



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

November 4, 2009 Government Records Council Meeting

Ali S. Morgano
Complainant

Complaint No. 2008-104

v.

Essex County Prosecutor's Office
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 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 Complainant's description of the record requested as Item #1 fails to identify with reasonable clarity the precise record sought, and the Custodian has certified that she cannot locate a specific identifiable government record responsive to the Complainant's request, the Custodian has met the burden of proof that access to this record was not unlawfully denied pursuant to the Superior Court decisions 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 New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the Custodian certified that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive for Item #2 of the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 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 4th Day of November, 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: November 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Ali S. Morgano¹
Complainant**

GRC Complaint No. 2008-104

v.

**Essex County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint:³

- 1) "Cheryl Johnson AKA Cheryl Harris June 9, 1988 Pretrial Plea and Bail arraignment '**ROR**' Prosecutor's recommendation Release Document."
- 2) "Cheryl Johnson AKA Cheryl Harris June 9, 1988 Pretrial Intervention Programs Prosecutor's Consent Recommendation Document."

Request Made: April 11, 2008

Response Made: April 18, 2008

Custodian: Executive Assistant Prosecutor Hilary L. Brunell

GRC Complaint Filed: May 20, 2008⁴

Background

April 11, 2008

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.

April 18, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same date the request was received. The Custodian denies the Complainant's request for Item #1 of the records relevant to the complaint because the records are part of a criminal investigatory file and comprise criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1.⁵ The Custodian also contends the requested records contain prosecutor's recommendations and as such are exempt from disclosure because they constitute deliberative material and therefore are not government records subject to disclosure pursuant to N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² Represented by Essex County Counsel (Newark, NJ).

³ The Complainant's OPRA request is quoted here as written by the Complainant because the Complainant has used terminology describing records that are not familiar to the GRC.

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

⁵ The Custodian means N.J.S.A. 47:1A-1.1.

The Custodian denies the Complainant's request for Item #2 of the records relevant to the complaint because the Custodian asserts that there are no records responsive to the Complainant's request. The Custodian also contends the requested records are part of a criminal investigatory file and comprise criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1.⁶ The Custodian further contends the requested records contain prosecutor's recommendations and as such are exempt from disclosure because they constitute deliberative material and therefore are not government records subject to disclosure pursuant to N.J.S.A. 47:1A-1.1.

May 20, 2008

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

- Four (4) page Transcript of Arraignment: State of New Jersey v. Cheryle [sic] R. Johnson, Superior Court of New Jersey, Criminal Division, Essex County, Indictment No. 442-2-89 dated March 2, 1989
- Complainant's OPRA request dated April 11, 2008
- The Custodian's response to the Complainant's OPRA request dated April 18, 2008

The Complainant states that he has been unlawfully denied access to the records requested because they are meant to be kept on file at the Essex County Criminal Division Manager's Office pursuant to "Pre-Trial Plea & Bail Arraignment 'ROR' Prosecutor's Recommendation Consent Release into the Pre-Trial Intervention program" under N.J.S.A. 3:28 (b)(c)(1). The Complainant purports to quote from this statute and goes on to cite the three (3) year suspension of proceedings provision for defendants accepted into a Pretrial Intervention ("PTI") program. The Complainant refers to a segment of the transcript he attached to the complaint wherein the court asks the defendant if she posted bail and the public defender interjects, "Judge, it indicates Pretrial Release Program, ROR."⁷ The Complainant also cites N.J.S.A. 3:28(h) as providing an affirmative duty for prosecutors to complete a consent application recommendation form within fourteen (14) days after defendant's "pre-trial plea & bail arraignment ROR release has been accepted by the court." The Complainant further contends that he is entitled to the requested records pursuant to discovery and N.J.S.A. 47: 1A-3.b. The Complainant states that, although the Custodian denied him the requested records because the Custodian alleges there are no records responsive to his request, N.J.S.A. 3:28 (b)(c)(1)(h) proves that the records exist.

September 16, 2008

Letter from the Complainant to the GRC. The Complainant requests that the GRC obtain from the Custodian a certification index table and forward a copy of it to him.

⁶ The Custodian means N.J.S.A. 47:1A-1.1.

⁷ ROR is an abbreviation for "released on own recognizance," i.e. the defendant is released on his/her promise to appear in lieu of bail in a criminal proceeding.

