J.S.A. 47:1A-10 exempts from disclosure personnel or pension records, but permits disclosure of certain limited information, including a "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received," awards and commendations are personnel records pursuant to N.J.S.A. 47:1A-10 and do not fall within any of the types of records permitted to be disclosed. Therefore, the Custodian did not unlawfully deny access to these records.
10. Records pertaining to disciplinary actions are personnel records which are exempt from disclosure pursuant to N.J.S.A. 47:1A-10. Moreover, to the extent that no records exist which are responsive to the Complainant's request for records of OPRA complaints filed within the last ten (10) years, the Custodian has not unlawfully denied access to such records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
11. The Council defers analysis and determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access

⁵ Thomas Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231 (January 2006).

under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

March 3, 2008

Council's Interim Order distributed to the parties.

March 6, 2008

Custodian's response to the Council's Interim Order attaching the following:

- Letter from the Custodian to the Complainant dated March 6, 2008.
- Transcript of Docket for Complaint No. MTC019320.

The Custodian certifies that she has provided the requested record to the Complainant via certified mail on March 6, 2008.

Analysis

Whether the Custodian complied with the Council's February 27, 2008 Interim Order?

The Custodian responded in writing to the Council's February 27, 2008 Interim Order two (2) days after receipt of the Council's order, certifying that the requested record had been provided to the Complainant via certified mail. Therefore, the Custodian has complied with the Council's February 27, 2008 Interim Order by releasing the requested record to the Complainant and providing a subsequent certification to the GRC within the five (5) business days ordered by the GRC.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has complied with the Council's February 27, 2008 Interim Order by releasing the requested record to the Complainant and providing a subsequent certification to the GRC within the five (5) business days ordered by the GRC.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008



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GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

February 27, 2008 Government Records Council Meeting

Robert Vessio
Complainant

Complaint No. 2006-130

v.

Township of Manchester
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council ("Council") considered the February 20, 2008 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. Because the Custodian failed to provide a written response to the Complainant's June 15, 2006 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant's OPRA request was deemed denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Requests for records made to the Judiciary branch of New Jersey state government are not within the Council's authority to adjudicate. N.J.S.A. 47:1A-7. Because the requested tape recordings of the municipal court proceedings were made, maintained and kept on file by the Municipal Court Administrator, the Custodian should have provided a written response to the Complainant's OPRA request stating that she possessed no records responsive to this request. See N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i.
3. Because the request for names, addresses, and telephone numbers of individuals relevant to the adjudication of Summons No. MTC019320 is an invalid OPRA request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), and because the request for attorney notes and call of witnesses is a request for records which are exempt from the definition of a government record under N.J.S.A. 47:1A-1.1, the Custodian did not unlawfully deny access to these records.



4. The evidence of record further indicates that access to the requested officers' notes and reports regarding the incident that led to Summons No. MTC019320 was provided on August 2, 2006. The Custodian, therefore, did provide access to these records, although such access was not within the statutorily mandated seven (7) business days.
5. With regard to the Complainant's request to inspect the ordinance, certification and resolution in reference to Summons No. MTC019320, the Custodian certified that no certification or resolution exists because the motor vehicle incident which gave rise to the summons occurred on a county road. The Custodian further certifies that the Police Department provided a copy of the relevant ordinance on August 2, 2006. The Custodian, therefore, did provide access to these records, although such access was not within the statutorily mandated seven (7) business days.
6. As previously discussed herein, the availability of records pursuant to discovery or other court rule does not preclude the availability of the same records pursuant to OPRA. Mid-Atlantic Recycling Technologies, Inc., v. City of Vineland, 222 F.R.D. 81 (Div. NJ, 2004). Therefore, the Custodian unlawfully denied access to the disposition of the Municipal Court matter adjudicating Summons No. MTC019320. The Custodian should, therefore provide access to the requested record. **The Custodian shall disclose the requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g.**
7. **The Custodian shall comply with item #6 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
8. Because the Complainant failed to respond to the Custodian's request for clarification of the records sought, the Custodian did not unlawfully deny access to the requested records. See Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-226 (January 2006).¹
9. Because N.J.S.A. 47:1A-10 exempts from disclosure personnel or pension records, but permits disclosure of certain limited information, including a "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received," awards and commendations are personnel records pursuant to N.J.S.A. 47:1A-10 and do not fall within any of the types of records permitted to be

¹ Thomas Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231 (January 2006).

disclosed. Therefore, the Custodian did not unlawfully deny access to these records.

