



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

June 11, 2009 Government Records Council Meeting

Virginia Ellen Jeffries
Complainant

Complaint No. 2007-126

v.

East Orange Board of Education (Essex)
Custodian of Record

At the June 11, 2009 public meeting, the Government Records Council (“Council”) considered the May 20, 2009 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 original Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i and Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-202 (February 2009).
2. Because the Complainant’s OPRA request is not a request for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, said request is invalid and the original Custodian has not unlawfully denied access to the requested records pursuant to 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), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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 11th Day of June, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: June 16, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 11, 2009 Council Meeting**

**Virginia Ellen Jeffries¹
Complainant**

GRC Complaint No. 2007-126

v.

**East Orange Board of Education (Essex)²
Custodian of Records**

Records Relevant to Complaint: All records pertaining to the matter of a Parent Teacher Association investigation billed by Board Counsel, Schwartz Simon Edelstein Celso & Kessler, LLC, under the cross reference number “EO082” for the years 2005 to present.

Request Made: April 30, 2007

Response Made: May 8, 2007 and May 14, 2007

Custodian: Victor R. Demming³

GRC Complaint Filed: May 25, 2007⁴

Background

April 30, 2007

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

May 8, 2007

Original Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that the Board Attorney is gathering the requested records, which should be available by May 14, 2007. The Custodian states that once she receives the records responsive to the Complainant’s request, she will contact the Complainant regarding a date and time for inspection or the cost for providing copies.

May 11, 2007

E-mail from Complainant to Custodian. The Complainant states that she filed her OPRA request because of the length of time it has taken to obtain the requested records

¹ No legal representation listed on record.

² Represented by John E. Croot, Esq., of Schwartz Simon Edelstein Celso & Kessler, LLC (Morristown, NJ).

³ The Custodian at the time of the Complainant’s OPRA request was Jamie L. Adams.

⁴ The GRC received the Denial of Access Complaint on said date.

by other means. The Complainant states that she will make an appointment to review the records responsive as soon as the Custodian receives said records from the Board Attorney.

May 11, 2007

E-mail from original Custodian to Complainant. The Custodian states that because the Complainant submitted her OPRA request on April 30, 2007, the Custodian had until May 9, 2007 to make the records available or to advise when said records could be made available. The Custodian states that she e-mailed the Complainant on May 8, 2007 to indicate that the records are being compiled and should be available on May 14, 2007. The Custodian states that once she receives the records, she will contact the Complainant regarding a date and time to inspect said records.

May 14, 2007

Original Custodian's subsequent response to the Complainant's request. The Custodian denies access to the Complainant's OPRA request on the basis that said request is stated so broadly that the records responsive are exempt from disclosure under the attorney-client privilege. The Custodian states that she will attempt to provide any records responsive should the Complainant submit a more specific request for records.

May 14, 2007

E-mail from Complainant to Custodian. The Complainant states that her request was for records in possession of the Board of Education, not its attorneys. The Complainant contends that the following records should be readily available under OPRA:

1. All records not covered by the attorney-client privilege
2. All records that generated the Parent Teacher Association ("PTA") investigation
3. All records of the results of the PTA investigation
4. All records regarding the public disclosure of the PTA investigation

The Complainant asks the Custodian to contact her if more clarification is required.

May 14, 2007

E-mail from original Custodian to Complainant. The Custodian states that the Complainant's request pertains to records held by the Board Attorney relating to an investigation.

May 14, 2007

E-mail from Complainant to Custodian. The Complainant asks the Custodian if she is referring to N.J.S.A. 47:1A-3⁵, regarding access to records of an investigation in progress. The Complainant asks the Custodian to identify what records pertaining to the PTA investigation are not exempt from disclosure.

⁵ N.J.S.A. 47:1A-3.a.

May 14, 2007

E-mail from original Custodian to Complainant. The Custodian states that she will forward the Complainant's e-mail dated May 14, 2007 to the Board Attorney. The Custodian states that the records requested are not maintained on file by the district itself, but are maintained by the Board Attorney.

May 14, 2007

E-mail from Complainant to Custodian. The Complainant asserts that file number EO082 is a billed legal matter that was paid with public funds and therefore records that are not available to the public are contrary to the OPRA process. The Complainant asks who determined that the records should be maintained by the attorney and why. The Complainant asks why the district does not maintain any records on a matter paid with public funds.

