



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

September 30, 2009 Government Records Council Meeting

Richard Redden
Complainant

Complaint No. 2007-206

v.

Cape May County Prosecutor's Office
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council ("Council") considered the September 23, 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. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because item no. 1 of the Complainant's OPRA request sought access to an entire Prosecutor's Office file, which comprised three (3) banker boxes and 2,594 pages, and because said request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records pursuant to Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009), and Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (July 2008), said request is 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), 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, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).



3. Besides not providing a timely response to the Complainant's OPRA request, the Custodian has not unlawfully denied access to item nos. 2-14 of the Complainant's OPRA request.

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 September, 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, Secretary
Government Records Council

Decision Distribution Date: October 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Richard Redden¹
Complainant**

GRC Complaint No. 2007-206

v.

**Cape May County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint: Regarding indictment no. 86-0101-I:

1. Entire criminal file
2. Cape May County Police continuation reports
3. Cape May County Appeal Update Sheet
4. Court Action Sheet
5. Intake screening printout sheet
6. Criminal case history printout sheet
7. Criminal action ex parte order
8. Cape May County pre-complaint internal report
9. Cape May County Police incident reports
10. Pre-indictment peal form
11. Cape May County Prosecutor's administrative dismissal reports
12. Cape May County Prosecutor's plea retraxit form
13. Cape May County Prosecutor's plea proceedings transcripts
14. Cape May County Prosecutor's sentencing transcripts

Request Made: July 30, 2007

Response Made: September 11, 2007 and September 19, 2007

Custodian: J. David Meyer

GRC Complaint Filed: August 29, 2007

Background

July 30, 2007³

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.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Custodian certifies in his Statement of Information dated September 24, 2007 that he received the Complainant's OPRA request on August 1, 2007.

August 29, 2007

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

- Complainant’s OPRA request dated July 30, 2007
- New Jersey State Prison Postage Remit dated July 30, 2007
- Certified Mail receipt date stamped received by Cape May County on August 1, 2007

The Complainant states that he submitted his OPRA request on July 30, 2007. The Complainant states that he has not received a response to said request.

September 7, 2007

Offer of Mediation sent to both parties.

September 11, 2007

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the twenty-eighth (28th) business day following receipt of such request. The Custodian states that he is searching through three (3) banker boxes of records regarding the Complainant’s criminal case. The Custodian states that most of the records are not available under OPRA, but he will provide said records as discovery. The Custodian states that he is in the process of reviewing and copying the requested records. The Custodian states that once the copying is complete, he will send the Complainant a bill for the copying charges.

September 11, 2007

Custodian’s signed Agreement to Mediate.

September 11, 2007⁴

Complainant’s signed Agreement to Mediate.

September 19, 2007

Letter from Custodian to Complainant. The Custodian states that the Complainant has received the requested records per discovery. The Custodian requests payment of \$259.40.

September 19, 2007

Request for the Statement of Information (“SOI”) sent to the Custodian.

September 24, 2007

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated July 30, 2007
- Custodian’s response to the Complainant’s OPRA request dated September 11, 2007
- Letter from Custodian to Complainant dated September 19, 2007

⁴The GRC received the Complainant’s signed Agreement to Mediate on September 25, 2007.
Richard Redden v. Cape May County Prosecutor’s Office, 2007-206 – Findings and Recommendations of the Executive Director

The Custodian certifies that he received the Complainant's OPRA request on August 1, 2007. The Custodian certifies that he determined that said request was more accurately a criminal discovery request than an OPRA request. The Custodian asserts that with the exception of the court filed records, such as complaints, indictments, orders, and judgment of conviction, the bulk of the requested records are exempt from disclosure under N.J.S.A. 47:1A-1.1. as criminal investigatory records. The Custodian certifies that he determined to provide the requested records as discovery pursuant to N.J. Court Rule 3:13-3.

