



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

June 11, 2009 Government Records Council Meeting

JLB

Complaint No. 2008-205

Complainant

v.

Somerset County Prosecutor's Office

Custodian of Record

At the June 11, 2009 public meeting, the Government Records Council ("Council") considered the May 20, 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 OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the Somerset County Prosecutor's Office files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in 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) and the Council's decision in Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008).
2. The Custodian certified in the Statement of Information that no records responsive existed because they were destroyed in accordance with the agency's New Jersey Department of State, Division of Archives and Records Management schedule and there is no credible evidence in the record to refute the Custodian's certification. Therefore, there was no unlawful denial of access. See 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 11th Day of June, 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
Government Records Council

Decision Distribution Date: June 16, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 11, 2009 Council Meeting**

JLB¹
Complainant

GRC Complaint No. 2008-205

v.

Somerset County Prosecutor's Office²
Custodian of Records

Records Relevant to Complaint: Copies of any and all records regarding a domestic violence incident that resulted in a hearing before Judge Hoens in August, 1994, including what happened during the incident, prosecutors involved, the reports, comments made and anything related to the trial and a copy of the Order by Judge Thomas Dilts in June, 1994.

Request Made: August 13, 2008

Response Made: August 14, 2008

Custodian: Daniel J. Livak

GRC Complaint Filed: September 12, 2008³

Background

August 13, 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.

August 14, 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.⁴ The Custodian states that access to the requested records is denied for the following reasons:

- The request is overbroad and of the nature of a blanket request for a class of various documents. *See* 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), Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006),

¹ No legal representation listed on record.

² Represented by Scott Rodgers, Esq. (Somerville, NJ).

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

⁴ The evidence of record supports the fact that the Complainant's OPRA request was received by the Custodian on August 14, 2008.

Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008).

- This request seeks the production of criminal investigatory records which are not considered government records under OPRA pursuant to N.J.S.A. 47:1A-1.1.
- This request may seek the production of handwritten notes which are not considered government records under OPRA pursuant to O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007).
- This request may seek the production of documents protected from disclosure under the deliberative process privilege found in N.J.S.A. 47:1A-1.1.

September 12, 2008

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

- Complainant's OPRA request dated August 13, 2008.
- Letter from the Custodian to the Complainant dated August 14, 2008.

The Complainant states that she submitted an OPRA request to the Somerset County Prosecutor's Office on August 13, 2008, for records relating to a domestic violence incident in 1994. The Complainant states that the Custodian responded in writing on August 14, 2008, denying access to the requested records and stating that the request was broad and unclear, the records constituted criminal investigatory records, handwritten notes could not be provided and the records responsive could be exempt from disclosure pursuant to the deliberative process privilege found in N.J.S.A. 47:1A-1.1.

The Complainant argues that the requested records should be disclosed to her because she was the victim in the domestic violence complaint to which the requested records are related. The Complainant asserts that she wants access to all transcripts and anything leading up to the hearing in front of Judge Hoens in August 1994, the names of the prosecutors involved in the hearing, the name of the person that took the initial report from the Victim's Witness Unit, the testimony of the defendant and other records. The Complainant reiterates that, regardless of whether the records are criminal investigatory in nature, the Complainant has a right to access the requested records.

The Complainant did not agree to mediate this complaint.

October 1, 2008

Request for the Statement of Information sent to the Custodian.

October 2, 2008

Custodian's Statement of Information ("SOI") with the following attachments:⁵

- Complainant's OPRA request dated August 13, 2008.
- Certified mail receipt date stamped August 14, 2008.

⁵ The Custodian includes an OPRA request and response that are not relevant to the adjudication of the instant complaint.

- Letter from the Custodian to the Complainant dated August 14, 2008.
- Copy of Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (July 30, 2008).

The Custodian certifies that all record storage rooms of the Somerset County Prosecutor's Office were physically searched for the requested records.

The Custodian certifies that the general dates of the records that the Complainant refers to in her OPRA request are 1992 and 1994. The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") was 2004; therefore, no records responsive exist which are responsive to the relevant OPRA request.

The Custodian states that he received the Complainant's August 13, 2008 OPRA request on August 14, 2008, and immediately responded in writing denying access to the Complainant's request.

The Custodian contends that the Complainant's request is overly broad and a blanket request for a class of various records rather than a specific government record because the request is for an entire Somerset County Prosecutor's Office ("SCPO") file. The Custodian asserts that OPRA does not require custodians to research files to discern which records may be responsive to a request 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), Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006), Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008).

The Custodian asserts that the records may also include criminal history record information. The Custodian states that *N.J.A.C. 13:59-1.6(c)*, which is applicable in OPRA pursuant to N.J.S.A. 47:1A-9.a., prohibits public servants from permitting any other person to access criminal history record information and cites to Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008).

Additionally, the Custodian argues that the requested records may contain handwritten notes which do not constitute government records pursuant to O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007). The Custodian asserts that the records may also be exempt from disclosure under the deliberative process privilege and criminal investigatory exemptions found in N.J.S.A. 47:1A-1.1.

The Custodian asserts that the Complainant refers to herself as a victim in the requested records, but there is no indication in the case file that exists that the Complainant was a victim of a crime. The Custodian avers that no charges were brought as a result of the information provided by the Complainant. The Custodian certifies that no other records regarding the Complainant exist in the files that relate to the Complainant's August 13, 2008 OPRA request.

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 Complainant’s request sought any records relating to an incident in August 1994, including what happened, information, comments and notes. Conversely, the Custodian, citing to Feiler-Jampel, supra, asserts the Complainant’s request is overly broad and is a blanket request for a class of various documents of which many could be exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

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),⁶ 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.”⁷

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).”

In Feiler-Jampel, *supra*, the Complainant requested “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office. The GRC reasoned that while the Complainant’s request was for an entire investigation file identified by number and containing numerous individual records, the Complainant failed to identify specific government records. The GRC held that:

“because the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG, *supra* and Bent, *supra* and the Council’s decisions in Asarnow, *supra* and Morgano, *supra*.”

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent, *supra*.

In the matter currently before the Council, the Complainant's request for any records regarding a domestic violence incident in 1994 fails to identify specific records and is a blanket request for information rather than a request for specific government records. Therefore, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in *MAG, supra* and *Bent, supra* and the Council's decision in *Feiler-Jampel, supra*.

Additionally, the Custodian certified in the SOI that no records responsive to the Complainant's OPRA request existed. The Custodian certified that any records from 1992 to 1994 regarding the Complainant were destroyed in accordance with the Records Destruction Schedule established and approved by DARM between 1997 and 2004.

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 determined the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

In this complaint, the Custodian certified in the SOI that no records responsive existed because they were destroyed in accordance with the agency's DARM schedule and there is no credible evidence in the record to refute the Custodian's certification. Therefore, there was no unlawful denial of access. See *Pusterhofer, supra*.

Moreover, whether any of the other cited exemptions apply is moot because the Complainant's OPRA request is invalid.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the Somerset County Prosecutor's Office files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in *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) and the Council's decision in *Feiler-Jampel v. Somerset County Prosecutor's Office*, GRC Complaint No. 2007-190 (March 2008).
2. The Custodian certified in the Statement of Information that no records responsive existed because they were destroyed in accordance with the agency's New Jersey Department of State, Division of Archives and

Records Management schedule and there is no credible evidence in the record to refute the Custodian's certification. Therefore, there was no unlawful denial of access. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2009