November 2, 2008

Letter from the Complainant to the GRC. The Complainant declines to participate in mediation.

November 10, 2008

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

November 17, 2008

Custodian’s SOI attaching the Custodian’s response to the OPRA request dated April 18, 2008. The Custodian certifies that her search for the requested records involved speaking with Homicide Section personnel and obtaining a file which could contain records responsive to the Complainant’s request. The Custodian also certifies that the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable to the records requested in this complaint.

The Custodian certifies that she received the Complainant’s OPRA request on April 18, 2008 and that she responded to the request on the same date it was received. The Custodian attaches a copy of her response. The Custodian certifies that Item #1 of the Complainant’s request was denied because the request was not stated with sufficient specificity to identify a record that may have been responsive to the Complainant’s request. The Custodian certifies that there are no records responsive to the Complainant’s request for Item #2.⁸

December 5, 2008

Letter from the Complainant to the GRC. The Complainant confirms that he has received the Custodian’s SOI. The Complainant requests a copy of the Custodian’s index table certification.

March 25, 2009

Letter from the GRC to the Complainant. The GRC acknowledges receipt of the Complainant’s December 5, 2008 correspondence to the GRC. The GRC informs the Complainant that it is not clear what the Complainant is seeking because the Custodian included a document index table as part of the SOI, on which the Custodian copied the Complainant. The GRC further informs the Complainant that if said table is missing from the SOI that the Complainant received, the Complainant should so advise the GRC and the GRC will send a copy of the table to him.

March 30, 2009

Letter from the Complainant to the GRC. The Complainant states that he is submitting additional arguments in support of his Denial of Access Complaint.

⁸ The Custodian further certifies that if the records do exist they would be exempt from disclosure as criminal investigatory records, or in the alternative, because the records would include opinion and recommendations they would be exempt as ACD material pursuant to N.J.S.A. 47:1A-1.1.
Ali S. Morgano v. Essex County Prosecutor’s Office, 2008-104 – Findings and Recommendations of the Executive Director

June 9, 2009⁹

Letter from the GRC to the Complainant. The GRC informs the Complainant that *N.J.A.C. 5:105 et seq.* provides for one (1) submission to the GRC from the Complainant (the Denial of Access Complaint) and one (1) submission to the GRC from the Custodian (the Statement of Information); therefore, his additional arguments will not be considered by the GRC unless they are in reply to new issues or arguments that were raised by the Custodian.¹⁰

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-1.1.

OPRA defines a government record as:

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 also provides that:

“[i]f an arrest has been made [the following information shall be made available to the public] the defendant’s name, age, residence, occupation, marital status and similar background information and the identity of the complaining party...the text of any charges...the identity of the investigating and arresting personnel and agency...the time and place of arrest...and information as to circumstances surrounding bail, whether it was posted and the amount thereof.” N.J.S.A. 47:1A-3.b.

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.

⁹ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

¹⁰ The Custodian did not raise any new issues or arguments.

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.

In the instant matter, the Complainant argued that he was unlawfully denied access to the requested records because he argued said records must be kept on file at the Essex County Criminal Division Manager’s Office pursuant to N.J.S.A. 3:28 (b)(c)(1). The Complainant also argued that N.J.S.A. 3:28(h) requires prosecutors to complete a “consent application recommendation” within fourteen (14) days after the court approves a defendant’s release on his/her own recognizance. The Complainant further argued that he is entitled to the requested records pursuant to discovery and N.J.S.A. 47: 1A-3.b. The Complainant stated that the Custodian averred that there are no records responsive to the Complainant’s request; however, the Complainant asserted that the statutes he cited proves there are records responsive to his request.

The Custodian certified that Item #1 of the Complainant’s request, the June 9, 1988 “Pretrial Plea and Bail Arraignment ROR Prosecutor’s Recommendation Release Document” for Cheryl Johnson (AKA Harris) was denied because the request was not stated with sufficient specificity to identify a record that may have been responsive to the Complainant’s request.

OPRA requests that fail to identify specific government records have been deemed as invalid requests under OPRA. 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),¹¹ 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.”¹²

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² 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..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

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)."