10. Records pertaining to disciplinary actions are personnel records which are exempt from disclosure pursuant to N.J.S.A. 47:1A-10. Moreover, to the extent that no records exist which are responsive to the Complainant's request for records of OPRA complaints filed within the last ten (10) years, the Custodian has not unlawfully denied access to such records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
11. The Council defers analysis and determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

Interim Order Rendered by the
Government Records Council
On The 27th Day of February, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Government Records Council

Decision Distribution Date: March 3, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 27, 2008 Council Meeting**

**Robert J. Vessio¹
Complainant**

GRC Complaint No. 2006-130

v.

**Township of Manchester (Ocean)²
Custodian of Records**

Records Relevant to Complaint: The Complainant requests inspection of:

1. Summons No. MTC019320³ State v. Vessio, tape recordings of municipal trial from 12/7/2005, 1/26/2006 and 3/1/2006,
2. Names, addresses and telephone numbers of those individuals relevant to the case, including attorney notes and/or call of witnesses pertaining to Summons No. MTC019320,
3. Officer's notes and reports by officers that assisted Ptl. Brook at the incident pertaining to Summons noted above,
4. Ordinance, certification and resolution as per Summons No. MTC019320,
5. Disposition by the Municipal Court of proceedings pursuant to Summons MTC019320,
6. Manchester Township Municipal Court personnel information including title, salaries and overtime pay pertaining to 2005 contract year,
7. Manchester Township police personnel data, including officer names, titles, rank, annual pay and overtime pay by name, title and rank for 2005,
8. Manchester Township police officer awards and commendations by local, county, state and national citations, for 2005 and
9. All OPRA complaints filed against Manchester Township and disciplinary actions against Manchester Police Department within the last 10 years.

Request Made: June 15, 2006⁴

Response Made: July 18, 2006

Custodian: Marie S. Pellecchia, Municipal Clerk, Manchester Township

GRC Complaint Filed: June 30, 2006

¹ No legal representation listed on record.

² Represented by Guy P. Ryan Esq. of Secare, Delanoy, Martino & Ryan (Toms River, NJ).

³ The Complainant's OPRA request refers to this as "Summons No. MTC0193Z0" while the Township's responses refer to it as "Summons MTC019320."

⁴ Complainant asserts that he filed his OPRA request on June 16, 2006, however, the official OPRA request form is date stamped June 15, 2006.

Background

June 16, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests inspection of the records relevant in a letter attached to an official OPRA request form.

June 30, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request.
- Copy of Summons No. WTC019320.

The Complainant states that he did not receive a response to his OPRA request, resulting in a denial of the request.

July 18, 2006

Offer of Mediation sent to both parties. The Custodian agrees to mediate this complaint. The Complainant does not respond to the Offer of Mediation.

July 18, 2006

Letter from Felicia Baber, Manchester Township Municipal Court Administrator, to the Complainant. The Court Administrator responds to the Complainant's OPRA request twenty-two (22) business days after the request, stating that she attempted to telephone the Complainant on July 6, 2006, July 7, 2006 and July 11, 2006 regarding the Complainant's request for court records. The Court Administrator also states that she left several messages on the Complainant's answering machine.

The Court Administrator states that a copy of the requested Summons is available for the Complainant's inspection at any time and requests that the Complainant telephone the court to schedule an appointment to listen to the recording of the court sessions. The Court Administrator states that it is still unclear exactly which session the Complainant seeks. The Court Administrator notes that the remaining items requested by the Complainant are not court records.