May 25, 2007

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

- Complainant's OPRA request dated April 30, 2007
- Custodian's response to the Complainant's request dated May 8, 2007
- E-mail from Complainant to Custodian dated May 11, 2007
- E-mail from Custodian to Complainant dated May 11, 2007
- Custodian's subsequent response to the Complainant's request dated May 14, 2007
- E-mail from Complainant to Custodian dated May 14, 2007
- E-mail from Custodian to Complainant dated May 14, 2007
- E-mail from Complainant to Custodian dated May 14, 2007
- E-mail from Custodian to Complainant dated May 14, 2007
- E-mail from Complainant to Custodian dated May 14, 2007⁶

The Complainant states that she submitted her OPRA request on April 30, 2007. The Complainant states that she received a written response to her request dated May 8, 2007 in which the Custodian indicated that the requested records could be made available by May 14, 2007. The Complainant states that the Custodian denied access to the requested records via e-mail dated May 14, 2007.

June 12, 2007

Offer of Mediation sent to both parties.

June 14, 2007

Complainant's signed Agreement to Mediate.

June 19, 2007

Custodian's signed Agreement to Mediate.

⁶ The Complainant attaches additional records to her Denial of Access Complaint. However, said records are not relevant to the adjudication of this complaint.

June 19, 2007

Complaint referred to the Office of Dispute Settlement for mediation.

June 20, 2007

Letter of Representation from Custodian's Counsel.

November 7, 2008

Complaint referred back to the GRC for adjudication.

November 24, 2008

Letter from GRC to Complainant. The GRC asks the Complainant to amend her Denial of Access Complaint in the event that some issues were resolved during the mediation process and no longer require adjudication.⁷

January 6, 2009

Request for the Statement of Information sent to the Custodian.

January 7, 2009

E-mail from GRC to Custodian's Counsel. The GRC grants an extension of time until the close of business on January 21, 2009 for the Custodian to submit his completed Statement of Information.⁸

January 20, 2009

Custodian's Statement of Information ("SOI"). The current Custodian submits an SOI that discusses events which took place during the mediation process.

January 29, 2009

Letter from GRC to Custodian's Counsel. The GRC states that the Custodian's SOI dated January 20, 2009 includes communications between the Board of Education and the Complainant which took place during the mediation process. The GRC states that pursuant to the Uniform Mediation Act, the Council cannot consider any evidence arising from the mediation process. The GRC states that because the Complainant did not amend her complaint, the GRC must adjudicate the complaint based on the facts surrounding the original request and denial of said request. As such, the GRC requests that the Custodian submit a revised SOI addressing the Board of Education's legal basis for the denial of access at the time of the denial.

February 2, 2009

E-mail from GRC to Custodian's Counsel. The GRC grants an extension of time until the close of business on February 13, 2009 for the Custodian to submit his completed SOI.⁹

⁷ The Complainant did not submit a complaint amendment to the GRC.

⁸ In response to Council's verbal request via telephone on January 7, 2009.

⁹ In response to Council's verbal request via telephone on February 2, 2009.

February 13, 2009

Letter from Custodian's Counsel to GRC. Counsel states that his office just became aware that the Custodian will be out of the office until February 17, 2009 due to the Board's holiday closing schedule. Counsel requests an extension of time until the close of business on February 18, 2009 to submit the Custodian's SOI.

February 18, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 30, 2007
- E-mail from Complainant to Custodian dated May 11, 2007
- E-mail from Custodian to Complainant dated May 11, 2007
- E-mail from Custodian to Complainant dated May 14, 2007
- E-mail from Complainant to Custodian dated May 14, 2007
- E-mail from Custodian to Complainant dated May 14, 2007
- E-mail from Complainant to Custodian dated May 14, 2007
- E-mail from Custodian to Complainant dated May 14, 2007
- E-mail from Complainant to Custodian dated May 14, 2007

The current Custodian certifies that the Board of Education received the Complainant's OPRA request on April 30, 2007. The Custodian certifies that the Board of Education initially responded to the Complainant's OPRA request via e-mail dated May 8, 2007 and again on May 14, 2007. The Custodian certifies that the Complainant's request seeks internal files maintained by the Board's Counsel, Schwartz Simon Edlestein Celso & Kessler, LLC and are not files maintained by the Board. The Custodian certifies that the Board does not maintain any files or documents corresponding to file number EO082.