Additionally, the Custodian certifies that his search for the requested file from 1986 determined that the criminal case involved a murder prosecution and the file, in its entirety, was located in the secured homicide file storage facility. The Custodian certifies that staff retrieved the three (3) banker boxes of records. The Custodian certifies that he reviewed the records during the last week in August and identified the records not to be provided via discovery, such as attorney's notes, intra-office memoranda and correspondence. The Custodian certifies that an investigator was then assigned to the task of copying the records subject to discovery.

Further, the Custodian certifies that during the compilation of the requested records, he discovered that he had inadvertently failed to respond to the Complainant's OPRA request. The Custodian certifies that he provided the Complainant with a written response on September 11, 2007 and ultimately released 2,594 pages of records to the Complainant on September 19, 2007.

Additionally, the Custodian certifies homicide files must be retained permanently.

September 26, 2007

Complaint transferred to mediation.

October 30, 2007

Letter from Complainant to GRC. The Complainant states that on September 26, 2007, he received the following records pursuant to his OPRA request:

1. Mr. Thomas Carter's police statements, plea agreement transcripts, police detective written reports, PCR motion documents, grand jury transcripts, psychological evaluation reports, copy of indictment documents, copy of search warrants, and copy of items seized.
2. Mr. William Polini's pretrial motions, police statements, police detective written reports, trial transcripts, crime scene photos, sentencing transcripts, PCR motion documents, copy of indictment documents, copy of search warrants, and copy of items seized.
3. Mr. Arthur Todd Vitola's sentencing transcript, plea agreement documents, police statements, police detective written reports, copy of indictment documents, copy of search warrants, and copy of items seized.
4. Mr. Fred Sower's police statements, hospital reports, and police detective written reports.
5. Mr. Richard Redden's PCR motion documents, appeal motion documents to New Jersey Supreme Court, Attorney General reply motion, Federal Writ Habeas

Corpus motion documents, appeal from Habeas Corpus Writ motion documents, 3rd Circuit Court Order denying Habeas Corpus Writ with Judge's opinion of the appeal documents.

April 25, 2009

Complaint referred back to the GRC for adjudication.

June 25, 2009

Letter from GRC to Complainant. The GRC asks the Complainant if he would like to amend his complaint in the event that some issues were resolved during the mediation process and no longer require adjudication.⁵

July 16, 2009

Letter from GRC to Custodian. The GRC requests an itemized list of all records responsive to the Complainant's OPRA request that the Custodian did not provide to the Complainant, in whole or in part, including the legal basis for said denial.

July 31, 2009

Custodian's Certification. The Custodian certifies that the records withheld from disclosure are:

1. A manila folder entitled "Correspondence: Miner [sic] Homicide" containing both letter and phone memo slips regarding contacts with insurance company investigators and/or adjustors;
2. A manila folder entitled "Defense Attorney Richard Redden, Correspondence" containing a letter from Deputy Public Defender Harry W. Leszchyn, Jr.;
3. A manila folder entitled "Defense Attorney Todd Vitola, Correspondence" containing a letter and phone memo concerning Mr. Vitola's assigned attorney, Linda Lawhun, Esq.;
4. A manila folder entitled "Defense Attorney Wm. Polini Jr., Correspondence" containing a letter from Mr. Polini's attorney, Francis J. Hartman, Esq.;
5. A manila folder entitled "Victim/Witness Sowers" containing several letter concerning a Violent Crimes Compensation Board claim submitted on behalf of Ferdinand Sowers;
6. A manila folder entitled "RW Notes – Redden" containing a number of yellow legal pads with handwritten pre-trial and trial notes of First Assistant Prosecutor Robert Wells and several typewritten memoranda containing notes of both F.A.P. Wells and Prosecutor John Corino;
7. A manila folder entitled "Agg Factors 11" containing a yellow legal pad with handwritten notes that appear to have been authored by FAP Wells, an unsigned consent order, and a copy of a Defense Expert report authored by Bernard Loigman, Ed.D., Consulting Psychologist;
8. A manila folder entitled "Constitutional Issues 12, 13, 14, 16, 16" containing handwritten notes and a copy of a "Notice of Motion to Strike the Death Penalty as Unconstitutional";
9. A manila folder entitled "Case Notes" containing various handwritten notes of FAP Wells concerning searches and complaints and copies of supporting documents;

⁵The Complainant did not respond to the GRC's letter.