July 31, 2006

Letter from Sabina Skibo, Deputy Clerk of Manchester Township, to the Complainant. The Deputy Clerk states that the Complainant inspected a copy of the Summons provided by the Police Department on June 15, 2006 and notes that requests to the Court must be made on the court request form which was previously provided to the Complainant. The Deputy Clerk states that the Court Administrator previously contacted the Complainant regarding this request for court records. The Deputy Clerk notes that clarification is necessary regarding the Summons number requested because the Complainant provided conflicting Summons numbers.

The Deputy Clerk also requests clarification regarding the Complainant's request for personnel data regarding whether the Complainant seeks data for Officer Brooks or the entire Manchester Police Department.

The Deputy Clerk states that the only OPRA complaint filed against Manchester Township in the past ten years was the current one initiated by the Complainant. The Deputy Clerk requests clarification as to whether the Complainant seeks records pertaining to disciplinary actions against Officer Brooks or the entire Police Department.

The Deputy Clerk contends that the request was, in fact, answered within the seven (7) business days required by OPRA.⁵

August 1, 2006

Memorandum from Custodian's Counsel to Custodian. The Custodian's Counsel advises that records for Items No. 1 and No. 5 (summons and disposition) should be made available. The Custodian's Counsel also states that requested records for Items No. 2, No. 3 and No. 4 (personal information on individuals involved in the municipal court proceeding, officers' notes and reports, ordinances) should also be produced unless they have been disposed of following discovery, which would warrant a "no records responsive" reply. The Custodian's Counsel states that the request for Items No. 6 and No. 7 (police personnel data) are unclear and must be clarified.

The Custodian's Counsel asserts that N.J.S.A. 47:1A-10 applies to records Item No. 8 (officer awards and commendations). The Custodian's Counsel also asserts that N.J.S.A. 47:1A-1, State v. Kuszubinski, 177 N.J. Super. 136, 138 (Law Div. 1980) and Dixon v. Rutgers, 215 N.J. Super. 333, 339 (App. Div. 1987) support non-disclosure of information "that would violate the citizen's reasonable expectation of privacy." N.J.S.A. 47:1A-1. The Custodian's Counsel asserts that police officers have a legitimate expectation of privacy in their personnel files which should protect the disclosure of home addresses, commendations, awards and so on.

The Custodian's Counsel states that police disciplinary records requested in the first part of Item No. 9 are part of an internal affairs process and are confidential pursuant to N.J.S.A. 40A:14-181.⁶ The Custodian's Counsel states that there are no records responsive to part two of Item No. 9 (OPRA complaints filed with Manchester Township) because there have been no prior OPRA complaints filed against Manchester Township since OPRA's inception on July 8, 2004.⁷

August 2, 2006

Letter from Pat Mongiardini of the Manchester Township Police Department to the Custodian attaching records relevant to Items No. 1 and 3 (summons and officers' notes) and No. 4 (ordinance) for inspection and stating that Item No. 8 (police officer awards and commendations) is not a public record pursuant to N.J.S.A. 47:1A-10. The

⁵ There is no evidence in the record which provides proof of a response in writing to the OPRA request within seven (7) business days.

⁶ The statute requires that internal affairs records are confidential and permits disclosure in extremely limited circumstances.

⁷ OPRA became law in July, 2002.

Manchester Police Department also asserts that disciplinary actions are considered confidential by N.J.S.A. 40A:14-181 and that there have been no OPRA complaints filed against Manchester Police in regard to Item No. 9.

August 3, 2006

Letter from the Deputy Clerk to the Complainant. The Deputy Clerk notes that on August 2, 2006, a call was placed to the Complainant and a message left on the Complainant's answering machine regarding the Complainant's OPRA request. The Deputy Clerk also encloses the August 1, 2006 memorandum from Custodian's Counsel to the Custodian.

August 15, 2006

Request for the Statement of Information sent to the Custodian via facsimile.

August 16, 2006

Letter from the Custodian to the GRC. The Custodian requests an extension of time to submit the SOI because she will be away from August 18, 2006 through August 28, 2006.

August 16, 2006

Facsimile from the GRC to the Custodian. The GRC grants the Custodian an extension until September 5, 2006 to file the SOI.

