



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

September 26, 2007 Government Records Council Meeting

William G. Lamboy
Complainant

Complaint No. 2007-67

v.

NJ Department of Transportation,
Motor Vehicle Commission
Custodian of Record

At the September 26, 2007 public meeting, the Government Records Council (“Council”) considered the September 19, 2007 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 did not provide the Complainant with a written response denying access to the requested records within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial.
2. Because the Complainant did not request an identifiable government record, and because the Custodian is not required to conduct research in response to an OPRA request, the Custodian has carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6, Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super 30 (October 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 26th Day of September, 2007

Vincent P. Maltese, 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: October 2, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 26, 2007 Council Meeting**

**William G. Lamboy¹
Complainant**

GRC Complaint No. 2007-67

v.

**NJ Department of Transportation, Motor Vehicle Commission²
Custodian of Records**

Records Relevant to Complaint: Copies of documentation (memoranda, correspondence, etc.) in which the Commission accepted “other documentation” to verify a driver’s identity. The request is limited to two (2) or three (3) circumstances in which the Commission used its discretionary authority to accept other documentation. Please redact personal information (driver names, addresses, and license numbers) in accordance with privacy laws.³

Request Made: December 27, 2006

Response Made: January 24, 2007 and January 25, 2007

Custodian: Joseph Bruno

GRC Complaint Filed: February 2, 2007

Background

December 27, 2006

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.

January 8, 2007

Custodian receives Complainant’s OPRA request dated December 27, 2006.

January 24, 2007

Letter from Regulatory Officer to Complainant in response to the Complainant’s OPRA request. The Regulatory Officer responds to the OPRA request on the eleventh (11th) business day following receipt of such request. The Regulatory Officer states that access to the requested records is denied because there are no records responsive to the request. The Regulatory Officer states that the Complainant has requested records that

¹ Represented by William Ray Lamboy, Esq.

² Represented by DAG Paul G. Witko, on behalf of the NJ Attorney General.

³ The Complainant also included the following statement with his OPRA request: “...my wife was denied a driver’s license renewal because she could not produce a certified marriage certificate, and the Customer Advocacy Office told us we had no choice but to apply for passport or get a court order.”

are not routinely maintained by the NJ Motor Vehicle Commission (“MVC”). The Regulatory Officer states that the MVC processes initial and renewal applications for driver’s licenses at many locations throughout the State and that discretion is exercised to approve exceptions (to the six (6) point identification system) and it is impossible to know exactly how many exceptions were processed for a person who lacked certain required documents. The Regulatory Officer states that the MVC does not maintain a central repository of exceptions and also does not maintain statistics on exceptions.

January 25, 2007

Custodian’s response to the OPRA request. The Custodian responds to the Complainant’s OPRA request on the twelfth (12th) business day following receipt of such request. The Custodian states the exact same information as the Regulatory Officer in his letter to the Complainant dated January 24, 2007.

February 2, 2007

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

- Complainant’s OPRA request dated December 27, 2006
- Custodian’s response to the OPRA request dated January 25, 2007⁴

The Complainant’s Counsel states that the Complainant submitted his OPRA request on or about December 28, 2006 (the request is dated December 27, 2006) and did not receive a response from the Custodian until January 25, 2007. Counsel asserts that the Custodian’s response is non-responsive and constitutes a wrongful denial of access.

Counsel states that the MVC refused to renew the Complainant’s wife’s license because her maiden name on her birth certificate did not match her married name on other identification documentation and she could not produce a certified marriage certificate with a state or municipal seal. Counsel states that N.J.A.C. 13:21-8.2(a)8 provides that “[c]ommission authorized personnel may review, approve or accept other documentation that proves the applicant’s identity and date of birth, and that the applicant’s presence in the United States is authorized under Federal Law.” Counsel states that upon contacting the MVC, the Customer Advocacy Unit informed the Complainant that his wife had no choice but to satisfy the MVC’s six (6) point identification standard. Counsel states that the Complainant then submitted his OPRA request.