The Custodian states that OPRA serves to make government records "readily accessible for inspection, copying or examination." N.J.S.A. 47:1A-1. The Custodian states that pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 547 (App. Div. 2005), "OPRA does not require records custodians to conduct research among its records for a requestor and correlate data from various government records in the custodian's possession." The Custodian also states that pursuant to MAG, "agencies are required to disclose only 'identifiable' government records not otherwise exempt. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. In short, OPRA does not countenance open-ended searches of an agency's files."

The Custodian states that the court in MAG held that the custodian properly denied an OPRA request seeking "all documents or records evidencing that the [Alcoholic Beverage Control] sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity." The Custodian states that the court reasoned that the request was overly broad because the request failed to specifically name or otherwise identify the government records sought.

The Custodian asserts that the Complainant's OPRA request in this instant matter is similar to the OPRA request at issue in MAG because the Complainant failed to identify the specific records she sought. The Custodian contends that the Complainant's request served as a general request for all records regarding a PTA investigation and failed to specifically name or otherwise identify any records. As such, the Custodian asserts that the Board properly responded to the Complainant's OPRA request on May 14, 2007 when the original Custodian advised the Complainant that her request was overly broad and requested that the Complainant provide more specific information regarding the records sought.

Further, the Custodian certifies that the records requested were not records maintained by the Board of Education, nor was the number EO082 used or otherwise of any significance to the Board of Education. The Custodian certifies that the requested records represent the internal file maintained by the Board's Counsel, Schwartz Simon Edlestein Celso & Kessler, LLC, which the Custodian asserts is a private law firm and not a public agency. Thus, the Custodian asserts that the records maintained by the Board's Counsel are not government records pursuant to N.J.S.A. 47:1A-1.1. because said records are not maintained by a public agency.

However, the Custodian contends that even if said records are considered to be government records, said records are not subject to public access because said records represent attorney work product and attorney-client privilege because they are maintained by the Board's Counsel.

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.

OPRA also mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Additionally, N.J.S.A. 47:1A-5.i. provides that a custodian must inform the requestor when the requested records will be made available and that failure to provide the records by such date results in a “deemed” denial.

In this instant complaint, the current Custodian certified that the Board of Education received the Complainant’s OPRA request on April 30, 2007. The Custodian certified that the original Custodian responded to the Complainant’s request via e-mail dated May 8, 2007, the sixth (6th) business day following the Custodian’s receipt of said request, in which the Custodian requested an extension of time until May 14, 2007 to fulfill said request.

In Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-202 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request. In said response, the Custodian indicated that she required an extension of time to fulfill the request and provided an anticipated date upon which she would provide the requested records to the Complainant. The Council held that the Custodian properly requested an extension of the statutorily mandated seven (7) business day response time because the Custodian notified the Complainant in writing within said time period that she required an extension of time and provided a date on which the records would be provided.

The facts in Johnson, supra, are similar to those in this instant complaint. Specifically, the original Custodian in this instant matter provided the Complainant with a written response to her OPRA request on the sixth (6th) business day following receipt of the request in which the Custodian requested an extension of time and provided an anticipated date on which she would fully respond to the Complainant’s request.

Therefore, because the original Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i and Johnson, supra.

Ultimately, the original Custodian denied access to the Complainant’s OPRA request via e-mail dated May 14, 2007 on the basis that said request is so broadly stated that the requested records are exempt from public access under the attorney-client privilege. Additionally, the original Custodian requested that the Complainant be more

specific as to the particular records sought. The Complainant provided the following clarification regarding the records sought:

1. All records not covered by the attorney-client privilege
2. All records that generated the Parent Teacher Association (“PTA”) investigation
3. All records of the results of the PTA investigation
4. All records regarding the public disclosure of the PTA investigation

To determine whether a request is broad or unclear, the Council looks to the courts for guidance. Specifically, 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),¹⁰ 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.”¹¹ (Emphasis added).

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).”

In this complaint, the Complainant requested all records pertaining to the matter of a PTA investigation billed by Board Counsel under the cross reference number “EO082” for the years 2005 to present. The Complainant failed to specifically name or otherwise identify the specific records sought in her request and subsequent clarification

¹⁰ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹¹ As stated in Bent, *supra*.

of her request. The Complainant's request is open-ended and seeks access to any and all records pertaining to a PTA investigation.

Therefore, because the Complainant's OPRA request is not a request for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, said request is invalid and the original Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra and Schuler, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the original Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i and Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-202 (February 2009).
2. Because the Complainant's OPRA request is not a request for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, said request is invalid and the original Custodian has not unlawfully denied access to the requested records pursuant to 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), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2009