September 1, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Copy of memorandum from Manchester Township Court Administrator to the Custodian dated June 5, 2006.
- Complainant's OPRA request dated June 16, 2006.
- Copy of letter from the Court Administrator to the Complainant dated July 18, 2006.
- Copy of letter from Deputy Clerk to the Complainant dated July 31, 2006.
- Copy of memorandum from Custodian's Counsel to the Custodian dated August 1, 2006.
- Copy of memorandum from Pat Mongiardini of the Manchester Township Police Department to the Custodian dated August 2, 2006.
- Copy of letter from Manchester Township Deputy Clerk to the Complainant dated August 3, 2006.
- Copy of facsimile from GRC Executive Director to the Custodian dated August 16, 2006.
- Copy of letter from the Custodian to the Complainant dated September 1, 2006.
- Copy of Motor Vehicles Statutes.
- Copy of Summons # MTC019320.
- Copy of New Jersey Automated Traffic System General Inquiry page for Summons #MTC019320.

Request Item No. 1

The Custodian certifies that Summons # MTC019320 was provided to the Complainant on August 2, 2006.

The Custodian also states that the Court Administrator attempted to telephone the Complainant on July 6, 2006 and July 7, 2006 regarding the tape recordings of court proceedings which took place on December 7, 2005, January 28, 2006 and March 1, 2006. The Custodian also states that the Court Administrator left messages on July 6, 2006 and July 7, 2006 but received no response. The Custodian also states that the Court Administrator sent a letter to the Complainant on July 18, 2006 requesting that the Complainant call the court to schedule an appointment to listen to the tapes. The Custodian states that the Court Administrator received no response to her request that the Complainant schedule an appointment to listen to the tapes.

Request Item No. 2

The Custodian states that on July 31, 2006, the Complainant was informed that the names, addresses and telephone numbers of individuals with information relating to the Complainant's case was being verified. The Custodian also states that access to personal names, addresses and telephone numbers was denied because they were considered discovery and were available to the Complainant prior to the hearing.

The Custodian states that the attorney's notes requested by the Complainant were denied because they were considered discovery and were available from the police or the prosecutor prior to the hearing.

Request Item No. 3

The Custodian failed to indicate a reason why the requested officer's notes or reports by police at the time of the incident were not provided to the Complainant.

Request Item No. 4

The Custodian states that a verbal response was given to the Complainant that no records responsive to the request exist.

Request Item No. 5

The Custodian states that a copy of the Municipal Court disposition of the Complainant's case was offered to the Complainant for his inspection, but that the Complainant refused to accept it because it was not certified. However, the Custodian notes that the Complainant requested only the opportunity to inspect the court disposition.

Request Items No. 6 and No. 7

The Custodian notes that the Complainant was asked to clarify his requests for Municipal Court personnel, titles, salary, and overtime paid for 2005, as well as for the names, titles, rank, annual pay and overtime pay of Manchester Township police personnel, but that the Complainant failed to clarify these requests.

Request Item No. 8

The Custodian notes that the Manchester Township police awards and commendations requested by the Complainant are not subject to disclosure under N.J.S.A. 47:1A-10.

Request Item No. 9

The Custodian notes that a response asserting that no other OPRA complaints exist and that complaints against the police department are exempt from disclosure pursuant to N.J.S.A. 40A:14-181 was provided to the Complainant in writing on July 31, 2006.

The Custodian contends that the Complainant's OPRA request is frivolous because he has only requested to examine records, does not seek copies of the requested records and has failed to respond to requests for clarification. The Custodian also contends that the Complainant's OPRA request has resulted in substantial disruption of operations for the Township. The Custodian further requests that the GRC take into consideration that the request is substantially disrupting agency operations.

Analysis

Whether the Custodian's response to the OPRA request was timely?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefore ...” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA requires that a custodian must grant access, deny access, seek clarification or request an extension of the statutorily mandated response time in writing within seven (7) business days from receipt of a request. N.J.S.A. 47:1A-5.i., see Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007) and Paff v. Bergen County Prosecutors Office, GRC Complaint No. 2005-115 (March 2006). Pursuant to N.J.S.A. 47:1A-5.g., if a custodian is unable to fulfill an OPRA request, that custodian shall promptly return the request form with a written explanation as to why the records are unavailable. A custodian's failure to respond in writing to a records request within the required seven (7) business days results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. Moreover, a custodian is statutorily mandated to seek clarification for any requests deemed broad or unclear within seven (7) business days.