Counsel contends that the Custodian’s response is not responsive to the Complainant’s request because the Complainant did not inquire how many exceptions were processed by the MVC nor did the Complainant request any statistics. Counsel asserts that the requested records exist because the Custodian stated that the MVC exercised the exception process at various levels of its organization. Counsel also contends that an MVC Regulatory Officer informed him that the Commission has an

⁴ The Complainant attaches additional records to his Denial of Access Complaint that are not relevant to the adjudication of this complaint.
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exception process to work with people who cannot strictly comply with the specific documentation in the six (6) point identification system.

Counsel requests that the GRC order the Custodian to release the requested records without delay. Counsel asserts that no attorney-client privilege or OPRA exemption applies to the requested records. Counsel states that if the MVC claims that no records exist, the Complainant requests copies of any non-privileged records relating to the MVC's various level exception process pursuant to N.J.A.C. 13:21-8.2(a)8. Additionally, Counsel also states that if the MVC asserts a privilege or an OPRA exemption to said records, the Complainant requests formal mediation.

February 21, 2007

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

March 1, 2007

Request for the Statement of Information sent to the Custodian.

March 2, 2007

Letter of Representation from Custodian's Counsel.

March 5, 2007

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

- Complainant's OPRA request dated December 27, 2006
- Custodian's response to the OPRA request dated January 25, 2007
- Letter from Regulatory Officer to Complainant dated January 24, 2007

The Custodian certifies that he received the Complainant's OPRA request on January 8, 2007. The Custodian certifies that the information requested is contained in the application for a driver's license, permit or non-driver identification card. The Custodian certifies that the MVC places handwritten notations on applications in which the applicant submitted other documentation in situations like the Complainant's wife to provide identity, date of birth and lawful presence in the United States under Federal Law. The Custodian also certifies that all MVC license, permit and non-driver identification card applications, including those with and without notations regarding the submission of other documentation, are stored on microfilm. The Custodian certifies that the records are not categorized based on the presence or absence of notations. Additionally, the Custodian certifies that since the MVC's six (6) point system went into effect, the MVC has processed and stored approximately five (5) million renewal and first time license, permit and non-driver identification cards. The Custodian certifies that the vast majority of such applications do not require the exercise of MVC discretion under N.J.A.C. 13:21-8.2(a)8 to establish the applicant's identity, date of birth and lawful presence in the United States under Federal Law.

The Custodian states that OPRA requires a requestor to specifically describe the records being sought. *See Gannett New Jersey Partners L.P. v. County of Middlesex*, 379 N.J. Super. 205, 211-12 (App. Div. 2005; *see also N.J.S.A. 47:1A-5.f.*). The Custodian

also states that in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005), the court held that agencies are required to disclose only identifiable government records.

The Custodian asserts that the Complainant's request does not identify a specific government record because the Complainant did not provide additional information such as the name, address and date of birth of the applicant whose record is being requested. The Custodian contends that without said information, the MVC would be required to search potentially millions of records to identify one (1) of a few records which may be responsive to the Complainant's OPRA request. The Custodian asserts that such a search would substantially disrupt the operations of the MVC office pursuant to N.J.S.A. 47:1A-5.g. As such, the Custodian certifies that the MVC informed the Complainant that there are no records responsive because the agency is not required to conduct an open-ended search of agency files for the requested records. The Custodian requests that the GRC dismiss this complaint and asserts that he has not knowingly and willfully denied access to the requested records.

March 20, 2007

The Complainant Counsel's response to the Custodian's SOI. The Complainant's Counsel contends that the MVC may require more documentation than handwritten notations on applications before the MVC grants an exception to the six (6) point identification system. Counsel states that the Complainant's request was based on the assumption that the MVC carefully documented the exceptions it granted, but the Custodian's SOI implies otherwise. Counsel states that if the Custodian certifies that the MVC does not retain records of the applicants to which it grants exceptions to the six (6) point identification system other than the handwritten notations on the application, the Complainant will withdraw his complaint. However, Counsel also states that the Complainant otherwise requests that the GRC conduct an investigation to determine whether the MVC retains records such as memoranda and correspondence in conjunction with granting exceptions to applicants and to order the Custodian to release such records.

