



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

February 25, 2009 Government Records Council Meeting

David Nugent
Complainant

Complaint No. 2008-120

v.

Ocean County Community College
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 18, 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 because the Complainant’s OPRA request did not specify an identifiable government record, but instead sought information, the Complainant’s OPRA request is invalid. MAG Entertainment LLC. v. Div. 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).

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 25th Day of February, 2009

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: March 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

**David Nugent¹
Complainant**

GRC Complaint No. 2008-120

v.

**Ocean County Community College (Ocean)²
Custodian of Records**

Records Relevant to Complaint: The dates of attendance for fourteen (14) Ocean County College students, including the last date of attendance.

Request Made: April 16, 2008

Response Made: April 24, 2008

Custodian: Richard Parrish

GRC Complaint Filed: June 5, 2008³

Background

April 16, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter which does not specifically refer to OPRA.⁴

April 21, 2008

Letter from Carey Trevisan, Dean of Special Services, to the Complainant. Dean Trevisan states that he is treating the Complainant's April 16, 2008 letter as an OPRA request. Dean Trevisan states that he is forwarding this request to the Custodian.

April 24, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following the Custodian's receipt of such request. The Custodian states that access to the requested attendance dates is denied pursuant to the higher education exemption found in N.J.S.A. 47:1A-1.1. which deems confidential "information concerning student records *or* grievance *or* disciplinary proceedings against a student..." (Emphasis added). Finally, the Custodian states that because access to the requested records has been denied, the

¹ No legal representation listed on record.

² Represented by John C. Sahradnik, Esq. (Toms River, NJ).

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

⁴ The Complainant's April 16, 2008 letter was a rebuttal of a denial of access based on a prior request made by the Complainant's coworker at the *Viking News*, Suzanne Penna. The Complainant also attached an official OPRA request executed by someone else (Ms. Penna).

Complainant has a right to challenge the Custodian's decision in Superior Court or with the Government Records Council.

April 25, 2008

Letter from the Complainant to the Custodian. The Complainant states that he is in receipt of the Custodian's April 24, 2008 letter denying access to the requested attendance dates and that he intends to publish the Custodian's letter as confirmation that the fourteen (14) students in question had disciplinary proceedings against them and/or a lack of ordinary attendance.

June 5, 2008

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

- Complainant's letter request dated April 16, 2008.
- Letter from Dean Trevisan to the Complainant dated April 21, 2008.
- Letter from the Custodian to the Complainant dated April 24, 2008.
- Letter from the Complainant to the Custodian dated April 25, 2008.⁵

The Complainant states that he sent a letter to Dean Trevisan on April 16, 2008 rebutting the Dean's prior denial of access to Suzanne Penna's ("Ms. Penna") request for attendance dates.⁶ The Complainant states that he received a letter from Dean Trevisan on April 21, 2008 stating that the Complainant's letter was being treated as an OPRA request and forwarded to the Custodian. The Complainant states that the Custodian denied access to the requested attendance dates on April 24, 2008 based on the disciplinary exclusion in FERPA.⁷ The Complainant finally states that he wrote a letter to the Custodian on April 25, 2008 acknowledging receipt of the Complainant's response. The Complainant states that he advised the Custodian that the newspaper believed the Custodian's response was confirmation that the fourteen (14) students had been involved in disciplinary action and that the newspaper intended to publish the response.

The Complainant did not agree to mediate this complaint.

July 18, 2008

Request for the Statement of Information sent to the Custodian.

July 24, 2008

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

- Complainant's letter request dated April 16, 2008.

⁵ Additional attachments included in the Complainant's Denial of Access Complaint are irrelevant to the adjudication of this complaint.

⁶ The Complainant asserts that the April 16, 2008 letter was accompanied by an OPRA request; however, the evidence of record shows that no official OPRA request was submitted by the Complainant to Ocean County Community College.

⁷ The Custodian actually denied access pursuant to the higher education exemption in N.J.S.A. 47:1A-1.1. David Nugent v. Ocean County Community College (Ocean), 2008-120 – Findings and Recommendations of the Executive Director

- Ms. Penna’s OPRA request dated April 16, 2008.⁸
- Letter from the Dean Trevisan to the Complainant dated April 21, 2008.
- Letter from the Custodian to the Complainant dated April 24, 2008.

The Custodian states that the Complainant’s request was received on April 16, 2008. The Custodian states that he responded in writing on April 24, 2008, denying access to the requested attendance dates for fourteen (14) students pursuant to the higher education exemption found in N.J.S.A. 47:1A-1.1. The Custodian avers that this exemption specifically states that:

“[a] government records shall not include the following information which is deemed to be confidential: information concerning student records *or* grievance *or* disciplinary proceedings against a student to the extent that disclosure would reveal the identity of the student.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

The Custodian states that this exemption provides three separate reasons that certain records are exempt from disclosure and is in no way an admission that any of the fourteen (14) students identified in the Complainant’s request had been involved in disciplinary proceedings.

The Custodian states that Ocean County Community College (“OCC”) is also governed by the Family Education Rights and Privacy Act (“FERPA”). The Custodian asserts that although attendance dates may be considered “Directory Information” under FERPA, an institution is granted authority as to whether or not such information can be disclosed. The Custodian avers that FERPA’s purpose is to ensure that students over the age of 18 and their parents have access to their education records and protect such individual’s rights to privacy by limiting disclosure without consent of the student. The Custodian states that violating FERPA carries significant penalties.

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

⁸ Ms. Penna’s April 16, 2008 OPRA request appears to be the request to which the Complainant makes reference in the Denial of Access Complaint.
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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 states that:

"[a] government record shall not include the following information which is *deemed to be confidential*...information concerning student records *or grievance or disciplinary proceedings* against a student to the extent that disclosure would reveal the identity of the student..." (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.

In the instant complaint, the Complainant's request seeks attendance dates for fourteen (14) students, including the last date of attendance. The Custodian responded in a timely manner stating that access to the requested information was denied based on the higher education exemption found in N.J.S.A. 47:1A-1.1.

The request relevant to this complaint seeks information, not identifiable government records. The Complainant's request fails to identify a specific government record or records that may contain these dates. 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)⁹, 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.”¹⁰

In the complaint currently before the Council, the Complainant’s request would require the Custodian to conduct research to identify records which contain dates of attendance for the fourteen (14) students specified. OPRA does not require that the Custodian perform such research.

Because the Complainant’s OPRA request did not specify an identifiable government record but instead sought information, the Complainant’s OPRA request is invalid. MAG Entertainment LLC. v. Div. 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).

Additionally, OPRA exempts student records from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. To the extent that attendance dates constitute a student record, they are not subject to disclosure under OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant’s OPRA request did not specify an identifiable government record, but instead sought information, the Complainant’s OPRA request is invalid. MAG Entertainment LLC. v. Div. 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).

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2009

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁰ As stated in Bent.