There is no evidence in the record before the Council of a timely written response from the Custodian to the Complainant's OPRA request. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request until July 18, 2006, twenty-two (22) business days following the initial request results in a deemed denial of access pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. If the Custodian required clarification of the request, she should have requested such clarification within the statutorily mandated seven (7) business day period. See Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007); Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006).

Because the Custodian failed to provide a written response to the Complainant's June 15, 2006 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant's OPRA request was deemed denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

Further, OPRA provides that:

“Notwithstanding the provisions of [OPRA] or any other law to the contrary, the personnel ... *records* of any *individual* in the possession of a public agency, ... *shall not be considered a government record and shall not be made available for public access, except ... an individual’s name, title, salary, payroll record, length of service, date of separation and the reason therefore ... personnel or pension records of any individual ... when required to be disclosed by another law ... data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment ... shall be a government record.*” (Emphasis added.) N.J.S.A. 47:1A-10.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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 pursuant to N.J.S.A. 47:1A-1.1. 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

Following is a breakdown of the Complainant’s OPRA request and the Custodian’s responses:

Record Requested	Provided	When	Reason for Non-Disclosure
1. a. Summons #MTC019320. b. Tapes of Municipal Trial on December 7, 2005, January 26, 2006, and March 1, 2006.	Provided part a. Did not provide part b.	8/2/06	Summons disclosed. The Custodian states that she received no response from the Complainant to call and make an appointment to listen to the tapes requested in part b.
2. Names, addresses, and telephone numbers of individuals relevant to Summons #MTC019320, including attorney notes and call of witnesses.	Not provided.		The Custodian states that access to names, addresses and telephone numbers was denied because this information is considered part of discovery which was available to the Complainant prior to the municipal court hearing. The Custodian states

			that attorney notes are also considered discovery and were available to the Complainant prior to the municipal court hearing.
3. Officers' notes and reports regarding the incident that led to Summons # MTC019320.	Provided.	8/2/06	(Records were disclosed)
4. Ordinance, Certification and Resolution in reference to Summons #MTC019320.	Not Provided.		The Custodian states that no Certification or resolution exists because the incident occurred on a county road. However, the Manchester Township Police Department provided a motor vehicle statute for inspection on August 2, 2006.
5. Disposition by the Municipal Court	Not Provided.		The Custodian states that the disposition of the Municipal Court action was offered to Complainant at the completion of the Municipal Court hearing, but the Complainant refused to accept the disposition because it was not certified.
6. Municipal Court personnel information including title, salaries and overtime pay in 2005.	Not Provided.		The Custodian states that she requested clarification of this request but the Complainant did not respond.
7. Manchester Township police personnel information, including names, titles, rank, and overtime pay in 2005.	Not Provided.		The Custodian states that she requested clarification of this request but the Complainant did not respond. Additionally, the Custodian states that portions of these records are not subject to disclosure under <u>N.J.S.A. 47:1A-10</u> .
8. Manchester Township police officer awards and commendations locally, by state, county or national in 2005.	Not Provided.		The Custodian states that these records are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u> ; moreover, disclosure of the requested records violates a citizen's reasonable expectation of privacy; therefore, these records are not public records.

<p>9. Manchester Township police department disciplinary actions and OPRA complaints filed within the last 10 years.</p>	<p>Not Provided.</p>		<p>The Custodian states that disciplinary actions are considered confidential by <u>N.J.S.A. 40A:14-181</u> and there have been no OPRA complaints filed against Manchester Police.</p>
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Request Item No. 1 (Summons, tape recordings of trial)

Requests for records made to the Judiciary branch of New Jersey state government are not within the Council’s authority to adjudicate. N.J.S.A. 47:1A-7. Because the requested tape recordings of the municipal court proceedings were made, maintained and kept on file by the Municipal Court Administrator, the Custodian should have provided a written response to the Complainant’s OPRA request stating that she possessed no records responsive to this request. See N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i.