March 30, 2007

Letter from Custodian's Counsel to GRC. The Custodian's Counsel states that the MVC understood the Complainant's OPRA request as one which sought records regarding the use of its discretion in two (2) or three (3) situations similar to that experienced by the Complainant's wife. Counsel asserts that the MVC interpreted the Complainant's request in such a way for two (2) reasons. First, Counsel states that the MVC had been in contact with the Complainant's Counsel several weeks prior to receiving the Complainant's OPRA request in an attempt to assist the Complainant's wife in satisfying the six (6) point identification system to renew her license. Second, Counsel states that the Complainant's OPRA request specifically referenced the Complainant's wife's situation when it stated, "...my wife was denied a driver's license renewal because she could not produce a certified marriage certificate, and the MVC Customer Advocacy Office told us we had no choice but to apply for passport or get a court order."⁵

⁵ As stated in the Custodian's Counsel's letter to the GRC dated March 30, 2007.

Counsel states that it appears as though the Complainant is modifying his request to seek records about any instance where the MVC exercised its discretion pursuant to N.J.A.C. 13:21-8.2(a)8. Counsel states that if the Complainant is now seeking records regarding exceptions granted pursuant to N.J.A.C. 13:21-8.2(a)8 in situations unlike his wife's, the Complainant can submit another OPRA request for said records without referencing his wife's situation.

Further, Counsel asserts that the MVC contacted the Complainant within the statutorily mandated seven (7) business days but did not receive any clarification regarding the records being sought. Counsel states that the Custodian then provided a written response to the Complainant's request on January 25, 2007. Counsel contends that the Custodian acted in good faith at all times in responding to the Complainant's OPRA request.

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 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 thereof ..." (Emphasis added.) N.J.S.A. 47:1A-5.g

Additionally, OPRA 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. 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 provides that if a Custodian is unable to comply with a records request, he must notify the Complainant in writing indicating a lawful reason for same pursuant to N.J.S.A. 47:1A-5.g. Additionally, OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days of receipt of said request. 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.

The Complainant states that he submitted his OPRA request on or about December 28, 2006. The Custodian certifies receiving said request on January 8, 2007. While the Custodian’s Counsel asserts that the Custodian contacted the Complainant within the statutorily mandated seven (7) business days, the Custodian certifies that he did not provide a written response denying access to the Complainant’s request until January 25, 2007, the twelfth (12th) business day following receipt of such request.

In Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-63 (July 2006), the Council held that:

...as the Custodian certifies that no records responsive to the Complainant’s March 6, 2006 request exist, the Custodian would not have unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-1.1, except that the Custodian’s failure to provide the Complainant with a written response to her request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, thus violating N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Similarly in this complaint, because the Custodian did not provide the Complainant with a written response denying access to the requested records within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial.

Further, the Custodian asserts that the Complainant’s request does not identify a specific government record because the Complainant did not provide additional information such as the name, address and date of birth of the applicant whose record is being requested. The Custodian contends that without said information, the MVC would

be required to search potentially millions of records to identify one (1) of a few records which may be responsive to the Complainant's OPRA request. The Custodian asserts that such a search would substantially disrupt the operations of the MVC office pursuant to N.J.S.A. 47:1A-5.g. As such, the Custodian certifies that the MVC informed the Complainant that there are no records responsive because the agency is not required to conduct an open-ended search of agency files for the requested records.

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 (March 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 (October 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

Therefore, because the Complainant did not request an identifiable government record, and because the Custodian is not required to conduct research in response to an OPRA request, the Custodian has carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6, Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super 30 (October 2005).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian did not provide the Complainant with a written response denying access to the requested records within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial.
2. Because the Complainant did not request an identifiable government record, and because the Custodian is not required to conduct research in response to an OPRA request, the Custodian has carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6, Mag Entertainment, LLC v.

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

⁷ As stated in Bent.

Division of Alcoholic Beverage Control, 375 N.J. Super 534 (March 2005)
and Bent v. Stafford Police Department, 381 N.J. Super 30 (October 2005).

Prepared By:

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Catherine Starghill, Esq.
Executive Director

September 19, 2007