



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 Morgano
Complainant

Complaint No. 2008-146

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 Custodian has certified that that no records responsive to Request Items Nos. 1 – 4 and 7 – 10 exist and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the records requested in Request Items Nos. 1 – 4 and 7 – 10.
2. Because Request Items Nos. 5 and 6 fail to identify with reasonable clarity the records sought, Request Items Nos. 5 and 6 are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (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). As such, the Custodian has not unlawfully denied the Complainant access to the requested records.

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 Morgano¹
Complainant**

GRC Complaint No. 2008-146

v.

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

Records Relevant to Complaint:³

1. Cheryl Johnson's Essex County Prosecutor's correspondence letter's disposition recommendations documents.
2. A.K.A. Cheryl Harris' Essex County Prosecutor's correspondence letter's disposition recommendations documents.
3. Cheryl Johnson's Essex County Prosecutor's interview plea agreement disposition recommendations notes.
4. A.K.A Cheryl Harris' Essex County Prosecutor's interview plea agreement disposition recommendations notes.
5. Cheryl Johnson's Essex County Prosecutor's disposition recommendations plea agreement documents.
6. A.K.A. Cheryl Harris' Essex County Prosecutor's disposition recommendations plea agreement documents.
7. Cheryl Johnson's Essex County Prosecutor's documents of East Calwell Jail Annexes facility psychological evaluation report.
8. A.K.A Cheryl Harris' Essex County Prosecutor's documents of East Calwell Jail Annexes facility psychological evaluation report.
9. Cheryl Johnson's Essex County Prosecutor's documents of East Calwell Jail Annexes facility psychiatric medical condition report known as short attention span disorder deficit.
10. Cheryl Harris' Essex County Prosecutor's documents of East Calwell Jail Annexes facility psychiatric medical condition report known as short attention span disorder deficit.

Request Made: April 29, 2008

Response Made: May 6, 2008

Custodian: Hilary Brunell

GRC Complaint Filed: July 10, 2008⁴

¹ No legal representation listed on record.

² Represented by Essex County Counsel.

³ This is a verbatim recitation of the records requested in the Complainant's April 29, 2008 OPRA request.

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

Background

April 29, 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.

May 6, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that the records responsive to Request Items Nos. 1 – 6 are part of a criminal investigatory file and are therefore exempt from disclosure under N.J.S.A. 47:1A-1.1. The Custodian also states that recommendations, if any exist, are protected under N.J.S.A. 47: 1A-1.1. Bent v. Township of Stafford Police Department, 381 N.J.Super. 30, 40 (App. Div. 2005), citing MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534, 546-49 (App. Div. 2005) (a request under OPRA shall not extend to materials which include opinions and deliberative materials). The Custodian states that there are no records responsive to Request Items Nos. 7-10.

July 10, 2008

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

- Complainant's OPRA request dated April 29, 2009;
- Letter from the Custodian to the Complainant dated May 6, 2008.

The Complainant states the Custodian unlawfully denied the Complainant access to the records requested. The Complainant requests that the GRC assume jurisdiction over his complaint.

August 13, 2008

Offer of Mediation sent to both parties.

August 19, 2008

The Complainant agrees to mediate this complaint.

August 21, 2008

The Custodian agrees to mediate this complaint.

September 23, 2008

The GRC refers the Denial of Access Complaint to mediation.

May 19, 2009

The Denial of Access Complaint is referred back to the GRC for adjudication.

May 20, 2009

Letter from the Custodian to the Complainant. The Custodian states that she responded to the Complainant's OPRA request for records from Prosecutor's file Numbers 88-005354 and 88-067784 on May 1, 2009. The Custodian states that the Complainant's request was the subject of a prior GRC decision in Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009). The Custodian asks the Complainant to confirm that he is still in possession of the records in question.

June 1, 2009

Request for the Statement of Information sent to the Custodian.

June 1, 2009

E-mail from the Custodian to the GRC. The Custodian states that to complete the Statement of Information, she must review prosecutor files numbers 88005354 and 88006734. The Custodian states that these files are archived in an off-site storage facility and will require several business days to retrieve. Additionally, the Custodian states that she will be out of the office on June 5 and 8 and requests an extension until June 15, 2009 in which to file the Statement of Information.

June 4, 2009

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

- Complainant's OPRA request dated April 29, 2008;
- Letter from the Custodian to the Complainant dated May 20, 2009.