Request Item No. 2 (Names, addresses, telephone numbers of individuals relevant to the municipal court case, including attorney notes and call of witnesses)

The Custodian denied access to the requested names, addresses and telephone numbers of those individuals relevant to the case, including attorney notes and/or call of witnesses pertaining to Summons No. MTC019320, stating that these records were available to the Complainant through discovery at the time of his municipal court trial. OPRA contains no exemption from disclosure for records which are available through discovery pursuant to litigation.

Moreover, in Mid-Atlantic Recycling Technologies, Inc., v. City of Vineland, 222 F.R.D. 81 (Div. NJ, 2004), the City of Vineland sought a protective order precluding the plaintiff from requesting records under OPRA and stating that this practice circumvents the Federal Rules of Civil Procedure. The defendant essentially wanted to bar the plaintiff from conducting discovery outside the limitations set forth by Federal Rules of Civil Procedure. The court held that “Federal Rules of Civil Procedure do not act as an automatic bar of a litigant’s rights to obtain or seek documents under a public record access statute such as OPRA.” *Id.* at 87. The court also noted that OPRA contains exemptions that can allow a public agency to deny access to “records falling within attorney-client privilege. N.J.S.A. 47:1A-1.” *Id.* at 87.

However, the request for names, addresses and telephone numbers of individuals relevant to the adjudication of Summons No. MTC019320 is not a request for identifiable records but is instead a request for information. The New Jersey Appellate Division has concluded that OPRA does not contemplate “[w]holesale requests for general information to be analyzed, collated and compiled by the responding government entity.” MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534, 549 (App. Div. 2005).

In MAG, the Division of Alcoholic Beverage Control sought to revoke MAG's liquor license for various violations. Trying to establish a defense of selective prosecution, MAG filed an OPRA request with the Division, seeking "all documents or records ... that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person [who], after leaving the licensed premises, was involved in a fatal auto accident," and "all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity." *Id.* at 539-40. MAG's request did not identify any specific case by name, date, docket number or any other citation, but instead demanded that:

“the documents or records should set forth the persons and/or parties involved, the name and citation of each such case, including unreported cases, the dates of filing, hearing and decision, the tribunals or courts involved, the substance of the allegations made, the docket numbers, the outcome of each matter, the names and addresses of all persons involved, including all witnesses and counsel, and copies of all pleadings, interrogatory answers, case documents, expert reports, transcripts, findings, opinions, orders, case resolutions, published or unpublished case decisions, statutes, rules and regulations.” *Id.* at 540.

The court found that this was an invalid OPRA request with which the Custodian was not obligated to comply. *Id.* at 553. The court found it very significant that MAG “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.” *Id.* at 549. Because MAG failed to identify any particular documents by name, type of document, date range, or any other identifying characteristic, the custodian would have been required:

“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....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.” *Id.*

The court therefore found that “MAG's request was not a proper one for specific documents within OPRA's reach, but rather a broad-based demand for research and analysis, decidedly outside the statutory ambit.” *Id.* at 550.

In MAG, the court observed that “[f]ederal courts, considering the permissible scope of requests for government records under the Freedom of Information Act [FOIA], 5 U.S.C.A. § 522, have repeatedly held that the requested record must 'be reasonably identified as a record not as a general request for data, information and statistics’” *Id.* at 548 (quoting Krohn v. Dep't of Justice, 202 U.S. App. D.C. 195, 628 F.2d 195, 198 (D.C. Cir. 1980)). The court therefore held that OPRA does not compel government to review its files and analyze, collate or compile data. *Id.* at 549-50.

The request for names, addresses and telephone numbers of individuals relevant to the adjudication of Summons No. MTC019320 is therefore an invalid OPRA request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534, 549 (App. Div. 2005).

The Complainant's request for attorney notes and call of witnesses is, moreover, a request for records which are exempt from the definition of a government record under OPRA as attorney work product subject to attorney client privilege. N.J.S.A. 47:1A-1.1 exempts from the definition of government record any record which is within the attorney-client privilege. The Appellate Division has held that:

“[i]n performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other intangible ways.” Miller v. J.B. Hunt Transport, Inc., 339 N.J. Super. 144,148 (App. Div. 2001) (citing to Hickman, *supra*, 329 U.S. at 510-511, 67 S. Ct. at 393, 91 L. Ed. at 462.)

