



**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**

Alfred Sallie, Sr.  
Complainant

Complaint No. 2008-163

v.

New Jersey Department of Banking and Insurance,  
Consumer Protection Service  
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 failed to identify with reasonable clarity the records sought, the Complainant’s OPRA request is invalid pursuant to 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), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008), and Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008). As such, the Custodian has not unlawfully denied the Complainant access to the records requested.
2. Because the Complainant’s OPRA request is invalid, further analysis into the basis for the denial of access is unnecessary. However, in Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-227 (April 2009), the Council considered a similar request by Mr. Sallie for exactly the same records wherein the Council held that the records contained in complaint number 200700136 were not subject to disclosure under OPRA.



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 4<sup>th</sup> 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**

**Alfred Sallie, Sr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-163**

v.

**New Jersey Department of Banking and Insurance,  
Consumer Protection Service<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Any available records concerning complaint number 200700136, including but not limited to records from the Passaic County Surrogate Court and the Superior Court of New Jersey.

**Request Made:** July 14, 2008

**Response Made:** July 15, 2008

**Custodian:** Gary Vogler

**GRC Complaint Filed:** July 29, 2008<sup>3</sup>

**Background**

**July 14, 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.

**July 15, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1<sup>st</sup>) business day following receipt of such request. The Custodian states that access to the records requested is denied because pursuant to N.J.S.A. 47:1A-1 et seq., investigative or complaint files in any pending or completed investigation in which no formal disciplinary action was taken are not disclosable public records. The Custodian further states that because complaint number 200700136 is an open investigation, any records currently in the agency's possession are not subject to disclosure.

**July 29, 2008**

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

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Kristine Maurer, on behalf of the NJ Attorney General.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

- Complainant's OPRA request dated July 14, 2008;
- Letter from the Custodian to the Complainant dated July 15, 2008.<sup>4</sup>

The Complainant states that the Custodian incorrectly reported that the agency is not in possession of public records from the Passaic County Surrogate Court and Superior Court of New Jersey. The Complainant further states that in a letter<sup>5</sup> dated July 17, 2008, the investigator for complaint number 200700136 indicated that the Custodian's agency was in possession of records responsive to the Complainant's OPRA request. The Complainant states that as Power of Attorney for Corey Teague, he has an interest in the outcome of the investigation and that release of any records pertaining to the investigation would not be a breach of confidentiality or a public threat.<sup>6</sup> The Complainant states that the Custodian refused to properly identify the statute the Custodian relied upon when he denied the Complainant's OPRA request. The Complainant further states that he believes that the statute in question is from the New Jersey Administrative Code and that the statute is not applicable to the custodial agency.

The Complainant did not agree to mediate this complaint.

#### **August 12, 2008**

Request for the Statement of Information sent to the Custodian.

#### **August 12, 2008**

E-mail from the Complainant to the GRC. The Complainant requests the removal of the Custodian's Counsel from his position as legal representative for the Custodian.

#### **August 12, 2008**

E-mail from the GRC to the Custodian. Pursuant to an earlier conversation, the GRC grants the Custodian's request for a five (5) business day extension of the deadline for filing the Statement of Information, thereby making the new due date for the Statement of Information August 26, 2008.

#### **August 26, 2008<sup>7</sup>**

Custodian's Statement of Information ("SOF") attaching the Complainant's OPRA request dated July 14, 2008. The Custodian certifies that a search for records responsive to the Complainant's OPRA request revealed that at the time the Complainant submitted his OPRA request, complaint number 200700136 was an ongoing investigation. The Custodian also certifies that he lawfully denied the Complainant access to the requested records because the records requested were part of an ongoing investigation and disclosure of said records would be inimical to the public interest and the file is exempt

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<sup>4</sup> The Complainant included other documents not relevant to the adjudication of this complaint.

<sup>5</sup> The Complainant included a copy of this letter with his Denial of Access Complainant. However, this letter did not contain any information that was relevant to the Complainant's OPRA request or the Custodian's denial of said request.

