



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

May 28, 2008 Government Records Council Meeting

Joseph A. Elcavage
Complainant

Complaint No. 2006-64

v.

West Milford Township
Custodian of Record

At the May 28, 2008 public meeting, the Government Records Council (“Council”) considered the May 21, 2008 Supplemental 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 Complainant’s requests in Items #1, #3 and #4 is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and the Council’s decision in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006).
2. Because the Custodian certified that no records responsive to the Complainant’s request exist for Items #1, #3, #4 and #6, and because the Custodian certified that with respect to Item #2 concerning Councilman Warden’s personal e-mail account there are no records responsive to the Complainant’s request, and because the Custodian certified all e-mails in Councilman Warden’s township e-mail account were made available to the Complainant, the Custodian has met her burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access was authorized by law.



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 28th Day of May, 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, Secretary
Government Records Council

Decision Distribution Date: June 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2008 Council Meeting**

**Joseph A. Elcavage¹
Complainant**

GRC Complaint No. 2006-64

v.

**West Milford Township²
Custodian of Records**

Records Relevant to Complaint: The Complainant requests to view the following records:

1. All documents created by James Warden regarding the investigation of Robert Nolan and the Hatch Act. This will include, but not be limited to, all documentation, telephone notes, e-mails and other communications provided to Mr. Semrau.
2. All e-mails to or from James Warden for the period commencing February 18, 2006 through the date of this request. This includes e-mail from the West Milford computer system, Warden's personal computer(s) as well as any computer made available by his employer.
3. All memos, letters, telephone notes and any other written correspondence made by Warden in his capacity as a councilman or made by him referring to any township official or volunteer for the period commencing January 1, 2005 through the date of this request.
4. All memos, letters, telephone notes and any other written correspondence made by any township official or volunteer at the request of Warden for the period commencing January 1, 2005 through the date of this request.
6. All documentation to or from Warden regarding 192 Highcrest Drive.³

Request Made: March 13, 2006

Response Made: March 17, 2006

Custodian: Antoniette Battaglia

GRC Complaint Filed: March 22, 2006

Background

March 13, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to the complaint listed above on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by Fred Semrau, Esq., of Dorsey & Semrau (Boonton, NJ).

³ The OPRA request which gave rise to this complaint also included one (1) other item, Item #5, that is not now contested by the Complainant.

March 13, 2006

Facsimile transmission from the Custodian to West Milford Township Councilman James Warden. The Custodian requests the Councilman review the Complainant's OPRA request and advise her if he has any information pertinent to the request.

March 15, 2006

Letter from Councilman Warden to the Custodian. The Councilman replies to the Custodian's inquiry regarding information the Councilman has pertinent to the Complainant's OPRA request.

March 17, 2006

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian informs the Complainant that his request is very broad and therefore it was difficult for her to discern exactly which records the Complainant was seeking. The Custodian advises the Complainant that she has contacted Councilman Warden with respect to the Complainant's request, and that she has determined that with respect to the Complainant's request for Items #1, #3, #4 and #6, there are no records responsive to the Complainant's request. With respect to Item #2, the Custodian informs the Complainant that he may view the Councilman's township e-mail account. The Custodian further informs the Complainant that the Councilman does not have any e-mails responsive to the Complainant's request in the Councilman's personal e-mail account.⁴

March 22, 2006

Letter from the Complainant to the Custodian. The Complainant disputes the Custodian's assertion that several records requested by the Complainant are not in the possession of Councilman Warden. To support his contention, the Complainant encloses an e-mail from the Township Engineer to a resident in the community dated March 1, 2006 which indicates a copy was sent to Councilman Warden.

March 22, 2006

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

- E-Mailed OPRA request dated March 13, 2006
- Custodian's response to the Complainant's OPRA request dated March 17, 2006
- Letter from the Complainant to the Custodian dated March 22, 2006

The Complainant states that he submitted his OPRA request on March 13, 2006 for the records relevant to this complaint. The Complainant also states that he received a response from the Custodian that alleged Councilman Warden did not have any of the requested records except for those which were requested by the Complainant in Item #5

⁴ The Custodian also addressed Item #5 of the Complainant's March 13, 2006 OPRA request; however, that item is not contested in the instant complaint.

of his OPRA request. The Complainant states that he sent a letter to the Custodian dated March 22, 2006, wherein he informed the Custodian that her response to his OPRA request was not responsive.

The Complainant asserts that he was able to obtain a copy of one of the documents responsive to his request from another township source. The Complainant alleges that this is proof of a clear violation of OPRA. The Complainant requests that the GRC find Councilman Warden, whom he names as de facto custodian, in violation of the law. The Complainant further requests that the GRC levy the maximum fine permissible against the Councilman.

March 22, 2006

Offer of Mediation sent to both parties.

March 22, 2006

The Custodian agrees to mediate this complaint.

March 30, 2006

The Complainant agrees to mediate this complaint.