“In order for the work product doctrine to apply, the materials must have been prepared in anticipation of litigation and not in the ordinary course of business.” Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997). However, a document may be found to have been prepared in anticipation of litigation even though litigation had not been commenced or even threatened when the document was prepared. Miller, 339 N.J. Super. at 149 (App. Div. 2001). Moreover, “a statement or other document will be considered to have been prepared in anticipation of litigation if the ‘dominant purpose’ in preparing the document was concern about potential litigation and the anticipation of litigation was ‘objectively reasonable’.” Id. at 150.

Attorney notes including the call of witnesses at trial are “materials . . . prepared in anticipation of litigation” as contemplated by the New Jersey Supreme Court in Payton, *supra*. As such, they are exempt from the definition of “government record” pursuant to the exemption for attorney-client privilege at N.J.S.A. 47:1A-1.1. The Custodian did not, therefore, unlawfully deny access to these records.

Because the request for names, addresses, and telephone numbers of individuals relevant to the adjudication of Summons No. MTC019320 is an invalid OPRA request pursuant to MAG Entertainment, *supra*, and because the request for attorney notes and call of witnesses is a request for records which are exempt from the definition of a government record under N.J.S.A. 47:1A-1.1, the Custodian did not unlawfully deny access to these records.

Request Item No. 3 (Police Officer notes, reports)

The evidence of record further indicates that access to the requested officers' notes and reports regarding the incident that led to Summons No. MTC019320 was provided on August 2, 2006. The Custodian, therefore, did provide access to these records, although such access was not within the statutorily mandated seven (7) business days.

Request Item No. 4 (Ordinance, certification and resolution)

With regard to the Complainant's request to inspect the ordinance, certification and resolution in reference to Summons No. MTC019320, the Custodian certified that no certification or resolution exists because the motor vehicle incident which gave rise to the summons occurred on a county road. The Custodian further certifies that the Police Department provided a copy of the relevant ordinance on August 2, 2007. The Custodian, therefore, did provide access to these records, although such access was not within the statutorily mandated seven (7) business days.

Request Item No. 5 (Disposition by the Municipal Court of the proceedings pursuant to Summons No. MTC019320)

The evidence of record indicates that the Complainant requested inspection of the disposition of the Municipal Court matter adjudicating Summons No. MTC019320. The Custodian's Counsel noted that this record was offered to the Complainant at the close of the court hearing, but that the Complainant rejected the record because it was not certified.

As previously discussed herein, the availability of records pursuant to discovery or other court rule does not preclude the availability of the same records pursuant to OPRA. Mid-Atlantic Recycling Technologies, Inc., v. City of Vineland, 222 F.R.D. 81 (Div. NJ, 2004). Therefore, the Custodian unlawfully denied access to the disposition of the Municipal Court matter adjudicating Summons No. MTC019320. The Custodian should, therefore provide access to the requested record.

Request Item No. 6 (Manchester Township Municipal Court personnel information) and Request Item No. 7 (Manchester Township police personnel data)

The evidence of record indicates that on July 31, 2006, the Custodian requested, but did not receive clarification of the Complainant's request for Municipal Court personnel information, including title, salaries and overtime pay in 2005 and for Manchester Township police personnel information, including names, titles, rank and overtime pay in 2005. This information is disclosable pursuant to N.J.S.A. 47:1A-10. However, because the Complainant failed to respond to the Custodian's request for clarification of the records sought, the Custodian did not unlawfully deny access to the

requested records. See Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-226 (January 2006).⁸

Request Item No. 8 (Manchester Township Police awards and commendations)

The Custodian denied access to the requested Manchester Township police officer awards and commendations locally, by state, county or national in 2005, stating that these records are exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and, moreover, that disclosure of the requested records would violate a citizen's reasonable expectation of privacy.