The Complainant, however, asserted that he provided proof that records responsive to his request exist. The Complainant cited to N.J.S.A. 3:28 (b)(c)(1), which he claimed proves that the requested records must be kept on file at the Essex County Criminal Division Manager's Office. The Complainant also cited to N.J.S.A. 3:28(h), which the Complainant argued requires prosecutors to complete a consent application recommendation within fourteen (14) days after the defendant's "pre-trial plea & bail arraignment ROR release" has been accepted by the court. The Complainant also referred to a segment of the transcript he attached to his complaint in which the public defender, in reply to the court's question concerning bail, mentions that the defendant was released ROR.

In his legal argument, the Complainant cited to sections of New Jersey Statutes that do not exist. The Complainant may be referring to the New Jersey Court Rules rather than statutes, but even the Court Rules do not support the Complainant's argument. R. 3:28 (b)(c)(1) does not exist; however, R. 3:28 (b) contains language very similar to that which was quoted by the Complainant concerning the three (3) year suspension of proceedings provision for defendants accepted into a PTI program. The Complainant argued that it means the records he requested must be kept on file at the Essex County Criminal Division Manager's Office, but the Rule's content is not even similar to the Complainant's interpretation. R. 3:28(h), contrary to the Complainant's assertion, does not require a prosecutor to complete a consent application recommendation within fourteen (14) days; the rule does not even mention such a document. Further, the public defender's statement as referenced in the transcript has no relevance to the record the Complainant requested. In fact, it is questionable whether the transcript even refers to the same person for whom the Complainant is requesting records because the name of the defendant on the transcript is spelled differently than the name or the alias of the person about whom the Complainant is requesting records.

The Complainant further argued that N.J.S.A. 47:1A-3.b. provides that certain information should have been disclosed to him. The Complainant cited the section of OPRA which he alleged was relevant to his request as follows:

“[i]f an arrest has been made [the following information shall be made available to the public] the defendant’s name, age, residence, occupation, marital status and similar background information and the identity of the complaining party...the text of any charges...the identity of the investigating and arresting personnel and agency...the time and place of arrest...*and information as to circumstances surrounding bail, whether it was posted and the amount thereof.*” (Emphasis added by the Complainant).

The Complainant argues that this provision entitles him to the Prosecutor’s Bail Arraignment **ROR** Recommendation Release Document and the Prosecutor’s Pretrial Intervention Program Consent Recommendation Document. Which are identified as Item #1 and Item #2 of the Complainant’s OPRA request, respectively. The complainant is incorrect. First, the cited section of OPRA provides for disclosure of specific information listed within the statute. Second, N.J.S.A. 47:1A-3.b. also states that “...the [listed information] concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a *request for such information* ... (Emphasis added.). The Complainant did not request any of the listed information; he requested two (2) putative documents.

Accordingly, contrary to the Complainant’s contention, the evidence he has submitted in his legal argument does not prove the records he requested exist.

Therefore, because the Complainant’s description of the record requested as Item #1 fails to identify with reasonable clarity the precise record sought, and the Custodian has certified that she cannot locate a specific identifiable government record responsive to the Complainant’s request, the Custodian has met the burden of proof that access to this record was not unlawfully denied pursuant to the Superior Court decisions in MAG, supra, Bent, supra, and New Jersey Builders Association, supra, and the Council’s decision in Schuler, supra.

Pursuant to N.J.S.A. 47:1A-1.1., a government record is only responsive to an OPRA request if it has “been made, maintained or kept on file...or has been received in the course of [the public agency’s] official business ...” The Custodian certifies that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive for Item #2, of the Complainant’s request. Further, the Complainant failed to provide any evidence to contradict the Custodian’s certification.

Because the Custodian certified that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive for Item #2 of the Complainant’s request, and because the Complainant has failed to provide any evidence to contradict the Custodian’s certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant

to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

The Custodian has sufficiently borne her burden of proving that the denial of access to Item #1 and Item #2 of the Complainant's request was authorized by law pursuant to N.J.S.A. 47:1A-6., therefore it is unnecessary to analyze whether the records were also exempt from disclosure as criminal investigatory records or ACD material pursuant to N.J.S.A. 47:1A-1.1.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's description of the record requested as Item #1 fails to identify with reasonable clarity the precise record sought, and the Custodian has certified that she cannot locate a specific identifiable government record responsive to the Complainant's request, the Custodian has met the burden of proof that access to this record was not unlawfully denied pursuant to the Superior Court decisions 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 New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the Custodian certified that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive for Item #2 of the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009