



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

November 19, 2008 Government Records Council Meeting

Dudley Burdge
Complainant

Complaint No. 2008-109

v.

NJ Department of State,
NJ Public Broadcasting Authority
Custodian of Record

At the November 19, 2008 public meeting, the Government Records Council (“Council”) considered the November 13, 2008 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 because the Custodian certified that he forwarded the Complainant’s OPRA request to the appropriate Custodian on April 24, 2008 and notified the Complainant in writing of such on the same date, the Custodian has not unlawfully denied access to the Complainant’s OPRA request and properly forwarded said request to the appropriate Custodian pursuant to N.J.S.A. 47:1A-5.h.

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 19th Day of November, 2008

Robin Berg Tabakin, Chair
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: November 20, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2008 Council Meeting**

**Dudley Burdge¹
Complainant**

GRC Complaint No. 2008-109

v.

**NJ Department of State, NJ Public Broadcasting Authority²
Custodian of Records**

Records Relevant to Complaint:

1. A list of all employees of the Foundation for New Jersey Public Broadcasting including salaries and bonuses.
2. A copy of materials provided to the Foundation employees concerning employee benefits.
3. A list of all contracts entered into by the Foundation and the amount of funds expended on contractual services from fiscal year 2005 to present.

Request Made: April 24, 2008

Response Made: April 24, 2008

Custodian: Stephen McPhillips

GRC Complaint Filed: May 30, 2008³

Background

April 24, 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 24, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day following receipt of such request. The Custodian states that access to the requested record is denied because the New Jersey Public Broadcasting Authority does not have jurisdiction over the records of the Foundation for New Jersey Public Broadcasting. The Custodian states that he will forward the Complainant's request to the Foundation.

¹ Represented by Annemarie Pinarski, Esq., of Weissman & Mintz, LLC (Somerset, NJ).

² Represented by DAG David A. Balaban, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

May 21, 2008

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

- Complainant’s OPRA request dated April 24, 2008
- Custodian’s response to the Complainant’s request dated April 24, 2008

The Complainant states that he submitted his OPRA request on April 24, 2008 and received the Custodian’s written response on the same day, in which the Custodian stated that he would forward the Complainant’s request to the Foundation for New Jersey Public Broadcasting. The Complainant states that to date he has not received the requested records. Additionally, the Complainant did not agree to mediate this complaint.

July 8, 2008

Request for the Statement of Information sent to the Custodian.

July 9, 2008

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated April 24, 2008
- Custodian’s response to the OPRA request dated April 24, 2008

The Custodian certifies that he received the Complainant’s OPRA request on April 24, 2008 and provided a written response on the same date. The Custodian certifies that the Complainant’s OPRA request seeks records of the Foundation for New Jersey Public Broadcasting which is an independent non-profit corporation organized under Title 15A of the New Jersey statutes. The Custodian certifies that the Foundation’s records are not made, maintained or kept on file by the New Jersey Public Broadcasting Authority.

July 11, 2008

Letter of representation from Custodian’s Counsel. Counsel requests a five (5) business day extension of time to supplement the Custodian’s Statement of Information.

July 11, 2008

Custodian’s supplement to his SOI. The Custodian states that because the requested records have never been made, maintained, kept on file or received in the course of official business by the New Jersey Public Broadcasting Authority, no search was undertaken to satisfy the records request.

July 14, 2008

Letter from GRC to Custodian’s Counsel. The GRC grants a five (5) business day extension of time for the Custodian to supplement the Statement of Information.

July 22, 2008

Custodian Counsel’s supplement to the Custodian’s SOI. Counsel states that there are no records responsive to the Complainant’s request on file with the New Jersey

Public Broadcasting Authority. Additionally, Counsel asserts that the Custodian has no obligation to search for records responsive to the Complainant's request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super., 534, 546-549 (App.Div. 2005) because said request is open-ended and relies upon the Custodian to extract and compile information. As such, Counsel contends that the Complainant's Denial of Access Complaint should be dismissed.

August 8, 2008

Letter from GRC to the Custodian. The GRC requests that the Custodian provide a legal certification indicating whether or not he forwarded the Complainant's OPRA request to the Foundation for New Jersey Public Broadcasting. The GRC also requests that the Custodian include any documentation indicating such transmittal.

August 11, 2008

Custodian's Certification. The Custodian certifies that he received the Complainant's OPRA request on April 24, 2008. The Custodian also certifies that on said date he personally delivered the Complainant's OPRA request to Dave Miller, Executive Vice President of the Foundation for New Jersey Public Broadcasting.

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 also states that:

"[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record." N.J.S.A. 47:1A-5.h.

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.

Additionally, OPRA provides that any employee of a public agency who receives an OPRA request must either direct the requestor to the appropriate custodian or forward said request to the custodian. N.J.S.A. 47:1A-5.h.

In this complaint, the Complainant states that he submitted his OPRA request on April 24, 2008. The Custodian certified that he received the Complainant’s request on April 24, 2008 and on the same date provided the Complainant with a written response denying access to the requested records on the basis that he does not maintain or have control over the Foundation for New Jersey Public Broadcasting’s records. The Custodian indicated in said response that he would forward the Complainant’s request to the Foundation. The Custodian certified that on April 24, 2008 he personally delivered the Complainant’s OPRA request to Dave Miller, Executive Vice President of the Foundation for New Jersey Public Broadcasting.

Therefore, because the Custodian certified that he forwarded the Complainant’s OPRA request to the appropriate Custodian on April 24, 2008 and notified the Complainant in writing of such on the same date, the Custodian has not unlawfully denied access to the Complainant’s OPRA request and properly forwarded said request to the appropriate Custodian pursuant to N.J.S.A. 47:1A-5.h.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian certified that he forwarded the Complainant’s OPRA request to the appropriate Custodian on April 24, 2008 and notified the Complainant in writing of such on the same date, the Custodian has not unlawfully denied access to the Complainant’s OPRA request and properly forwarded said request to the appropriate Custodian pursuant to N.J.S.A. 47:1A-5.h.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 12, 2008