Because N.J.S.A. 47:1A-10 exempts from disclosure personnel or pension records, but permits disclosure of certain limited information, including "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received," awards and commendations are personnel records pursuant to N.J.S.A. 47:1A-10 and do not fall within any of the types of records permitted to be disclosed. Therefore, the Custodian did not unlawfully deny access to these records.

Request Item No. 9 (All OPRA complaints filed against Manchester Township and disciplinary actions filed against Manchester Police Department within last ten (10) years)

The Custodian denied access to the requested Manchester Township police department disciplinary actions and OPRA complaints filed within the last ten (10) years, stating that disciplinary actions are considered confidential by N.J.S.A. 40A:14-181. Moreover, the Custodian certifies that there have been no OPRA complaints filed against Manchester Police.

Records pertaining to disciplinary actions are personnel records which are exempt from disclosure pursuant to N.J.S.A. 47:1A-10. Moreover, to the extent that no records exist which are responsive to the Complainant's request for records of OPRA complaints filed within the last ten (10) years, the Custodian has not unlawfully denied access to such records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Whether the Custodian's actions rise to the level of a knowing and willful violation of the OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis and determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the

⁸ Thomas Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231 (January 2006).

totality of the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to provide a written response to the Complainant's June 15, 2006 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant's OPRA request was deemed denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Requests for records made to the Judiciary branch of New Jersey state government are not within the Council's authority to adjudicate. N.J.S.A. 47:1A-7. Because the requested tape recordings of the municipal court proceedings were made, maintained and kept on file by the Municipal Court Administrator, the Custodian should have provided a written response to the Complainant's OPRA request stating that she possessed no records responsive to this request. See N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i.
3. Because the request for names, addresses, and telephone numbers of individuals relevant to the adjudication of Summons No. MTC019320 is an invalid OPRA request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), and because the request for attorney notes and call of witnesses is a request for records which are exempt from the definition of a government record under N.J.S.A. 47:1A-1.1, the Custodian did not unlawfully deny access to these records.
4. The evidence of record further indicates that access to the requested officers' notes and reports regarding the incident that led to Summons No. MTC019320 was provided on August 2, 2006. The Custodian, therefore, did provide access to these records, although such access was not within the statutorily mandated seven (7) business days.
5. With regard to the Complainant's request to inspect the ordinance, certification and resolution in reference to Summons No. MTC019320, the Custodian certified that no certification or resolution exists because the motor vehicle incident which gave rise to the summons occurred on a county road. The Custodian further certifies that the Police Department provided a copy of the relevant ordinance on August 2, 2006. The Custodian, therefore, did provide access to these records, although such access was not within the statutorily mandated seven (7) business days.

6. As previously discussed herein, the availability of records pursuant to discovery or other court rule does not preclude the availability of the same records pursuant to OPRA. Mid-Atlantic Recycling Technologies, Inc., v. City of Vineland, 222 F.R.D. 81 (Div. NJ, 2004). Therefore, the Custodian unlawfully denied access to the disposition of the Municipal Court matter adjudicating Summons No. MTC019320. The Custodian should, therefore provide access to the requested record. **The Custodian shall disclose the requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g.**
7. **The Custodian shall comply with item #6 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
8. Because the Complainant failed to respond to the Custodian's request for clarification of the records sought, the Custodian did not unlawfully deny access to the requested records. See Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-226 (January 2006).⁹
9. Because N.J.S.A. 47:1A-10 exempts from disclosure personnel or pension records, but permits disclosure of certain limited information, including a "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received," awards and commendations are personnel records pursuant to N.J.S.A. 47:1A-10 and do not fall within any of the types of records permitted to be disclosed. Therefore, the Custodian did not unlawfully deny access to these records.
10. Records pertaining to disciplinary actions are personnel records which are exempt from disclosure pursuant to N.J.S.A. 47:1A-10. Moreover, to the extent that no records exist which are responsive to the Complainant's request for records of OPRA complaints filed within the last ten (10) years, the Custodian has not unlawfully denied access to such records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
11. The Council defers analysis and determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order in this matter.

⁹ Thomas Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231 (January 2006).

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February 20, 2008