The Custodian certifies that there are no records responsive to Request Items Nos. 1– 4 and 7–10. The Custodian identifies the following records as responsive to Request Items Nos. 5 – 6 of the Complainant's OPRA request:

1. Plea form for Cheryl Johnson, a.k.a. Cheryl Hams, P# 88005354, dated August 1, 1989;
2. Request to recommend disposition for Cheryl Johnson, P# 88005354, dated March 17, 1989;
3. Request to recommend disposition for Cheryl Harris, a.k.a. Cheryl Johnson, P# 88006784, dated March 23, 1989;
4. Request to recommend disposition for Cheryl Hams, P# 88006784, dated May 18, 1989;
5. Request to recommend disposition for Cheryl Hams, P# 88006784, incomplete and undated.

The Custodian certifies that the identified records were previously provided to the Complainant pursuant to an order of disclosure in Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009). The Custodian also certifies that the above identified records are part of a criminal investigatory file and therefore exempt from disclosure under N.J.S.A. 47:1A-1.1. The Custodian also certifies that the Complainant has not indicated that he no longer possesses the identified records. The

Custodian certifies that recommendations are protected as advisory and consultative material under N.J.S.A. 47:1A-1.1.

June 12, 2009

E-mail from the GRC to the Custodian. The GRC requests that because the Custodian indicated in the SOI that there were no records responsive to the Complainant's OPRA request, the Custodian provide the GRC with a legal certification of such within 5 business days.

June 17, 2009

Letter from the Custodian to the GRC attaching the Custodian legal certification. The Custodian certifies that she has reviewed prosecutor files numbers 88005354 and 88006784 to determine whether any records existed that were responsive to Complainant's request. The Custodian further certifies that there are no "Correspondence Letter's Disposition Recommendations" in the file. The Custodian also certifies that there are no "Interviews Plea Agreement Disposition Recommendations Notes" in the file. The Custodian certifies that "Disposition Recommendations Plea Agreement Documents" were previously provided to the Complainant. The Custodian also certifies that she did not receive a response to the letter she wrote to the Complainant to confirm that the he was still in possession of the records in question. The Custodian certifies that there were no documents in the file corresponding to the request for psychological or psychiatric reports.

Analysis

Whether the Custodian unlawfully denied access to the requested record(s)?

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 places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA certifies:

"...[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 Custodian responded in writing to the Complainant’s OPRA request on the seventh (7th) business day. The Custodian stated in her response to the Complainant that the records responsive to Request Items Nos. 1 – 6 were part of a criminal investigatory file and were exempt from disclosure under N.J.S.A. 47:1A-1.1. The Custodian also stated that recommendations, if any exist, were exempt from disclosure under N.J.S.A. 47: 1A-1.1. The Custodian further stated that there were no records responsive to Request Items Nos. 7-10. However, the Custodian later certified in the SOI that there were no records responsive to Request Items Nos. 1 – 4 and 7 – 10.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed. The GRC held the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian has certified that that no records responsive to Request Items Nos. 1 – 4 and 7 – 10 exist and there is no credible evidence in the record to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the records requested in Request Items Nos. 1 – 4 and 7 – 10.

Moreover, the Complainant’s OPRA request is invalid. 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),⁵ 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

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

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.”⁶

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 were 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).”

In Request Items Nos. 5 and 6, the Complainant sought “disposition recommendations plea agreement documents.” However, Request Items Nos. 5 and 6 do not identify the records sought with reasonable clarity. While Request Items Nos. 5 and 6 mention various classes of records, they fail to provide sufficient information to identify the exact nature of the records sought (i.e. the date of the requested records, the authors of the requested records).

Because Request Items Nos. 5 and 6 fail to identify with reasonable clarity the records sought, Request Items Nos. 5 and 6 are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (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). As such, the Custodian has not unlawfully denied the Complainant access to the requested records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian has certified that that no records responsive to Request Items Nos. 1 – 4 and 7 – 10 exist and there is no credible evidence in the record to refute the Custodian’s certification, pursuant to Pusterhofer v. New

⁶ As stated in Bent, *supra*.

Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the records requested in Request Items Nos. 1 – 4 and 7 – 10.

2. Because Request Items Nos. 5 and 6 fail to identify with reasonable clarity the records sought, Request Items Nos. 5 and 6 are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (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). As such, the Custodian has not unlawfully denied the Complainant access to the requested records.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009