March 30, 2006

The complaint is forwarded to the Office of Dispute Resolution for mediation.

February 15, 2008

The Office of Dispute Resolution refers the complaint back to the GRC for adjudication.

February 19, 2008

Request for the Statement of Information sent to the Custodian.

February 26, 2008

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

- Complainant's OPRA request dated March 13, 2006
- Fax from the Custodian to Councilman Warden dated March 13, 2006
- Letter from Councilman Warden to the Custodian dated March 15, 2006
- Custodian's response to the Complainant's OPRA request dated March 17, 2006⁵

The Custodian certifies that her search for the requested records involved submitting a request to Councilman Warden for access to the requested records and obtaining a reply from the Councilman containing documents responsive to the Complainant's request.

⁵ The Custodian attached additional e-mails and documents to the SOI; however, these items all appear to be related to Item #5 of the Complainant's March 13, 2006 OPRA request, an item that is not contested by the Complainant in this complaint.

The Custodian also certifies that no records responsive to the Complainant's request have been destroyed and therefore the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management has not been triggered in this matter.

The Custodian certifies that all records responsive to the Complainant's request in existence were accumulated and made available to the Complainant in their entirety and without any redactions. The Custodian further certifies that the Complainant did not view any of the records made available for the Complainant's inspection.

April 24, 2008

Facsimile transmission from the GRC to the Custodian. The GRC requests a certification from the Custodian delineating which records were made available for the Complainant's inspection and which records did not exist or were otherwise denied.

April 28, 2008

Facsimile transmission from the Custodian to the GRC. The Custodian forwards a certification in which she certifies that with respect to Item #2 of the Complainant's request, all e-mails in Councilman Warden's township e-mail account from February 18, 2006 to the date of the Complainant's OPRA request have been made available to the Complainant. The Custodian also certifies that with respect to all e-mails in Councilman Warden's personal e-mail account during the same time, there are no records responsive to the Complainant's request. The Custodian further certifies that there are no records responsive to the Complainant's request for Item #1, Item #3, Item #4 and Item #6.

Analysis

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.

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. 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 Complainant’s requests in Items #1, #3 and #4 seek all documentation, telephone notes, e-mails memos, letters and any other communications concerning several various matters. The requests also encompass communications from Councilman Warden concerning any township official or volunteer and communications made by any township official or volunteer at the request of the Councilman. The nature of these requests is such that the Custodian could not possibly be sure that she identified all of the records responsive to the request.

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 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.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005)⁶, the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”⁷

In Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006), where the Complainant requested “all delinquent report notices” compiled over a thirteen month period, the GRC found that the Custodian properly denied access to records because the Complainant’s request “does not meet the standard for a proper OPRA request in that the documents the Complainant is requesting are not readily identifiable and his request is of the nature of a blanket request for a class of various documents.”

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent.

Here, the Complainant's requests in Items #1, #3 and #4 are overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, *supra* and Bent, *supra* and the Council's decisions in Asarnow, *supra*.

The Custodian, even though she was not legally required to do so, found that there were no records responsive to the Complainant's request for Items #1, #3 and #4 of the Complainant's OPRA request. The Custodian also found that there were no records responsive to the Complainant's request for Item #6. With respect to Item #2 of the Complainant's request, the Custodian found that there were no records responsive to the request for e-mails in Councilman Warden's personal account and that all e-mails in Councilman Warden's township account were made available to the Complainant.

The Complainant asserts that he was able to obtain a copy of one of the denied documents responsive to his request from another township source and alleges that this is proof of a clear violation of OPRA. The document the Complainant refers to is an e-mail from the Township Engineer to a township resident dated March 1, 2006 in which Councilman Warden was copied via his township account. The Complainant attached a copy of this e-mail to his Denial of Access complaint as proof that he was unlawfully denied at least one (1) record. The Custodian, however, certified that all e-mails in the Councilman's township account had been made available to the Complainant.

Accordingly, because the Custodian certified that no records responsive to the Complainant's request exist for Items #1, #3, #4 and #6, and because the Custodian certified that with respect to Item #2 concerning Councilman Warden's personal e-mail account there are no records responsive to the Complainant's request, and because the Custodian certified all e-mails in Councilman's Warden's township e-mail account were made available to the Complainant, the Custodian has met her burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access was authorized by law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's requests in Items #1, #3 and #4 is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and the Council's decision in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006).

2. Because the Custodian certified that no records responsive to the Complainant's request exist for Items #1, #3, #4 and #6, and because the Custodian certified that with respect to Item #2 concerning Councilman Warden's personal e-mail account there are no records responsive to the Complainant's request, and because the Custodian certified all e-mails in Councilman Warden's township e-mail account were made available to the Complainant, the Custodian has met her burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access was authorized by law.

Prepared By:

John E. Stewart
Case Manager/*In Camera* Attorney

Approved By:

Catherine Starghill, Esq.
Executive Director

May 21, 2008