<sup>6</sup> The Complainant does not explain how his position as the Power of Attorney for Corey Teague grants him an interest in complaint number 200700136.

<sup>7</sup> Additional material 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.

from disclosure pursuant to N.J.S.A. 47:1A-3.a. and *N.J.A.C.* 11:17-2.15b.6. The Custodian further certifies that the Complainant's assertion that the Custodian denied possessing records responsive to the Complainant's OPRA request is erroneous. The Custodian certifies that he denied the Complainant's OPRA request because the records requested were not disclosable under OPRA.

The Custodian certifies that pursuant to N.J.S.A. 47:1A-3.a., a custodian may deny access to records that pertain to an ongoing investigation where disclosure would be inimical to the public interest. The Custodian further certifies that maintaining the confidentiality of investigative files is necessary because disclosure would impede the flow of information regarding allegations of improper misconduct and hamper the agency's ability to investigate such allegations. See *Loigman v. Kimmelman*, 102 N.J. 98, 109 (1986). The Custodian also certifies that *N.J.A.C.* 11:17-2b.6. protects records in an ongoing investigation from public disclosure.

### **August 29, 2008**

Letter from the GRC to the Complainant. The GRC denies the Complainant's request to remove the Custodian's Counsel. The GRC is in receipt of the Complainant's e-mails and objections to Deputy Attorney General ("DAG") Witko's representation of the records custodian in this matter. The GRC states that it has not received a response from DAG Witko. The GRC's Executive Director, on behalf of the GRC, finds that the Complainant's objections do not contain any credible evidence requiring the removal of a Deputy Attorney General from legal representation of a state employee records custodian.

### **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 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.

The Custodian responded in writing to the Complainant’s OPRA request on the first (1<sup>st</sup>) business. The Custodian stated that access to the requested records was denied because pursuant to N.J.S.A. 47:1A-1 et seq., investigative or complaint files are not public record in any pending or completed investigation in which no formal disciplinary action was taken. The Custodian further stated that because complaint number 200700136 was an open investigation, any records currently in the agency’s possession were not public 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 (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),<sup>8</sup> 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.”<sup>9</sup>

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

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<sup>8</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>9</sup> As stated in Bent, *supra*.

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..."

In Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), the Complainant filed an OPRA request for two entire prosecutor's office files. The Council relied upon MAG, Bent and Asarnow, each cited *supra*, in determining that the request was overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific government record. As such, the Council found that the Custodian met her burden of proof in denying the Complainant access to the records.

In Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008), the GRC held that because the records requested comprise an entire Somerset County Prosecutor's Office file, were overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records, the request was invalid.

The Complainant's OPRA request sought any available records concerning complaint number 200700136 including but not limited to records from the Passaic County Surrogate Court and the Superior Court of New Jersey. The Complainant's OPRA request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific government record. Additionally, the Complainant's general request for all the records in the file includes the added caveat that asks the Custodian to disclose all the Passaic County Surrogate Court and New Jersey Superior Court records the Custodian may have on hand. Like the requests the Council considered in Morgano and Feiler-Jampel, the request in the current complaint is invalid.

Because the Complainant failed to identify with reasonable clarity the records sought, the Complainant's OPRA request is invalid pursuant to 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), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), and Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). As such, the Custodian has not unlawfully denied the Complainant access to the records requested.

Because the Complainant's OPRA request is invalid, further analysis into the basis for the denial of access is unnecessary. However, in Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-227 (April 2009), the Council considered a similar request by Mr. Sallie for exactly the same records wherein the Council held that the records contained in complaint number 200700136 were not subject to disclosure under OPRA.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant failed to identify with reasonable clarity the records sought, the Complainant's OPRA request is invalid pursuant to 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), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), and Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). As such, the Custodian has not unlawfully denied the Complainant access to the records requested.
  
2. Because the Complainant's OPRA request is invalid, further analysis into the basis for the denial of access is unnecessary. However, in Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-227 (April 2009), the Council considered a similar request by Mr. Sallie for exactly the same records wherein the Council held that the records contained in complaint number 200700136 were not subject to disclosure under OPRA.

Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 21, 2009