10. A manila folder entitled “Prosecutor and Investigator Notes” containing both typewritten and handwritten notes of Prosecutor Corino and others;
11. A manila folder entitled “Richard Redden, Defense Motions and Request for Discovery” containing a yellow legal pad with handwritten notes that appear to have been authored by FAP Wells; and
12. A manila folder entitled “Pros. Corino Notes to Wells & Barnett” containing both handwritten and typewritten notes and memoranda of Prosecutor Corino.

The Custodian contends that any challenge to the propriety of his determination that the records listed above are not subject to discovery must be resolved by the court pursuant to a Motion to Compel Discovery pursuant to NJ Court Rule 3:13-3(g) since said records are clearly criminal investigatory records excluded from disclosure pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian asserts that the Complainant’s OPRA appeal should be denied.

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 ... A government record shall not include...criminal investigatory records...[which] means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor 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 thereof ...” 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 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 GRC first turns to the issue of whether the Custodian responded to the Complainant's OPRA request in a timely manner.

OPRA 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. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this instant complaint, the Custodian certified that he received the Complainant's OPRA request on August 1, 2007. The Custodian certified that he provided the Complainant with a written response to his request on September 11, 2007, the twenty-eighth (28th) business day following the Custodian's receipt of said request. In said response, the Custodian indicated that most of the requested records were not available under OPRA, but that the Custodian would provide said records to the

⁶ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Complainant as discovery. The Custodian certified that he released 2,594 pages of records to the Complainant on September 19, 2007.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

Next, the GRC examines whether the Custodian unlawfully denied access to the requested records. The Custodian asserts that most of the requested records are not available under OPRA because they are criminal investigatory records, and thus decided to release said records to the Complainant as discovery. However, the Custodian did not require the Complainant to submit a new request under the NJ Court Rules governing discovery requests. The Custodian ultimately disclosed some of the requested records to the Complainant pursuant to his OPRA request, but identified it as discovery. 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). Although the Custodian claims that he released said records as discovery, the fact remains that the Custodian released said records after the Complainant filed an OPRA request. Therefore, the records disclosed were pursuant to the OPRA request, not discovery.

However, in item # 1 of the Complainant's OPRA request, the Complainant sought access to his entire criminal case file for indictment no. 86-0101-I. Both the New Jersey courts and the GRC have addressed the level of specificity required for an OPRA request to be considered valid.

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),⁷ 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."⁸

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent, supra.

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)."

Moreover, in a complaint similar to the complaint at issue here, Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009), the Complainant sought access to the Prosecutor's Office Case File Nos. 88005354 and 88006784 in their entirety. The Council held that the Complainant's request was overbroad. Also, in Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (July 2008), the Council held that because the records requested comprise an entire Somerset County Prosecutor's Office file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records.

Therefore, in this instant complaint, because item no. 1 of the Complainant's OPRA request sought access to an entire Prosecutor's Office file, which comprised three (3) banker boxes and 2,594 pages, and because said request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records pursuant to Morgano, supra, and Feiler-Jampel, supra, said request is invalid and the Custodian has lawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra.

As for the remaining items of the Complainant's OPRA request, the Complainant acknowledges that he received said records on September 26, 2007. Therefore, besides not providing a timely response to the Complainant's OPRA request, the Custodian has lawfully denied access to items 2-14 of the Complainant's OPRA request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because item no. 1 of the Complainant's OPRA request sought access to an entire Prosecutor's Office file, which comprised three (3) banker boxes and 2,594 pages, and because said request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records pursuant to Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009), and Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (July 2008), said request is 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), 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, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. Besides not providing a timely response to the Complainant's OPRA request, the Custodian has not unlawfully denied access to item nos. 2-14 of the Complainant's OPRA request.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009